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STATE ex inf. SUTTON, Pros. Atty., v.
FASSE.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. SCHOOL DIRECTORS — OFFICES — APPELLATE JURISDICTION.

The office of school director is an office within Const. art. 6, § 12, conferring exclusive appellate jurisdiction on the Supreme Court in cases involving the title to an office under this state.

2. SAME — PAYMENT OF TAXES.

Under Rev. St. 1899, §§ 9759, 9760, declaring that a school director must be a resident taxpayer and a qualified voter of the district, and must have paid a state and county tax within one year next preceding his election, it is not required that a director be a resident taxpayer of the district in which he is elected; but, if he has paid state and county taxes in another county, from which he removed to the county in which he is elected, within a year preceding his election, he is eligible.

3. SAME — BILL OF EXCEPTIONS — REVERSAL.

Where defendant's title to the office of school director was contested in quo warranto proceedings on the ground that he had not paid taxes within a year prior to his election, as required by Rev. St. 1899, §§ 9759, 9760, and there was no contention that he was not a citizen of the United States or lacked any other qualification, a judgment in favor of defendant will not be reversed for failure of the bill of exceptions to show that defendant proved he was a citizen of the United States.

Appeal from Circuit Court, Lincoln County; E. M. Hughes, Judge.

Quo warranto by the state, on the information of Robert L. Sutton, as prosecuting attorney, against William Fasse, to try defendant's title to the office of school director. From a judgment in favor of defendant, relator appeals. Affirmed.

Robert L. Sutton, in pro. per. Martin & Woolfolk, for respondent.

LAMM, J. Quo warranto, on the information of the prosecuting attorney of Lincoln county, ex officio, to try the title of Fasse to the office of school director of district 1, township 48, range 2, of Lincoln county. Judgment was rendered below for respondent, and relator appealed to the St. Louis

Court of Appeals, where, on January 20, 1908, the judgment of the lower court was affirmed (71 S. W. 745); the St. Louis Court of Appeals speaking through Goode, J. A rehearing was granted on the suggestion that the St. Louis Court of Appeals had no jurisdiction, and that this court, under section 12, art. 6, of the state Constitution, has exclusive appellate jurisdiction "in cases involving title to an office under this state." The St. Louis Court of Appeals, under the authority of State ex rel. v. Hill, 152 Mo. 234, 58 S. W. 1062, rightly concluded that the office of school director was an office under this state, and that it was without jurisdiction, wherefore it granted a new hearing and transferred the cause here for our determination.

We have examined the bill of exceptions, the briefs of counsel, and the opinion handed down, and, being persuaded that the opinion of Goode, J., correctly construed the statutes involved and applied the law to the facts, so that ultimate justice was attained, we adopt it as our own. That opinion is as follows:

"This is a quo warranto proceeding instituted at the relation of Robert L. Sutton, prosecuting attorney of Lincoln county, against the respondent, to oust the latter from the office of member of the board of directors of a school district in Lincoln county, to which office the evidence shows Fasse was elected on the first Tuesday in April, 1901. The information charges the respondent with unlawfully usurping the office, exercising the powers and performing the duties thereof since said date. An answer was filed alleging the lawful election of Fasse on said date by his receiving 26 out of the 32 votes cast by the qualified voters of the district voting at the election, and stating also his qualifications for the office.

"For a person to be eligible to the office of director of a school district in this state, he must be a citizen of the United States, a resident taxpayer and a qualified voter of the district, and must have paid a state and county tax within one year next preceding

his election. It is also prescribed that he must take and subscribe to the oath of office within four days after his election. Rev. St. 1899, §§ 9759, 9760. Respondent's title to the office was assailed on the ground that he was not a resident taxpayer in the district in which he was chosen, and in support of that position appellant points to the fact testified to by Fasse himself, that he paid no tax in the year 1900. His omission to do so was likely due to the circumstance that he had moved into Lincoln county the preceding year, to wit, 1899, from Warren county, where he had been residing since the year 1894. Previous to the last-mentioned year he had resided and paid taxes in Lincoln county and in the very school district in which he was elected director. Fasse was a man in humble circumstances, having only some household goods, a mule, a cow, and a one-half interest in a "saw outfit" and engine. The testimony, however, shows that he had continually paid taxes on the small property he owned for years in Lincoln and Warren counties, according to his residence; but in the year 1900 the assessor of Lincoln county overlooked him, presumably on account of his recent return there. That he had paid a state and county tax in Warren county within one year preceding his election was proved by a tax receipt dated March 22, 1901; the election, as stated, occurring on the first Tuesday in April, 1901. This proof, therefore, satisfied the statute as to that qualification.

"Appellant insists the requirement that a school director must be a resident taxpayer of the district means that he must have paid taxes for school purposes within the district. That contention cannot be adopted without enlarging the language of the statute and changing its intention. The meaning is that a person who is a qualified voter of the district and also a taxpayer is eligible. A qualified voter is defined in the same section to be one who, under the general laws of the state, would be allowed to vote in any county for state and county officers, and who has resided in the district 30 days preceding the school district meeting at which he offers to vote. Any person who possesses those qualifications is a qualified voter, as defined in section 9759 in regard to the qualifications of school director. If he is also a taxpayer (that is, a person owning property in the state subject to taxation and on which he regularly pays taxes), he is eligible to the office of school director, whether he has in fact paid a tax within such school district or not; otherwise, when a new district is formed, no one would be eligible to the office of school director, or, if territory is taken from one district and attached to another, no person residing in the newly attached part would be eligible to the office of school director in the district to which it is attach-

ed until he first had paid a school tax therein. Provisions are made by the statutes for the formation of new districts, and also for changing the territory of districts. Rev. St. 1899, § 9742. The statutes bearing on the subject must not be so construed as to have unreasonable consequences, and the construction contended for by appellant, we think, would have. We are cited to the case of *State ex rel. v. Rebenack*, 135 Mo. 340, 36 S. W. 893, as holding that no one is eligible to hold office as a member of a school board unless he has paid a school tax in the district; but that decision dealt with a special statute referring to the city of St. Louis, which provided that no person should be eligible as a member of the school board of said city who had not 'paid a school tax therein for two consecutive years next preceding his election.' Rev. St. 1899, p. 2172, § 7. That language is different from the statute under consideration, and compelled the Supreme Court to decide as it did.

"Appellant further contends that Fasse did not show he was a citizen of the United States and that he qualified after the election by taking the oath of office. The state took this appeal and made up the bill of exceptions. We are satisfied the only contested issue below was whether Fasse was a taxpayer within the meaning of the statutes, and that no point was made about his lacking other qualifications. We are also convinced that he proved he was a citizen and that he was sworn into office in time, which proof was omitted from the bill of exceptions simply because there was no contention that he was disqualified by lack of citizenship or that he failed to take the official oath; in fact, as much was stated by the counsel for respondent in his brief, and also on argument in this court in the relator's presence, and was not denied by the latter. When the incumbent of an office is called on by the state to show his title thereto, the burden is on him to show it; but this rule of law is based on the assumption that public officers who are intrusted with the power to institute quo warranto proceedings will use their authority under a sense of official responsibility, as doubtless the relator did, and will not attempt to oust the incumbent of an office unless there is probable cause. It would be wholly unjust to reverse and remand this case in order that the respondent may make proof of his citizenship and that he duly qualified as school director, in view of the undenied fact that proof of those facts was made, and that they were not controverted during the former trial. The judgment is therefore affirmed."

The judgment of the circuit court of Lincoln county, being for the right party, is, for the reasons formulated in the above opinion, accordingly in all things affirmed. All concur.

MISSOURI PAC. RY. CO. v. KANSAS CITY & I. AIR LINE CO.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. CONTRACTS—QUANTUM MERUIT.

In an action on a contract between railroad companies for the protection of a right of way, defendant company electing to stand on the contract cannot recover on a quantum meruit.

2. SAME—COUNTERCLAIM.

In an action on a contract for work and materials furnished in protecting the right of way of plaintiff on which defendant company, under the contract, had constructed its road, defendant company cannot sustain a counterclaim for work performed by it in protecting a portion of its own right of way not covered by the contract, on the ground that by so protecting its own right of way it conferred an incidental benefit on plaintiff and saved it from probable expense.

3. EXCESSIVE DAMAGES—REMITTITUR—COSTS.

Where the motion for new trial assigned as ground that the damages were excessive, and the instruction was to find a specified sum with specified interest from specified dates, the plaintiff cannot avoid the costs of the appeal because the specific objection was not made in the trial court, and an opportunity there given to remit the excess of damages.

Appeal from Circuit Court, Jackson County; John W. Henry, Judge.

Action by the Missouri Pacific Railway Company against the Kansas City & Independence Air Line Company. From a judgment for plaintiff, defendant appeals. Affirmed on conditions.

Samuel W. Moore and Samuel W. Sawyer, for appellant. Elijah Robinson, for respondent.

MARSHALL, J. This is an action upon a contract entered into between the parties hereto on the 24th of October, 1891, and under which the plaintiff seeks to recover \$9,160.78 for the work and labor done and materials furnished in protecting the right of way of the plaintiff, on which the defendant company, under the contract, had constructed its line also, from the inroads and ravages of the Missouri river. The plaintiff, also, in the second count of the petition, seeks to enter and take possession and oust defendant from the portion of the land upon which the defendant's track is laid, on the ground that under the terms of the contract the plaintiff was authorized to enter upon and remove the defendant's tracks from the plaintiff's right of way if the defendant failed to make the payments stipulated for in the contract. The answer of the defendant admits the doing of the work set out in the first count of the petition of the plaintiff, but alleges that it amounted to \$8,074.22, and not to \$9,160.78, as the plaintiff claims. The answer also admits the contract. The answer then contains a counterclaim, under which the defendant seeks to recover \$15,068.06 from the plaintiff, which defendant claims is due to it for work done by the defendant under the terms of the contract, and which, by the con-

tract, the plaintiff was obligated to do but refused to do. At the close of the whole case, the defendant asked the court to instruct the jury that the plaintiff was not entitled to recover. The court refused so to do, and the defendant excepted. At the request of the plaintiff the court instructed the jury that the plaintiff was entitled to recover \$8,074.22, the amount admitted to be due by the defendant in its answer, with interest thereon from the 15th of July, 1897, to the date of the verdict, at the rate of 6 per cent. per annum, and further instructed the jury to find for the plaintiff on the defendant's counterclaim. The jury returned a verdict for the plaintiff for \$9,722.20 on the plaintiff's cause of action, and also found for the plaintiff on the defendant's counterclaim. After proper steps, the defendant appealed.

The case made is this: Both companies are domestic railroad corporations. At the date of the contract here involved, the plaintiff owned a right of way adjacent to the Missouri river, in Jackson county, between Independence and Kansas City. The defendant was about to construct a railway between Independence and Kansas City, which would cross the plaintiff's right of way at a point about 1,500 feet west of the Big Blue river. On the 24th of October, 1891, the two companies entered into a contract, the preamble of which recited that the defendant company was desirous of, and was then constructing, a line of railroad connecting with the Kansas City Suburban Railroad near a point where said railroad crosses the plaintiff's road in Jackson county, thence to Independence, and that it was mutually advantageous to the parties hereto to avoid the crossing of the tracks of said companies, and that "such mutual purpose and advantage can only be gained by the location of the railway of the said Air Line Company, north of the tracks of the Missouri Pacific Railway Company, from said point of connection with the said road, to point east of where the Chicago, Santa Fé and California Railroad crosses overhead of Missouri Pacific Railroad Company's tracks; and whereas, the chief obstacle in so locating said track, is the imminent danger of encroachment upon it by the Missouri River by the erosions of its banks. * * * That for and in consideration of the mutual and reciprocal covenants, undertakings, promises and agreements, made by each of said parties, to, and with the other, and which are hereinafter stated, as well as for other good and valuable considerations; the parties hereto have come to an understanding and entered into an agreement, looking to the location, construction, maintenance and operation of the said second party's railroad on the first party's right of way, between the Kansas City and Suburban Belt Railroad and a point about four hundred feet east of the Chicago, Santa Fé and California Railroad, and looking to the protection of the second party's

tracks when there built, against damage by the Missouri River, the terms and conditions of which understanding and agreement are as follows."

The first stipulation of the contract contains a conveyance by the plaintiff to the defendant of an easement or right of way for defendant's railroad over a portion of the plaintiff's right of way beginning at the point 400 feet east of the right of way of the Chicago, Santa Fé & California Railroad, which point is marked "A" on the plat attached to the contract, and extending westwardly about 1,077 feet to a point marked "B" on the plat, and also from a point marked "C" on the plat, and extending westwardly to a point marked "D" on the plat for a distance of about 2,900 feet. From the points B to C, a distance of about 3,000 feet, the plaintiff did not grant an easement to the defendant to place its railroad on plaintiff's right of way, but the defendant acquired a right of way of its own, lying to the north of the plaintiff's right of way, and between the plaintiff's right of way and the Missouri river. The contract does not disclose why this condition existed, nor is any reason given why the defendant did not acquire the right to run its road over and upon the plaintiff's right of way between said intermediate stations, as well as at other points along the route; but the fact is that between said points B and C, for a distance of about 3,000 feet, the defendant acquired its own right of way and constructed its road thereon.

The second clause of the contract is as follows:

"Whereas the right of way and roadbed of the party of the first part, between said points, are now in danger of being wholly or in part washed away by the waters of the Missouri River; and whereas, when the party of the second part shall have built its road on said first party's right of way as herein provided for, said danger from said waters will then be common to both parties hereto, the party of the first part in consideration of that fact, and for the consideration aforesaid, has undertaken, promised and agreed, to promptly do, from time to time, all work which may be necessary and proper (unavoidable and unforeseen accidents or causes excepted) to protect the said second party's roadbed, when so built, on said strips or right of way, from danger of being injured or damaged by the waters of said river, and the said second party [the defendant herein] shall be under no obligation of law to do any of such work, but the party of the second part, has promised and agreed, and does hereby promise and agree, to pay to the party of the first part, one-half of the actual cost of doing such work, and in estimating the cost of such work, the first party shall not claim any profit either on the material furnished or on the labor employed, or charge for the transportation of such ma-

terial a greater freight rate than charged for other material carried over its lines for its own use.

"Said work of protection shall be divided into two classes; the one class to be called 'Emergency Work,' the other, 'Permanent Work.' All emergency work shall be done whenever necessary or whenever in the opinion of the party of the first part, or its agents, an immediate necessity shall have arisen for some protection against the then immediate and impending danger of injury or damage by the encroachment of the Missouri River. For the expense of doing such emergency work, bills shall be rendered monthly, to the party of the second part, for its half of the cost of such work done during the previous month and shall be paid within thirty days after the receipt thereof. The plans and location of the 'permanent work,' such as the constructing of dykes and other like permanent structures for the purpose of diverting the current and force of the Missouri River from impinging against and encroaching upon the right of way, shall be designed and the costs estimated in advance of the beginning of such work by the engineers of the two parties to this agreement.

"Party of the second part shall pay upon monthly estimates for the work of the previous months, in like manner for the permanent work as for the emergency work."

The contract also contained a stipulation for the forfeiture of all rights thereunder by the defendant in case it failed to promptly pay its half of the cost of maintenance provided for by the contract.

Under this contract the defendant constructed its railroad upon the parts of the defendant's right of way herein described. From time to time between the date of the contract in 1891 and the month of June, 1896, the plaintiff did the necessary work of protecting the right of way from the inroads of the river, and each month rendered a bill to the defendant for one-half of the cost thereof, which the defendant paid. Between June, 1896, and June, 1897, the plaintiff did other work of like character, and rendered bills to the defendant for one-half thereof, aggregating \$8,074.20, but the defendant failed to pay the same, and the plaintiff's suit is to recover said sum.

The defendant's counterclaim is based upon the contract, and predicates a right to recover \$15,088.06, being one-half of the amount expended by the defendant in doing work for the protection of the portion of its right of way and track lying between the points B and C. The particulars of the defendant's claim are that in 1894 the river began to make rapid encroachments on the land lying between the bank of the river and the defendant's right of way, between points B and C, and for five or six days about 15 or 20 feet a day of said land was being carried away by the river. The defendant requested the plaintiff to take steps to protect

the same from said encroachments. The defendant declined so to do, on the ground that under its contract it was not obligated to protect that portion of the defendant's right of way. In the winter of 1895, to prevent a repetition of the experience of 1894, the defendant constructed four dikes, two of which were projected into the river, between the points B and C, and two others between the point C and the mouth of the Big Blue river, which emptied into the Missouri river, between the points C and D. The work done in the summer of 1894 was "emergency work," whereas the dikes were "permanent work." No estimate of costs in advance of the doing of the "permanent work" was made by the engineers of the parties to the contract, as provided in section 2 of the contract for "permanent work." The plaintiff refused to do said work to protect the portion lying between the points B and C, and the defendant had the work done, and did not at any time until a short time before the institution of this suit, and after being threatened with suit by the plaintiff, assert any claim against the plaintiff therefor, or render to the plaintiff any account of the expense incurred by it in so doing. The work thus done to protect the portion of the defendant's right of way between points B and C is the sole point involved in this case, and is the whole foundation for the defendant's counterclaim.

1. The defendant's counterclaim is based entirely upon the contract of 1891. Unless, therefore, the contract authorized the defendant to do the work sought to be recovered for by it in this action, the counterclaim must fail. The defendant having elected to stand on the contract, it is not entitled to recover, even though the work done by it may have been of value to the plaintiff in the protection of the other parts of the plaintiff's right of way, which the plaintiff was under obligation to protect. A party cannot count upon a contract and recover upon a quantum meruit. *Cole v. Armour*, 154 Mo., loc. cit. 351, 55 S. W. 476, and cases cited.

The record does not disclose why the defendant did not contract for the use of or easement over the portion of the plaintiff's right of way which lies between points B and C, as well as over the other portions of the plaintiff's right of way. It is not, therefore, for the court to speculate as to the causes or reasons which actuated the parties in making this difference. Courts can only give effect to contracts, when legal, as the parties themselves have made them. The defendant's right in this case must depend upon the construction of the contract. It is not contended by the defendant that the words or letter of the contract cast any obligation on the plaintiff to protect the right of way between the points B and C from the encroachments of the river, but the defendant contends that the whole spirit of

the contract casts such an obligation on the plaintiff. The defendant reasons that it was obligatory upon the plaintiff to protect its own right of way from the encroachments of the river, and that the construction of the defendant's road north of the plaintiff's right of way, and the agreement of the defendant to pay the plaintiff one-half of the cost of such protection, necessarily casts upon the plaintiff the duty of protecting its whole right of way, and that the plaintiff failed in this duty, and that the defendant was obliged to do the work in order to protect its own right of way between points B and C, and thereby incidentally benefited the plaintiff's right of way between those points, and likewise benefited it at other points where the defendant's road was constructed on the plaintiff's right of way, and which, by the terms of the contract, the plaintiff, concededly, was under obligations to do the work of protecting.

The defendant further claims that the construction put on the contract by the acts of the parties should control the court in its construction of the contract, and under this contention the defendant claims that the plaintiff did work 1,000 feet west of the point D, where the defendant's road entered upon the plaintiff's right of way, so as thereby to protect the portion of the defendant's right of way which lies east of point D, and that the plaintiff rendered bills to the defendant for one-half of the cost thereof, and the defendant paid the same. The defendant, however, is clearly in error in this branch of its contention, for there is no evidence whatever to sustain the contention. It is true that the plaintiff did such work at the point 1,000 feet east of point D, but the evidence shows that it did so under a contract with the Kansas City & Suburban Belt Railway Company, and not under its contract with the defendant, and that the plaintiff and the Kansas City & Suburban Belt Railway Company paid the cost thereof, and the defendant paid no part thereof. This feature of the defendant's contention will therefore receive no further consideration.

Under the issues joined in this case it may be conceded that, if the defendant had not done the emergency work between points B and C in the summer of 1894, the result might have been that after washing away the defendant's right of way the river might have encroached upon the plaintiff's right of way, and that by protecting its own right of way from the inroads of the water the defendant thereby conferred an incidental benefit upon the plaintiff. But the complete answer to this is that the defendant had no contract with the plaintiff so to do, the plaintiff refused to have anything to do with the work or to pay any part of the cost thereof, and the defendant could not create a contract with the plaintiff therefor without its consent; and in this action it is only entitled to recover by virtue of contract, for its right

is, in this action, predicated upon the contract. The defendant has no more claim against the plaintiff for such work because of the incidental benefit that accrued to the plaintiff from the doing thereof, than it has against the Chicago & Alton Railroad, whose tracks lie south of the plaintiff's right of way, and which might have also been washed away if the defendant had not done such work. The same is true as to the owners of all other property lying eastwardly of the points C and B who were incidentally benefited by the emergency and permanent work done by defendant.

The contract casts a specific obligation upon the plaintiff to protect specified portions of its right of way from the inroads of the river, and there is no pretense that the plaintiff failed in its duty as to such portions. Neither the letter, the context, nor the spirit and meaning of the contract casts any obligation on the plaintiff to protect the defendant's right of way between the points B and C. This being true, the trial court properly overruled the defendant's demurrer to the evidence, and likewise properly instructed the jury to find against the defendant on its counterclaim, and in favor of the plaintiff for \$8,074.22, with 6 per cent. interest thereon from the 15th of July, 1897, the date when the same became due, was demanded, and was not paid.

2. The defendant next contends that the verdict is excessive. The gravamen of this contention is that \$8,074.22, with 6 per cent. interest thereon from July 15, 1897, to October 31, 1900, does not aggregate \$9,722.70, the amount of the verdict. The plaintiff admits that the verdict is \$53.85 in excess of the proper amount due the plaintiff under the instruction of the court. The plaintiff, however, contends that whilst it should be required to, and is willing to, remit the \$53.85, it should not be charged with the costs of this appeal, because this specific objection was not made in the trial court, and the plaintiff was not given an opportunity there to remit the excess of damages; and the plaintiff contends that whilst the defendant, in its motion for new trial, claimed that the damages assessed by the jury were excessive, such general allegation was not sufficient to put plaintiff and the trial court upon notice of the particulars wherein the defendant claimed the damages were excessive. What the plaintiff urges may be true, yet as the motion for new trial assigned as a ground therefor that the damages were excessive, and as the instruction of the court was to find a specified sum, with specified interest from specified dates, it was a mere matter of mathematical calculation as to whether or not the verdict exceeded the amount the jury were instructed to return a verdict for. The plaintiff could have made that calculation at that time as well as now, and its contention must therefore be resolved against it.

Upon the plaintiff remitting the sum of

\$53.85 within 30 days, the judgment of the circuit court will be affirmed, otherwise it must be reversed and the cause remanded for a new trial. All concur.

NEWMAN v. MERCANTILE TRUST CO. et al.

(Supreme Court of Missouri, Division No. 1.
May 24, 1905.)

1. FRAUD—PLEADING.

A mere charge of fraud, without specification of the acts which constitute the alleged fraud, is not a good allegation of fraud.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 37; vol. 33, Cent. Dig. Pleading, § 28½.]

2. CORPORATE STOCK—SALES—FRAUD.

A transaction by which a railroad attempted to procure through a trust company a majority of the stock of a ferry company by offering to shareholders who accepted the proposition a certain price per share for the stock, to be paid on the condition that a majority of the stock could be so acquired, was not rendered fraudulent by the act of the trust company in purchasing part of the desired stock at a higher price from outside parties and completing the contract with the accepting shareholders without divulging that fact.

3. TROVER—TITLE OF PLAINTIFF—RIGHT TO POSSESSION.

In order to maintain trover for shares of stock, plaintiff must have been the owner of the shares and entitled to their possession at the time of the alleged conversion.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, § 119.]

4. SAME—DEMAND AND REFUSAL.

Demand and refusal are evidence of conversion.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, § 58.]

5. CORPORATE STOCK—SALES—ACCEPTANCE—PAYMENT.

A stockholder in a corporation, together with other stockholders, surrendered his stock to a trust company, which executed an agreement to purchase the stock of the parties, accepting the same at a stipulated price, on condition that it could in that manner purchase a majority of the stock of the corporation. The trust company gave the stockholder a receipt for his stock, obligating it to deliver the same to him or pay him the price specified on or before a certain date. The trust company before the date specified exercised its option by accepting the stock and paying the stockholder the specified purchase price. Held, that by the acceptance of the stock and payment of the purchase price the sale was complete, and title to the stock passed to the trust company.

6. SAME—VALIDITY OF SALE—UNDISCLOSED PRINCIPAL.

A transaction by which a trust company acquires the stock of a ferry company for a foreign railroad company, which is not disclosed as a principal in the transaction, is not, as between the trust company and the vendors of the stock, rendered invalid because of any inability of the railroad to legally acquire the stock.

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Louis E. Newman, trustee, against the Mercantile Trust Company. From an order overruling a motion to set aside a nonsuit, plaintiff appeals. Affirmed.

John W. Noble and George H. Shields, for appellant. Klein & Hough, Clinton Rowell, Joseph H. Zumbahlen, and Joseph S. Laurie, for respondent.

BRACE, P. J. This is an appeal from an order of the St. Louis circuit court overruling plaintiff's motion to set aside a nonsuit. The suit was instituted on the 13th of May, 1902. The defendants are the Mercantile Trust Company, the Chicago, Rock Island & Pacific Railway Company, John Scullin, and Festus J. Wade.

The petition is in two counts. The first count is as follows: "Plaintiff states: That the defendant the Mercantile Trust Company was at the time hereinafter stated, and now is, a corporation duly organized under the laws of the state of Missouri, providing for the incorporation of trust companies. That the Chicago, Rock Island & Pacific Railway Company was at the times hereinafter stated, and now is, a railroad corporation duly incorporated under the laws of the state of Illinois. That the plaintiff, Louis E. Newman, is, and was at the times hereinafter stated, the trustee appointed by and acting under the last will and testament of Socrates Newman, deceased, said will having been duly probated in the probate court in and for the city of St. Louis, Missouri, and that plaintiff brings this action in his capacity as said trustee. That heretofore, to wit, on the 23d day of April, 1902, plaintiff owned and held as such trustee 100 shares of the capital stock of the Wiggins Ferry Company, a corporation duly incorporated under the laws of the state of Illinois, and was lawfully possessed of the certificates duly issued for said 100 shares of stock. That on the 28th of April, 1902, the defendant John Scullin, a director and president, and defendant Festus J. Wade, a director, of the Wiggins Ferry Company, officially and individually illegally combined with said Mercantile Trust Company and said Chicago, Rock Island & Pacific Railway Company, defendants, to deceive and defraud plaintiff, and presented to this plaintiff a paper or offer to purchase said stock, as follows: 'The Mercantile Trust Company, acting herein for other parties, offers to purchase a majority of all the shares of the capital stock of the Wiggins Ferry Company, a corporation existing under the laws of Illinois, and agrees to pay therefor on the delivery of the certificates for so many of said shares, not less than a majority, as shall be deposited with said trust company on or before May 5th, 1902, properly endorsed in blank for assignment and transfer on the books of said Ferry Company the sum of five hundred dollars per share. The Trust Company acting in the capacity as agent of other parties is to receive from such other parties for its services a commission of two and one-half per cent upon the purchase price

of five hundred dollars per share in addition to said purchase price. The Mercantile Trust Company will not be obliged to accept any stock unless the owners of a majority of shares have agreed to sell the same to said Mercantile Trust Company, agent, on or before May 5th, 1902.' (Signed 'Mercantile Trust Company, by Festus J. Wade, President.') That in connection with said offer to purchase there was prepared and attached to said offer as a part of the proposed contract an acceptance to be signed by the stockholders of said Wiggins Ferry Company, in words and figures as follows, to wit: 'The undersigned stockholders of the Wiggins Ferry Company, do hereby accept the foregoing proposition and sell to the Mercantile Trust Company on and subject to the terms therein stated, the number of shares of the capital stock of the Wiggins Ferry Company set opposite to our respective names.' Plaintiff says that, relying on the terms of said offer and acceptance, and that it was the intention of said trust company to purchase not less than a majority of said stock at and for the price of five hundred dollars a share, and no more, and that if said trust company did not obtain such majority of stock on or before the 5th day of May, 1902, at said price of five hundred dollars a share, that his said stock would be returned to him, plaintiff signed said acceptance and delivered his stock, or the certificates representing the same, to said trust company, and received a receipt therefor, being a receipt for certificates for one hundred shares of the capital stock of the Wiggins Ferry Company assigned in blank; said shares being deposited with the Mercantile Trust Company under and in pursuance of said proposition made by said Trust Company as agent for other parties, and the acceptance thereof signed by L. E. Newman, trustee of Socrates Newman's estate, dated April 24, 1902, for the purchase of said shares. Plaintiff states that afterwards, to wit, on April 28, 1902, and before the time on which said contract could have become binding on the plaintiff, all said defendants, having so combined to deceive and defraud plaintiff, did further misrepresent the facts as to purchases of stock under said contract, and to illegally retain the same and withhold the same from plaintiff the said Mercantile Trust Company sent plaintiff by mail a letter inclosing to him its treasurer's check for the sum of fifty thousand dollars in payment, as stated in said letter, for one hundred shares of stock in the Wiggins Ferry Company, sold in accordance with the terms of the proposition made by said company and accepted by plaintiff, thereby representing that the terms and conditions of said proposal and acceptance had been fully complied with by said Mercantile Trust Company, and that a majority of the stock of the Wiggins Ferry Company had been acquired from the stockholders at the price

named therein. Plaintiff states that he notified said Mercantile Trust Company that he accepted said check only on condition that said trust company had fully carried out said contract on its part, and had obtained the majority of said stock at and for the price of five hundred dollars a share, and that plaintiff waived no rights which he might have in the matter. Plaintiff states that said Mercantile Trust Company has at no time purchased, secured, and had a majority of said stock for itself, or for any principal represented by it—that is, over five thousand shares thereof; that, in order to obtain what shares it did have on said 5th day of May, 1902, said Mercantile Trust Company paid to other stockholders much more than five hundred dollars a share, and the purchaser has not kept and performed the offer and contract on its part, and that on the 5th day of May, 1902, said purchaser did not have a majority of said stock, and did not purchase what he did have at five hundred dollars a share, and thereby this plaintiff was released from said agreement, and said purchasers were bound to return said stock of this plaintiff to him. That on said 5th day of May plaintiff, learning of the failure of said purchasers to so keep said contract, and that the same had been so violated by them, he did then and there tender back to said trust company and said purchasers, in good and sufficient form, the full sum of fifty thousand dollars, which was the sum so sent plaintiff by check as aforesaid. That the said Mercantile Trust Company, by said Wade as president, acknowledged the sufficiency of said tender as to amount and form, and plaintiff then and thereupon demanded the return to him of his certificates of stock, but said Wade, as president as aforesaid, in conjunction with his attorney, then present, refused to accept the said tender or return to plaintiff his said stock certificates, said Wade declaring that he had turned them over to the said defendant the Chicago, Rock Island & Pacific Railway Company, which was, as said Wade declared, and as plaintiff avers, the party represented by said Mercantile Trust Company in said transactions. Plaintiff states that said defendants in the manner aforesaid unlawfully converted said stock to their own use; that the same was then and there of the value of fifteen hundred dollars per share and of the value of one hundred and fifty thousand dollars; that by said unlawful conduct and conversion of said stock by defendants, plaintiff has been damaged in the sum of one hundred and fifty thousand dollars, which is due plaintiff and unpaid, for which plaintiff asks judgment of defendants, with interest and costs."

The second count is in the form of a common-law action of trover for the conversion specifically set out in the first count.

The answer of the defendants is as fol-

lows: "Now come the defendants in the above-entitled cause, and for answer to the first count of plaintiff's petition herein admit that defendant the Mercantile Trust Company was at the time stated and is a corporation organized under the laws of Missouri providing for the incorporation of trust companies; admit that the Chicago, Rock Island & Pacific Railway Company was and is a railroad corporation incorporated under the laws of Illinois; admit that plaintiff was and is the trustee under the last will and testament of Socrates Newman, deceased. Defendants further admit that plaintiff owned and held, as said trustee, one hundred shares of the capital stock of the Wiggins Ferry Company, and that plaintiff, on or about April 25, 1902, for a consideration of five hundred dollars per share, amounting to fifty thousand dollars, in cash, paid to him by the Mercantile Trust Company, sold and delivered his one hundred shares of stock of the Wiggins Ferry Company to said Mercantile Trust Company, acting for and on behalf of defendant the Chicago, Rock Island & Pacific Railway Company. And defendants deny each and every other allegation contained in the first count of plaintiff's petition. And for answer to the second count of plaintiff's petition, defendants deny each and every allegation therein contained."

In support of his action the plaintiff introduced the following evidence:

The plaintiff testified as follows: "That he was forty-one years old, son of Socrates Newman, and trustee under his will. April 24, 1902, held 100 shares of stock of the Wiggins Ferry Company as such trustee. John Scullin was president of the Wiggins Company. There was an agreement for a voting trust existing between the stockholders of the Wiggins Company at that time. Received dividends on stock. The stock was held in two lots—thirty shares outside voting trust, seventy shares in that trust. On the 25th of April (1902) received a letter from John Scullin, president Wiggins Company. (Identifies letter.) Knows Scullin's signature." Letter admitted, and marked "Exhibit No. 1," on Wiggins Ferry letter head, and is as follows:

"St. Louis, April 24, 1902. Dr. L. E. Newman, City—Dear Sir: I have a matter pertaining to this company which requires the immediate action of its stockholders, and deem it to be of the utmost importance that you should call at my office at once. Please regard this as strictly confidential. Yours respectfully, John Scullin, President."

After receiving the letter he went to Wiggins office. Met Mr. Wade, who stated that Scullin had left him to look after affairs; that Scullin had gone to a meeting, and had left him to take charge of things. "He then stated to me that the Mercantile Trust Company had an offer to buy a majority of all of the stock of the Wiggins Ferry Company at \$500 a share. He then handed me a pa-

per, which I read, signatures to which I looked over, and without very much ado I signed the paper. (Identifies that paper.) Knows signature of Festus J. Wade thereto, president of the Mercantile Trust Co. I signed it 'Socrates Newman Estate, L. E. Newman, Trustee'; '100' opposite indicating 100 shares." The paper was admitted in evidence as Exhibit No. 2, and reads as follows:

"St. Louis, April 24, 1902.

"The Mercantile Trust Company, acting herein for other parties, offers to purchase a majority of all of the shares of the capital stock of the Wiggins Ferry Company, a corporation existing under the laws of Illinois, and agrees to pay therefor on the delivery of the certificates for so many of said shares, not less than a majority, as shall be deposited with said Trust Company on or before May 5th, 1902, properly endorsed in blank for assignment and transfer on the books of said Ferry Company, the sum of five hundred dollars (\$500) per share. The Trust Company acting in the capacity as agent of other parties, is to receive from such other parties for its services a commission of two and one-half (2½) per cent upon the purchase price of five hundred dollars (\$500) per share, in addition to said purchase price. The Mercantile Trust Company will not be obliged to accept any stock unless the owners of a majority of shares have agreed to sell the same to said Mercantile Trust Company, agent, on or before May 5th, 1902.

"Mercantile Trust Company,

"By Festus J. Wade, President.

"The undersigned stockholders of the Wiggins Ferry Company do hereby accept the foregoing proposition and sell to the Mercantile Trust Company on and subject to the terms therein stated, the number of shares of the capital stock of the Wiggins Ferry Company set opposite our respective names.

Names.	No. of Shares.
John Scullin, and others	2,296 shares
Festus J. Wade	20 "
Socrates Newman Estate, L. E. Newman, Trustee	100 "
Louis Nidelet, by Ernest Puegnet, Atty.	82 "
Marie O. Puegnet, by Ernest Puegnet, Atty.	82 "
Ernest Puegnet	82 "

Witness continues: "Did not sign that day. Signed Friday, April 25th, about 4:30. Delivered the stock Saturday, April 26th, to Mercantile Trust Company, about noon. It was indorsed in blank, so it could be transferred on the books of the company. Received a receipt from Mr. Wilson, treasurer of the Mercantile Trust Company. (Identifies receipt.) Knows the signature of Mr. Wilson, treasurer of the Trust Co." Receipt dated April 28, 1902, marked "Exhibit No. 3," reads as follows:

"Received, St. Louis, April 28, 1902, from L. E. Newman, Trustee Soc. Newman estate, certificate Nos. 120-129-932 for one hundred

(100) shares of the capital stock of the Wiggins Ferry Company, assigned in blank, said shares being deposited with the Mercantile Trust Company under and in pursuance of a proposition made by said Trust Company, as agent for other parties, and the acceptance thereof, signed by the said L. E. Newman, Trustee Soc. Newman Est. dated April 24th, 1902, for the purchase of said shares. The said Trust Company is either to pay for such shares of stock at the rate of five hundred dollars (\$500) per share net, or to redeliver said certificate to said L. E. Newman, Trustee Soc. Newman Est. on or before May 5th, 1902.

"Mercantile Trust Company,

"By Geo. W. Wilson, Treasurer."

Witness continues: "April 29th received a communication from Mercantile Trust Company. (Identifies paper and Mr. Wade's signature.)"

The paper reads as follows:

"Mercantile Trust Company.

"St. Louis, April 28, 1902.

"Mr. L. E. Newman, Trustee Soc. Newman Estate, 3024 Locust St., City—Dear Sir: Enclosed please find our Treasurer's check for the sum of fifty thousand dollars (\$50,000) in payment for your one hundred (100) shares of stock in the Wiggins Ferry Company sold by you in accordance with the terms of the proposition made by this company and accepted by you. Kindly acknowledge receipt of the same, and oblige. Yours very truly,

"Festus J. Wade, President."

Witness continues: "I went to see Mr. Wade after I received that check, either the day I received it or the next day. I said to Mr. Wade, in substance: 'Are you very busy?' and he said, 'Yes, I am always busy;' and I said, 'I would like to see you about a matter of importance.' 'Well,' he said, 'if it is about Wiggins, I can talk to you.' 'Well,' I said, 'I received a check for \$50,000 from your company, and I want to say to you that I acknowledge the receipt of that check upon the assumption that you have fulfilled, or are fulfilling, the terms of your agreement, namely, that you have paid only \$500 a share, and that you have a majority of the stock.' I said, 'If you are not fulfilling your contract, or if you have not fulfilled your contract, I expect to hold you for the difference between \$500 a share and the higher sums which I can prove you have paid.' He said, 'I hear you.' 'Well,' I said, 'if you hear me, that is about all I have to say.' 'Well,' he said, 'I have got your stock anyhow;' and I said, 'Very well; good day.' I then went to my office, and made a short memorandum of the conversation, and indited a letter to the Mercantile Trust Co. practically embodying my verbal statement to Mr. Wade." Witness then identified a copy of the letter, saying it is an exact copy made before the letter was mailed by himself in his own handwriting. "Wrote two letters, duplicated, and this is a copy. I sent the original of that copy

by mail, addressed to Festus J. Wade, president of the Mercantile Trust Company, or to the Mercantile Trust Company, I don't know which; but think it was Festus J. Wade, president of the Mercantile Trust Co. It was stamped with a two-cent stamp, and deposited in the government mail box." The letter was dated April 30, 1902, written on L. E. Newman's letter head, marked "Exhibit No. 5," and is as follows:

"St. Louis, April 30, 1902.

"Festus J. Wade, Esq., President Mercantile Trust Co., City—Dear Sir: Allow me to acknowledge herewith receipt of your treasurer's check for the sum of fifty thousand dollars (\$50,000) on account of sale of one hundred shares Wiggins Ferry Company's stock, according to agreement of April 24, 1902, and I accept it only on condition that you have kept and will keep said agreement in all respects, and I desire to formally notify you that I waive no rights which I may have in the matter.

"Yours truly,

"L. E. Newman, Trustee,

"Est. Soc. Newman."

Witness resumes: "Nothing further was done between the date of that letter and May 5, 1902, when accompanied by my attorney, Gen. Noble, I went to the Mercantile Trust Co. Festus J. Wade, James L. Blair, John W. Noble, and myself were present. Gen. Noble said that he came there for the purpose of asking back, for his client, Dr. Newman, the Wiggins Ferry stock, and he said he wanted to make a tender of the money to Mr. Wade, and demanded his stock. Wade looked at the cashier's check which Gen. Noble handed him, and said he would not be as mean as some people, but that he would consider that a formal and proper tender; but he said, 'I will not return the stock.' It was a cashier's check of the American Exchange Bank for \$50,000. Gen. Noble said to Mr. Wade, as the 5th of May ran until midnight, and it was then noon, he wanted to know whether he would consider it was necessary to come back the next day, when the option had expired, and Mr. Wade said, 'Gen. Noble, you can come to-morrow, and you can come the next day, and I shall always give you the same answer.' Gen. Noble said, 'Will it be necessary for me to return,' and he said: 'No, Gen. Noble, it will not be necessary for you to return. My answer will be the same.' Gen. Noble asked if it was acknowledged by Mr. Wade that the Rock Island was the principal in the purchase of the Wiggins Ferry Co., and Mr. Wade and Mr. Blair, if I remember rightly, stated it was. Mr. Blair said he was representing Mr. Wade. Gen. Noble asked Mr. Blair as to whom the Mercantile Trust Co., Mr. Wade, and himself were representing, and he said they were representing the Rock Island Ry. Co. Gen. Noble stated to Mr. Wade, 'Mr. Wade, do you deny that you are or have paid

more than \$500 a share for the stock?' and Mr. Wade said: 'No, I do not deny that we have paid more. It will have to go into court anyhow.' He did not state how much more than \$500 he had paid. Nothing was said as to whether Mr. Wade had paid any more than \$500 a share to those who had signed the proposal. It was just a general statement that he had paid it."

On cross-examination witness said: "Wade refused to take the cashier's check tendered him, and I still have the \$50,000 in my possession." Defendant's counsel admitted that the stock was purchased for the Rock Island Ry. Co. Dr. L. E. Newman was recalled, and questioned by the court, and stated that after he had his interview with Mr. Wade, he deposited the check. He did not collect the money. He deposited it, and waited until the time for the option to expire. "It went through the clearing house, and was collected in the regular course, and went to my credit as trustee."

The plaintiff was then permitted to introduce the following written agreement in evidence over the objection of the defendants:

"An agreement made and entered into this 22nd day of April, A. D. 1902, by and between the Chicago, Rock Island and Pacific Ry. Co. (hereinafter called the Rock Island Company) and the Mercantile Trust Company of the City of St. Louis, Missouri, (hereinafter called the Trust Company), Witnesseth:

"The Trust Company for a valuable consideration, hereby undertakes as agent to buy for the Rock Island Company a majority or all of the shares of the capital stock of the Wiggins Ferry Company, an Illinois corporation, on the terms and subject to the conditions following:

"Said shares shall be purchased at the price of five hundred dollars (\$500) per share, it being understood that the entire capital stock of said Wiggins Ferry Company consists of ten thousand (10,000) shares of the par value of one hundred dollars (\$100) each. Payment for said shares shall be made in cash on the surrender of the certificates for so many of said shares (not less than a majority) as shall be deposited with the Trust Company on or before May 5, 1902, properly endorsed in blank for assignment and transfer on the books of the company. The Rock Island Company will provide funds for such payment on said May 5th, 1902, on demand of the Trust Company. It being understood, however, that no such payment shall be made by the Rock Island Company, nor shall said company be liable to purchase or take any of said shares unless certificates for at least a majority of the entire capital stock of said Wiggins Ferry Company shall then be on deposit with said Trust Company ready for delivery as aforesaid. The Rock Island Company agrees to pay to the Trust Company at the time of payment for said shares so purchased, and the delivery of the certificates

therefor, a commission of two and one-half per cent (2½%) on the total purchase then paid therefor.

"The Chicago, Rock Island & Pacific Railroad Company,

"By W. B. Leeds, President.

"Mercantile Trust Company,

"By Festus J. Wade, President."

The plaintiff then introduced Gen. Noble, who testified as a witness in his behalf, and whose evidence corroborated that of the plaintiff as to the tender and demand for a return of the stock on the 5th of May, 1902. After which, plaintiff offered in evidence the depositions of Daniel G. Reed, Wm. H. Moore, and Robert Mather, which, after a colloquy between the court and counsel, were rejected.

Besides these depositions, some other depositions of like character and other evidence was offered and rejected, which, in the view we take of this case, need not be particularly noticed; after which the plaintiff was permitted to introduce in evidence the charters of the Wiggins Ferry Company and the defendant railway company.

At the close of the plaintiff's evidence the court instructed the jury that under the pleadings and evidence in the case the plaintiff is not entitled to recover, and their verdict should be for the defendants on both counts of the petition. Thereupon the plaintiff took a nonsuit with leave, and thereafter filed his motion in due time to set the same aside, which having been overruled, he appealed.

1. The first contention of counsel for plaintiff is that: "Under the pleadings all the evidence offered by the plaintiff and rejected by the court below was admissible, and that the court erred in its rulings thereon. The petition was broad enough to let in all the facts tending to prove fraud at any step of the transaction and enable the jury to pass upon the whole case." It is well-settled law in this state that "a mere charge of fraud, without specification of the act or acts which constitute the alleged fraud, amounts to nothing in pleading." *Nagel v. Lindell Ry. Co.*, 167 Mo. 89, 68 S. W. 1090, and cases cited. In the first count of the petition the only acts specified as fraudulent are the presentation to the plaintiff of the contract of April 24, 1902, and the sending to him by mail of the letter inclosing the check for \$50,000 in payment for his stock, upon the representations contained in which it is alleged that he relied. These instruments speak for themselves, and of them no fraud is predicable. But it seems to be contended that under the second count in the petition the rejected evidence was admissible, the broad claim being that under that count "any facts tending to prove fraud at any step in the transaction" are admissible. It is sufficient to say, in answer to this contention, that after a careful perusal and consideration of all the rejected evidence we fail to find therein any evidence tending to

prove the perpetration, or even the contemplation, of any fraud on the plaintiff, or, for that matter, upon any person. All this evidence tended to prove that could in any way affect the plaintiff was that the defendant railway company, being desirous of obtaining a majority of the stock of the ferry company, undertook to accomplish that purpose by the means set out in the written instruments contained in the foregoing statement, and that, after the offer of \$500 per share by the trust company became noised abroad, the price of the stock suddenly rose, and that the trust company before the 5th of May did in fact purchase some of the stock at such advanced price. The fact that such advanced price was so paid by the trust company was proven, and, as a conceded fact, will be treated for all it is worth in considering the real issues in the case; but that fact was and could be no fraud upon the plaintiff. There is in fact no question of fraud in the case. The only real questions in the case arise upon the written instruments set out in the statement, and the acts of the parties thereunder. The court committed no error in the rejection of offered evidence, and we will now proceed to the consideration of the real questions in the case.

2. The plaintiff's action is essentially one of trover. Such an action may be maintained for shares of stock in a corporation. "Stock certificates" and "shares of stock" may be treated as synonymous, as they were evidently so regarded by the parties to this transaction. In order to maintain his action, the plaintiff must have been the owner of the shares of stock in controversy, and entitled to their possession at the time of the alleged conversion. It is conceded that on the 5th of May, 1902, he tendered to the trust company the sum of \$50,000, and demanded the stock, and that his demand was refused. Demand and refusal are evidence of conversion. Hence if on that day he was the owner of the stock, and entitled to the possession thereof, his case is made out; otherwise not. Prior to April 24, 1902, the plaintiff was the owner and in possession of the stock. On that day he entered into the agreement of that date with the trust company, in pursuance of which, on the 28th day of April, 1902, the stock was delivered to the trust company, and the plaintiff accepted the receipt therefor of that date. By this means the title to the stock and the possession thereof became separated. The title remained in the plaintiff and the possession in the trust company, each holding subject to the contract. Now, the crucial question is, "What was that contract?" It was in writing, and is evidenced by the proposition of the trust company, the acceptance of that proposition by the plaintiff, and the receipt for the stock, set out in the statement. The proposition of the trust company of April 24, 1902, was, in substance,

to pay the sum of \$500 per share for all or a majority of the shares of the capital stock of the Wiggins Ferry Company that should be deposited with the said trust company in the manner therein stated on or before May 5, 1902; the acceptance of the stock, however, not to be obligatory on the trust company unless the owners of a majority of the shares agreed to sell the same to the company. This proposition was, on the next day, accepted by the plaintiff, and in pursuance thereof the plaintiff's stock was delivered to the trust company on the 26th of April, 1902, and the receipt of the company of that date accepted by him, in which the general terms of the contract were applied specifically to his 100 shares of stock, for which the trust company was, on or before May 5, 1902, to pay him the sum of \$500 per share, or return the stock to him as therein stated. To consummate the sale and pass the title of the stock to the trust company, in whose possession it then was, nothing remained to be done except for the trust company to accept the stock and pay the plaintiff \$500 per share therefor. The acceptance of the stock was obligatory upon the trust company if a majority of the stockholders, on or before May 5, 1902, agreed to sell their stock in like manner; otherwise the acceptance was optional with the trust company until that date. This is the plain and obvious meaning of the contract. The trust company exercised its option by accepting the stock and paying the plaintiff the purchase price therefor on the 28th of April, 1902, in the manner set out in the statement. When this was done, the sale was complete, and the title of the stock passed to the trust company, in whose possession it then was; and on the 5th of May thereafter, when the conversion is alleged to have taken place, the title to the stock as well as its possession being in the defendant trust company, and the plaintiff having neither title thereto nor right to the possession thereof, the court committed no error in its peremptory instruction that plaintiff could not recover.

3. But it is further contended that the title did not so pass to the trust company because the defendant railway company, for whom the trust company purchased the stock, was a foreign corporation, not having license to do business in this state, and the making of such a contract by it was not within its corporate powers. A sufficient answer to this contention is that the contract was not made with the railway company. The parties for whom the purchase was being made were not disclosed, and it was not made upon the faith or credit of any such parties. It was in form and in fact a personal contract between the plaintiff and the trust company, a responsible party entirely competent to make the contract and to charge itself with all the liabilities thereof, and who did so charge itself, and upon whose responsibility the plaintiff

entirely relied. There is nothing in this contention.

The judgment of the circuit court is affirmed. All concur, except MARSHALL, J., not sitting.

STATE v. MINTZ.

(Supreme Court of Missouri, Division No. 2.
May 16, 1905.)

1. CRIMINAL LAW — LARCENY — DEFENSE Brought in ANOTHER STATE.

Where defendant induced R., who had previously been employed by a dray company authorized to receive goods for a consignee of certain shoes, and who was known to the servants of the carrier holding such goods for delivery, to go to the freight depot of the carrier in Illinois after his employment by the dray company had terminated, and procure a load of the shoes from the carrier, and R. obtained such shoes, and delivered them to a person other than the consignee in Missouri, such act constituted larceny, and not false pretenses, and was therefore punishable under Rev. St. 1899, § 2362, providing that every person who shall steal the property of another in any other state and shall bring the same into Missouri may be convicted and punished for larceny as though the property was stolen in Missouri.

2. LARCENY — INDICTMENT.

Rev. St. 1899, § 2362, provides that where goods are stolen in another state, and brought into Missouri, the person guilty of the larceny may be punished therefor in Missouri, and that in any such case the larceny may be charged to have been committed, and every such person may be indicted and punished, in any county into which or through which such stolen property may have been brought. *Held*, that where goods stolen in Illinois were brought into Missouri it was not essential to the validity of an information therefor that it should charge that the property was stolen in Illinois and brought into Missouri.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 100.]

3. SAME — EVIDENCE.

Where defendant selected and used R. as a mere instrument by which property was feloniously obtained in Illinois and hauled by R. for defendant into Missouri, and defendant entertained a felonious intent to obtain and convert the property, and directed R. to do such acts as would result in his obtaining the property without informing him of such intent, the fact that R. had no felonious intent in obtaining the property was immaterial to defendant's guilt.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Samuel Mintz was convicted of larceny, and he appeals. Affirmed.

The information in this case was filed in the circuit court of the city of St. Louis by the circuit attorney of St. Louis on January 26, 1904, charging the defendant, Samuel Mintz, together with Alexander Zellinger, Jacob Zeidell, and William Wiseman, with stealing 146 cases of shoes from the Cleveland, Cincinnati, Chicago & St. Louis (commonly called the "Big Four") Railroad Company, of the aggregate value of \$1,800. The defendant was arrested, and filed a motion to quash the information, which motion was by the court overruled. The defendant was arraigned, pleaded not guilty,

and was placed upon his trial after a severance was granted, and the state elected to first try defendant.

The information contains two counts, and the offense was thus charged:

"Now comes Joseph W. Folk, circuit attorney within and for the Eighth Judicial Circuit of the state of Missouri, aforesaid, and upon his official oath information makes as follows: That Alexander Zellinger, Jacob Zeidell, Samuel Mintz, and William Wiseman, at the city of St. Louis, aforesaid, on or about the 12th day of September, in the year 1903, did feloniously steal, take, and carry away from the possession of the Cleveland, Cincinnati, Chicago & St. Louis (commonly called the 'Big Four') Railroad Company, a corporation, one hundred and forty-six cases and one thousand seven hundred and ninety-nine pairs of shoes contained in said cases, all of the aggregate value of eighteen hundred dollars, and all the goods and personal property of the said Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, with the intent then and there feloniously to deprive the owner of the said goods and personal property of the use thereof, and to convert the same to their own use, without the consent of the owner; against the peace and dignity of the state. And the said Joseph W. Folk, circuit attorney within and for the Eighth Judicial Circuit of the state of Missouri, aforesaid, upon his official oath aforesaid, further information makes as follows: That Alexander Zellinger, Jacob Zeidell, Samuel Mintz, and William Wiseman, at the city of St. Louis, aforesaid, on or about the 12th day of September, in the year 1903, did feloniously and fraudulently buy, receive, have, and take into their possession one hundred and forty-six cases and one thousand seven hundred and ninety-nine pairs of shoes, contained in said cases, all of the aggregate value of eighteen hundred dollars, and all the goods and personal property of the Cleveland, Cincinnati, Chicago & St. Louis (commonly called the 'Big Four') Railroad Company, a corporation, which said goods and personal property had then lately before been feloniously stolen, taken, and carried away from the possession of the said Cleveland, Cincinnati, Chicago & St. Louis Railroad Company; they the said Alexander Zellinger, Jacob Zeidell, Samuel Mintz, and William Wiseman, then and there well knowing the said goods and personal property to have been so feloniously stolen, taken, and carried away as aforesaid, with the intent on the part of the said Alexander Zellinger, Jacob Zeidell, Samuel Mintz, and William Wiseman then and there feloniously to deprive the owner of the said goods and personal property of the use thereof and to convert the same to their own use, without the consent of the owner; against the peace and dignity of the state. Jos. W. Folk, Circuit Attorney.

"State of Missouri, City of St. Louis—*ss.* Being duly sworn upon his oath, says, that the statements contained in the foregoing information are true. William Oassen.

"Sworn to and subscribed before me this 25th day of January, A. D. 1904. Casper J. Wolf, Clerk of the Circuit Court, City of St. Louis, for Criminal Causes."

The evidence developed at the trial of this cause substantially shows the following state of facts:

The freight depot of the Big Four Railroad for the reception and delivery of freight for the city of St. Louis, Mo., is situated in the city of East St. Louis, Ill., and it is the custom of merchants in St. Louis to give the work of hauling goods from this and other railroads to transfer companies which contract to haul freight for the merchants from East St. Louis to St. Louis, crossing the river by bridge or ferry, as the case may be. On or about the 10th or 11th day of September, 1903, there was received among other freight at the Big Four Depot 146 cases of shoes consigned to the Giesecke-D'Oench-Hays Shoe Company, a firm of merchants in the city of St. Louis. It appears that in the course of business of the Big Four Company the freight received for delivery is checked out of the cars on what is called a "blind tally"—that is, the "checker" takes a blank sheet provided, and as the goods come out of the car enters the items on the "blind tally"—and this "blind tally" is turned over to other employes, and by them checked against the waybills to ascertain the correctness of the list of goods. From the waybills are then prepared delivery tickets, giving the name of the consignor and consignee, and the location of the goods in the warehouse of the Big Four Company, so that when the goods are called for the delivery clerk will know the class and character of the goods called for, and their location in the warehouse. A person calling for goods is referred to the delivery clerk, who refers to his delivery tickets, and turns the tickets over to a person known as a "picker." The "picker" directs the party to whom the goods are to be delivered to place his wagon in front of the door nearest to the location, and the goods are by him delivered to the wagon, and the driver signs the delivery ticket, and is given a ticket to be signed by the consignee, which is to be returned to the railroad company when signed by the consignee. The testimony shows that the Mound City Transfer Company had been doing all the hauling for the Giesecke Company for several years, and that fact was well known and so understood at the Big Four Depot. Clarence Rector, who procured the goods, had for about a year or more previous to August 12, 1903, been an employe and driver for the Mound City Transfer Company, and had made almost daily visits to the Big Four Depot in such capacity, and was well known to the delivery clerks as a Mound

City employé. On Saturday morning, September 12, 1903, about 7 o'clock, or a little after, Rector drove up to the depot, and there met Robert Morcom, one of the delivery clerks of the Big Four. On that morning there was what was known as a "rush order" in the Big Four Depot for the delivery of a box of brass faucets for the Blanke Company, a concern for which the Mound City Transfer Company also did the hauling, and when Rector appeared Morcom proceeded to make up a load of freight for him to be hauled by the Mound City Transfer Company. Morcom produced the delivery tickets for the Blanke order and for the Giesecke order, and handed them to Cassen, a "picker," and told him to give the goods called for by the tickets. As to the custom of delivery Morcom testified that when a man came in, whether an employé of the Mound City Transfer Company or any other, and asked for a load, he would turn the sheets over to his men, and instruct them how to load the wagon. On this morning, when Rector called for one particular shipment of shoes, he had a rush order from Blanke for one box of brass faucets, and told him he would have to take those goods; then he would deliver him the shoes.

W. O. Life, a witness for the state, testified that on September 12, 1903, he worked for the Big Four Company, and was a partner with Morcom, both delivery clerks at the same window, and that Rector came to the window and said a load of shoes; and that when he told him he could not get the load of shoes without taking the box of brass, he said he would not take the box of brass; had not time enough to go after that. He again told him he would have to take the box of brass or he would not get the shoes, to which Rector replied: "I have got to hurry. I have got to reach a car of the Missouri Pacific." Life then told him that it didn't make any difference what he had to do; he would have to take the box of faucets or he would not get the shoes. Life further testified that the Mound City Company did the hauling for the Giesecke Company, and that he knew Rector as an employé of said transfer company.

The testimony of other employées of the Big Four Company shows that they knew Rector was a driver for the Mound City Company, and that the box of brass for Blanke and the shoes for Giesecke were delivered to Rector in the regular course of business; that the steps taken by them were such as are taken in the usual course of business when dealing with the delivery of freight; that it was the custom of the transfer company to give the number of the wagon hauling the goods; that Rector gave the number of his wagon as 105. That number was given by Rector, who accounted for his wagon not being the regular wagon of the Mound City Company by stating that his regular wagon had broken down.

It appears from the evidence that the Giesecke Company have all the cases in which shoes are manufactured for them marked with what is known as the "Key Brand."

Rector testified that prior to about the 12th day of August, 1903, he was employed by the Mound City Transfer Company of St. Louis; that from about that date to September 12, 1903, he was unemployed; that he had known Sam Mintz for perhaps a month before September 12th, and that on September 11, 1903, he met Mintz in a saloon in St. Louis by prearrangement, and that Mintz hired him to drive a team for him the next day, also promising future employment; that early on the morning of September 12, 1903, and about 5 a. m., he went to Mintz's house in St. Louis, and Mintz, by agreement, had a team brought around hitched to a stake wagon, and told Rector to go to the Big Four Depot and get a load of shoes, saying to him, "Just call for a load of shoes, and you will get them." Mintz accompanied Rector a part of the way on foot, toward the bridge, and then turned the team over to him, and Rector drove over the bridge; Mintz having told him to get the shoes, and that a young fellow who had brought the team would tell Rector where to deliver the shoes. Mintz again met Rector at the end of the bridge, bought him several drinks, again told him what to call for at the Big Four Depot, and told him about the young fellow, and Rector proceeded to the depot with his team and wagon. The details of what happened at the depot, as shown by the evidence of the Big Four employées, is corroborated by Rector, who testified as follows as to what happened after the team was turned over to him by Mintz and he started from St. Louis for the Big Four Depot in East St. Louis: "Q. What occurred then? A. He told me he would meet me the other side of the river. I didn't see Sam Mintz there, so I went on across. There was an old fellow gets on the wagon with me. I don't know his name. He asked me to ride across. I told him 'All right.' He rode across the bridge to the stairs on the far side, the old fellow did; and he gets off and walks down the stairs. He works at the Big Four, I think. After I passed the stairs, Sam Mintz got over. He overhauled the wagon. Rode about half way down the entrance to the bridge. Q. Was that the first time you saw him? A. Since I left the saloon, yes, sir. So Sam gets on there, and he says, 'You drive down to the Big Four, back in to door No. 8, and ask for a load of shoes,' and he says, 'You will get them.' I told him 'All right.' As he got off the wagon, he said, 'Stop down at the corner, and sweep the coal dust off.' There was some coal on the wagon. I drove down there, went to the saloon, got a broom, and by that time Sam was there too. Sam went in the saloon before we swept the wagon. Had a couple of drinks. I went out and swept the wagon

off, came back, and had a couple more. I was feeling pretty good then. So I drove down to door No. 8, backed in, met the foreman or delivering clerk. I said, 'I am after a load of shoes.' He said, 'Where is your wagon?' I said, 'No. 8 door.' He said, 'They are just opposite here.' I said, 'All right.' He said, 'There is a box of faucets to go over with that load.' I said, 'I ain't sent for no faucets.' He said, 'You have got to take them; that settles it.' So we commenced loading shoes, and he brought the faucets out, and says, 'Take this box and load it first.' I said, 'I will not do it.' He said, 'You have got to take that now; that settles it.' So he put these men to loading my wagon. Three truckers, three pickers, piled the shoes out faster than I could load up. Finally I got loaded up. He wanted me to sign two tickets—three tickets, rather—and Mintz told me on the bridge to sign the name 'Reed,' not to sign my name for the shoes; but I supposed it to be all right. So I signed that box of faucets in the name of Reed. Signed the whole business. Q. Was there anything said about the wagon? A. Yes, they asked what was the number of my wagon. They always do that. That is customary. I told them '105.' Sam told me that was his number; the wagon goes by that number; that the other wagon was broken down." After driving from the Big Four Depot, Rector and the young man who Mintz told him would be his guide, crossed the ferry with him, and finally they drove to Zellinger's place at 2620 Franklin avenue, where all of the shoes were deposited. Zellinger protested about taking all the 146 cases until Mintz told him they would take them away on Monday. Zellinger testified that the young man whose name he does not know told him to walk down the street and see Mintz, which he did, and then it was arranged that Zellinger take all the shoes. Rector testified that after the shoes and the brass faucets were unloaded the team and wagon were turned over to the young man, and that he met Mintz, who gave him \$25 for his day's work; that subsequently Mintz gave him other money, trying to get Rector to agree to run away; that Mintz kept promising to give him enough money so he could leave the country, but he failed to produce the agreed amount, and finally Rector was arrested on or about the 17th of September.

The testimony shows that one Zeldell was sent for to buy part of the shoes, and that on Saturday evening—the day the shoes were placed in Zellinger's store—Zellinger gave Zeldell \$100, which was turned over that same evening to Mintz. On Sunday Zeldell testified he was sent for, and told to get ordinary dry goods boxes and pack the shoes in; that he and Zellinger, Zellinger's clerk, and the young man who brought the shoes on Saturday opened the cases, and packed the shoes, or rather dumped them, in large dry goods boxes. That while they were at work at this,

\$156 worth, or what was sold to one Volker for that amount, were packed up and sent to this man, said to be from Texas. Defendant was present when the goods were repacked and during the time the sale was being made to the merchant from Texas. That on Monday seven dry goods boxes of these shoes were loaded on an express wagon and taken to 7616 South Broadway, to the home of a man by the name of Isaac Seifer, and put in a shed in the rear of his house, where they remained until Friday of that week, when they were taken away by the police to the Four Courts.

The testimony of the police officers shows that two or three of the original cases were found in Zellinger's place; that in his basement or cellar were found broken boxes with the "Key Brand," showing that they were boxes in which Giesecke shoes had been shipped; and Zellinger testified that the shoes produced in court were like the ones delivered to him by the young man, and which Mintz told him to take.

Zellinger testified that Mintz told him to make the sale to Volker for \$156, and that on Monday night Mintz asked Zellinger to give him what money he had, and that he gave Mintz \$90.

On or about Thursday of that week the arrests were made, and the shoes recovered. The identification of the shoes was complete, not only from the testimony of the witnesses, but from the invoice sent by the factory which made them, when compared with the shoes themselves.

At the close of the evidence for the state the defendant asked an instruction in the nature of a demurrer, which the court refused. Thereupon the defendant rested his case, and the state dismissed as to the second count of the information. At the close of all the evidence the court instructed the jury, fully covering every feature of the case to which the testimony was applicable. The case was submitted to the jury, and they returned a verdict of guilty, assessing his punishment at imprisonment in the penitentiary for a term of three years. Sentence and judgment was entered in accordance with the verdict, from which judgment the defendant prosecuted this appeal, and the cause is now before us for review.

Thos. B. Harvey, for appellant. H. S. Hadley, Atty. Gen., and Rush C. Lake, Asst. Atty. Gen., for the State.

FOX, J. (after stating the facts). The record in this case presents three legal propositions for consideration: (1) It is insisted that the testimony in this cause does not establish a larceny of the property in the sister state, but simply shows the obtaining of goods under false pretenses, and therefore defendant's offense does not fall within that provision of section 2362, Rev. St. 1899; hence he was improperly convicted under

that section. (2) That the indictment upon which this prosecution is predicated is insufficient, by reason of the omission of any allegation charging that the property was stolen in the state of Illinois and brought to this state. (3) The correctness of the instructions given by the court are challenged, and error is also assigned upon the refusal of the court to give instructions requested by defendant.

Section 2862, Rev. St. 1899, upon which this prosecution is based, provides: "Every person who shall steal, or obtain by robbery, the property of another in any other state or country, and shall bring the same into this state or country, may be convicted and punished for larceny in the same manner as if such property had been feloniously stolen or taken in this state, and in any such case the larceny may be charged to have been committed, and every person may be indicted and punished, in any county into or through which such stolen property shall have been brought." At the very inception of the consideration of the proposition presented to us for solution it is not inappropriate to say that learned counsel for appellant has said everything that can be urged in support of the contentions presented. It must be conceded that it is essential to constitute the offense denounced by the statute that the property in the sister state must be stolen, or obtained by robbery. It is clear that the facts developed at the trial do not show that the property was obtained by robbery. None of the essential elements of that offense are present, according to the testimony offered. Hence that brings us to the consideration of the first proposition—as to whether or not the evidence developed at the trial established the obtaining of the property by larceny, as contemplated by the statute.

It is insisted by appellant that the proof in this case is insufficient to establish larceny; hence that, if it shows anything, it was the obtaining of property under false pretenses. The distinction between larceny and obtaining goods under false pretenses was carefully marked in the recent cases of *State v. Anderson*, 84 S. W. 946, *State v. Buck*, 84 S. W. 951, *State v. Copeman*, 84 S. W. 942, decided by this court. A fair and reasonable application of the rules announced in those cases must furnish the solution of the first proposition presented in this case. As applicable to this first proposition, the facts are undisputed, and may thus be briefly stated: Rector, who obtained the goods from the railroad company, had been for a long time in the employ of the transfer company that usually received and delivered the freight from the Big Four Depot consigned to Giesecke-D'Oench-Hays Shoe Company. There was little or no conversation between the employes of the railroad company and Rector in respect to getting the cases of shoes. Rector made no representation, and it is apparent that, he having formerly worked for

the transfer company, it was simply taken for granted that he was authorized to receive the goods for the purpose of delivery to the shoe company in the city of St. Louis, and the goods were delivered to him under those circumstances. It is insisted that Rector, having been previously engaged as a driver for the transfer company which was authorized to receive and deliver goods to the shoe company, appearing at the depot of the railroad company in his usual way, with a wagon, calling for the cases of shoes charged to have been stolen, and the delivery of the goods to him under the circumstances, constitutes the offense of obtaining the cases of shoes in controversy under false pretenses; not by larceny. In other words, that while there was no express representations or pretenses made to secure the delivery of the goods, yet, considering all the circumstances which resulted in the obtaining of the goods, it amounts to a pretense or false representation that he was still a driver for the transfer company, with full authority to receive freight for the shoe company, when in fact such pretense was false, and he had no such authority. It is unnecessary to express an opinion upon the correctness or incorrectness of this insistence by the appellant. Courts of high standing have treated conduct similar to that of Rector as amounting to the practice of false pretenses. This contention may be conceded, and still we are quite distant from the solution of the vital and overshadowing question as to whether the defendant, under the facts disclosed at the trial, was guilty of larceny or obtaining goods under false pretenses. The railroad company was in possession of the property charged to have been stolen, and this possession constitutes a sufficient ownership as against the wrongdoer. *State v. Waghalter*, 177 Mo. 676, 76 S. W. 1028; *Greenleaf's Evidence* (16th Ed.) vol. 3, § 161. In *State v. Anderson* and *State v. Buck*, supra, the distinction between the offenses of obtaining goods under false pretenses and larceny has been clearly drawn. It can serve no useful purpose, nor can it add anything to the legal literature, to burden this opinion with a repetition of what was said in those cases; hence we must be content with a simple reference to the general rules making the distinction in those two offenses as are announced in the adjudications which have met the approval of this court.

The authorities uniformly recognize the narrow margin between a case of larceny and where the property has been obtained by false pretenses, and fully appreciate the nicety as well as the importance of the distinction. In the treatment of the distinction between larceny and obtaining property under false pretenses the authorities employ different terms in giving expression to the rules governing the distinction, but the same conclusion is reached, and the general rule is now settled and fully recognized that,

where property is delivered with the intention of parting with it altogether (that is, by giving the title as well as the possession), the offense is that of false pretenses. On the other hand, if the possession is parted with, and not the right of property, the offense is that of larceny. In *Commonwealth v. Barry*, 124 Mass. 325, the rule is thus briefly stated: "If the possession is fraudulently obtained with intent on the part of the person obtaining it to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offense is larceny." In *Murphy et al. v. The People*, 104 Ill. 528, the same rule is announced, with a mere change of expression. It was said: "If the owner of the goods alleged to have been stolen parts with both the possession and the title to the goods to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to fraud. It is obtaining goods under false pretenses." To the same effect is *People v. Morse*, 99 N. Y. 662, 2 N. E. 45; *Stinson v. The People*, 43 Ill. 397; 2 Arch. C. R. P. L. 372; *Clark & Marshall*, 2d vol. 710. It will be observed that all of these cases are fully discussed in the recent cases of *State v. Anderson* and *State v. Buck*, in which the rule as announced fully met the approval of this court. In *Murphy et al. v. The People*, 104 Ill., and *Stinson v. The People*, 43 Ill., supra, the further distinction was made between these two offenses that where "the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back, and make the taking and conversion a larceny."

It is ably and earnestly urged by counsel for appellant that under the line of authorities as indicated the facts developed in this case simply constitute the offense of obtaining property under false pretenses. We are unable to give our assent to this contention. It is urged by appellant that the railroad company had a special property in the goods delivered to Rector, and that in delivering the goods to him it surrendered its entire title or special ownership; hence the case should fall within the rule of the cases herein referred to that, where an owner voluntarily parts with his title to the property, and not only the possession, the offense is that of false pretenses. In our opinion, the argument of counsel for appellant is predicated upon an erroneous conception of the relation of the railroad company and Rector to the property charged to have been stolen. While it may be said that the railroad company had such a special interest in this property as to make the stealing from it larceny, yet

their dominion over the property was far from being absolute. The railroad company is a common carrier. They had carried these goods to their place of destination, and had the possession of them for a limited purpose—that was the delivery to the consignee or their authorized agent. The appearance of Rector, who had formerly been in the employ of the transfer company, in his usual way, with his wagon, upon the theory of the defense, must be treated as a representation or pretense that he was authorized to receive the goods of the shoe company. Upon this representation the delivery was made, but it was made for a special purpose, and upon an implied understanding that he would deliver the goods to the shoe company. It is clear under the facts in this case that the railroad company did not pass any title to this property, but they merely delivered the possession of these goods for a particular purpose. The dominion of the railroad company over this property was by no means absolute. They were simply intrusted with the custody of the property for a particular purpose. Its delivery of the possession of the property to Rector was accompanied with the implied condition or understanding that such possession was delivered for the purpose of the delivery of the goods to the shoe company.

There is a well-recognized distinction between obtaining possession of property from the absolute owner by false and fraudulent representations and the obtaining of property from other persons who simply have the custody and possession of the property as the agent or servant of the owner. Mr. Greenleaf, in treating of this subject, makes clear this distinction. In discussing this proposition he says: "A felonious intent may be proved by evidence that the goods were obtained from the owner by stratagem, artifice, or fraud. But here an important distinction is to be observed between the crime of larceny and that of obtaining goods by false pretenses. For, supposing that the fraudulent means used by the prisoner to obtain possession of the goods were the same in two separate cases, but in the one case the owner intended to part with his property absolutely, and to convey it to the prisoner, but in the other he intended only to part with the temporary possession for a limited and specific purpose, retaining the ownership in himself, the latter case alone would amount to the crime of larceny, the former constituting only the offense of obtaining goods by false pretenses. Thus, obtaining a loan of silver money in exchange for gold coins to be sent to the lender immediately, but which the prisoner had not and did not intend to procure and send, was held no felony, but a misdemeanor; and so it was held where the prisoner obtained the loan of money by means of a letter written by himself in the name of another person

known to the lender. But where the goods were obtained from the owner's servant, the prisoner falsely pretending that he was the person to whom the servant was directed to deliver them, it was held to be larceny. For in the two former cases the owner intended to part with his money, but in the latter case the taking from the servant was tortious, he having only the care and custody of the goods for a special purpose." *Greenleaf's Ev.* vol. 3, § 180.

Mr. Wharton, in his recognized standard work upon Criminal Law, fully demonstrates this proposition. He said in the text: "Suppose A. goes to B. and says, 'I am C., sell me these goods,' and B. delivers the goods to A. believing A. to be C., this being an essential incident of the contract, does any property pass to A.? The better view is in the negative, there being no contract between A. and B. If this be correct, then it is larceny in A. to take goods on this false personation; though there are authorities to the effect that the case is not larceny, but false pretenses. If the pretense be not false personation, but false statement of means, then, as there is a contract of sale, the case is false pretense, and not larceny. And where A. says, 'I am sent by C. to carry the goods to him,' which is false, and thus obtains only possession of the goods, this is larceny in cases in which B. intends to part only with the possession of the goods to A. But here we encounter a subordinate distinction. Suppose A., pretending to be C., goes to B., and fraudulently obtains from B. certain goods of C., which are in B.'s hands as bailee. Is that larceny? It certainly is, because B. has no intention of passing the property in the goods to A., or to any one; he (B.) considering himself to have no property in the goods to pass. This distinction has been vindicated in Massachusetts in the following case: 'Sanderson had left his watch at a watchmaker's to be repaired, and the defendant went to the shop, pretending to be Sanderson, asked for the watch, paid for the repairing, and took the watch with a felonious intent.' 'These acts,' said Chapman, J., 'constitute larceny at common law.' The case is like that of *Rex v. Longstreet*, 1 Mood. C. C. 137. The defendant in that case went to a carrier's servant, and obtained from him a parcel by falsely pretending to be the person to whom it was directed. It was held to be a larceny, because the servant had no authority to deliver it to him, so that no property passed to him but the mere possession feloniously obtained. So in this case the watchmaker had no authority to deliver the watch to the defendant, and the latter obtained no property in it, not even the qualified property of a bailee, but a mere felonious possession, which is the essence of the crime of larceny." Wharton's *Crim. Law*, vol. 1, § 888, and cases cited. In *Steen v. Harris*, 81 Ga. 681, 8 S. E. 206, the rule is clearly and correctly

announced as to the delivery of possession for a particular purpose. The Supreme Court of Georgia, in discussing the *Harris* case, which in some of its features is very similar to the case at bar, thus stated the law: "The rule is that 'if one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to him, under the understanding that the property in them is to pass, he commits neither larceny nor any other crime by the taking, unless the transaction amounts to an indictable cheat. But if, with the like intent, he fraudulently gets leave to take possession only, and takes and converts the whole to himself, he becomes guilty of larceny; because, while his intent is thus to appropriate the property, the consent which he fraudulently obtained covers no more than the possession.' 1 Bishop, *Crim. Law*, § 583, and authorities there cited. In this case *Harris* fraudulently represented to High & Ryan's Sons that he was the agent of Moore & Marsh. They did not sell him the goods, nor did they intend the title to go into *Harris*; but they simply delivered him the custody of the goods, to be delivered by him to Moore & Marsh. He having converted the proceeds of the sale of the boxes to his own use, he was guilty of larceny. The title still remained in the vendor. *Harris* got the custody of the goods wrongfully and fraudulently." In *State v. Lindenthall*, 5 Rich. Law, 237, 57 Am. Dec. 743, it was ruled that a person who obtained the possession of goods by consent of the owner for one purpose, such as hiring or carrying, with the intent to steal, and consummates that intention partly or entirely by converting the goods to his own use, is beyond doubt guilty of larceny.

In the case at bar Rector obtained the goods from the railroad company for a particular purpose—that of delivery to the shoe company. He acquired no sort of title or ownership to the property, but a mere bare possession. The authority of the railroad company in respect to the goods in dispute was limited. They were only authorized to deliver the possession to the consignee or its authorized agent.

In support of the contention by appellant we are cited to the case of *State v. Kube*, 20 Wis. 217, 91 Am. Dec. 390. The facts in that case somewhat distinguish it from the case at bar. In that case an express agent had a package for Christiana Kube. John L. Kube, her husband, claimed the package for his wife, and by false representations induced the agent to believe that a mistake was made in the address of the package, and thereby secured the absolute delivery of it to him for his wife. It will be observed that the delivery to the defendant, John Kube, for his wife, was absolute, not coupled with any conditions or implied contract that he would deliver the package to the true owner. Neither the defendant nor his wife were the owners of the package, but the agent parted

absolutely with the package, believing that defendant's wife was the owner of it, and that he had delivered it to the proper person. The offense in that case consisted of false representations as to the true owner of the package, and the absolute dominion over the property was thereby obtained. In the case at bar the offense consisted of obtaining possession of the property for a particular purpose—that of delivery to the true owner, the shoe company. It may be said that the railroad company thought and believed that it was delivering the goods to a person who was authorized to receive it, and no doubt that was true; but the delivery by the railroad company to Rector was not intended to grant to him absolute dominion over the property, but was limited to a particular purpose—that of delivery to the shoe company—who was known to the railroad company as the owner of the property. In other words, embodying one of the illustrations of Wharton, Rector says, "I am sent by the shoe company to get its goods," which was false, and thus obtained only possession of the goods for the purpose of delivering them to the shoe company. That is larceny, for the reason that the railroad company was only authorized and only intended to deliver a bare possession for the purpose of having the goods delivered to the consignee.

This brings us to the consideration of the second proposition—that the indictment is insufficient to support the judgment of conviction. This contention is predicated upon the failure of the indictment to charge that the property was stolen in Illinois and brought into this state. Section 2362 expressly provides: "In any such case the larceny may be charged to have been committed, and every such person may be indicted and punished in any county into or through which such stolen property shall have been brought." If the allegations contended for by appellant "that the property was stolen in Illinois and brought into this state" are essential to the validity of an indictment or information for such offense, it must necessarily follow that the provision of the statute which authorizes the charging of the larceny to have been committed in any county into or through which such stolen property shall have been brought is void, and of no effect. The statute, substantially, upon which the charge in this cause is based, was enacted by the Legislature at a very early period in the history of this state. This court at a very early period of its organization had in judgment the validity of this statute in the case of *Hemmaker v. State*, 12 Mo. 453, 51 Am. Dec. 172. Napton, J., in that case, after reviewing a number of causes in other jurisdictions, in which it was held that offenses of this character committed in other states or foreign countries were not cognizable in the courts of the state to which the property had been brought, said: "We are not under the necessity of

deciding the question which these cases present. Our statute was obviously intended to punish offenses committed against our criminal laws, and not those which were committed without jurisdiction of the state. If the Legislature think it expedient to declare that a person who is guilty of grand larceny in another state or country, and brings within our jurisdiction the stolen goods, shall be considered as guilty of grand larceny here, it is clearly within their constitutional power to make such enactment. In the determination of the character of the offense there is no necessity for inquiring what may be larceny under the laws of the country where the offense was committed. The Legislature punish the offense committed in this state by bringing the stolen property into it, and in doing so they merely codify a settled principle of the common law applicable to different counties, and extend it here to neighboring states and foreign countries. The case of *People v. Burke*, 11 Wend. 129, is an authority in point upon a statute exactly like our own." In *State v. Williams*, 35 Mo., loc. cit. 232, 233, this court again made reference to this statute, and very briefly thus stated its conclusions: "Whether the crime of larceny committed in one state can be transplanted with the goods into another state, so as to become an offense against and punishable in the latter state, is a mooted question, and has given rise to many conflicting opinions. But no such question can arise in this case, for it is expressly authorized by the third section of the ninth article of chapter 50 of our act relating to crimes and punishments. Rev. Code 1855, p. 637." Again, in *State v. Butler*, 67 Mo. 59, the validity of this statute was called in question, and its validity was maintained, and the conclusions as reached in the case of *Hemmaker v. State*, supra, were fully approved. In all three of these cases, in which there was a conviction by the trial court, the judgments were affirmed, and we have the original records now before us, and in none of them do the allegations contended for by appellant that the property was stolen in another state and brought into this state appear in the indictment.

In the disposition of this proposition we might be content by simply announcing that the cases to which we refer must be treated as decisive of the question now under discussion. However, it may be further said in *State v. Butler*, supra, the case of *People v. Williams*, 24 Mich. 156, 9 Am. Rep. 119, is cited with approval, and gives full support to the correctness of the conclusions announced by this court upon this statute. The provisions of the Michigan statute upon this subject were substantially the same as ours. Judge Cooley, in that case, responding to the challenge to the validity of the statute, in an able, clear, and exhaustive discussion of the proposition, fully met and answered every contention urged against it.

After a careful and logical discussion of the purposes of the statute, and fully stating the broad grounds upon which its validity should be maintained, the learned and distinguished jurist then sums up his conclusions upon the question in judgment before him. He said: "Now, it may be true that this wrong would not have been an offense within this state at the common law; but that does not prevent its being made so by statute. Many trespasses upon individual rights are made punishable because the interest society has in suppressing such disorders is such that they may properly be treated as offenses against society. The present is a case of trespass upon private right, begun, indeed, in another state, but continued into our own, and which the paramount law of the land requires that we should see righted on demand of the party aggrieved. The persistence in the wrong here, then, as against the right of one whom the state is bound to protect to the full extent that it must protect one of its own citizens, is not only not a matter of indifference to the state, but is a flagrant contempt of its authority; and it is eminently proper that the state should treat it as a crime, if in the opinion of the Legislature the peace and good order of the state demand its punishment. That such is its opinion is proved by the statute in question." Whatever doubts may have been entertained as to the validity of this statute, they are certainly removed by the clear and able discussion of the proposition by Judge Cooley.

It is very earnestly urged and ably presented that the failure to charge in the indictment that the property was stolen in Illinois and brought into this state is misleading to the defendant, and does not comply with the provisions of the Constitution, which guaranties to him the right to know the nature and character of the charge preferred against him. In response to this argument it is sufficient to say that when a defendant is charged with stealing property, and the property is described, even though it does not aver the particular place of the stealing other than the county or city in this state to which the property is brought, seems to us as rather a full notification of the nature and character of the charge, and is amply sufficient to require the defendant, in order to meet such a charge, to summon to his aid proof of every nature and character, in whatever state it may be found, to rebut such charge, and, if in possession of the property, to show that such possession was honestly acquired. We see no legal reason for overturning the results of the cases heretofore referred to which were decided by this court upon indictments similar in form to the one in the case at bar.

This brings us to the only remaining proposition presented to our consideration; that is, the refusal of the court to instruct the

jury that if "they believe and find from the evidence that the witness Rector had no intention to take, steal, and carry away the property when he obtained it, then he was not guilty of larceny, nor was the defendant guilty of larceny." Upon the facts developed at the trial of this case we have reached the conclusion that there was no error in the refusal of this request. The testimony as introduced by the state is undisputed that the witness Rector was the instrument selected by the defendant to accomplish his fraudulent and felonious intent of stealing the property as charged in the information, and permanently depriving the owner of it. He furnished the wagon, directed Rector how to proceed in order to obtain this property, and upon the testimony as disclosed by the record the felonious intent and design entertained by the defendant in this case is made too clear for discussion. Whatever was done by Rector must be treated as the act of this defendant, and, even though Rector's mind was inactive, and he was ignorant of the purposes of his act, if defendant, Mintz, directed the act to be done, and had the felonious intent of stealing the property and converting it to his own use through the act of his instrument, Rector, then the act of Rector and the intention of the defendant, Mintz, should be brought together, and the commission of the act must be treated as though it was executed by the defendant, who directed it. In other words, if defendant, Mintz, entertained the felonious intent and design of stealing this property, and directed Rector to do such acts as would result in obtaining the property, without informing Rector as to his intent, and by reason of the commission of the act by Rector the property is obtained and converted by the defendant, Mintz, to his own use, we are unwilling to say that this would not constitute larceny on the part of the defendant, Mintz. If Rector had no design or intent to steal the property obtained by him at the time of taking such property, and he was simply, as claimed by appellant, carrying out the purposes of the defendant, Mintz, without any information as to what Mintz's purposes were, then there is no difference in principle in the use of Rector by the defendant as an instrument to remove the property from the possession of the owner, and in using any inanimate instrument in reaching out—such as tongs, pinchers, or other instruments—to remove the property sought to be stolen from its location. The defendant, Mintz, having directed Rector in the commission of the act of taking the property, it must be held that the intent of defendant, Mintz, accompanied Rector in the commission of such act.

We have carefully considered the instructions given by the court upon which this cause was submitted to the jury. They fully cover every feature of this case to which the testimony was applicable, and, finding no

reversible error upon the record as presented, the judgment of the trial court should be affirmed; and it is so ordered.

GANTT, J., concurs. BURGESS, P. J., absent.

STATE v. HEUSACK.

(Supreme Court of Missouri, Division No. 2.
May 16, 1905.)

1. HOMICIDE—CORPUS DELICTI.

On a prosecution for murder, evidence examined, and held to establish the corpus delicti.

2. SAME—IDENTITY OF MURDERER.

The evidence held sufficient to identify defendant as the murderer.

3. WITNESSES—COMPETENCY—CONVICTION OF CRIME.

Under Rev. St. 1899, § 4680, providing that any person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but that the conviction may be proved to affect his credibility, proof of a former conviction for a misdemeanor is admissible.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1127.]

4. CRIMINAL LAW—OTHER CRIMES.

Under Rev. St. 1899, § 4680, the state, on a prosecution for crime, was entitled to ask the defendant on cross-examination as to his previous conviction for crime in another state.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1147.]

5. HOMICIDE—INSTRUCTIONS.

On a prosecution for homicide, where there were no eyewitnesses of the killing, and nothing to induce the jury to believe there were, an objection to a portion of a charge that it was not necessary to prove the defendant guilty by the testimony of "the" witnesses who may have seen the offense committed, on the ground that it was an implication that eyewitnesses saw the defendant commit the crime, but that in the case at bar it was not necessary to bring them into court, was hypercritical.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Henry Heusack was convicted of murder in the first degree, and he appeals. Affirmed.

Chas. J. Maurer and Chas. P. Johnson, for appellant. H. S. Hadley, Atty. Gen., and John Kennish, Asst. Atty. Gen., for the State.

GANTT, J. The defendant was indicted at the April term, 1904, of the circuit court of the city of St. Louis, for the murder in the first degree of August Raphael at said city on the 16th day of March, 1904. The cause was regularly assigned for trial to division No. 8 of said court. The defendant was formally arraigned upon said indictment, and entered a plea of not guilty thereto, and on the 10th day of May, 1904, was put upon his trial, and convicted of murder in the first degree. Motions for a new trial and in arrest of judgment were filed in due time, heard, and overruled, and exceptions properly saved, and from the judgment pronounced the defendant appealed to this court.

The evidence upon which the verdict and judgment are based was circumstantial, and tended to prove the following facts: Au-

gust Raphael was murdered in his own home at No. 2213 South Tenth street, in the city of St. Louis, between the hours of 11 a. m. and 1 p. m. on the 16th day of March, 1904. He was then 77 years of age, and his family, residing with him at that time, consisted of his wife 83 years of age, and their grandson, Herman Raphael, about the age of 17 years. The defendant, Henry Heusack, was the son-in-law of Raphael and his wife, and lived with his wife and son at No. 1750 South Eighteenth street, in said city. Heusack was addicted to the excessive use of intoxicating liquor, and was somewhat under its influence on the day of the homicide. The house in which Raphael lived was located on the west end of a lot 25 feet wide and extending from Tenth street on the east to the alley on the west. The alley runs north and south, and connects with Ann avenue on the north and Shenandoah street on the south. On the east end of said lot, fronting on Tenth street, there was a building covering the full width of the lot, consisting of three rooms. This building was owned by Raphael, the deceased, and was rented and occupied by a club of 12 or 15 young men, who met there for social purposes two or three evenings each week. The Raphael home fronted on the alley, and to the west. It was a one-story house, with a basement. The basement was not occupied by the Raphael family. They lived in the first story, consisting of three rooms; the front room being next to the alley, a door opening from it to the middle room on the east, and a door from the middle room east to the kitchen. The kitchen and a kind of porch outside formed the east end of the Raphael home. Between this east end of the Raphael home and the west end of the building used by the club there was an open space from 30 to 50 feet in length. But in this space there was a shed on the south, and an ash box, used as a flower bed, on the north; so that there was not much open space left. This space is referred to by the witness as the yard. There was a fence on the north side of this property. Entering the Raphael house from the alley (which was the only way it could be reached from the outside save by going through the club-rooms) there were four or five steps up to what was called a "gangway" or "aisle." This gangway was about four feet wide, extending along between the house and the fence on the north side. There was an outer door to the front room on the east, and another outer door on the north of the kitchen along this gangway. The gangway led from the alley back to the yard, and the members of the club sometimes passed back and forth by that way. There was a door in the partition between the kitchen and the middle room, and another from the middle to the front room. In the northwest corner of the front room there was a bed, in which the old lady, Mrs. Raphael, was lying sick, hav-

ing been sick since about a month before Christmas. Old man Raphael kept chickens in the garret of his house, to which entrance was gained by means of a ladder from the yard. On the property next north of the Raphael lot a Bohemian tailor, named Rhomatka, and his family, resided; their house fronting on Tenth street alongside of the club building, and their yard extending back along the Raphael home. On the next lot immediately south of the Raphael lot a lady named Ulrick lived. The evidence tends to show that for some time preceding the homicide the defendant, Heusack, had not been on friendly terms with his father-in-law. About six months before he said in a conversation with Henry Bene, "My father-in-law put my wife up so she won't give me no money, and I am going to kill the old son of a bitch one of these days." About two or three weeks before Raphael was killed, Herman Raphael, the grandson, saw the defendant at the Raphael home. On that day the defendant and old man Raphael had a quarrel. The defendant wanted to borrow some money, and Raphael refused to let him have it, and ordered him out of the house, saying in German, "Get out of my house, you damned old drunkard." At another time, about a month before the homicide, Herman complained to the defendant that his grandfather was quarreling with his grandmother, and the defendant said, "If the old son of a bitch was young, he would lick the ——— out of him." On Wednesday morning, March 16, 1904, the day of the murder, Herman Raphael left home about a quarter of 7 and went to his work for the St. Louis Cordage Company, leaving his grandparents alone at their home, his grandfather being up and around, and his grandmother sick in bed. About 3:30 in the afternoon he heard his grandfather had been killed, and immediately returned to his home. The same morning Phillip Bernhard and one or two other members of the club were in the clubrooms, cleaning up the rooms, and making preparations for a box party to be given by the club the following Saturday night. Bernhard saw old man Raphael in the yard in the morning, and talked with him. He saw him again a second time about five minutes before 11 o'clock, as Bernhard was leaving the clubrooms for home, going out the back way to the alley. The defendant testified that he called at the Raphael home between 9 and 10 o'clock in the morning, then went home, and in about three-quarters of an hour returned. As Bernhard was leaving the premises about 11 o'clock, he met the defendant at the alley gate on his way to Raphael's the second time. The defendant asked Bernhard if the old man was home, and, being answered in the affirmative, he went in and Bernhard went home. Mrs. Rhomatka and her daughter-in-law were washing that day. About half past 11 in the morning, while hanging

out the clothes in the back yard, adjoining the Raphael home, Mrs. Rhomatka heard a voice coming from the kitchen of the Raphael home, which she understood to be hollering, "Henry, Henry, mamma, dead." This was repeated. She also heard a noise in the same place "just like something was scratching." She immediately called her husband, and he, his 17 year old son, Gus Rhomatka, and his daughter-in-law, Laura Rhomatka, all went out in the yard and listened. The four Rhomatkas testified at the trial. The elder Rhomatka and his wife could not speak English, and testified through an interpreter. While there is a slight discrepancy as to the language they heard emanating from the kitchen, there is a substantial concurrence. Gus Rhomatka, who could speak and understand English, testified that the voices screamed, "Oh, mamma, oh mamma, I'm dead," and he also heard a noise "like with his feet kicking on the floor." The Rhomatka family had not lived there long, and was little acquainted with the Raphael family. They knew Mrs. Raphael was sick, and supposed from what they heard that she was dying. A little after 1 o'clock, the elder Rhomatka asked one of the three young men who were in the clubroom if he had heard that old lady Raphael was dead. Thereupon the young man requested Mr. Miller, one of their number, to go and see old Mr. Raphael. Miller knocked on the kitchen door, and, receiving no response, he opened the door, and saw the dead body of the old man lying on the kitchen floor in a pool of blood, a bloody hatchet lying by his side. Miller immediately told his companions, and the three returned, and together witnessed the evidence of the crime. They found all the inner doors closed, and opened them. Then they gave the alarm, and notified the police.

When found, old man Raphael's body was lying with his face down, the right arm underneath and the left arm extending out with the hatchet across it, his head toward the door of the middle room. The hatchet, which had belonged to old man Raphael, was covered with blood. A chicken, killed by a cut in the back of the head, the way old man Raphael killed chickens, was found in the yard, and the knife with which the chicken was killed was found on the table on the porch, smeared with blood and feathers. The defendant testified on the witness stand that the old man told him when he was there that morning that he was going to kill a chicken.

Dr. Gradwohl testified that he was connected with the coroner's office as post-mortem physician. He performed the autopsy on the body of August Raphael, the deceased, on the 16th of March, 1904. That he was a white man, and looked to be about 70 years of age. The principal injuries were upon the head. Upon the back part of the head were numerous cuts in the scalp—one that run from the top of the back part down

to the right side of the nape of the neck; another one run forward to the right ear, and another one which run to the left ear. Below these the skull was fractured. The back part of the skull was completely caved in, and the brain matter oozed out; and on the left temple a depressed fracture, as if it had been made by some round instrument like the head of a hammer, about two and a quarter inches in diameter; and from this point where the skull was fractured there were lines of fracture leading down to the base of the skull. There were several fingers fractured. The end of the little finger was broken, and the second bone of the second finger. From the character of the wounds, some of them were made with the sharp edge of a dull instrument. The man's death was caused by the fracture of the skull and hemorrhage into the brain. The back of the head was all caved in.

The defendant lived about 11 or 12 blocks from the Raphael home. He went to the Raphael home three times between 9 and 1 o'clock of that day. He testified that he had worked at the arsenal, and that he started for that point between 9 and 10 in the morning, and that his wife told him to stop on the way, and see how her mother was. He went to Raphael's, but did not go to the arsenal. He returned to his home, and in three-quarters of an hour, and after having had five or six drinks of liquor that morning, he again wanted to go to the arsenal, saying to his wife, "I must go to the arsenal to-day, because they are going to start up to-day, and I work there." At 11 o'clock Bernhard met defendant at the alley gate of the Raphael home. The defendant asked Bernhard, "How is the old man in there?" This time, he testified, he remained but a few minutes, but again he went home, and did not go to the arsenal. The third time, about 1 o'clock, he started for the arsenal again. Mrs. Ulrich saw him come down the alley, and when he got to the Raphael gate he stood there awhile and looked in. The defendant testified that his reason for calling on the Raphaels the third time on his way to the arsenal to work was to tell his mother-in-law "that we [meaning his wife and himself] intended to spend the afternoon there"; that when he went in the Raphael home the third time he entered by the front room, and told his mother-in-law that his wife would soon be down; that his mother-in-law asked him to go in and see what the old man was doing, as she had not seen him for a long time; and that he went into the kitchen, saw the evidence of the crime, and ran back out of the house and home without ever telling any person of the crime, not even his mother-in-law. Then he said he told his wife what he had seen, and hurried back to the Raphael home, in advance of his wife. When defendant arrived at the Raphael home the fourth time, he found a number of people gathered at the scene of the crime.

He first asked, "What the hell is the matter here?" and then told the people that he had been there twice that morning, and that "the old man was all right this morning." The police officers soon arrived at the scene. They discovered fresh blood spots on the defendant's ear, neck, cheek, between his fingers, and on his shoes. There is evidence that the defendant stepped in the blood on the floor after the arrival of the police, but the evidence further shows that at that time the blood had dried and stiffened, so that by stepping in it at that time it would not have made the spots upon the person and the shoes of defendant as found thereon. The defendant first denied that there was blood on him, and when they started to take his shoes off he wanted to rub his shoes on his leg. The officers asked the defendant many questions, his name, where he had been, who killed this man, how he got blood stains on his shoes, neck, and ear, to all of which, he either refused to answer or said, "You are smart and wise, go and find out," or "It's none of your business," or "Go find out; that is what you are paid for." The officers thereupon took the defendant in charge, and on the way to the police station Bernhard was in the patrol wagon with defendant, and defendant said to him: "Do not say anything. We will explain it down at the station. These fellows are so wise, let them find out."

At the close of the evidence for the state the defendant demurred to the evidence, which demurrer was overruled by the court, and defendant excepted, and thereupon the defendant went on the witness stand in his own behalf. In addition to the statements of his already noted as to his presence in the house of old man Raphael between 9 and 10 o'clock in the morning and about 10 or 15 minutes to 11, he says he went back to his father-in-law's about 1 o'clock, went into the front room, and saw the old lady first, and told her that her daughter, defendant's wife, would be down in a few minutes. The old lady said to him, "Come in, and see what the old man is doing." That he went into the kitchen, and saw the old man there, and walked up to him, and saw blood all around there, and "I got hold of him, and then I run out as fast as I could, and told my wife something had happened to papa down there. She grabbed a shawl and threw it over her head, and we both went down there. I talked with my father-in-law nearly every day for the last six months. He always spoke German; called me Heinrich, the German for Henry. I never told Mr. Bene six months ago that I would kill my father-in-law some day, or words to that effect. Never made any threatening remarks of that kind. I heard Herman Raphael testify. Never told him that I would give my father-in-law a beating. My father-in-law and I were the best of friends. I cut my finger on Sunday morning, March

13th, and if there was any blood on my person any place, the only way I can account for it is when I first went in there and tried to pick my father-in-law up." On cross-examination he stated he did not go to the arsenal, but went to Seventh street and Shenandoah. "Met a friend at Seventh, and got as far as Broadway, and I changed my mind, and went back home. Had a couple of drinks on my way back before I went home. Then I wanted to go back to the arsenal, and my wife did not want me to go out of the house, and I said, 'I must go to the arsenal to-day, because they are going to start up to-day.' I worked there. Then I went back to Raphael's the second time. I went down through the alley and into the house. Saw my father-in-law this time. He was in the middle room. I talked with him just a minute. Then I went back home. Did not go to the arsenal. It must have been 10 or 15 minutes to 11 when I got down there this time." Admits he saw Bernhard, and asked him, "How is the old man in there?" Bernhard said, "I do not know." That he just merely asked the question. He went on in, found the old man in there, and the old man told him he was going to kill a chicken, and he asked the old man if he wanted him to take it home, and he answered, "No, Emma would be down there pretty soon, and it will be too much trouble anyway." The defendant asked him to let him take the chicken home, the defendant's wife could fix it up better than he could, and the old man replied, "No, I will attend to it myself," to which defendant said "All right," and then went away. He says: "I guess I closed the door as I went out. I think the old man was in the kitchen. Bought some whisky that morning at Eighteenth and Geyer. I had taken about three or four drinks before I went down there the second time, about five or six drinks in all. Not of whisky. I drank two glasses of beer. Felt the effect of it, but not much." It was a little after 1 o'clock that he discovered the dead body of the old man. "I did not tell any person in the neighborhood when I discovered the old man with his brains knocked out. Did not call the police, or the tailor. I just run home. I did not tell the people there, when I came back, I had been there twice that morning. I did say, 'I saw the old man all right this morning.' Did not tell the officers, when they asked me how I got blood on my face and shoes, that it was none of their business. If I said that, I don't know it." He was asked if he had ever been convicted of a crime, and answered, "No, sir." His counsel objected to this question, and the court ruled he could answer. He then stated: "I was convicted here once in St. Louis, and then pardoned, for a misdemeanor. That was twenty-five or thirty years ago. I never was convicted in Arkansas. I do not know a man by the name of Jas. G. Senata."

Other facts and the objections to the instructions will be noted in the course of the opinion.

1. The heinousness of the crime of which the defendant was found guilty by the jury in the circuit court, and the gravity of the consequences to him alike call for the most serious consideration. The verdict is founded upon circumstantial evidence alone, and the law in such cases is that, in order to sustain a conviction, the facts and circumstances must be established beyond a reasonable doubt, and, when so established, should point so strongly to the guilt of the defendant as to exclude any other reasonable hypothesis. That old man August Raphael was murdered in his own home between the hours of 11 a. m. and 1 p. m. of the 16th of March, 1904, there cannot be, in view of the evidence in the case, a reasonable doubt. The character of the wounds and the nature of the instrument by which they were produced excludes all idea of self-destruction; and, indeed, the able counsel for the defendant make no claim that the old gentleman came to his death by suicide, and the facts in evidence likewise forbid the conclusion that his death was the result of an accident or mishap. We have, then, the corpus delicti established beyond a reasonable doubt. It remains to be seen whether the evidence on behalf of the state established the criminal agency of the defendant in the perpetration of the crime, for, while it may be conceded that the old gentleman was murdered in his own home, and by a hatchet belonging to him, unless the evidence was such as to justify the jury in reaching the conclusion that the defendant was his murderer, then the conviction ought not to stand. Was there such a failure of testimony on the part of the state? When we consider the age of the deceased—an old man 77 years of age—and his simple life, residing alone with his aged wife and grandson, we naturally look for some motive in the perpetration of the crime. While a want of motive is no excuse for a crime when it is clearly established, it is often said that in a case depending mainly upon circumstantial evidence the want of a motive is an important consideration bearing upon the probability of guilt; but the investigation of human motives has found it to be a matter of great difficulty, and experience shows that aggravated crimes are sometimes committed from very slight causes, and often without any apparent or discoverable motive. The character, instincts, and intents of persons differ so much that what might be an adequate motive for one for a certain act would be none at all for another. In this case the prosecuting officer with commendable diligence brought before the jury all the facts and circumstances obtainable. From this evidence it appears that the old gentleman lived in his little home all alone with his sick wife and a grandson, about 17 years of

age. The evidence discloses beyond a peradventure of a doubt that this grandson did not commit the crime, because he left home early that morning, and his grandfather was seen alive up to about 11 o'clock, and this boy during all that time was engaged in his work with the cordage company, and was there when notified of his grandfather's death. There is nowhere in the whole record any suggestion of any ill will harbored against the old man by any other person than the defendant. The defendant was his son-in-law, and the evidence tends to show that he was addicted to the use of liquor, and that he was more or less thriftless, and had some two or three weeks prior to the homicide endeavored to borrow some money from the old gentleman, and the old gentleman told him that he did not have any money, and told him "to get out of the yard." Some six months before the homicide the witness Bene testified that the defendant told him that his father-in-law had put his wife up so she would not give him any money, and that he was going to kill the old son of a bitch one of these days. At another time, and about a month before the old man was killed, Herman, the grandson, complained to the defendant that his grandfather was quarreling with his grandmother, and the defendant said, "If the old son of a bitch was young, I would lick him." From these expressions it appears that there was a bad feeling on the part of the defendant toward the old man. The evidence tends strongly to show that after the old man refused to loan money to the defendant, the defendant ceased to visit him; at least he was not known to the neighbors who lived immediately adjoining the old couple. On the day of the homicide it appears that the defendant made three distinct trips to the Raphael home alone. His account of himself and his movements on that day were very unsatisfactory. He started out on each occasion, he says, to go to the arsenal to go to work, and each time landed at the Raphael home, and admits that he never succeeded in reaching the arsenal, although there was nothing to hinder him in so doing. Certain it is that he was the last man seen to go to the Raphael home, and that but a few minutes before the murder must have occurred, keeping in mind the time when he was last seen to go into the Raphael home. The evidence places him there when the Rhomatka family were directed by the voice calling out "Mamma, mamma, I am dead," or "Henry, Henry, mamma, dead," and heard sounds of heavy stamping, and as if some one was scratching within the kitchen. When there is added to the admitted proximity of the defendant to the scene of the tragedy the blood stains on the lobe of the ear, and on his face, hands, and shoes, and the strange story of the defendant that when, at the request of the old lady, he went to the kitchen to see the old gentleman,

and discovered him murdered, he ran out of the house 11 blocks away to his own home without giving any alarm to any of the neighbors or police officers, and without even notifying the wife of the deceased. But this is not all. His conduct and actions when he returned the fourth time to the Raphael home, and found there the neighbors, who had gone, as they supposed to the assistance of the old man, because they believed his wife was dead, was strongly indicative of guilt. According to his own testimony he had been in this house, and knew that his father-in-law lay murdered therein, and yet upon his arrival at the house this time he greeted the assembled neighbors with the query, "What the hell is the matter here?" He then told the people that he had been there twice that morning, and that the old man was all right then. If innocent, and he had discovered the murder of his father-in-law, a natural sense of horror would have indicated that he should have at once given the alarm to the neighbors, and called the officers of the law to ferret out the murderer. If innocent, why ask what was the matter there, when he saw that the neighbors had discovered the murder of the old man, and were there to render what aid they could to the hapless old wife? If innocent, why should he have dissembled, and stated that he had been there only twice that forenoon, when in fact he had been there three times? The presence of fresh blood stains on the defendant's ear, neck, cheek, fingers, and shoes were physical facts entirely consistent with the theory of the state that he himself was the perpetrator of this murder. If, as the facts tend to indicate, he slew the old man with the hatchet which was there in the kitchen, and which bore the signs of blood and hair upon it, nothing would have been more natural than that the blood from the old man's wounds in the head would have spurted on his face, neck, and hands as he stood close enough with the short-handled hatchet to inflict the murderous wounds in the head. Unsatisfactory in the extreme was his explanation to the officers of the presence of this blood on his face, ear, and neck. He showed a cut on his right hand, which he said he had received on the previous Sunday, which the officer testified looked like an old cut. His effort to remove the blood from his shoes by attempting to rub his shoes against his pants when the officer started to take his shoes off of him evinced a purpose of obliterating the damning evidence against him, and he betrayed his appreciation of the weight of this evidence when he charged the officers then and there with trying to put up a job on him, because they were endeavoring to preserve the blood stains on the shoes just as they appeared when they arrested him. It was also very significant that he should step into the blood of the murdered man after the officers had arrived at the house, and in this

manner account for the blood upon his person. But unfortunately for him, and fortunately for the state, the blood had then become so dry and stiff that it would no longer spatter when he stepped in it and produce the blood spots which the officer described as splashes, and not thick, congealed blood. But the most unnatural feature in defendant's conduct was the manner in which he treated the officers when they were inquiring for evidence upon which to apprehend the murderer of his father-in-law. Instead of gladly rendering any and all assistance to enable them to ascertain who the murderer was, and willingly giving them all the information as to his relation to the old man, and when he had last seen him alive, and under what circumstances, strange enough he answered them, "You are smart and wise; go and find out who murdered him," and to another, "It is none of your business," and still to another, "Go find out; that is what you are paid for." Nor did he cease at this. As he rode to the police station with young Bernhard he cautioned him to say nothing, saying, "These fellows are so wise, let them find out." These expressions to the officers have none of the earmarks of innocence. They disclose none of that natural anxiety to discover the murderer of his wife's father, whose cruel taking off would have aroused a natural desire on his part to see the murderer caught and punished; on the contrary, evinced a mind and heart devoid of natural affection, and insensible to the enormity of the crime that had been committed. Doubtless it appeared to the jury that these speeches sprang from the sense of guilt and a desire to thwart the discovery of the murderer, and that one related as the defendant was to this old man, who could indulge in such conduct toward the officers of the law, would have had little hesitation in doing the murder himself if an opportunity presented itself. He utterly and insolently refused to render any assistance toward the apprehension of the guilty party, and obstructed every effort of the officers in their investigation. With this array of facts and circumstances before them, and with the additional advantage of seeing and observing the witnesses and their manner of testifying, it cannot be said that the jury were not authorized to find a state of facts beyond a reasonable doubt which were not only consistent with and attended with all reasonable certainty to point to the defendant as the person who killed August Raphael; and when such a state of evidence appears it is not the province of this court to substitute its judgment for that of the jury and direct an acquittal. On the contrary, the rule is too well established to require a citation of authorities that if there is substantial evidence to uphold the verdict, this court will not interfere with it.

2. Among other errors assigned, defendant complains of the cross-examination of the de-

fendant. In his cross-examination counsel for the state inquired of defendant, "Have you ever been convicted of a crime?" to which the defendant answered: "I was convicted here once in St. Louis of a misdemeanor, and was pardoned. That was twenty-five or thirty years ago. Q. Have you ever been convicted but that once? A. That is all. Q. Were you ever convicted in Arkansas? A. No, sir. Q. Did you ever know a man in Arkansas by the name of Jas. G. Senate? A. No, sir. Q. Were you in Arkansas about '86? Counsel for the Defendant: I object to that question as being incompetent and immaterial. It throws no light on this transaction at all. The Court: I do not know the purpose of it. Counsel for the State: The purpose of it is to continue on the question I asked him about this man Senate, and with reference to that conviction I asked him about in Arkansas. The Court: He may answer the question"—to which ruling the defendant duly excepted. It is insisted that this examination was highly prejudicial, and that the explanation of its purpose was but a clever charging that the accused was convicted in Arkansas. In connection with this assignment the defendant complains of instruction No. 6, which reads: "You are further instructed that you are to consider the evidence which was introduced tending to prove that the defendant was previously convicted of a criminal offense solely for the purpose of discrediting defendant as a witness, and you are not to consider that evidence as bearing upon the question of his guilt of the crime charged in the indictment herein. And you should not permit that evidence to influence you against defendant." It is urged that the effect of this instruction was to cause the jury to believe the defendant had been convicted of a criminal offense in Arkansas, when in truth there was no evidence offered to prove that he was thus convicted. There was no error in permitting the state to inquire of the defendant, after he had become a witness in his own behalf, whether he had ever been convicted of a criminal offense. Section 4680, Rev. St. 1899, expressly provides that such conviction may be proved to affect his credibility by his own cross-examination. And it was ruled in this court in *State v. Blitz*, 171 Mo., loc. cit. 540, 71 S. W. 1027, that a conviction of a misdemeanor might be shown in this manner, as well as of felony. And that ruling was approved in *State v. Thornhill*, 174 Mo. 370, 74 S. W. 832. Now, in this case the question sought to elicit proof of a prior conviction resulted in showing the defendant had been convicted of a misdemeanor in St. Louis some 25 years before the trial. All questions as to the conviction in Arkansas were answered in the negative, and no attempt was made to contradict the defendant as to them. The state had the right to ask the question, and, having received an unfavorable answer, its tendency was to injure the state, and establish there had

been no conviction of defendant in Arkansas; hence no reversible error can be predicated upon the cross-examination aforesaid. Neither was there any error in giving the instruction No. 6. We do not think it can fairly be considered as referring to a conviction in any other criminal offense than the misdemeanor which had occurred some 25 years previously in St. Louis, and the court carefully and properly restricted the evidence of the conviction of a misdemeanor to the one purpose of affecting the credibility of the defendant as a witness, and forbade the jury considering it upon the question of his guilt of the crime for which he was being tried. This instruction was manifestly given as a protection to the defendant, and it could not have operated otherwise.

3. Objection is also made to the fourth instruction. That instruction is in these words: "You are instructed that it is not necessary to prove the defendant is guilty by the testimony of the witnesses who may have seen the offense committed. Guilt may be shown by proof of the facts and circumstances from which it may be reasonable and satisfactorily inferred. In determining whether the defendant is guilty or not, you should take into consideration all the facts and circumstances in evidence, the acts and conduct of the defendant, and his motive, if any, for doing or not doing the act charged as shown by the evidence; and if you find from all the facts and circumstances in evidence that there is no other reasonable conclusion than that he is guilty, you will so find; but to convict the defendant on circumstantial evidence alone the circumstances proven must be consistent with one another, and must, taken together, point so conclusively to his guilt as to exclude every reasonable hypothesis of his innocence." That part of the instruction complained of is as follows: "You are instructed that it is not necessary to prove the defendant guilty by the testimony of the witnesses who may have seen the offense committed." The argument of the defendant is that this is an implication that eyewitnesses saw the defendant commit the crime, but in this case it was not necessary to bring them into court. We can but regard this as a strained and hypercritical criticism of the instruction. If the article "the" before the word "witness" had been omitted, there could not possibly be any valid objection to the instruction. It would then have told the jury that it is not necessary to produce direct and positive evidence to convict one charged with crime, but that it is sufficient if facts and circumstances are proven from which no other reasonable conclusion than the guilt of the accused can be reached. The argument of the defendant against this instruction would be just as forcible if the word "the" had been omitted, because the inference that there were eyewitnesses, according to defendant's construction of the instruction, would still remain. In this case there were no eye-

witnesses, and nothing to induce the jury to believe there were. Read as a whole, and considered altogether, the instruction conveyed simply the idea that it was not necessary, in order to convict, that his guilt should be established by direct evidence, but may be shown by proof of facts and circumstances from which no other reasonable conclusion than his guilt could be reached. The other instructions in the case, together with this fourth instruction, fully and fairly covered all the propositions of law arising in the case, and left nothing more to be desired.

We have gone carefully through the record in view of the serious charge against the defendant, and our conclusion is that he has had a fair and impartial trial, and that the sentence which the law pronounced must be executed; and it is so ordered.

FOX, J., concurs. BURGESS, P. J., absent, sick.

STATE ex rel. GOODNOW v. POLICE COM'RS.

(Supreme Court of Missouri. April Term, 1904.)

Dissenting opinion.

For majority opinion, see 71 S. W. 215.

VALLIANT, J. For the following reasons I am unable to concur in opinion of the court in this case:

The act of 1874 (Laws 1874, p. 327) looks to the appointment and maintenance of a permanent police force for Kansas City. It prescribes the numerical standard of the force, or, rather, a rule by which the numerical strength shall be measured. That numerical standard once established, it is the duty of the board of police commissioners to keep the force up to it until the same is reduced according to law. The power to increase the number is given to the common council on the recommendation of the board of police commissioners, and in the same sentence the power is given the commissioners to reduce the force. The fixing of the numerical standard in the first place, its increase and its reduction, are all treated by the Legislature in one breath, as it were, and are all intended to apply to the one object—that is, the general standard of the force—and they have no relation to the appointment or the discharging of individuals. In the exercise of the authority conferred in that sentence, the governmental agency to whom it is intrusted would say: The police force for Kansas City shall consist of so many officers and so many men; or it would say the force shall be increased to so many men, or that it be reduced to such a number. In the exercise of the power conferred in that sentence the government agency appoints no one; neither does it discharge any one. The power there conferred is rather in

the nature of legislative than executive function. It prescribes the standard of strength, but does not appoint to the office.

The language of the act is: "Sec. 6. To enable said board to perform the duties imposed upon them, they are hereby authorized and required, as speedily as may be, to appoint, enroll and employ a permanent police force for the City of Kansas, which they shall equip and arm as they may judge necessary." So far the act confers only power to appoint, equip, etc., the duty there prescribed is purely of administrative character, and it does not leave it to the commissioners to say of what number the police force shall consist, but the number or standard of measure is elsewhere in the act fixed, and until it is altered the police commissioners cannot lawfully refuse to appoint that number.

Then follows a new sentence: "The number of policemen to be so appointed and employed, exclusive of officers, shall, at the first organization, be not exceeding the number now employed by the corporate authorities of the City of Kansas; but the common council of said city shall have the power to increase the police force at any time to any number recommended by the board of police commissioners; and said commissioners may reduce the present or any future number of police, as experience may warrant." In that sentence the power is given to the common council, on recommendation of the board, to increase, and to the board to reduce, the number of the force. The power committed to the council is of the same nature as that committed to the board—the one to increase, the other to reduce. Surely it was not intended to give the council the power to increase by adding certain individuals of its selection to the force; no more can it be said that it was intended to give the board power to reduce by discharging individuals. It meant that the council by ordinance should have the power to say that hereafter the police force of the city shall contain so many men, and in like manner the board shall by resolution say that hereafter the force shall consist of only so many men. The power conferred by the act is of the same nature in each case, and is to be exercised in the same or similar manner.

Further down in the same section is this: "The policemen shall be employed to serve for three years, and be subject to removal only for the cause after a hearing by the board, who are hereby invested with exclusive jurisdiction in the premises." That sentence is emphatic and its object cannot be mistaken. It is designed to confer an important and valuable right on the policemen. The right there conferred is not visionary, but very substantial. It means that the policeman does not hold his office at the mere will of the commissioners, and it means that they shall not discharge him except for cause, after due trial. But if the commis-

sioners, under the name of reducing the force, have the power to discharge an individual, of what value is the clause in the statute saying that a policeman shall not be discharged except for cause after trial? If the construction given the clause conferring the power to reduce the force by the majority opinion is correct, then the policeman is absolutely at the mercy of the board of commissioners, and the clause essaying to give him a right to serve his term unless upon charges and conviction is set at naught.

It is a rule that a statute should be so construed as to give effect to all its parts if possible. If we construe the clause empowering the board of commissioners to reduce the force to mean that it may by resolution or other proper form say, in effect, that hereafter the police force shall consist of only so many men in the same way that the common council may say that it shall be increased to so many men, then it is in perfect harmony with the clause conferring on the policeman the right to remain for his term, unless dismissed for cause after due trial.

In my opinion the relators were unlawfully discharged, and they are entitled to the relief prayed.

STATE ex rel. CHICAGO, B. & Q. R. CO.
v. BLAND et al., Judges (two cases).

STATE ex rel. CHICAGO & A. RY. CO. v.
SAME.

(Supreme Court of Missouri. June 1, 1905.)

1. CIVIL CONTEMPT—RIGHT OF APPEAL.

Under Rev. St. 1899, § 2693, declaring that in all cases of final judgment rendered upon any indictment an appeal to the Supreme Court shall be allowed the defendant if applied for during the term at which such judgment is rendered, a complaint informing the court of the violation of an injunction is not an information or indictment, and a judgment rendered thereon is not appealable under the section cited.

2. SAME—FINAL JUDGMENT.

Certain ticket brokers were enjoined from dealing in the return-trip part of a certain class of railroad tickets. They violated the injunction by selling some of such tickets, and complainants in the injunction suit instituted proceedings to have them punished for contempt. Rev. St. 1899, § 806, provides that any party aggrieved by any judgment in any civil cause from which an appeal is not prohibited by the Constitution may appeal from any final judgment in the case. Section 1616 provides that every court of record shall have power to punish as for a criminal contempt willful disobedience of any process or order. Section 1617 limits the punishment which may be inflicted for contempt, and the following section provides that contempts committed in the presence of the court may be punished summarily, but in other cases the party charged shall be notified of the accusation, and have a reasonable time to make his defense. *Held*, that the order adjudging the brokers guilty of contempt was a final judgment in a civil cause, appealable under section 806.

In Banc. Three separate proceedings in prohibition by the state on the relation of the Chicago, Burlington & Quincy Railroad Company, the Chicago & Alton Railway Com-

pany, and the Chicago, Burlington & Quincy Railroad Company against Charles C. Bland and others, as the judges of the St. Louis Court of Appeals, to prevent respondents from proceeding further with appeals to the court mentioned from orders adjudging Herman Schubach and another guilty of contempt in disobeying an injunction issued in a suit by relators against said Schubach and another. Preliminary rule discharged and writ denied.

Johnson, Allen & Richards and Martin L. Clardy, for relator Chicago, B. & Q. R. Co. Edward S. Robert, Douglas W. Robert and Martin L. Clardy, for relator Chicago & A. Ry. Co. Chester H. Krum, Edward J. O'Brien, and Henry W. Bond, for respondents. McKeighan, Wood & Watts and J. M. Dickinson, amici curiæ.

LAMM, J. In 1903 the Burlington Company commenced two proceedings in equity in the circuit court of St. Louis, one against Schubach and one against Gildersleeve, and the Alton Company also commenced in said court its proceeding in equity against Gildersleeve, the life of each bill being for injunctive relief restraining said Schubach and Gildersleeve from dealing in the return-trip part of a certain class of railroad tickets issued severally by relators to accommodate travel to and from the Louisiana Purchase Exposition at St. Louis, and sold at reduced price in consideration of being nontransferable. See a case on all fours, *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452, where the averments and a copy of a similar bill are set forth with particularity. Such proceedings were had in each of said causes as resulted in temporary restraining orders against said defendants severally. While said temporary injunctions were in force, and after they had been served upon defendants, plaintiffs in said suits, relators here, in their own several names and through their own counsel filed in said circuit court during its June term, 1904, verified complaints in said causes, causing the court to be informed that said Gildersleeve and Schubach, after injunction bonds filed and approved, and after service of the preliminary restraining orders, violated the terms thereof by carrying on the business of ticket brokerage by buying, selling, and dealing in World's Fair mileage, excursion and passenger tickets and return coupons thereof, and commutation passenger tickets or return coupons thereof, which were and had been issued by the plaintiffs severally for passage over their respective railroads, which said tickets were sold below regular schedule rates and under contracts with the original purchasers entered upon such tickets and signed by the original purchasers making them nontransferable and void in the hands of any other person than such original purchasers. Said complaints also caused the

court to be informed of divers and sundry specific instances of violations of said orders in names, tickets, dates, and amounts, and prayed the court to make an order requiring said Schubach and Gildersleeve to appear and show cause why all and every of them should not be punished for contempt of court in violating said injunction. Thereupon Gildersleeve and Schubach were ordered cited to appear and show cause, and they appeared and filed returns through counsel. Thereupon the matter of said complaints, citations, and returns came on for hearing, and thereafter the court entered its judgments, finding and adjudging Schubach and Gildersleeve guilty of contempt and adjudging Gildersleeve in one case to be committed to and be imprisoned in the common jail in the city of St. Louis for a period of 30 days from 2 o'clock p. m. on the 2d day of August, 1904, until 12 o'clock p. m. on the 1st day of September, 1904, or until he be discharged according to law; and in the other case adjudging him to pay to the sheriff of the city of St. Louis for the use of the public schools the sum of \$300, together with the costs incurred in the proceeding, before the 1st day of October, 1904, and, if said fine and costs be not paid by the 1st day of October, 1904, that the body of said Gildersleeve be attached by the said sheriff, and that said Gildersleeve be committed to and imprisoned in the common jail in the city of St. Louis for a period of 30 days from the 1st day of October, 1904, or until he shall be discharged according to law; and in the other case adjudging Schubach to pay a fine of \$250 and the costs of the proceeding, to be paid to the clerk of said court forthwith to the use of the public schools, and, if said fine is not paid forthwith, then the said Schubach to be committed to and imprisoned in the common jail in the city of St. Louis until such fine is paid; and further adjudging said Schubach to be committed to and imprisoned in the common jail in the city of St. Louis for a period of 10 days, or until he shall be discharged according to law—execution being stayed until October 2d. Afterwards proceedings were had in all said contempt cases, whereby the Honorable Charles C. Bland, one of respondents, as a judge of the St. Louis Court of Appeals, granted appeals to the St. Louis Court of Appeals, approved recognizances tendered, and stayed all proceedings pending said appeals. Thereupon relators filed here their three several suggestions for prohibition in substantially common form, setting forth the pendency of the injunction proceedings in the St. Louis circuit court, the issue of the temporary restraining orders, the filing and approval of the injunction bonds, the service of the restraining orders, the complaints causing the court to be informed of the violation of said orders, the citations and rules to show cause, the returns to said rules, the hearings had thereon in said circuit court, the several judgments finding said Schubach and Gilder-

sleeve contemptners and adjudging fines and imprisonments against them, the granting of appeals by Judge Bland, and then (selecting one as a sample of all) the petition proceeds as follows, in part: "Said petitioner further states that the proceedings instituted as aforesaid by the Honorable Charles C. Bland, Richard L. Goode, and Albert D. Norton, judges as aforesaid, of the St. Louis Court of Appeals, are a direct encroachment upon the authority and jurisdiction of the circuit court of the city of St. Louis, in that no appeal was allowable from any order in contempt thereof, or committing any person for contempt of court in disobeying an order of said St. Louis circuit court, and that under the Constitution and the laws it is made the care of this court that the said Hon. Charles C. Bland, Hon. Richard L. Goode, and Hon. Albert D. Norton, judges of the St. Louis Court of Appeals aforesaid, and the said St. Louis Court of Appeals, keep within the bounds and limits of the jurisdiction prescribed to them by the laws of the state; and that the St. Louis Court of Appeals has no jurisdiction in said matter, for the reason that there is no law providing for an appeal from a judgment for contempt." On the filing of said petitions for prohibition and an exhibition here of exemplifications of the records of the Circuit Court and of Judge Bland's orders granting appeals, this court issued a preliminary rule to show cause in each case. Thereafter respondents filed their returns to said rules in common form as follows: "Now come Charles C. Bland, Richard L. Goode, and Albert D. Norton, and, making return to the writ of prohibition herein, show unto the court here that in the matter concerning which they have been cited to appear they proceeded with and were proceeding in the proper exercise of the appellate jurisdiction in such matters conferred upon them by law, and that there is no valid reason in law why the rule heretofore made upon them should be made absolute. Wherefore they pray that the said rule may be discharged." The causes were heard together in this court, were argued orally by distinguished counsel with candor and ability, and submitted on briefs, in which the only question presented is whether a judgment of a superior court of record, fining and imprisoning a defendant for violating a temporary injunction, is appealable.

If such judgment be not appealable, then the attempt of the St. Louis Court of Appeals to draw to itself jurisdiction is in excess of its power, and the writ will lie. If, per contra, such judgment be appealable, then the St. Louis Court of Appeals has jurisdiction, and is proceeding within the constitutional orbit of its power, and the writ will not lie. This court, *ex gratia*, permitted the Illinois Central Railroad Company, through its counsel, McKeighan, Wood & Watts, to appear, file a brief, and argue orally, *amici curiæ*.

It may simplify and aid the consideration

of the case to state the several contentions of counsel thus: By relators' counsel proper it is contended that not only is there no statute allowing a contemner an appeal from a judgment finding him guilty of contempt, but that, if such statute exist, it is unconstitutional, in that by submitting such matter to review in another court it would impinge upon the inherent common-law power of a superior court of record to punish for contempt. By one of the counsel appearing *amici curiæ* it is conceded that a statute allowing an appeal in such case would be constitutional, but it is contended that no such statute exists in this state. By respondents' counsel it is conceded that the right to an appeal, if any, must be spelled out in the statute; and it is contended that when such right is so located no constitutional or inherent right in a lower court is interfered with in giving it force; and, furthermore, respondents' counsel put their finger on statute law, which they insist grants the right to appeal.

Contempts have been divided into civil and criminal, into direct and constructive, into contempts which affect alone the dignity of the court and those which affect the beneficial rights of a party litigant, and there is a class of contempts in which both elements appear. There are many contempts which are punishable as crimes *malum in se*, and others *malum prohibitum*, and which are of such a dual sort as to subject to punishment by distinctively criminal process as well as by contempt proceedings. In many cases contempts are designated as "criminal" where an attempt at classification may not have been in mind, but the court had in view, by the use of the word, merely an epithet which might fill a wholesome office as a deterrent. An examination of the authorities will show that the line of demarcation between the different classes of contempts is often shadowy, and does not run true, and that the learning on the question abounds with fine as well as superfine distinctions. It will be found, further, that the earlier decisions in some of the states relating to the right of review in an appellate court in contempt cases have been somewhat modified by a judicial inclination towards discovering reasons in favor of review in constructive or indirect contempts. It will be found, too, that the earlier doctrine of the Supreme Court of the United States, denying the right of appeal or writ of error in contempt cases, has been modified by express statute, and this modification has been recognized, and the statutes given effect, in the later decisions of that tribunal. It will be found, also, that where no statutory right of appeal exists or writ of error lies, appellate courts have been astute and diligent in granting relief by inspecting records under writs of certiorari or habeas corpus. See, for instance, *Ex parte O'Brien*, 127 Mo. 477, 30 S. W. 158; *State v. Leftwich*, 41 Minn. 42, 42 N. W. 598; *In re Watts & Sachs*, 190

U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933. And, lastly, it will be found that the right of appeal has been granted in many states of this Union in indirect contempt cases, and that no respectable authority exists expressly declaring such statutes unconstitutional, inoperative, or void, although the point has been many times pressed by ripe counsel before great judges.

Authorities covering the whole range of the common and statute law on the subject of contempts have been industriously collated by counsel, and may be found cited in their briefs. In may be possible the last word has not been spoken, but it would not advance any interest of the science of jurisprudence to now assume the bootless task of undertaking to distinguish the cases, to discriminate between them, or strive to harmonize them, when possible, or point out their discordant notes. It is settled law that every constitutional court of common-law jurisdiction has the inherent power to punish for contempt, and cannot be shorn of such power by statute. It is settled law that contempt cases are *sui generis*, that one court may not try a case of contempt against another, that contempt proceedings are summary, that there is no constitutional right to trial by jury, and that no change of venue will lie. But the right to have a review of a conviction for indirect contempt, committed by disobeying an order made in a pending civil case and punished in a lower court, by appeal or writ of error, is a different proposition, and one by no means new in Missouri. In considering it, it may be assumed as elementary that the right of appeal in civil cases did not exist at common law, and is a mere creature of statute; and this is true of the right of appeal in criminal cases as well. *State v. Thayer*, 158 Mo. 36, 58 S. W. 12. The statute providing for appeals in criminal cases (section 2696, Rev. St. 1899) reads: "In all cases of final judgment rendered upon any indictment, an appeal to the Supreme Court shall be allowed the defendant, if applied for during the term at which such judgment is rendered." It will be seen at a glance that an appealable judgment in a criminal case is limited to a final one, and to one rendered upon an "indictment." This section was held not to allow an appeal from a final conviction on an information. *State v. Brown*, 153 Mo. 578, 55 S. W. 76. Subsequently the latter case was overruled in banc (*State v. Thayer*, *supra*), in which it was held that the above section, read with other sections of the Code of Criminal Procedure, should be construed as allowing an appeal from a conviction on an information. Now, in repeated adjudications we have defined the word "information" as used in our Constitution and laws. See, for example, *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115, in which we said: "The terms 'information' and 'indictment,' as used in the Constitution, are to be understood in their com-

mon-law sense. *Ex parte Slater*, 72 Mo. 102; *State v. Kelm*, 79 Mo. 515. In the *Kelm* Case it was held that the term 'information,' as used in article 2 of section 12 of the state Constitution of 1875, was to be understood in its common-law sense; that is, a criminal charge which at common law is presented by the Attorney General, or, if that office is vacant, then by the Solicitor General of England, and in this state by the prosecuting attorneys of the respective counties, who exercise the same powers as are exercised by the Attorney General or Solicitor General of England—that is, the power to present informations under their official oaths." It is obvious that by no sort of allowable legal construction can the complaints in these cases informing the court of the violations of its injunctions (loosely termed "informations," and colloquially spoken of as such) be read to mean "informations" or "indictments" under the foregoing definition and the precision satisfactory to the legal mind, and it follows that, if the proceedings against Gildersleeve and Schubach are to be considered criminal cases in the technical sense, then, whatever their remedy, it cannot be by appeal.

But this view falls short of disposing of the matter. Turning to the statute upon civil appeals (section 806, Rev. St. 1899), the pertinent part reads: "Any party to a suit aggrieved by any judgment of any circuit court in any civil cause from which an appeal is not prohibited by the Constitution, may take his appeal to the court having appellate jurisdiction, from * * *, or from any final judgment in the case. * * *" And the question at once arises whether the character of the judgments against Gildersleeve and Schubach will permit them to be brought within the letter and spirit of said section. If they cannot be, it unerringly results that no right of appeal exists. The subject of contempts is recurred to in more places than one in our statutes, and provisions relating to the same are practically as old as the statutes themselves. In the act regulating the granting of injunctions, passed in February, 1825 (Rev. Laws Mo. 1825, p. 441, § 6), the following appeared: "Sec. 6. Be it further enacted, that if any person, against whom a writ of injunction shall be issued, shall, after the service thereof, be guilty of a disobedience to and a breach of the said injunction, it shall be lawful for the judge granting the same, or if the same were granted in open court, then for any judge of that court, in vacation, to issue an attachment against the said person for a contempt; and upon his being brought before the said judge, unless he shall disprove or purge the said contempt, the said judge may, in his discretion, commit him to gaol until the sitting of the court in which the said injunction is pending, or take bail for his appearance in the said court at the next term thereof, to answer for the said contempt, and

abide by the order of the court thereon." With some immaterial changes, the same provision was preserved in Rev. St. 1835 (page 314, § 17), and in Rev. St. 1845 (page 581, c. 81, § 17), and in Rev. St. 1855 (chapter 128, art. 8, § 17). In Rev. St. 1855, however, the following significant clause, somewhat indicative of the mischief struck at, was added to the section: "And in the meantime to observe and obey the injunction." Section 17, art. 8, c. 128, Rev. St. 1855, has been carried through the various revisions, and now appears as section 3643, Rev. St. 1899, under the title "Injunctions." In 1823, in an act to establish courts of justice and prescribe their powers and duties, there appeared the following provision relating to contempts (Rev. Laws Mo. 1823, p. 274, § 19): "Sec. 19. Be it further enacted, that the several courts aforesaid, shall respectively have the power to punish, by fine and imprisonment, the officers of their courts respectively, for their official misconduct; and all such officers, parties, jurors and witnesses, for any disobedience of process of the court; and any person what soever, for any contempt by him committed toward such court, or for any disorderly or contemptuous behavior, in their presence, while in session, or in any manner obstructing the administration of justice, and to issue attachments against any person so offending; but in no case shall the fine exceed one hundred dollars, nor the imprisonment be for a longer period than thirty days, and until the fine and costs are paid." The latter section, amended and amplified, has been carried through all the revisions, and now appears as sections 1616, 1617, 1618, 1619, and 1620, Rev. St. 1899, which are as follows:

"Sec. 1616. Every court of record shall have power to punish, as for a criminal contempt, persons guilty of any of the following acts, and no other: First, disorderly, contemptuous or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; second, any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings; third, wilful disobedience of any process or order, lawfully issued or made by it; fourth, resistance willfully offered by any person to the lawful order or process of the court; fifth, the contumacious and unlawful refusal to answer any legal and proper interrogatory."

"Sec. 1617. Punishment for contempt may be fine or imprisonment in the jail of the county where the court may be sitting, or both in the discretion of the court; but the fine in no case shall exceed the sum of fifty dollars, nor the imprisonment ten days; and where any person shall be committed to prison for the non-payment of any such fine, he shall be discharged at the expiration of thirty days."

"Sec. 1618. Contempt committed in the immediate view and presence of the court, may be punished summarily; in other cases the party charged shall be notified of the accusation, and have a reasonable time to make his defense."

"Sec. 1619. Whenever any person shall be committed for any contempt specified in this chapter, the particular circumstances of his offense shall be set forth in the order or warrant of commitment."

"Sec. 1620. Nothing contained in the preceding sections shall be construed to extend to any proceeding against parties or officers, as for contempt, for the purpose of enforcing any civil right or remedy."

On the material question as to whether or not an indirect or constructive contempt for violating an injunctive process is to be considered technically a criminal case, or whether it is merely quasi criminal, as this court held in *State ex rel. v. Dillon*, 96 Mo., loc. cit. 62, 63, 8 S. W. 781, and effects principally the beneficial right of a party litigant, it will be instructive to consider the last clause of section 3643, Rev. St. 1899, viz., "and in the meantime to observe and obey the injunction." Giving full effect to that clause makes it clear to our minds, when read in connection with the rest of the section, that, while the idea of punishment is in the eye of the law, yet there is injected the preservation of the status quo in favor of the plaintiff as, possibly, the gist and heart of the matter. In other words, the very life and purpose of the bill is to be preserved by the proceeding in contempt, thus making the contempt proceedings ancillary and in aid of the objects of the principal suit, while at the same time preserving the dignity of the court and the orderly administration of justice. In some of the cases this is made the line of demarcation between civil and criminal contempts. If a forbidden act has been wholly performed by the violation of an injunction order, if thereby it was put out of the power of the defendant to restore the condition of things existing at the time of the service of the injunction, there might be room for the conclusion that punishment for the violation could be of no benefit to the plaintiff, and would be considered solely punitive retribution for a contumacious insult to the court and the majesty of the law. This distinction this court had in mind in *Ex parte Crenshaw*, 80 Mo. 447.

It is argued that the acts for which Gildersleeve and Schubach were punished were completed acts, that they had put it out of their power to undo these acts, and therefore the punishment meted out to them was solely for a past offense, and affecting only the dignity of the court; but we are constrained to think this view too narrow, because the relief sought by the principal suits was directed to the business of Schubach and Gildersleeve. That business was ticket brokerage, dealing in forbidden tickets. The isolat-

ed sale of a few tickets was a matter of little pith to plaintiffs. If that were all they had involved, the game, to use a homely saying, was hardly worth the candle; there was great cry and little wool; the mountain labored and brought forth a mouse; but, contra, the continuous dealing in such tickets—the business of so dealing—was the gravamen of their complaints. This idea is carried forward into the after-proceedings, and the very citations for contempt and the orders and judgments of the court finding Schubach and Gildersleeve guilty show the heart of the matter was the illegal business they were carrying on, and the menace to plaintiffs' rights arising from this continuation. The state did not, *eo nomine*, move in this matter. Plaintiffs, as private citizens, moved, and the prime object of plaintiffs in so moving for citations for contempt and in procuring convictions therefor was to preserve the life of their injunctions, and to prevent a continuation of defendants' illegal business by putting defendants in terrorem.

Justice Brewer, in *Bessette v. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997, considers this question, quoting from *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622, and formulates the distinction we have in mind thus: "Proceedings for contempts are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. *Thompson v. Railroad Co.*, 48 N. J. Eq. 106, 108, 21 Atl. 182; *Hendryx v. Fitzpatrick* (C. C.) 19 Fed. 810; *Ex parte Culliford*, 8 Barn. & C. 220; *Rex v. Edwards*, 9 Barn. & C. 652; *People v. Court of Oyer and Terminer*, 101 N. Y. 245, 247, 4 N. E. 259, 54 Am. Rep. 691; *Phillips v. Welch*, 11 Nev. 187, 190; *State v. Knight*, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; *People v. McKane*, 78 Hun, 154, 160, 28 N. Y. Supp. 981; 4 Bl. Comm. 285; 7 Am. & Eng. Ency. Law, 68. A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with

the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings. See, also, *Rapalje on Contempts*, § 21. Doubtless the distinction referred to in this quotation is the cause of the difference in the rulings of various state courts as to the right of review. Manifestly, if one inside of a courtroom disturbs the order of the proceedings, or is guilty of personal misconduct in the presence of the court, such action may properly be regarded as a contempt of court; yet it is not misconduct in which any individual suitor is especially interested. It is more like an ordinary crime, which affects the public at large, and the criminal nature of the act is the dominant feature. On the other hand, if in the progress of a suit a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding. The punishment is to secure to the adverse party the right which the court has awarded to him. He is the one primarily interested, and if it should turn out on appeal from the final decree in the case that the original order was erroneous, there would be in most cases great propriety in setting aside the punishment which was imposed for disobeying an order to which the adverse party was not entitled. It may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party."

Referring again to section 806, Rev. St. 1899, and attending to its language, it will be observed that "any party to a suit aggrieved by any judgment of any circuit court in any civil cause from which an appeal is not prohibited by the Constitution may take his appeal to a court having appellate jurisdiction from * * * or from any final judgment in the case." It must be admitted that Gildersleeve and Schubach were parties to a suit. They allege they were aggrieved by a judgment, and it must be admitted it was a final judgment, and it was rendered ancillary to, and hence substantially "in," a "civil cause." Construing this statute, the St. Louis Court of Appeals in *State v. Horner*, 16 Mo. App. 191, held that, where a proceeding is instituted by a party to enforce a civil remedy, it assumes the es-

essential characteristics of an adversary proceeding, and that the decision of the court, by whatever name it may be called, and whether it may be in favor of or against the accused, shows the essential characteristics of a final judgment dispositive of a substantial right; and that, while it is a rule of common law procedure that an appeal does not lie from a judgment in a proceeding for a criminal contempt, yet it is generally held that, where a proceeding is a remedial proceeding as for contempt, the final judgment or order by which the court ends the proceeding and exhausts its jurisdiction is subject to a revision by an appeal. In *State v. Schneider*, 47 Mo. App. 669, Judge Romnauer, after reviewing the authorities and citing Rev. St. 1889, § 2246 (now section 806, supra), said: "We must therefore conclude that there is nothing in the mere fact that the final judgment sought to be reviewed is one in a proceeding for a contempt, which prevents its review on appeal in this state, where, as in this case, the contempt is not direct, and the appeal in no way interrupts or delays the proceedings in the main cause." In *State v. Lucksinger*, 79 Mo. App. 289, it was said: "The power to punish contempts was deemed essential to the existence and authority of the court and hence granted as a necessary incident in its establishment, and was equally available whether the contempt was direct or constructive, or, as otherwise designated, civil or criminal. In either case the judgment of a court of competent jurisdiction was final and conclusive. Rapalje on Contempts, §§ 21, 22. In this and many of the states the rule of the common law on this subject is not enforced in its full rigor. With us appeals or writs of error, though not permitted in cases of direct contempts, may be taken from a final judgment in a matter of constructive contempts to comply with an order for the inspection of papers." In *Glover v. Insurance Co.*, 130 Mo., loc. cit. 184, 32 S. W. 304, this court, through Gantt, J., said: "It is true that every superior court of record at common law is the sole judge of contempts offered or committed in its presence against its dignity and authority, and may punish the same summarily, and no other court can review its decisions in such cases, unless an appeal is expressly allowed by the statutes; but this principle is applicable only to those direct contempts which interfere with the orderly and effective administration of justice by judicial proceedings in which appeals, if sanctioned, would seriously impair the authority of the court against which they were committed, and deprive it of that respect without which it is impotent to perform its high function, and has not obtained in constructive contempts as in the case at bar. In many cases similar to this the right of appeal has long been recognized and sanctioned in many jurisdictions, and the necessity therefor we

think can hardly be questioned, if appeals are allowable in any case." Sustaining the doctrine thus formulated the learned judge cited a formidable array of authorities, to which may be added *Nienaber v. Tarvin*, 104 Ky. 149, 46 S. W. 513; *Livingston v. Swift*, 23 How. Prac. 1; *State ex rel. v. Gray* (Or.) 70 Pac. 904; *Strong v. Randall*, 177 N. Y. 400, 69 N. E. 721; *Witter v. Lyon*, 34 Wis. 564; *Snowman v. Harford*, 57 Me. 397; *Ex parte Wright*, 65 Ind. 504; *Wells v. Commonwealth*, 21 Grat. 500; *Turner v. Commonwealth*, 59 Ky. (2 Metc.) 619; *State ex rel. v. Pierce*, 51 Kan. 241, 32 Pac. 924.

While the subject is not free from doubt and embarrassment, yet under the reasoning of the foregoing cases and the liberal construction to be applied to statutes penal in their character, and bearing in mind that the law does not concern itself so much with mere names as it does with the essence of things, and realizing that it is the glory of our law to be diligent in preventing stealthy approaches upon the liberty of the citizen and to have a glow of generous warmth in its preservation, we are persuaded to adopt the view that the judgments punishing *Gildersleeve* and *Schubach* were remedial in their character, were primarily for the benefit of relators, and intended to prevent future encroachments upon the rights of relators involved in the subject-matter of the litigation, and that the right of appeal existed per legem terræ as from judgments in civil causes; that the punishment also relating to past sales in isolated instances, and also involving the dignity of the court below, should not solely dominate the situation, make the contempts criminal in their character, and prevent an appeal.

It is eloquently contended by counsel that to allow an appeal in cases of this sort would destroy the inherent power of a superior court of record to protect itself and the law from insult, and would subject courts to contumely and superciliousness, but it is not pointed out to us how the inherent power of the court to punish for contempt is involved in sustaining the right of review in constructive contempts. The power to render judgment in any matter within its jurisdiction is also an inherent power of which a constitutional court may not be shorn; but the right of an appellate court to review that judgment when rendered, and annul it, if erroneous, has not hitherto been allowed as any impairment of the inherent power of such court to render it. This court stands committed to the protection of the inherent powers of all constitutional courts to punish for contempt. *State ex inf. v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624. But we are now asked to take one step farther, and to hold that any statute permitting a review of a judgment nisi in constructive contempt is unconstitutional. This step we decline to take. May it not be possible that we may better protect

the inherent powers of all courts and the respect due them and their judgments by at the same time protecting the rights of citizens to have judgments subjecting them to fines and imprisonments reviewed, and reversed if found arbitrary or otherwise erroneous?

The preliminary rule is discharged, and the writ denied. All concur, except BURGESS, J., not sitting.

BOLING v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Missouri, Division No. 2.
June 6, 1905.)

1. APPEAL—CONSTITUTIONAL QUESTION.

An appeal, having fairly raised a constitutional question, and having been taken before the question was settled by the Supreme Court, will be retained, and not sent to the Court of Appeals.

2. CARRIERS—SPECIAL RATE TICKET.

The condition in a railroad ticket sold at a reduced rate that it will not be good for return passage unless the holder identifies himself as the original purchaser to the ticket agent at destination on any day within the limit of 21 days from date of sale, and that it will then be good for continuous return passage, which shall be commenced on date of execution, as punched in the right-hand margin, is binding, so that the purchaser having, on arriving at her destination, two days after purchase of the ticket, been identified by the ticket agent at that place, who then attested her signature and dated it as of that date, the ticket is not good for a return passage commencing several days thereafter, though within the limit of 21 days.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1020-1036.]

3. SAME—EXPIRATION OF TIME LIMIT.

The acceptance of a railroad ticket by one of the connecting carriers over whose lines it provides for passage does not require another of such carriers to accept it, the time for using it having expired.

4. SAME—RIGHTS OF PURCHASER.

The fact that one buying what she knew was a special-rate railroad ticket did not read it does not relieve her of the effect of a stipulation, plainly printed on its face, that return passage should be commenced on the date that she was identified, and the ticket was stamped and punched for return passage.

5. SAME—EXPULSION OF PASSENGER.

Though a railroad ticket presented by a passenger does not entitle her to passage, so that, on her being informed of its invalidity and refusing to pay fare, the conductor may remove her, the company is liable for compensatory damages for his using unnecessary and insulting language to her, injuring her feelings and humiliating her.

6. SAME.

The leaving of a train by a passenger whose ticket the conductor had refused to accept, in obedience to the conductor's command to the porter to see that she got off at the next station, is an ejection.

7. SAME.

For a passenger, whose ticket the conductor had refused to accept, to leave the train of her own accord, and against his advice that she remain, and allow him to hold her baggage check as security for passage, to be paid if the company agreed with him that the ticket was not good, is not an ejection.

8. SAME—TICKET AGENT—MISTAKE.

Defendant sold a ticket over its road and other roads to C. and return, providing that in

selling the ticket it acted as agent, and was not responsible beyond its line, and that the return passage must be commenced the day that the passenger identified herself to the ticket agent at C., and he punched the ticket. *Held*, that the ticket agent at C. was not the agent of defendant, so as to make it responsible for his mistake in punching it on her arrival, and telling her that she could use it on a later day.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by Julia M. Boling against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

L. F. Parker and J. T. Woodruff, for appellant. Vaughan & Coltrane, for respondent.

GANTT, J. This is an action by Mrs. Julia M. Boling, who resides at Claremore, Ind. T., against the defendant company for damages for being ejected from one of its trains at Pacific, Mo., April 6, 1900. The petition alleges the purchase of a railroad ticket from the defendant company at Joplin, Mo., entitling her to passage from Joplin to Chickamauga, Ga., and return, and then alleges that "before beginning her return passage said ticket was duly signed by her, and her signature witnessed and the same countersigned by the agent of the defendant's connecting line at Chickamauga, Georgia, and that at the times hereinafter stated said ticket entitled plaintiff to return over said lines of railway to Joplin, Missouri; that she began her return passage on the 5th day of April, 1899, and on the night of April 6, 1899, at St. Louis, Mo., she took passage upon and entered one of the defendant's trains leaving St. Louis, the same being a regular passenger from said city of St. Louis to Joplin, Missouri; that near a station of defendant's said railway, called 'Pacific,' and while she was rightfully on said train, the conductor in charge thereof rudely and wrongfully deprived her of said ticket and the use thereof by taking it up and denying her transportation thereon, and wrongfully, willfully, and insultingly expelled and ejected her from said train; that in consequence she was compelled to use the small amount of money she had to obtain other transportation to her home, and, being among strangers, was compelled to go without food the next morning, and was put to great expense, trouble, and inconvenience, was injured in body and mind, and suffered great shame and humiliation, on account of all of which plaintiff says she has been damaged in the sum of five thousand dollars." In its answer the defendant admits it is a railroad, and owns and operates the line of railways between St. Louis and Joplin, and is engaged in carrying passengers for hire thereon, but denies each and every other allegation in said petition contained.

The evidence, in substance, was: That plaintiff, a married lady, was a resident of the town of Claremore, Ind. T., on March

20, 1900, and on that date went to Joplin, Mo. She desired to go to Chickamauga, Ga., to visit her sister, and bring back with her a little niece, five or six years old. That she learned that the Frisco Road, the defendant herein, had on sale at Joplin, Mo., excursion tickets from Joplin to Chickamauga and return. That she endeavored to obtain one of these tickets from the agent at Claremore, but was unable to do so, and, desiring to see Joplin, she went to that city, and there purchased one of those excursion tickets from Joplin to Chickamauga and return. The ticket was sold at a reduced rate. This ticket, in large type, reads:

"Good for one first-class passage to Chickamauga, Georgia, and return, when officially dated, stamped and presented with coupons attached subject to the following contract:

"(1) In selling this ticket and carrying baggage hereon, this company acts as agent and is not responsible beyond its own line.

"(2) This ticket will be good to leave starting point only on date of sale, as stamped thereon. It will then be good for going passage within fifteen days from date of sale as per final going limit punched in left hand margin by selling agent.

"(3) Stop-overs will be allowed on going passage within the going of fifteen days. No stop-overs will be allowed on return trip.

"(4) It will not be good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the ticket agent at destination point by signature or otherwise, on any day within final limit of 21 days from date of sale, as stamped on back or written below. It will then be good for continuous return passage of the original purchaser, which shall be commenced on date of execution, as punched in right-hand margin hereof."

The ninth clause is: "Unless all the conditions on this ticket are fully complied with, it shall be void." "I hereby agree to all the conditions of the above contract. [Signed] J. M. Bolling, Purchaser. Witness: J. A. Glassey, Selling Agent. Date of sale March 20th, 1900."

The plaintiff commenced her journey from Joplin on the 20th of March, 1900, and arrived in Chickamauga, Ga., on the 22d, as indicated by punched marks on the left-hand margin of the ticket. On arriving at Chickamauga, Ga., on the 22d of March, and intending to visit relatives some 12 miles in the country, and near Kingston, on another railroad, leading into Chattanooga, Tenn., and not wishing to return by way of Chickamauga, she inquired of the station agent of the Chickamauga, Rome & Southern Railroad (the last road over which she traveled to Chickamauga) if she could be identified and have her ticket stamped by him at that time so that she would not have to return to Chickamauga for that purpose when she got ready to return to her home, in the Indian Territory. He assured her that she could,

and thereupon she signed the ticket before the ticket agent at that place, and he attested her signature, and dated the same March 22, 1900. This agent at Chickamauga was advised that she had just arrived, because she called on him for her baggage, which it appears had not arrived, but had been left in Chattanooga, when, at her request, he had the baggage sent from Chattanooga to Kingston direct on another road. When plaintiff got ready to return to her home, she did not return to Chickamauga, but started from Kingston, and went to Chattanooga. She began to use her ticket for return passage between Chattanooga and St. Louis, and it was honored by the other railroads until she reached St. Louis, on April 5, 1900. On the evening of April 6th, plaintiff purchased of the Pullman Palace Car Company a sleeping-car berth for herself and her sister Miss Davis, and the little niece, and was allowed to pass through the gate at the Union Station on the presentation of her ticket, and into the sleeping car attached to one of defendant's passenger trains, bound for Monett, Mo. The conductor of this train was John Gillis. After the train started, and near Valley Park, a station some 17 miles west of St. Louis, the conductor, Gillis, began taking up tickets in this sleeping car. Plaintiff's sister Miss Davis had her own and the plaintiff's said return ticket, and, when the conductor came to her, she handed both to him, and thereupon he pronounced the ticket invalid. And at this point there is a conflict in the testimony as to what occurred between plaintiff and the conductor. The evidence of the plaintiff tends to show that after the conductor had seen plaintiff's ticket he insinuated that she had not come by it properly; that he refused to make any effort to find out whether the ticket was good; that he disputed the plaintiff's words; that his manner was rude and insulting, and he wound up by confiscating the ticket, and directing his porter to see that the plaintiff got off the train at Pacific; that when they reached Pacific the porter came and got her grips, and told her this was the place to get off, and that she, her sister, and little niece got off the train and went into the station at Pacific, and plaintiff purchased a ticket to Monett, and she and her sister and little girl took the next train, and arrived at Monett at the same time and made the same connections for her home in the Territory that she would have made, had she remained on the train on which she first started. On the part of the defendant, the conductor, Gillis, testified that he refused to take the ticket because it had expired according to the limitations printed thereon, and that when he took it he gave her a receipt, and explained to her fully that the rules of the company prevented him from permitting her to ride on the ticket, and that she must pay her fare, and, if she did not have the money to do so, he would take her baggage check

as security, and send it to the general office with the ticket, with an explanation, and that, if it was all right, on reaching her destination, at Claremore, she could get her baggage, and, if it was not all right, she could call at the station in Claremore and pay the amount of fare and get her baggage; that he endeavored to persuade her to do this, and then left her, and went to the front of the train to finish taking up tickets, and supposed she would reconsider and pay her fare, though she had positively refused to do so; that he was at the front end of the car when they reached Pacific, and did not see her leave the train, and did not know that she and her sister had left the train until he went into the sleeper after the train left Pacific; that he did not direct the porter to see that she got off at Pacific; and that the train porter did not assist her in getting off, and had nothing whatever to do with the matter. As to this latter statement the conductor is corroborated by the Pullman conductor, who testified that he told her that, if she intended to get off, this was Pacific, and, upon being informed by her that she intended to get off and take the next train, he and the Pullman porter assisted them off the train, the porter carrying the baggage, and he the little girl; that neither Conductor Gillis nor the train porter were present at the time plaintiff left the train; that he refunded or transferred her Pullman ticket, so she would have the full benefit of it on the next train. The conductor denied that he used any rude or insulting language to the plaintiff. Miss Davis testified that when the controversy was going on between her sister, the plaintiff, and the conductor, she went over to where her sister sat, and her sister said to her, "The conductor says my ticket is no good, and wants to make me pay fare," and thereupon the conductor turned to witness and began to explain about scalpers—how expert they had become in fixing up tickets and fooling the conductors—and she said to him, "That is a scalper's ticket?" "He said, 'Yes, madam;' and I says, 'So you say your agent did not sell this ticket to her at Joplin?' and he said, 'No, sir; he did not;' and I said, 'You are not a gentleman, to dispute a lady's word like that.'" She testified that his tone "was just very insulting," and that in this way he accused her sister of telling a falsehood. The evidence tended also to show that, under the rules of the company, it was the duty of the conductor to refuse to honor the ticket, and compel the passenger to either pay fare, or retire from the train at the next station, and that, if he had violated this rule and accepted the ticket, he would have had to pay for it out of his own pocket. Under the instructions of the court, the jury returned the issues in favor of the plaintiff, allowing her \$125 as damages. Nine of the jurors concurred in this verdict, and three were against it. Other facts may be noted in the course of the opinion.

1. Under the recent decisions of this court in banc, and of both divisions, had this appeal been taken to or transferred to this court after the decisions in *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849, and *Gabbert, Adm'r, v. O., R. I. & Pac. Ry. Co.*, 171 Mo. 84, 70 S. W. 891, in which it was held that the amendments to article 10 of the Constitution by adding thereto two sections, to be known as sections 22 and 23, and to section 28 of article 2, were duly and legally adopted, so far as the publication of the notices of the election and the submission of the same to the qualified voters was concerned, this appeal should be remanded to the St. Louis Court of Appeals, as the sole ground upon which it is transferred to this court is that the amendment to section 28 of article 2, permitting nine jurors in a civil case to make a verdict, was never legally adopted; but inasmuch as the appeal, when taken, fairly raised the constitutional question whether such amendments had in fact become a part of the Constitution, and was taken prior to the settlement of that question by this court in the cases above cited, we will retain the appeal as properly in this court; otherwise we would not. *Lee v. Jones* (Mo. Sup.) 79 S. W. 927; *Carpenter v. Hamilton* (Mo. Sup.) 84 S. W. 863.

2. On both sides it is conceded that this action is one sounding in tort, to wit, the wrongful ejection of plaintiff from defendant's train on the night of April 6, 1900, by one of the defendant's conductors in charge thereof. The allegation as to the contract of transportation, to wit, the ticket described in the petition, is matter of inducement, to show that plaintiff was rightfully on the train, and hence that her expulsion was unlawful. *Book v. C., B. & Q. R. Co.*, 75 Mo. App. 604; *Ry. Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. 712, 60 Am. St. Rep. 706; *Ry. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315.

At the root of the case lies the question whether the ticket which plaintiff offered to the conductor entitled her to passage on the train, or by its terms had expired, and therefore the conductor was justified in demanding fare to Monett, and, upon plaintiff's refusal to pay fare, to require her to leave the train. The question is by no means a new one. It may, we think, be safely stated that the general rule is that when a passenger purchases a ticket for transportation from one point to another over the road of a common carrier, and pays full or regular ordinary fare, the ticket is not intended as a contract itself, but as a mere token or evidence of a contract which the law creates, and which lies behind the ticket. In such case the law makes the contract and regulates the reciprocal rights and duties of both carrier and passenger, and the ticket is a mere token that such contract exists, and under it the passenger is entitled to be carried to and from the points named, without

regard to time limit printed upon it. Railroad v. Turner, 100 Tenn. 214, 47 S. W. 223, 43 L. R. A. 140; Potter v. The Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746, note; Watson v. L. & N. R. Co. (Tenn.), 56 S. W. 1024, 49 L. R. A. 454.

On the other hand it has been held by a number of the highest courts in the United States, including the Supreme Court of the United States, that when, as in this case, the ticket on its face purports to be a special contract of carriage, and is based upon a valuable consideration (that is to say, sold at a reduced rate), then the ticket itself constitutes a contract of carriage between the parties, and the provision limiting the time within which it shall be good, and providing that it shall be stamped as of the date when the return passage is commenced, by the ticket agent at that place, and that the holder of the ticket must identify himself or herself to such agent as the original purchaser thereof, and sign the same in his presence, and the signing and attestation must be dated and indicated by punch marks on the ticket, and that such ticket should only be good for a continuous return passage commenced on that date, is a reasonable regulation, and binding upon the holder of such a ticket. Thus in Mosher v. St. Louis, etc., R. Co., 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, it appeared that the St. Louis, Iron Mountain & Southern Railway Company owned a railroad from St. Louis to Malvern, Ark., and the Hot Springs Railroad Company owned and operated a railroad from Malvern to Hot Springs, Ark., and the Iron Mountain Company sold a ticket at a reduced rate of fare for a passage from St. Louis to Hot Springs and return, and the ticket contained stipulations by which the purchaser agreed that in selling the ticket the St. Louis, Iron Mountain & Southern Railway Company acted only as agent, and was not responsible beyond its own line, and that the ticket was good for going passage only five days from the date of sale stamped on the back and written below, and would not be good for return passage unless the holder identified himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark., within 85 days from date of sale, and, when officially signed and dated in ink and duly stamped by said agent, the ticket should then be good only five days from said date; and it was expressly agreed that the purchaser would, whenever called upon, identify himself to any conductor or agent of the lines over which the ticket read, and that no agent or employé of any of the lines named in the ticket had any power to alter, modify, or waive any of the conditions named on the ticket; and it appeared that the plaintiff went to Hot Springs, and, within the time limited by the ticket, desiring to return to St. Louis, presented himself and

said ticket at the business and ticket office and depot of the Hot Springs Railroad, in the city of Hot Springs, during business hours, and a reasonable time before the departure of its train for St. Louis, for the purpose of identifying himself as the original purchaser of said ticket, and of having the same officially signed, dated, and stamped by said agent, but the Hot Springs Railroad Company failed to have said agent there at any time between the time when the plaintiff so presented himself and his ticket and the time of departure of the train, whereby, as it was alleged, the Iron Mountain Company and its agent and the agent of the Hot Springs Railroad at Hot Springs, without any just cause or excuse, failed to identify plaintiff as the original purchaser, or to officially sign, date, and stamp said ticket; and the plaintiff thereupon boarded the train of the Hot Springs Railroad, and was carried thereby to Malvern, where on the same day he boarded a regular passenger train of the Iron Mountain Company for St. Louis, and, upon the conductor demanding his fare, presented his ticket, and informed the conductor of the failure of the agent at Hot Springs to be at the office so that he could identify himself, and offered to sign his name and otherwise identify himself to the conductor, and demanded to be carried to St. Louis by virtue of his said ticket, but the conductor refused and put him off the train—it was held that the ticket was a valid contract, and binding upon the holder thereof, and, by its express terms, the plaintiff had no right to a return passage under the ticket unless it bore the stamp of the agent at Hot Springs, and that such a stamp was made by the contract a condition precedent to the right of a return passage, and no agent or employé of the defendant was authorized to waive that condition. It was held that, by the first condition of the contract, the defendant was not responsible beyond its own line, and was not responsible to plaintiff for failing to have an agent at Hot Springs; that, by the contract, the agent who was to identify plaintiff and stamp his ticket was the agent of the Hot Springs Railroad Company, and it was the duty of that company to identify plaintiff, and not the defendant; that the conductor of the defendant's train had no authority to dispense with the want of such stamp, or to inquire into the previous circumstances. The rule announced in that case was reasserted in Boylan v. Hot Springs Railroad Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 200; and it was further held that the purchaser of a ticket from a railroad company, at a reduced rate of fare, for passage to a certain station and back, containing a contract, signed by him, that the ticket should not be good for return passage unless stamped by the agent of the company at that station, and that no agent of the company was authorized to alter or modify any

condition of the contract, was bound by those conditions, whether he knew them or not, and neither the action of the baggage master in punching the ticket and checking the plaintiff's baggage, nor that of the gate-man in admitting him to the train, could bind the defendant to carry him, or estop it to deny his right to be carried. To the same effect, see *Watson v. L. & N. R. Co.* (Tenn.) 56 S. W. 1024, 49 L. R. A. 454; *Edwards v. R. Co.*, 81 Mich. 364, 45 N. W. 827, 21 Am. St. Rep. 527; *Bowers v. Pennsylvania Co.* (Pa.) 27 Atl. 893; 4 *Elliott on Railroads*, § 1593, p. 2484; *Pennington v. P., W. & B. R. Co.*, 62 Md. 95; *West Md. R. Co. v. Stocks-dale*, 83 Md. 245, 34 Atl. 880, and cases cited; *Moses v. R. R.*, 73 Ga. 356. In the last-cited case the circumstance noted by the plaintiff on this appeal, to wit, that the St. Louis, Nashville & Chattanooga Railroad Company accepted plaintiff's ticket on her return, and waived the limitations as to time in the contract, was commented on by Chief Justice Jackson, who said: "The ticket passed him over two roads, but each had a right to stand on the contract. If one passed him, the other was not bound thereby to pass him also, in the teeth of the contract he had made." See, also, *Dangerfield v. Railway Company* (Kan. Sup.) 61 Pac. 405; *Comer v. Foley* (Ga.) 25 S. E. 871; *Abram v. Railway Company*, 83 Tex. 61, 18 S. W. 321; *Rahilly v. Railway Company*, 66 Minn. 153, 68 N. W. 853.

It is asserted, however, by the plaintiff in this case that this line of authority is not the law in this state, and we are cited to *McGinnis v. R. R.*, 21 Mo. App. 399, and to *Cherry v. Railway Company*, 52 Mo. App. 499, as sustaining this contention. It is evident, however, from the reading of those cases, that neither of them reached the point now under discussion. In the *Cherry Case* the passenger had purchased a first-class passenger ticket, which read, "Good to stop over at all points." It was held that this justified the passenger in stopping off at a station short of his destination, and subsequently, within the life of the ticket, taking another train to his destination, and though on his presentation to the conductor of his ticket, with notice of his intention to stop over, the conductor took up the going coupon, and gave no check or token in lieu thereof, the passenger's rights were not affected, and the same conductor, with a knowledge of all the facts, was not justified in ejecting him from the train on his subsequent resumption of his journey. With that case we are entirely satisfied. The passenger had complied with every condition on his part, and had violated no rule of the company, and the same conductor who had wrongfully taken up the going coupon without preserving to the passenger any evidence of his right to resume his journey after the stop-over, with a full knowledge of all the facts and a personal acquaintance with the passenger,

wrongfully ejected him. In the *McGinnis Case* the passenger held a return ticket, but the date of it was blurred, and the conductor was of the opinion that there had been an alteration in the date, and for that reason refused to honor the return coupon; but the ground of recovery was that it turned out that the blurring of the ticket was caused by the defendant's own agent in dating it when he sold it, and the rude and offensive and insulting manner of the conductor in ejecting the plaintiff. That case likewise does not reach the point before us. In *Hot Springs Railroad Company v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913, the authorities are collected with much industry, and the conclusion reached that the efforts of the court to reconcile the conflicting views as to the right of the conductor, in collecting tickets and fares, to rely entirely upon the face and appearance of a ticket presented to him, in determining his duty as to the acceptance of the same, had not met with any degree of success. In that case it was held that notwithstanding the conductor had only carried out the company's rules and regulations, and that they were reasonable, and he therefore was blameless personally, inasmuch as the company which was sued, through its ticket agent, acting for it, had been guilty of doing that which produced the injury to the plaintiff, it was liable for such neglect, and could not shield itself behind the faithfulness of its servant, the conductor. We think that decision was unquestionably correct, and was but the application of the common-law of principal and agent. In that case the company was rightfully held responsible for the natural and reasonable consequences of the neglect of its own agent. But that case does not reach the question before us—whether the defendant company in this case is responsible for the neglect of the plaintiff to read the contract on her ticket, and in not complying therewith, and the mistake or negligence of the agent of the connecting line at Chickamauga, Ga. It is plain that no such question was involved in the *Deloney Case*, supra.

We have laboriously gone through the long line of cases cited to us by respondent, and find that in most of them the action was directly against the company whose agent had been guilty of the neglect or negligence which produced the inconvenience and injury to the passenger, or they were cases in which the ticket was apparently regular on its face, and the passenger misled thereby, and various other circumstances in which it was held that the defendant company was liable for the wrongful and negligent acts of its own servants; and, in our opinion, without attempting a review of all those cases or reconciling them, we think they are clearly distinguishable from the facts upon which the case is bottomed, and, in our opinion, the correct doctrine is stated in

Mosher v. Railway, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, and *Boylan v. Railroad*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290. We think the provisions of the ticket in this case were reasonable regulations, and that the agent at Chickamauga had no authority to bind the defendant company by waiving any of the contract provisions which inured to the benefit of all the roads which were parties to that contract, and the fact that the other roads waived the conditions in no manner affected the defendant's rights. By the terms of the contract, plaintiff was only entitled to a continuous return passage within the limits of the ticket, commencing on the date that she was identified and the ticket stamped and punched at Chickamauga for the return passage, and that consequently when it was presented to the conductor of defendant's road on the 6th of April, 1900, it had expired, according to the limitations plainly printed thereon, and did not entitle plaintiff to a passage from St. Louis to Monett, and that the conductor was justified in refusing to accept the ticket for passage between those points. And it is no justification of plaintiff's insistence that she had not read the contract which she had signed. The stipulations of the contract were plainly printed on the face of the ticket, in a way not calculated to escape observation, and the plaintiff's own evidence shows that she knew she was receiving a special rate, and went to Joplin for the express purpose of getting a ticket for a reduced fare; and, under the circumstances, it was her duty to read it when she received it, and, in the absence of proof of fraud, imposition or deceit, the law presumes she had knowledge of its contents, and must be held to have assented to the terms thereof. *Snider v. Adams Ex. Co.*, 63 Mo., loc. cit. 383; *Watson v. L. & N. R. Co.* (Tenn.) 56 S. W. 1024, 49 L. R. A. 454. Hence the instruction given for the plaintiff as to the right of the plaintiff to rely upon the statement made by the agent of the Chattanooga, Rome & Southern Railroad that she could be identified and have said ticket stamped on the 22d of March, 1900, and it would be good for her return passage at a later date, was erroneous.

But notwithstanding plaintiff had no right to passage over the defendant's road by virtue of said ticket after the same had expired by virtue of its limitations, and the failure of plaintiff to comply with the provisions of her contract with defendant, and while we think that when plaintiff was notified of the invalidity of the ticket and refused to pay the fare to Monett, the conductor had the right to remove her from the train, he had no right to use unnecessary and insulting language to her, and thereby hurt her feelings and humiliate her; and, if he did so, she was entitled to recover compensatory damages for such injured feelings and humiliation, but nothing in the way of punitive or exemplary damages. There is no pretense that the con-

ductor offered the plaintiff any personal violence, or that any other servant of the company did. On the contrary, it appears that the Pullman conductor and his porter rendered her every assistance that was possible when she left the train. If plaintiff's evidence is to be accepted, her leaving the train in obedience to the command of the conductor to the porter to see that she got off at Pacific must be regarded as an ejection from the train, and she very properly avoided the humiliation of being forcibly removed from the train. If, however, plaintiff left the train of her own free will and accord, and against the advice of the conductor, and refused to remain on the train and permit the conductor to hold her baggage check as security for her passage, if the general officers of the company should agree with the conductor that her ticket had expired, or, if they should decide the ticket was good, then she need not pay any other fare, then there was no ejection from the train within the meaning of the law, and plaintiff has no cause of action whatever against the company. That plaintiff suffered no appreciable damages in the way of delay in reaching her home, or of any discomfort by changing from one train to another, is perfectly apparent.

From the statement of facts in this case it must be apparent that the liability of the defendant in this case hinges upon the consideration whether the agent at Chickamauga of the connecting lines was the agent of the defendant in this case, by reason of the contract of carriage over the several lines mentioned in the ticket, and what force is to be accorded to the clause stipulating that the defendant in this case acted simply as agent, and was not responsible beyond its own line. If the defendant is to be held as agent for all the other roads over which this ticket reads, then there is much reason and authority for holding it liable for the misleading representation of the agent at Chickamauga waiving the agreement that the ticket should be stamped and the passenger identified on the day of the commencement of the return passage. If, on the other hand, the ticket and contract therein, properly construed, is the separate contract of each of the companies over which it reads, and the defendant, in issuing the ticket, is to be held only as an agent of the others, and not responsible for their defaults, then we can discover no legal reason why the defendant should be held responsible for the misrepresentation of the agent of the connecting line at Chickamauga. Judge Elliott, in his work on Railroads, vol. 4, § 1596, says: "There is some conflict among the authorities upon the subject of through tickets over several different roads, but the rule which is supported both by the better reason and by the weight of authority is that, even when the ticket does not expressly provide that the first company is acting for the other companies merely as their agent in selling it, the rights of the passenger

and the duties and responsibilities of the different companies are substantially the same as if the ticket had been purchased at the office of each company separately, unless there is something in the contract making the first company responsible beyond its own line." And this statement of the law is supported by the decision of the Supreme Court of the United States in *Mosher v. Railroad Company*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, already noted; and *Mr. Hutchinson*, in his work on *Carriers*, § 152, indorses this statement of the rule; and to the same effect is *Railway Co. v. Looney*, 85 Tex. 153, 19 S. W. 1039, 16 L. R. A. 471, 84 Am. St. Rep. 787; *Harris v. Howe*, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862; *Central Trust Co. v. East Tenn.*, etc., Co. (C. C.) 65 Fed. 332. The only case directly in point opposing this statement of law is that of *Head v. Railway Company*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. In that case, it is true, the learned and distinguished jurist Chief Justice Bleckley, upon a similar ticket, held that the agent at New Orleans, the point of the destination, was the representative of the selling company, but he enters into no discussion whatever of the principle upon which he bases this conclusion; and, profound as is our respect and admiration for that gifted jurist, we think his conclusion is opposed by the great weight of authority and the elementary principles of the law of principal and agency. Moreover, we think that the Supreme Court of Georgia could have reached the conclusion which it did by applying the doctrine of numerous cases on this subject, and holding that it was clearly the mistake of the selling agent at Tallapoosa, in placing the stamp on the wrong margin, and in having the passenger sign at the wrong place, and the action in that case was properly against the selling company for its own default and the damages resulting therefrom.

Our conclusion is that the agent at Chickamauga was not the agent of the defendant in this case, and that the defendant cannot be held responsible for his neglect or misconstruction of the contract, and that the conductor of the defendant was bound, under the rules and regulations of the defendant, to decline to recognize said ticket after it had expired according to the contract embodied in it. And as already said, we can see no possible ground upon which plaintiff can recover of this defendant, save and except that the conductor, in the performance of a perfectly legal right, performed it in a rude or insulting manner, as to which the evidence is in strong conflict, and in such case is a question of fact for the jury.

As the judgment of the circuit court must be reversed for the reasons above given, it becomes unnecessary to decide whether the verdict, in the form in which it was rendered, would constitute reversible error, as that objection can be readily obviated on another

trial by the court requiring the jurors to sign the verdict as required by the act of 1901, p. 190.

The judgment is reversed, and the cause remanded, to be proceeded with in accordance with the views herein expressed. All concur.

STATE ex rel. GARNER v. MISSOURI & K. TELEPHONE CO.

(Supreme Court of Missouri. June 1, 1905.)

1. MUNICIPAL CORPORATIONS — CHARTER—TELEPHONE COMPANIES — REGULATION OF TOLLS—DELEGATION OF AUTHORITY.

Const. Mo. art. 9, § 16, provides that any city having a population of more than 100,000 may frame a charter for its own government, "consistent with and subject to the Constitution and laws of this state," etc. The so-called "Enabling Act" of 1887, providing the means for cities to avail themselves of that constitutional privilege, provides (Acts 1887, p. 51, § 50; Rev. St. 1899, § 6408) that such city shall have exclusive control over its public highways, streets, etc. Section 51 (Rev. St. 1899, § 6409) declares that it shall be lawful for any such city in such charter, or by amendment thereof, to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city, or by or under the state or any other authority. Under such act and constitutional provision, Kansas City in 1889 adopted its charter, literally embodying therein said two sections. Article 3, § 1, of the charter provides that the city shall have power by ordinance to regulate the prices to be charged by telephone companies, and to compel them and all persons and corporations using, controlling, or managing electric wires for any purpose to put and keep their wires under ground, and to regulate the manner of doing the same. The "general welfare" clause of the charter authorizes the city to pass any ordinance that "may be expedient in maintaining the peace, order, good government, health and welfare of the city * * * or that may be necessary and proper for carrying into effect the provisions of this charter." Held that, while the enactment by the city of an ordinance fixing the maximum rate to be charged by telephone companies for telephone service in the city was expressly authorized by the charter, the state had not delegated to the city the power to exercise such authority in framing its charter, and the ordinance was void.

2. SAME.

The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state granting the franchise or suffering it to be exercised within its borders, which power may be conferred on a municipal corporation; but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government.

3. SAME—GRANT OF RIGHTS IN STREET—POWER OF LEGISLATURE.

The General Assembly, except as limited in the Constitution, has jurisdiction to grant franchises to be exercised in the streets of the cities and other public highways in the state. [Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 175.]

Brace, C. J., dissenting.

In Banc. Original proceeding by the state, on the relation of James W. Garner, for a writ of mandamus against the Missouri & Kansas Telephone Company. Peremptory writ denied.

R. J. Ingraham, O. H. Dean, E. E. Yates, Garland M. Jones, and Jas. W. Garner, for relator. Rozzelle, Vineyard & Thatcher, Jno. C. Tarsney and W. M. Williams, for respondent.

PER CURIAM. On a rehearing, the following opinion by VALLIANT, J., is adopted as the opinion of the court in banc. GANTT, FOX, BURGESS, and VALLIANT, JJ., concur. MARSHALL, J., concurs in the result, for reasons given in his separate opinion. LAMM, J., dubitante. BRACE, C. J., dissents.

VALLIANT, J. This is an original proceeding in this court to obtain a writ of mandamus. Respondent is a telephone company, incorporated under the laws of this state, engaged in furnishing telephone service in Kansas City and adjacent territory. It was incorporated in 1882 under article 5, c. 21, Rev. St. 1879 (now article 6, c. 12, Rev. St. 1899), and has ever since the date of its incorporation owned and operated a system of telephones in Kansas City. In September, 1902, Kansas City adopted an ordinance fixing the maximum rate to be charged by telephone companies for their service in that city. The relator requested the respondent to furnish him a telephone and telephone service in his office at the maximum rate fixed by the ordinance, which he tendered, but the respondent refused to furnish it at that rate, whereupon relator instituted this suit to compel respondent to do so. Respondent in its return pleads several defenses. The one which is of first importance is that the city had no authority to enact the ordinance. If respondent is correct in that proposition, there will be no necessity for looking into the other defenses pleaded.

Prior to the adoption of what is called the "Freeholders' Charter," which was in 1889, Kansas City had a special charter, first granted in 1853, and afterwards several times amended, but there was nothing in it authorizing the city to regulate telephone companies or fix the rates to be charged for telephone service. Section 16, art. 9, of our Constitution adopted in 1875 ordains: "Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state," etc. In 1887 (Acts 1887, p. 42) the General Assembly passed an act which in the briefs is called an "Enabling Act," the object of which was to provide the means for cities to avail themselves of that constitutional privilege and form their own

charters. In that act were the following two sections:

"Sec. 50. Such city shall have exclusive control over its public highways, streets, avenues, alleys and public places, and shall have exclusive power, by ordinance, to vacate or abandon any public highway, street, avenue, alley or public place, or part thereof, any law of this state to the contrary notwithstanding.

"Sec. 51. It shall be lawful for any such city in such charter, or by amendment thereof, to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city or by or under the state of Missouri or any other authority."

Those are now sections 6408 and 6409, Rev. St. 1899.

Under that act, and by virtue of section 16, art. 9, of our Constitution above quoted, Kansas City adopted its present charter in 1889, and in that charter the two sections of the enabling act above quoted are literally adopted. The respondent telephone company had already been planted in the city and doing business there several years before the charter was adopted. In section 1, art. 3, of the charter, it is provided that the city shall have power by ordinance " * * * to regulate the prices to be charged by telephone, telegraph, gas and electric light companies, and to compel them and all persons and corporations using, controlling or managing electric wires for any purpose whatever to put and keep their wires under ground and to regulate the manner of doing the same." There was also in the charter what is called the "general welfare" clause, which authorized the city to pass any ordinance that "may be expedient in maintaining the peace, order, good government, health and welfare of the city, its trade, commerce and manufactures, or that may be necessary and proper for carrying into effect the provisions of this charter." If the city had power to enact the ordinance fixing the maximum rate for telephone service in question, it is to be found in that clause of the Constitution, those sections of the statute, and those charter provisions above quoted. In so far as the ordinance depends upon the charter, there is no doubt of the authority; the charter expressly authorizes it. But whether the provision of the charter is backed by lawful authority is the serious question in the case.

It is not questioned that the state has power to keep telephone corporations in this state within reasonable bounds in respect of charges for their service, nor can it be questioned that the state may delegate that power to be exercised by a municipal corporation within its limits, but the question is, has the state delegated that authority to this city? Until the adoption of our Constitution in 1875

all cities in the state derived their charter powers from the General Assembly, and therefore whatever was contained in a city charter had the full force of a legislative enactment. But under that Constitution cities of certain descriptions were authorized to frame their own charters. A charter framed under that clause of the Constitution, within the limits therein contemplated, has a force and effect equal to one granted by an act of the Legislature. But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the General Assembly, because the Constitution does not confer on the city the right to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality, yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers, the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution, "may frame a charter for its own government," mean, may frame a charter for the government of itself as a city, which includes all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves. Nor does the Constitution confer unlimited power on the city to regulate by its charter all matters that are strictly local, for there are many matters local to the city, requiring governmental protection, which are foreign to the scope of municipal government. In none of the cases that have been before this court bringing into question the charters of St. Louis and Kansas City under the Constitution of 1875 have we given to this constitutional provision any broader meaning than above indicated. *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370; *State v. Field*, 99 Mo. 353, 12 S. W. 802; *Kansas City v. Scarritt*, 127 Mo. 646, 29 S. W. 845, 30 S. W. 111; *State ex rel. Subway Co. v. St. Louis*, 145 Mo. 574, 46 S. W. 981, 42 L. R. A. 113; *Kansas City v. Stegmiller*, 151 Mo. 189, 52 S. W. 723; *Young v. Kansas City*, 152 Mo. 662, 54 S. W. 535.

The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders, and that power may be with wisdom and propriety conferred on a municipal corporation; but it is not a power appertaining to the government of the city,

and does not follow as an incident to a grant of power to frame a charter for a city government. The authority of Kansas City to insert in its charter the power to regulate the price to be charged for telephone service within the city is not conferred by the constitutional provision above quoted. Is it conferred by what is called the "Enabling Act" of 1887? The purpose of that act was to enable cities of the class named to avail themselves of that constitutional provision. It is entitled "An act providing that any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government and regulating the same." There is nothing, therefore, in the title that indicates an intention to confer on such cities any power except that conferred by the Constitution. In its grant of power it so closely copies the language of the Constitution that its meaning to keep within the lines there drawn is obvious. There is nothing in the whole act of 54 sections that purports to confer on the city any powers except those appertaining essentially to the government of the city, unless, as is contended by the relator, sections 50 and 51 above quoted confer such powers. Section 50 confers on the city "exclusive control over its public highways, streets, avenues, alleys and public places," etc., and section 51 authorizes the city to provide in its charter "for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city, or by or under the state of Missouri, or any other authority." The exclusive control of its streets as granted in section 50 is an attribute of municipal authority, and could have been adopted in the charter, under the authority of the Constitution, without the express sanction of the General Assembly. The word "exclusive," however, in that connection, is not to be given its unlimited meaning, but must be understood as subject to the control of the state whenever the state chooses to assume control. The constitutional grant of power under which the charter is formed says that it must always be subject to the Constitution and laws of the state, which we interpret to mean that in all matters not appertaining to city government the charter is subordinate to the will of the General Assembly. The Legislature, in conferring on the city the exclusive control of its streets, meant exclusive control for the purposes of the city government, not to the exclusion of the state in other matters. The General Assembly, except as limited in the Constitution, has jurisdiction to grant franchises to be exercised in the streets of the cities and other public highways in the state, and that jurisdiction has not been surrendered either to cities with charters under the Constitution or to other municipalities.

In adopting these two sections, 50 and

51, of the so-called "Enabling Act," the Legislature had in view the necessity of power in the city to control its streets and other public places, and the power in the state to grant franchises to be exercised by the grantee in the streets and other public places of the city, and it was not difficult to foresee that a clash might occur between the city in its exclusive control of the street, and the private corporation in the exercise of the franchise granted by the state. Therefore, after granting to the city, as it did in section 50, control of its streets, the thought occurred to the lawmakers that there were private corporations organized and to be organized under the laws of this state with express authority to use the streets and other public highways in the exercise of their franchises, and, in order to prevent any clash that might occur between the city in its control of the streets and the private corporation in its use of the same, section 51 was added, which gave the city power to regulate and control the private corporation in its use of the street. Under the power the city may regulate the planting of poles, wires, etc., or require the wires to be put under ground, or do anything within reason to render the use of the street by the private corporation as little of injury to the public as may be. But the section does not confer on the city the power to regulate the prices to be charged by the telephone company for its service to the inhabitants of the city.

The peremptory writ is denied.

MARSHALL, J. I concur in the result announced in this case. But as I do not fully agree with the position or contention of counsel on either side of the case, or with all that is said in the opinion rendered herein, I deem it proper to briefly express my reasons for so doing.

It is not my purpose at this time to discuss at length the many and important legal and constitutional questions that have been so ably argued by counsel in this case. The argument has taken a very wide range, and has covered many points concerning which this court has not heretofore been able to agree or to formulate any fixed, general rules which could solve all the cases that have arisen or that may hereafter arise. In brief, the relator contends that Kansas City has express power, under her charter, to regulate and fix the prices that may be charged for telephone service within the corporate limits of the city; that if such is not the case, then the enabling act has conferred that power upon the city; that, under section 16 of article 9 of the Constitution, Kansas City was authorized to adopt a charter which would regulate all matters of mere local concern as distinguished from matters of state concern, and that the General Assembly of the state has no power, even by a general law, to change such local regulations so adopted by the city; that as to even

matters which are not properly local, but as to which the state has a concern, Kansas City has the power, under its charter, to adopt regulations or enact laws that will be legal and binding as to all subjects upon which the General Assembly of the state has not spoken, but that thereafter the General Assembly has power, by general law, to change such regulations. It is not necessary herein to state the various contentions of the defendant.

I think that it is extremely unfortunate that this court ever attempted to solve the problem by drawing a distinction between matters of mere local concern and matters of state concern, and to say that, as to matters of mere local concern, the municipality has power to legislate. To my mind, no fixed, certain, general, or intelligible rule can be formulated upon such a distinction which will answer or solve the questions that will arise. There are many matters which are in a sense local, but in which the state at large has also a direct interest. So that the attempted distinction would necessarily fail when applied to such matters. I think experience has now conclusively shown the necessity for this court to adopt some rule of construction which will solve all such questions. I am firmly convinced that there is but one safe ground upon which the courts can rest the rule, and that is to hold: First, that it is within the power of the General Assembly to delegate to a municipality a portion of the state's police power, under which it will be competent for the city to enact police regulations—that is, such regulations as affect the citizens in respect to their relations to the municipality, and in their conduct towards each other—but that such police regulations can only be enforced by fine or imprisonment; second, that it is competent for the state to confer upon a municipality the right to enact regulations, laws, or ordinances that are purely municipal—that is, such as regulate the governmental or business affairs of the city, and of the citizens in their conduct towards the city, or such as regulate the conduct of municipal officers, and the like; third, that, under the Constitution of this state and the decisions of this court, it is not competent for the Legislature to delegate to a municipality any portion of the legislative power of the state, by which I mean the power to make laws, to confer civil rights, to create civil liabilities, to provide civil remedies, to punish by civil action any acts of commission or omission of duty, or to create any civil right of action between citizens inter se. I am thoroughly persuaded that it never was within the contemplation of the framers of our system of government, or of our Constitution, that any city, whether organized under the general laws of this state, or under the provisions of the Constitution which allow cities to frame their own charter, to confer upon cities anything more than

a police power and a strictly municipal power, and that the power to enact all laws of civil conduct, and to prescribe all civil remedies among citizens, in short, to enact laws as distinguished from municipal regulations, is expressly reserved to the Legislature of this state, and cannot be delegated by it. In my judgment, the whole subject would be simplified, and a plain rule of interpretation afforded, by adopting such a distinction between the powers of a city and the powers of the General Assembly of the state. I, therefore, have reached the conclusion that it is no part of a municipal power to regulate the prices that may be charged for telephone service, any more than it is to regulate the prices that may be charged for any quasi public service, or for the sale of the necessities of life. All such matters fall within the domain of legislative powers. Hence I therefore think that Kansas City could not, by its charter, take unto itself the power claimed in this case, and that it was incompetent for the General Assembly to delegate such power to Kansas City.

At first I was of opinion that as the defendant is organized under article 6 of chapter 12 of the Revised Statutes of 1890, and as that article conferred upon the defendant the right to do telephone business, "and to make such reasonable charges for use of the same as they may establish," it was within the power of the court to determine whether the charges established by the defendant were or were not reasonable, and that the question could be determined in a proceeding by mandamus. It is argued, however, that the power to fix such charges is a legislative power, which can only be exercised by the General Assembly, and that the court has no power to fix the same. Upon further reflection I have come to the conclusion that the true construction of the provisions of the article quoted is that the defendant may fix such reasonable charges as it sees fit, subject, however, to the right of the General Assembly, by general law, to fix such reasonable charges, and that the power of the court is limited to determining, in a proper case, whether the charges fixed, whether by the company or by the Legislature, are reasonable charges, and that such question cannot be decided in a proceeding by mandamus. I believe that the statute does not confer upon the defendant an absolute right to determine what shall be a reasonable charge, and I also believe that even the Legislature cannot arbitrarily and oppressively fix a charge that will amount to a deprivation of the privileges and franchises conferred by law upon the defendant company. The General Assembly, it is true, might repeal the whole act in relation to telephone companies, and leave the subject without legislative regulation, but as long as the Legislature permits a company to engage in such business it is beyond the

power of the Legislature to fix the charges it may make at a sum which would be destructive to its business. The power to regulate does not mean the power to destroy. Under the guise of regulation, it is incompetent for the Legislature to destroy franchises which are authorized by law, or to so lay down the manner of transacting a legitimate business as to make it impossible to conduct such business except at a loss.

I shall not attempt now to indicate in what manner or form of proceeding the right of the court to construe or determine the reasonableness of the charge, whether established by the defendant or by legislative act, can or must arise. I shall content myself now with saying that I don't think the question can be properly raised in a proceeding by mandamus.

The foregoing sufficiently indicates my reason for concurring in the result, only, in this case.

IN RE SEVENTEENTH ST.

KANSAS CITY v. KANSAS CITY, FT. S. & M. B. CO.

(Supreme Court of Missouri, Division No. 2.
June 6, 1905.)

1. MUNICIPAL CORPORATIONS — CONDEMNATION PROCEEDINGS—ABANDONMENT.

In the absence of statutory regulations to the contrary, a municipal corporation may discontinue proceedings to condemn property for public uses, and abandon the public improvement in question, at any time before the making of a final award in the nature of a judgment in favor of the property owners for their compensation.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 527.]

2. SAME—OPENING STREET — ABANDONMENT OF PROCEEDINGS—PRESUMPTIONS.

Where it does not appear that a city took any steps to continue street-opening proceedings after the passage of an ordinance confirming a verdict of viewers, and the city did not appear in a subsequent appeal taken by a property owner, it will be presumed that the city abandoned the improvement.

3. SAME—CONFIRMATION OF PROCEEDINGS—RIGHT OF APPEAL.

Where the property of appellant in street-opening proceedings was neither taken, damaged, nor assessed, but was in identically the same condition after the return of the verdict of the viewers' jury, and a confirmation thereof by the city council as before, he was not authorized to appeal, within Kansas City Charter, art. 7, § 5, authorizing a person affected by the proceeding, either as the owner of property taken or damaged, or the owner of property assessed who feels aggrieved, to appeal.

4. SAME—AFFIDAVIT OF APPELLANT—SUFFICIENCY.

Where the affidavit of an appellant in street-opening proceedings merely stated that he was the owner of certain property affected by the judgment, but did not allege the appellant's interest in the proceeding, as required by Kansas City Charter, art. 7, § 5, it was insufficient to support the appeal.

Appeal from Circuit Court, Jackson County; Edward P. Gates, Judge.

Proceedings by Kansas City to acquire land for the opening of Seventeenth street. From a judgment assessing damages, the Kansas City, Ft. Scott & Memphis Railroad Company appeals. Reversed.

This cause comes to this court by appeal from a judgment of the circuit court of Jackson county, Mo., against the defendant. These proceedings were begun by the passage of an ordinance of Kansas City, Mo. (No. 16, 129), which was in words and figures as follows:

"An ordinance to open and establish Seventeenth street from the west line of Holly street to the westerly line of Franklin street.

"Be it ordained by the common council of Kansas City:

"Section 1. That Seventeenth street be and the same is hereby opened and established from Holly street to the westerly line of Franklin street the boundary lines of which shall be as follows, to wit: Beginning at a point on the west line of Holly street at its intersection with the north line produced west of 17th street; thence west along this prolongation to the north line of 17th street to the westerly line of Franklin street produced north; thence south along this prolongation of the westerly line of Franklin street to an intersection with the southerly line produced west of lot A, block 1, of resurvey of Whipple's Second Addition; thence east along the south lines of lots A and B of said block 1 to the west line of Holly street; thence north along the west line of Holly street to the place of beginning. And all private property within said limits is hereby taken and condemned for public use as a part of 17th street and just compensation therefor shall be assessed, collected and paid according to law.

"Sec. 2. The common council determines and prescribed the limits within which private property shall be benefited by the improvement herein proposed and be assessed and charged to pay compensation therefor as follows, to wit: Beginning at a point on the west line of Bellevue avenue 132 feet south to the south line of 17th street; thence west and parallel to the south line of 17th street to the east line of Holly street; thence to the southeast corner of lot five (5), block 1, Resurvey of Whipple's Second Addition; thence to the southwest corner of said lot 5; thence to the southeast corner of lot 143 of said block 1; thence west along the south line of said lot 143 and this line produced west to a point 150 feet west of the west line of Franklin street; thence in a northerly direction parallel to the westerly line of Franklin street to the north line produced west of lot A, block 1, of the Resurvey of Whipple's Second Addition; thence north and parallel to the west line of Holly street 198 feet; thence east and parallel to the north line of 17th street produced west to the east line of Holly street; thence south

to the north line of 17th street; thence east to the east line of West Prospect Place; thence north 168 feet; thence east to the west line of Bellevue avenue; thence south along the west line of Bellevue avenue to the place of beginning.

"Sec. 3. All ordinances or parts of ordinances in conflict herewith are inasmuch as they conflict with this ordinance hereby repealed."

The city engineer of Kansas City, Mo., after the adoption of this ordinance, made out a map or plat, and delivered the same to the mayor of said city, in which was embraced a showing of the benefit district. The city clerk of Kansas City, Mo., issued a notice under his hand and seal to property owners, notifying them that their property would be taken for the purposes specified in the ordinance of Kansas City, No. 16,129. The city clerk also issued the following notice to the appellant in this cause: "You will take notice that your property will be assessed to compensate for the taking of private property for the purposes specified in the ordinance of Kansas City No. 16,129, entitled 'An ordinance to open and establish Seventeenth street from Holly street to westerly line of Franklin street,' approved January 5, 1901, and that a jury will be empaneled to make such assessment on the 20th day of May, A. D. 1901, at ten o'clock in the forenoon at the Lower House council chamber on the fourth floor of the city hall building on the southeast corner of Fourth and Main streets in Kansas City, Jackson County, Missouri." On May 20, 1901, on account of the failure to get service on some of the property owners, the proceedings were continued by the mayor to July 1, 1901. On July 1, 1901, the following proceedings appear of record:

"In the matter of the proceedings to ascertain and assess just compensation to be paid for private property taken for public use, for the purpose specified in an ordinance of Kansas City, No. 16,129, entitled 'An Ordinance to open and establish 17th street from the west line of Holly street to the westerly line of Franklin street,' Approved Jan'y 5th, 1901.

"Hon. Jas. A. Reed, Mayor of Kansas City, presiding:

"Now on this day come John A. Hanley, R. G. Perkins, John Bayha, Wm. Reeves, Chas. A. Bickell, F. N. Phelps, the jury summoned herein, and it appearing to the court that they are all qualified and disinterested freeholders of Kansas City, Missouri, they are duly empaneled a jury herein, sworn to faithfully and honestly discharge their duties according to law and the ordinances under which these proceedings are carried on.

"The jury was instructed by the court to go with the city engineer to-day to view the property to be taken and assessed, and this matter and all proceedings herein are continued to Monday, July 8th, 1901, at ten of the clock in the forenoon at the Lower House Council Chamber on the fourth floor of the

City Hall building on the southeast corner of Fourth and Main streets, in Kansas City, Jackson County, Missouri.

"[Signed] Jas. A. Reed, Mayor."

Thereafter, on July 8, 1901, at said city hall, further proceedings were had, as shown by said transcript, as follows:

"In the matter of the proceedings to ascertain and assess just compensation to be paid for private property taken for public use for the purpose specified in an ordinance of said city No. 16,129, entitled 'An Ordinance to open and establish 17th street from Holly street to the westerly line of Franklin street,' approved Jan'y 5, 1901.

"Hon. J. P. Lynch, Speaker Lower House of the Common Council of Kansas City, presiding.

"Now on this day comes John A. Hanley, R. G. Perkins, John Bayha, Wm. Reeves, Chas. Bickell, F. N. Phelps, the jury summoned herein.

"Also appears S. S. Winn, 2nd Assistant City Counselor for the city and offers in evidence the ordinance and plat under which these proceedings are carried on, and files the affidavit of publication of M. W. Hutchison, of the Kansas City Mail, accompanied with a copy of the notice to be published under order of the Mayor, dated May 20th, 1901, showing publication pursuant to said notice in the Kansas City Mail as follows, to wit:

"And the court adjudges that all parties have been duly notified and all persons interested duly served, the jury having heard the evidence of all persons appearing, and having viewed the property to be taken and assessed, render their verdict and are discharged by the court.

"[Signed] John P. Lynch,

"Speaker Lower House of the Common Council."

And on the same day said jury returned the following unanimous verdict:

"In the matter of the proceedings to ascertain and assess just compensation to be paid for private property taken for public use for the purpose specified in an ordinance of the said Kansas City No. 16,129, entitled 'An Ordinance to open and establish Seventeenth (17th) street from Holly street to the westerly line of Franklin street,' approved January 5th, 1901, the undersigned jury on oath having heard the proof of the several parties interested and examined personally the property to be taken and assessed, render our verdict as follows, to wit:

"We find that the damages for the property taken exceed the benefits to be derived by the city at large and by the property within the benefit limits as prescribed by said ordinance No. 16,129."

On the same day the mayor submitted said verdict and proceedings to the common council of said city as follows:

"Mayor's Office. Kansas City, Mo., July 8th, 1901. To the Hon. Common Council—

Gentlemen: I herewith submit for your consideration the verdict and proceedings taken and had by the city under ordinance No. 16,129, entitled 'An ordinance to open and establish 17th street from the line of Holly street to the westerly line of Franklin street,' approved January 5th, 1901. Respectfully, John P. Lynch, Acting Mayor."

Whereupon, at a meeting of said council on July 8, 1901, an ordinance was passed by that body, certified by the proper officers of both houses, and approved by the mayor on July 10, 1901, duly numbered (17,307) and entitled, which was as follows:

"Be it ordained by the common council of Kansas City:

"Section 1. That the verdict and proceedings (reported to the Common Council July 8th, 1901, by the mayor) rendered and taken in causing to be ascertained and assessed by a jury, just compensation to be paid for private property taken for the purpose specified in Ordinance No. 16,129, entitled 'An ordinance to open and establish 17th street from the west line of Holly street to the westerly line of Franklin street,' approved January 5, 1901, be and the same are hereby confirmed."

Thereafter, on July 27, 1901, the following affidavit was filed in the office of the city clerk:

"In the matter of opening and establishing of 17th street from Holly street to Franklin street under ordinance of Kansas City, No. 16,129. Approved January 5th, 1901.

"In the Mayor's Court. State of Missouri, County of Jackson—sa: A. G. Belinder, upon his oath being duly sworn, states that he is the owner of the following property affected by the judgment rendered in the above-entitled cause, to wit: Lots 4, 5, 6, 7, Resurvey of Whipple's Second Addition in block one (1) Kansas City, Missouri, and that he appeals to the circuit court of said county at Kansas City from the judgment rendered in said cause on the verdict of the jury, and that this application for appeal is not made for vexation or delay, but on the merits, because this affiant believes that he is injured by the verdict and judgment of the said court. A. G. Belinder.

"Subscribed and sworn to before me this 27th day of July, 1901. Term expires Nov. 18, 1902. R. B. Garnett, Notary Public. [Seal.]"

Upon this affidavit for an appeal a transcript of the proceedings before the mayor was certified to the office of the clerk of the circuit court of Jackson county, Mo.

On January 10, 1902, this cause was tried in the circuit court of Jackson county, Mo., before a jury. Ordinance No. 16,129 was offered in evidence, together with the plat and other testimony tending to prove the matters submitted to the jury.

At the close of the evidence the court instructed the jury as follows: "You are instructed that this proceeding is for the pur-

pose of assessing damages and benefits that may result from the proposed condemnation for public use of Seventeenth street from Holly street to the westerly line of Franklin avenue under the ordinance of Kansas City, Missouri, numbered 16,129, and approved on the 5th day of January, 1901, and offered in evidence. The public use of the property to be taken under said ordinance is such that the city must have exclusive possession and control thereof, and you are instructed that for each piece of property so taken you will ascertain and determine the just compensation therefor to be the actual value thereof. For all damages to each piece of property not actually taken, so as to give the city possession or control of the same, you will ascertain and determine the just compensation therefor to be the actual amount of the damages such property may sustain from the use of the private property taken for the public use for which it may be taken, including all that the city from time to time may do or cause to be done in, with, or upon the private property so taken. To pay such compensation, you will assess against the city the amount of benefit to the city and public generally, inclusive of the benefit to any property of the city, within the benefit limits prescribed by the ordinance in evidence; and against the several lots and parcels of private property, exclusive of the improvements thereon, which you may deem benefited by the proposed improvement under said ordinance, and which is within the limits of the benefit district prescribed by ordinance introduced in evidence, and shown on the plat introduced in evidence, you will assess the balance of such compensation; each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed. In making up your verdict, you are to be guided by your own judgment as to damages and benefits in connection with all the evidence in the case. You will make up your verdict in writing, and it shall be signed by each of you, and you will all return the same into court. Before returning and making your verdict, you will examine personally the property taken, damaged, and assessed. The city engineer or his assistant may aid you to put your verdict in proper form, and you will call upon him to do so. You are not at liberty to pass on the question as to whether there is any public necessity for the proposed proceeding, that being a matter within the discretion of the common council." To the giving of which instruction the Kansas City, Ft. Scott & Memphis Railroad Company duly objected and excepted at the time. Said railroad company thereupon asked the court to instruct the jury as follows: "The court instructs the jury that, in assessing benefits for the proposed opening of Seventeenth street in this proceeding, you cannot assess any such benefits against the

property of the Kansas City, Ft. Scott & Memphis Railroad Company, its successors or assigns, now occupied by the tracks of said railroad company." The court refused to give said instruction, to which refusal of the court said railroad company duly excepted at the time.

The cause was submitted to the jury, and they returned their verdict, in which they assessed the value of the property taken, and the damages done to the improvements thereon, in carrying out the purpose of opening of the street specified in Ordinance 16,129, and then proceeded to assess against the defendant and other property owners in the benefit district certain amounts to pay the compensation fixed as aforesaid for the property to be taken and damaged. Against that portion of the railroad yards of the defendant included in said benefit district the jury assessed the sum of \$458, and the court entered judgment that said verdict "be adjudged to be binding and conclusive on all parties interested," and that "Kansas City have and hold the land taken" for public use, and that the lands assessed with benefits "stand bound and charged to pay" the several assessments against them, and that execution issue to enforce said payments. From this judgment defendant in due time and form prosecuted this appeal, and the cause is now before us for consideration.

L. F. Parker and Pratt, Dana & Black, for appellant. R. J. Ingraham and S. S. Winn, for respondent.

FOX, J. (after stating the facts). We are not favored in this cause with a brief by respondent, or even a suggestion as to the theory upon which this proceeding can be maintained; hence we are left to make such independent investigation of the legal propositions presented by the record in this cause as will meet the contentions of counsel for appellant, so ably and clearly presented in their brief.

We have carefully considered the charter provisions of article 7 of the freeholders' charter of Kansas City (page 111, Ed. 1898), which furnishes the basis of this proceeding; and we are unable, with the record before us, made in pursuance of the charter provisions referred to, to discover upon what possible foundation this proceeding rests or can be maintained. It is fundamental that the power and authority to condemn property and open public streets in Kansas City, Mo., rests with the municipal authority, and that property cannot be condemned or public streets opened at the instance of any particular individual. We have in this case the proceeding in due form commenced by the proper authority in respect to the opening of Seventeenth street, by the passage of Ordinance 16,129. In pursuance of this ordinance, proper plats were made by the city engineer, and duly filed with the mayor, showing the benefit district in connection with the opening of the

street contemplated as directed by the provisions of the charter. In pursuance of the provisions of the charter, the mayor organized his court for the purpose of ascertaining the damages by reason of the property taken for said street and the improvements thereon, and for the assessment of benefits to make compensation for the value of the property taken and condemned by reason of the contemplated street. A jury was impaneled, and, after having heard the proof of the several parties interested, and examining personally the property to be taken and assessed, returned a verdict that the damages for the property taken exceeded the benefits to be derived by the city at large and by the property within the benefit limits as prescribed by said Ordinance No. 16,129. This verdict, by the acting mayor, John P. Lynch, was submitted to the common council of the city, and by Ordinance No. 17,307 fully confirmed and approved, which ordinance was approved by the mayor on July 10, 1901. So far as the municipal government is concerned, as disclosed by the record before us, no further steps were taken toward the completion of the purposes specified in the original ordinance, 16,129.

This proceeding, it appears, reached the circuit court by an appeal on the part of an individual who owned some lots of ground in the benefit district, whose property had neither been taken, damaged, nor assessed in respect to the opening of this street. The record in this cause discloses that Kansas City did not appeal from the verdict of the jury, nor, in the sense of contesting the adjudications upon its rights in the mayor's courts, was the city a party to the proceeding in the circuit court, nor is there anything indicated by the record that the city is still undertaking to carry out the purposes specified in the original ordinance, 16,129. Upon this state of facts the conclusion is irresistible that upon the return of the verdict by the jury, and its confirmation and approval by the city council, there was an abandonment of the purposes specified in the original ordinance. That the city had a right to discontinue this proceeding is beyond dispute. This right was clearly stated in the case of *Simpson v. Kansas City*, 111 Mo., loc. cit. 242, 20 S. W. 39. It was there said (McFarland, J., speaking for the court): "It has long been the rule in this state, and is the general rule elsewhere, that, in the absence of statutory regulations to the contrary, a municipal corporation has the right to discontinue proceedings for condemning property for public uses, and to abandon such public improvements, at any time before a final award in the nature of a judgment in favor of the property owners for their compensation is made. *Railroad v. Lackland*, 25 Mo. 515; *St. Joseph v. Hamilton*, 43 Mo. 288; *State ex rel. v. Hug*, 44 Mo. 117; 2 Dillon on Municipal Corporations, § 609; *Lewis on Eminent Domain*, § 656; 3 Sedgwick on Dam-

ages, § 1166; *Mills on Eminent Domain*, § 311; *City of St. Louis v. Meintz*, 107 Mo. 611, 18 S. W. 30." Judge Dillon, in his most excellent work upon Municipal Corporations (volume 2 [4th Ed.] § 608), clearly states the rule as to the right of a city to abandon or discontinue proceedings to open streets. He says: "Under the language by which the power to open streets and to take property for that purpose is usually conferred upon municipal corporations, they may at any time before taking possession of the property under completed proceedings, or before the final judgment, recede from or discontinue the proceedings they have instituted. This may be done, unless it is otherwise provided by legislative enactment, at any time before vested right in others have attached. Until the assessments of damages have been made, the amount cannot be known; and, on the whole, it is reasonable that, after having ascertained the expense of the project, the corporation should have the discretion to go on with it or not, as it sees fit, it being liable in proper cases for any wrongful acts injurious to the owner, as shown in the next section." In *Silvester v. St. Louis*, 164 Mo. 601, 65 S. W. 278, Burgess, J., speaking for this court, fully reviews all the authorities and concludes with the full recognition of the rights of the city at any time before any property rights are vested, to abandon or discontinue the proceeding to open a public street. In *Whyte v. City of Kansas*, 22 Mo. App. 409, it was very appropriately said: "The city stopped at the passage of the ordinance. It might have proceeded much further in the process of condemnation, and yet not been liable to damages, nor fallen under the authorities cited for plaintiff. There is matter for the council to pass upon at the very end of the condemnation proceeding, in its nature judicial, which may put an end to the proceeding and leave the parties in statu quo, which is the amount of damages that have been assessed. The council have, in reserve, the power to determine that the public good to be subserved from the appropriation of private property in a given instance is not commensurate with the damages awarded." To the same effect is *City of St. Joseph v. Hamilton*, 43 Mo. 282, where it was ruled "that the city may dismiss its proceedings at any time before final judgment, * * * and then the only liability that would be incurred would be the expenses. So, if, on account of excessive damages, it should be deemed unwise or impolitic to proceed, it might abandon the work. * * * If the city elects to abandon the enterprise and not to take the property, there is no divestiture of title from the owner, and he is not entitled to pay from the public." This case was afterwards affirmed in *State ex rel. Rogers v. Hug*, 44 Mo. 116.

If the record before us is to be our guide,

that Kansas City fully and completely discontinued and abandoned this proceeding upon the return of the verdict by the jury is too plain for discussion; and, this being true, we are unable to ascertain upon what ground Mr. A. G. Belinder can continue this proceeding, and undertake, contrary to the wishes of Kansas City, to open a public street within her corporate limits. The record is absolutely silent as to any steps taken by the city to pursue the purposes specified in the original ordinance any further. The city made no complaint at the verdict. Its common council accepted it, confirmed it, and approved it. It was no complaining party to the proceeding in the circuit court, and is making no suggestion now in this court as to the support and maintenance of the judgment in this proceeding. Again, under the showing as disclosed by the record in this cause, there was no right of appeal on the part of A. G. Belinder: First, for the reason that the verdict of the jury was not such a verdict as is contemplated by section 4 of article 7 of the charter of the city of Kansas, as to authorize an appeal from it; second, the right of appeal on the part of Mr. Belinder must rest solely upon the charter provisions of section 5, art. 7, of the city charter, and he is not such a person affected by said proceeding as is contemplated by that section of the charter, which would authorize an appeal by him. The provisions of this section authorizing an appeal substantially provide that in case the city or any person affected by such proceeding, either as the owner of property taken or damaged, or the owner of property assessed, shall feel aggrieved by the verdict, such party so aggrieved may appeal to the circuit court of Jackson county, Mo. Mr. Belinder's property was neither taken nor damaged, nor was there any assessment of any kind made against his property. In fact, his property was in identically the same condition and position after the return of the verdict, and the confirmation of it by the city council, as it was before; hence he had nothing to appeal from. The only person, under the provisions of the city charter governing this proceeding, who was authorized to prosecute an appeal, must be some one whose property has been taken, damaged, or assessed by such proceeding. The right of appeal in civil actions was unknown to the common law, and this appeal rests solely upon the provisions of the city charter, and it is essential to the exercise of this right that the provisions of that charter shall be substantially pursued. *State ex rel. v. Woodson*, 128 Mo., loc. cit. 514, 31 S. W. 105; *State v. Thayer*, 158 Mo. 36, 58 S. W. 12; *Thomas v. Town Mut. Ins. Co.*, 89 Mo. App. 12; *Schroeder v. Jabin*, 94 Mo. App. 111, 67 S. W. 949.

Again, it may be said that, upon the face of the affidavit of Mr. Belinder, this appeal was unauthorized. Section 5, *supra*, of the city charter, makes it an essential requisite

in an affidavit for an appeal that the party appealing, or his agent, shall state what interest the party appealing has in the proceeding. Now, so far as this affidavit is concerned, it is absolutely silent as to any interest of Mr. Belinder, who made this affidavit. The statement that he was the owner of certain property affected by the judgment is by no means a compliance with the essential requisite of the charter provision that he must show what interest he has in the proceeding, and, from the disclosures of the record, after the return of the verdict by the jury, and its confirmation by the city council, we are unable to conceive of any interest that he had in such proceeding, at least until some further steps were taken by Kansas City to carry out the purposes of the original ordinance. The remarks of the court in *State ex rel. v. Talty*, 139 Mo. 379, 40 S. W. 942, may very appropriately be applied to the appeal to the circuit court in this case. It was said: "But independently of what may be said of the control, duty, or power of the courts over property in their custody, no appeal will lie from judgments or orders made affecting the same, unless allowed by statute; and, by statute, appeals are allowed only to those who are aggrieved by judgments, orders, or decrees made, affecting directly some pecuniary or property rights or interests of the appellant. Judgments or orders that affect or offend merely the taste or sensibilities of a party constitute no legal grievance—authorize no appeal therefrom."

We have carefully considered all the disclosures of the record in this cause, and we are of the opinion that the conclusion is irresistible that the city, upon the return of the verdict by the jury, and its acceptance and approval by the city council, abandoned the proceeding put in operation by Ordinance 16,129; and it may be further added that the verdict of the jury and its approval by the city council did not in any way affect the interest in any property of A. G. Belinder, and was not such an adjudication of any of his rights as authorized an appeal, and that the circuit court was without jurisdiction to render the judgment disclosed by the record.

With these views, it results in the conclusion that the judgment should be reversed, and it is so ordered. All concur.

REYNOLDS v. ST. LOUIS TRANSIT CO.
(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. BILL OF EXCEPTIONS—AMENDMENT.

The amendment of defendant's bill of exceptions by incorporating into it an admission of defendant's counsel, contained in plaintiff's bill, that the accident was the result of defendant's negligence, if allowable, would not materially alter the case, where the admission was nothing more than what the uncontradicted evidence showed was the fact.

2. CARRIERS—PASSENGERS — PERSONAL INJURIES.

In an action against a street railroad company, where it appeared that defendant received plaintiff as a public carrier, and he was being carried as a passenger when he was injured, it was not error to instruct a finding for plaintiff if the jury found, among other facts, that defendant received plaintiff as a passenger to be carried for hire, though there was no evidence that plaintiff paid his fare, or that fare was demanded.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 974.]

3. SAME — INSTRUCTIONS — ERROR AFFECTING MERITS.

In an action against a street railroad for injuries, where it was alleged that defendant, by a "negligent and violent rate of speed" of another car, caused the collision, an instruction to find for plaintiff if the jury found that defendant so negligently ran and operated its cars, or either of them as to cause the collision, though broader than it should have been, was not error affecting the merits, which will be regarded on appeal.

4. PERSONAL INJURIES — MEASURE OF DAMAGES.

In an action for injuries, an instruction that in estimating the damages the jury may consider plaintiff's diminished capacity for earning money, if any, and on account thereof make such allowance as may be fair and just for any loss they may believe from the evidence he has sustained in the past by reason thereof, and for any loss they may believe he may sustain in his future earnings by reason of such diminished earning capacity, is not erroneous, as authorizing a recovery for loss of time, and also for diminished earning capacity during the same period, and for loss of what he "may" sustain in the future.

5. SAME—EXCESSIVE DAMAGES.

An award of \$23,400 for injuries sustained is excessive, though plaintiff was 42 years old, in good health, and his injuries have resulted in diabetes and paralysis of both legs, and he is a helpless cripple, and may remain so permanently.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 374.]

Appeal from Circuit Court, Franklin County; John W. McElhinney, Judge.

Action by William Reynolds against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehmann and Geo. W. Easley, for appellant. John W. Booth, Oscar E. Meyerseleck, Richard F. Ralph, Thomas F. Fauntleroy, and Shepard Barclay, for respondent.

VALLIANT, J. Plaintiff obtained a judgment for \$23,400 damages for injuries to his person received in a collision of two street cars of defendant. The defendant appeals.

The plaintiff was a passenger on one of defendant's street cars on what is called the "Bellefontaine Line," and as the car was crossing another track of defendant, called the Fourth Street Line, a car on the last-named track, aiming for the same crossing, struck the car in which plaintiff was riding, in consequence of which the plaintiff was thrown out of the seat and received severe injuries. The suit was begun in St. Louis,

but taken by change of venue to Franklin county, where it has been twice tried. On the first trial there was a verdict for the plaintiff for \$35,000; but the court sustained defendant's motion for a new trial, and the cause was tried again. On the second trial the verdict was for \$23,400, and the court overruled defendant's motion for a new trial, whereupon the defendant took this appeal.

1. It appears from the respondent's abstract that when the appellant presented its bill of exceptions to the trial judge for his signing the plaintiff insisted that the argument of Mr. Hocker, the defendant's attorney, to the jury, should be inserted in the bill of exceptions, and for that purpose presented to the court the stenographer's report of that argument; but the court refused the plaintiff's request, and signed the bill as it was offered by the defendant. Then the plaintiff excepted to that ruling, and the court thereupon signed a bill of exceptions for the plaintiff which contained the argument, and respondent now asks that his bill of exceptions be taken as a part of the record in the cause. The significance of this request is that in the argument of the defendant's counsel he frankly admitted to the jury that the accident was the result of defendant's negligence, and that the only point on which the plaintiff and defendant could not agree was the amount of damages the plaintiff should have to compensate him for his injury; that he was injured to some extent, but not to the extent claimed by him. Respondent contends, on the authority of what is said in *Darrier v. Darrier*, 58 Mo. 222, that this court should cause the defendant's bill of exceptions to be amended or corrected, by inserting the contents of the plaintiff's bill into it, or consider it done without going through the formality of doing it or requiring it to be done. We do not understand the case referred to as being a precedent for amending appellant's bill of exceptions in the manner proposed. But it would not materially alter the case if the bill of exceptions contained the admission referred to, because the admission was nothing more than what the uncontradicted evidence showed was the fact, and the counsel, in frankly making the statement, was not only discharging his duty to the court, but also discharging his full duty to his client, by presenting the case to the jury in the very best light in which it could be presented. The evidence showed that the plaintiff was a passenger in one of defendant's cars, which was struck by another of defendant's cars, and he was thereby injured. It was therefore in legal contemplation of the defendant's own hand that struck the plaintiff. When those facts were shown, a *prima facie* case was made for the plaintiff, and the burden of accounting for the collision was shifted to the defendant; but defendant offered no evidence on that point. The only evidence offered by defendant was that of experts

relating to the degree of the plaintiff's injuries.

2. The petition alleges that the defendant received the plaintiff on its car as a passenger, and for a valuable consideration paid by plaintiff undertook to carry him safely to his point of destination. In the instructions given for plaintiff the jury are told that if they should find certain facts, among them that "the defendant received the plaintiff as a passenger to be carried for hire," they should find for the plaintiff. There was no evidence that plaintiff paid any fare, or that fare was demanded. The submitting of that question to the jury is assigned for error. The argument in support of the assignment is that the relation of passenger and carrier is created only by contract, and that under the general denial the burden was on the plaintiff to prove the contract alleged, and, failing to offer any proof on that point, there was nothing to go to the jury—citing in support of that proposition *Schepers v. Railroad*, 126 Mo. 665, 29 S. W. 712; *Schaefer v. Railroad*, 128 Mo. 64, 30 S. W. 381. Those cases do hold that the relation of passenger and carrier grows only out of contract, but they also hold that the contract is either express or implied. The evidence in this case shows that the plaintiff boarded one of defendant's street cars at Lucas avenue, and was carried in it as far as the crossing of Park avenue and Gratton street, where the accident occurred. The facts that he was received in the vehicle of a public carrier and was being carried in the manner of a passenger, nothing else appearing, were sufficient for the inference that he was there under the implied contract that created the relation between him and the defendant of passenger and carrier. There was no error in submitting that question to the jury.

3. The petition alleges that, while the plaintiff was in a car of the defendant, its servants so carelessly and negligently managed another one of its cars by a "negligent and violent rate of speed" that it was brought into violent collision with the one in which plaintiff was being carried, and the accident resulted therefrom. In an instruction for the plaintiff the jury were told that if they should find certain facts, among them that the defendant "so negligently ran and operated said cars, or either of them," as to cause the collision, the verdict should be for the plaintiff. It is assigned for error that the words in quotation rendered the instruction erroneous, as authorizing a recovery on the finding of an act of negligence different from that stated in the petition; that is to say, on the finding that the car in which plaintiff was riding was negligently managed. If the instruction was broader than it should have been, the error does not reach the merits of the case. According to the contradicted evidence the accident was caused by the negligence of defendant's servants, either those on the Fourth Street car, which

crushed into the Bellefontaine car, or those on the latter in not avoiding the collision. Error not affecting the merits of the action is not to be regarded on appeal. Section 865, Rev. St. 1899.

4. Appellant complains of the instruction given for plaintiff on the measure of damages. The testimony for the plaintiff tended to show that his injuries were such as caused great suffering, physical and mental, that they disabled him from pursuing his avocation, and they were likely to be permanent. The instruction complained of is as follows: "If under the law and evidence you find the issues in this cause for the plaintiff, the damages which you may award him should be compensatory only, and in estimating such damages you will take into consideration and allow him for expenses for doctor's bill incurred, if any, in treating his injuries; also, compensation for the time lost, if any, during his illness occasioned by his injury. And while the evidence may not prove any specific sum in dollars and cents that plaintiff may have been damaged by reason of physical pain and mental anguish, yet you may allow him what you believe to be just and fair to compensate him for such sufferings, if any. You will also take into consideration, in estimating his damages, his diminished capacity for earning money, if you so believe from the evidence, and on account thereof make him such allowance as you may believe to be fair and just for any loss that you may believe from the evidence he has sustained in the past by reason thereof, and for any loss you may believe from the evidence he may sustain in his future earnings, by reason of such diminished earning capacity as may be occasioned by his injury." The criticism of plaintiff's instruction is that it authorizes a recovery for loss of time, and also for diminished earning capacity during the same period, and for loss of what he may sustain in the future, with emphasis on the word "may." The instruction does direct the jury to consider the plaintiff's loss of time and diminution of his earning capacity, past and future, and possibly one reading that instruction might construe it to mean that plaintiff was to be compensated for time lost in the past and wages lost in the same past period by reason of diminished earning capacity; but that would be a strained construction and an unreasonable one. The value of his lost time could be estimated only by the value of his lost wages. During some of the time he might be entirely incapacitated, and in other some his earning capacity be only diminished. In view of this criticism, we see how the instruction might have been worded so as to render it more accurate; but that may be said of almost every instruction, when viewed under the microscope.

The learned counsel for appellant do not attach much importance to that point, but do attach importance to another point in the

instruction. They say: "The vital error in this instruction, however, is that it directs a recovery for loss of future earnings that the plaintiff may sustain by reason of diminished earning capacity that may be occasioned by his injury." The counsel give to the word "may" in that connection the meaning of the term "possibly might," and they say: "This instruction violates the rule that future damages for injuries, pain, or suffering must be confined to such as the evidence renders it reasonably certain will result from the injury." That is the correct rule, as shown by the numerous cases cited in its support, among which are *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Bradley v. Railway*, 138 Mo. 301, 39 S. W. 763; *Chilton v. St. Joseph*, 143 Mo. 192, 44 S. W. 766. The word "may," used as an auxiliary verb, has a wide scope of meaning, into which the idea of mere possibility enters; but it also comprehends the idea of probability, and also the thought of what is with more or less certainty to be expected, and whether it is to carry the one thought or the other often depends on the context. The word "may" is used in this instruction nine times. If we should erase it whenever it occurs, and write in its place "possibly might," we would convert it into an instruction conveying a very different meaning from that which a casual reading of it now conveys. This instruction is an almost literal copy of one approved by this court in *Rodney v. Railroad*, 127 Mo. 676, 28 S. W. 887, 30 S. W. 150, where the word "may" is used in the same sense. The term "may sustain in the future," in reference to the same subject, has been approved in other cases by this court. *O'Connell v. Railway*, 106 Mo. 484, 17 S. W. 494; *Duerst v. Stamping Co.*, 163 Mo. 617, 63 S. W. 827. A safer word than "may" could be used to express the idea of probability or reasonable certainty; but we will not hold an instruction erroneous, where the context, in the light of the facts of the case to which the instruction is applied, shows that it is used to imply reasonable probability or reasonable certainty.

5. Lastly it is insisted that the damages are excessive. The testimony for the plaintiff tended to show that at the time of the accident he was 42 years old, in the prime of life, strong and healthy, weighing 190 pounds; by the collision he was thrown to the other side of the car in which he was seated, his back striking the edge of a seat on that side, inflicting a painful injury, and he was carried home in an ambulance; that he has never been able to stand or walk since that time; that he has lost 40 or 50 pounds of weight, is required constantly to take purgatives to move his bowels, has diabetes and paralysis of both his legs, and has manifestation of progressive nervous decay. He is a helpless cripple, and there is little hope of any improvement. The expert testimony on the part of the defendant

tended to show that the plaintiff's injuries were not as severe as he represented them to be; that the condition of his legs was due to hysterical anesthesia, which is a disturbance in the function of the central nervous system, and such cases usually get well. When recovery comes, it is spontaneous. A physician who examined the plaintiff by order of the court found no evidence of diabetes or ankylosis. Another learned witness testified that traumatic neurosis was not a disease, but was a condition. "The nervous system is in a bad condition—that is, does not act in a proper manner—and they are mentally disturbed more easily, and they are very miserable, irritable, little things worry them, and they may lose flesh, or else they may become weak as far as their muscular system is concerned. * * * Under proper conditions they recover, sometimes very promptly, sometimes with time. They may run for the course of a year or two. * * * They do not die of traumatic neurosis. * * * It is called hysterical paralysis. It is not a paralysis based upon a defined lesion of the spinal cord. * * * The recovery of sensation may be rapid, or it may be slow. It may be blood, or it may be paralysis."

The award of the jury was \$23,400. That award in our opinion is excessive. We recognize the difficulty in laying down a rule for the measure of damages in such cases, and it is always with great hesitancy that we interfere with the verdict of a jury on this question; but we feel constrained to do so in this instance. In our opinion \$15,000 would be a fair compensation to the plaintiff for the injuries he has suffered. If, therefore, the plaintiff sees fit within 10 days to remit \$8,400 of his award, we will affirm the judgment; otherwise, the judgment will be reversed, and the cause remanded for a new trial. All concur, except MARSHALL, J., not sitting.

HARRISON v. LAKENAN et al.

(Supreme Court of Missouri, Division No. 1.
May 24, 1905.)

1. BROKERS—COMMISSIONS—PLEADING.

Where, in an action against brokers who had effected a sale of plaintiff's land, the petition alleged that defendants received from the purchaser a sum of money for the use of plaintiff, and retained it, refusing to pay it over, the petition was not insufficient for failing to allege that defendants were authorized to collect the money.

2. SAME—VARIANCE — AFFIDAVIT OF PREJUDICE.

A defendant could not insist on appeal that the petition alleged a written contract, while the proof showed a verbal one, where he filed no affidavit under Rev. St. 1899, § 855, providing that, when it shall be alleged that a party has been misled by a variance, the fact shall be proved by affidavit, whereupon the court may order the pleading to be amended.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1428-1432.]

3. SAME—DEMURRER TO EVIDENCE.

Where there was substantial evidence introduced by plaintiff to establish the allegations of the petition, a demurrer to the evidence was properly overruled.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 346, 347.]

4. SAME—ADMISSIBILITY OF EVIDENCE—ERROR CURED BY INSTRUCTION.

Where the issue was whether plaintiff had consented to an alteration in a written contract between himself and defendant, the admission of evidence bearing on the question whether defendant had by false representations induced plaintiff to agree to a modification was cured by an instruction that, if plaintiff had consented to the modification, the verdict should be for defendant.

5. CROSS-EXAMINATION—HARMLESS ERROR.

There was no error prejudicial to defendant in cross-examining him as to the meaning of letters written by him to plaintiff, defendant being thus offered an opportunity of explaining the meaning of his letters.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4140-4145.]

6. ACTION—DEMAND—WAIVER.

By the express provisions of Rev. St. 1890, § 1576, an objection that no demand for the subject-matter of the suit was made prior to the action is not available unless it is expressly set up by way of defense and accompanied by a tender.

7. TRIAL — CREDIBILITY OF WITNESSES — INSTRUCTIONS.

An instruction that in determining the weight and credibility to be given to the testimony of any witness the jury might take into consideration the "character" of the witness was proper where each party contended that the testimony on behalf of the other party was unreliable.

8. BROKERS — COMMISSIONS — ALTERATION OF CONTRACT—EFFECT.

Where brokers, without the consent of their customer, altered a written contract so as to give them a greater commission, the alteration rendered the entire contract void.

9. SAME—INSTRUCTIONS.

On an issue as to whether brokers, without the consent of their customer, had materially altered the written contract, it was not error to instruct that the customer was not bound by the alteration unless he was present in the office of the brokers at the time the alteration was made, the brokers' theory being that the alteration was made at their office, and there being no evidence to show that it was proposed, agreed to, or made at any other place.

10. SAME—ACTION AGAINST BROKER—MONEY RECEIVED—INSTRUCTIONS.

In an action against brokers to recover moneys retained by them out of the purchase price, an instruction that, though plaintiff gave defendants authority to sell his land at a specified sum per acre, such authority did not excuse defendants from selling for the best obtainable price, was not erroneous on the theory that it made the agent exceed the instructions of his principal, and made him liable if he did not.

11. SAME—FRAUD—INSTRUCTIONS.

Where a landowner sued his brokers, who had effected a sale, to recover a portion of the purchase money which had been retained by them on the ground that the contract was not binding on him because he had been fraudulently induced to enter into it by the act of the defendants in not correctly reading the contract to him, and also on the ground that the contract had been nullified by an alteration thereof by defendants, an instruction that, if plaintiff signed the original contract, defendants, in reading it to him having fraudulently

deceived him, then the contract was not binding, was not erroneous on the theory that the action was not one for the cancellation of a contract.

12. SAME—INSTRUCTIONS ASSUMING FACTS.

Where, in an action to recover from brokers a portion of the purchase money retained by them for effecting a sale of plaintiff's land, the evidence showed that the purchaser gave his check to plaintiff, and he turned it over to defendants, who subsequently gave plaintiff their check, an instruction assuming that defendants received the money from the purchaser was not erroneous.

13. SAME—ARGUMENTS OF COUNSEL.

On an issue as to whether brokers had made an alteration in a written contract between themselves and their customer it was not error for plaintiff's counsel, in his argument to the jury, to comment on the fact that the contract which was before the jury appeared to be in five different handwritings.

14. APPEAL—REVIEW—QUESTIONS OF FACT.

The mere fact that the preponderance of the evidence may, in the opinion of the Supreme Court, be against the verdict, is no ground for disturbing the judgment where there is substantial evidence to support it.

Appeal from Circuit Court, Audrain County; E. M. Hughes, Judge.

Action by Thomas Harrison, Sr., against J. J. Lakenan and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

C. A. Barnes, F. R. Jesse, and Geo. Robertson, for appellants. R. D. Rodgers and P. H. Cullen, for respondent.

MARSHALL, J. This is an action at law to recover \$4,907.10 alleged to have been received by the defendants for the use of the plaintiff, and by the defendants retained without the knowledge or consent of the plaintiff. There was a verdict and judgment for the plaintiff for \$4,888, from which, after proper steps, the defendants appealed.

The issues: The petition was originally in three counts, and upon motion of the defendants the plaintiff was required to elect upon which count he would stand, and accordingly he elected to stand on the first count of the petition. In substance, that count alleges that the defendants were and are partners engaged in the real estate business; that in June, 1898, the plaintiff employed defendants to sell his farm, consisting of 985.82 acres of land, in Callaway county, Mo., and agreed to pay them for so doing a commission of 5 per cent. on the first \$1,000 realized from the sale, and 2½ per cent. on each remaining \$1,000 so realized; that the defendants agreed so to do for said commission; that thereafter, on the 14th of October, 1898, defendants sold the land to one L. K. Scroggins at the price of \$25 an acre, aggregating \$24,645.50, and that they collected said sum from purchaser therefor; that the defendants are entitled to retain, as their commission, the sum of \$522; that about October 25, 1898, the defendants paid to the plaintiff the sum of \$19,216.40, received by them from the sale of said land as aforesaid, "leaving a balance of \$4,907.10 due me out of the purchase price

of said land"; that said last-named sum was collected by the defendants for the use of the plaintiff as a part of the purchase price of said land about the 14th day of October, 1898, and retained by them, without his knowledge or consent; and that, though demanded, the defendants have failed and refused to pay the same to the plaintiff.

The answer is a general denial.

The case made is this: Prior to and on the 11th of September, 1897, the plaintiff was a man 82 years of age, a farmer, and owned about 1,249 acres of land, more or less, in Callaway county. The defendants were partners, and for many years had been engaged in the real estate business in Mexico, Mo. On said 11th of September, 1897, at plaintiff's solicitation, as the defendants say, or at defendants' request, as the plaintiff says, the plaintiff placed said land in the hands of the defendants for sale. A written authority or contract was then entered into between the parties, as follows:

"I hereby authorize and empower Lakenan & Barnes, of Mexico, Missouri, to sell for me the following real estate situated in Callaway County, Missouri: [Here follows a description of the land], and containing in all 1,249 acres, more or less, for the sum of \$23 per acre, or my home place, 950 acres, at the same price, or the 300 acre farm occupied by Jack Harrison, at the same price, and also [a certain 80-acre tract described] at \$20.00 per acre, separately or with other land.

"[July 15, 1898, price reduced to \$20.00 pr acre. L. & B. to get \$500.00 out of \$20.00 pr acre, and anything they can get over \$20.00 pr acre.]

"One-half or more, option of buyer, cash or possession, and balance in one year with 8% interest from date.

"I promise to pay to said agents 5% commission on the 1st \$1,000.00 of each sale; 2½% on balance, per cent. commission on the gross amount of said real estate, or any part thereof may bring when by or through them, or if sold by me, to pay party to whom they have shown this property. * * * In case said agents desire they may trade or sell said property for what they please just so they account to me for said price less said commission."

The portions of the writing omitted are not material to this controversy. In the fall of 1897 the defendants procured Senator Wall, of Stanton, Ill., to examine the place. The defendants contend that on that occasion the plaintiff told the defendant Barnes that he would take \$20 per acre for the land. The plaintiff says that in June, 1898, when Senator Wall examined the land a second time, the defendant Barnes told him he could not sell the farm at more than \$20 an acre, and he then authorized him to sell at that price. The defendants say that in July, 1898, Senator Wall indicated to them that he would come to Missouri and buy the land if he could get it for \$20 an acre, and that on the

11th of July, 1898, they wrote the following letter to the plaintiff: "We recently saw Mr. Wall and had quite a talk with him about your farm, and he talks like he might buy it at \$20.00 per acre. Would come and take a look at it if it was priced at that; that is, 960 acres, or about that. Now, while we consider this a low price, it is very seldom that we get a cash buyer for a farm of that size, and if you think best we will write him to come to see it with the understanding that he can buy it at \$20.00 per acre, if he wants it. Of course we did not go into particulars in regard to possession, etc. Let us hear from you." The defendants say that in response to the letter the plaintiff called upon them at their office in Mexico on the 15th of July, and authorized them to sell the land, and at the same time agreed with them to change the original contract so as to reduce the price of the entire tract to \$20 per acre, and to change the commission of the defendants, as aforesaid, so as to give defendants the sum of \$500, and allow \$20 per acre they might sell the land for, and that accordingly the defendant Barnes, in the presence and with the consent and by the authority of the plaintiff, and in the presence of J. J. Lakenan and Latney Barnes, wrote in the blank space that had been left in the original contract the words above reproduced in said contract and embraced in the brackets therein and italicised, and which are to the effect just stated. On the other hand, the plaintiff denies that he made any such modification or change in the original contract, or that he saw the same written into the contract, or knew that it had been so done, or consented thereto. In August, 1898, Senator Wall was killed, and the defendants sent the plaintiff a paper containing an account thereof, and under date of August 20, 1898, wrote the plaintiff as follows: "We send you herewith a paper in which you will notice of the death of Hon. H. W. Wall marked. Mr. Wall was the gentleman to whom we showed your farm; of course this will put an end to all negotiations with him. We are working on another man from whom we will have to take some Kansas land at \$25.00 and want you to price it at not less than that, and would like for you to price it at \$27.50 to \$30.00 in a general way. This don't keep you from selling it if you get a chance. Of course we know that in case we effect a sale or trade we account to you for the farm at \$20.00 per acre less a commission of \$500.00. We are in hopes we will have this man to look at the place this coming week." There is a conflict in the evidence as to whether or not the plaintiff received this letter; at any rate, he never answered it, and he says he never received it. Thereafter the defendants induced L. K. Scroggins, of Illinois, to examine the land. On the way back from the land to Mexico Scroggins offered to buy 985.82 acres at \$25 per acre, and the defendant Barnes, representing the defendants, accept-

ed the offer, the plaintiff having told Scroggins that he had put the land in the defendants' hands for sale, and would abide by whatever they did. Accordingly, on the 14th of October, 1898, the defendants entered into a contract of sale of the land to said Scroggins for \$25 per acre, aggregating \$24,645.50, of which \$15,000 was to be paid when the deed was delivered, and the balance to be paid on March 1, 1899, less 6 per cent. interest on the \$15,000 from the day of its payment until March 1, 1899. Said contract further recites that Scroggins executed and left with the defendants his check for \$15,000. On the same day the defendants wrote the plaintiff as follows: "We, this afternoon, sold your farm of 1,000 acres, more or less, to Mr. L. K. Scroggins of Illinois so as to net you the amount agreed upon between you and ourselves, namely \$20.00 per acre, less \$500.00." Then follow certain directions as to plaintiff procuring an abstract of title and having a survey made; and then the letter continues: "We have a good big check to be presented for payment when you make the deed, which will be as soon as the survey is made. . . . As soon as survey, abstract and deed are made you will get \$8,000.00 or \$10,000.00 cash, and the remainder of your purchase money March 1st, 1899, less 6% per annum interest from now until March 1st, as interest on the cash payment he now makes. Possession to be given March 1st next. We have in your name gone into a written contract with Scroggins on this sale. Please do not mention price to any one for that is no one's business but yourself and ourselves, and Scroggins don't want the price known." The plaintiff immediately procured the abstract of title and had the survey made, and on the 20th of October, 1898, he went to the defendants' office and executed his warranty deed conveying 985.82 acres of land to said Scroggins for a recited consideration of \$24,645.50. The revenue stamp placed upon the deed amounted to \$25, and the defendants say they called the plaintiff's attention thereto at the time. The defendants further say that the deed was read to the plaintiff by Latney Barnes, who had prepared the same; and when said Barnes read the clause reciting the consideration he stopped, and called the plaintiff's attention to the fact that the consideration mentioned in the deed was \$25 per acre, and offered to tell him exactly what they were making out of the transaction, but that the plaintiff replied, "It don't make any difference what you made," or "I have no desire to know what you sold it for." On the other hand, the plaintiff denies that any such conversation took place, and says that when he signed the deed he supposed the sale was at \$20. per acre, and did not know until nearly a year afterwards, when some neighbor spoke to him about it, and said he heard he had sold it for \$25 per acre, that the sale was for more than \$20 an acre, and that upon receipt of such information he sent a man to

Illinois and ascertained from Scroggins that the price paid was \$25 an acre. The plaintiff further says that when the consideration in the deed was read to him the defendant Lakenan told him that the consideration mentioned in the deed was not the correct consideration, and that after the deed was signed Lakenan remarked to him that they were making a good thing on the sale of the farm, and that he replied that he did not care what they made, thinking Lakenan referred to the commission the defendants would receive.

On the 25th of October, 1898, the defendants rendered to the plaintiff the following statement of the sale:

Thomas Harrison, Sr., In account with Lakenan & Barnes,		Dr.	Cr.
October 20th, 1898, by sale of \$85.83 acres of land @ 20.00 per A.....			\$19,716.40
To vendor's lien retained on land	\$9,320.50		
Discount on advance payment.....	201.50		
Revenue stamp for deed.....	20.00		
Commissions	500.00		
October 25th, 1898, check of L. & B. on Sav. Bank.....	\$9,674.40		
		19,716.40	19,716.40

Thereafter Scroggins gave his check to the plaintiff for \$9,320. The plaintiff took it to the defendants, and delivered it to them, and they gave the plaintiff their check therefor. Thus the matter stood until December, 1899, when this suit was brought to recover the said balance.

On the trial of the case the plaintiff called Scroggins as a witness, and he testified that after he had agreed with the defendant Barnes to purchase the land, and while on their way from the land to Mexico, Barnes said to him, "It won't make any difference to you to keep this thing still; maybe it will be to your advantage;" and he told Barnes it made no difference to him. The plaintiff tried the case upon the theory that the defendants were authorized to sell the land at not less than \$20 per acre, and to have a commission of 5 per cent. of the first \$1,000 and 2½ per cent. on the remainder, and that the original contract was never modified except by reducing the price of the whole tract to \$20 per acre, and that the memorandum of July 15, 1898, in the bracketed and italicized clause of the contract, was never made by him or agreed to by him, and was placed in the contract without his knowledge or consent. The defendants tried the case upon the theory that said modification of July 15, 1898, was agreed to by the plaintiff, and was inserted in the contract with his knowledge and consent, in corroboration of which the defendants referred to their letter of August 20, 1898, in which they said to the plaintiff that they were to account to him at \$20 per acre, less a commission of \$500, and further referred to the fact stated in the account sales that they charged the plaintiff with only \$20 for revenue stamps, whereas they had placed \$25 in revenue stamps on the deed, and further referred to the conversation testified to by them as to the consideration named in the deed and

when the deed was executed, and accordingly claimed that the contract, as so modified, required them to account to the plaintiff for \$20 per acre, less \$500 commission, and claimed that whatever they received in excess of that amount belonged to them, and consequently they were under no obligation to notify or inform the plaintiff that the sale was for \$25 per acre. Each party insists that the other was guilty of making many conflicting, contradictory, and false statements in their respective testimony, and the case was argued in this court as if such matters were open to review here. It is unnecessary to reproduce in more detail the testimony adduced upon the trial. What is hereinbefore said is sufficient to show the theories upon which the parties tried the case in the court below, and to indicate that there was substantial testimony to support the theory of each party. On behalf of the plaintiff the court gave 11 instructions, and on behalf of the defendants the court gave also 11 instructions. The defendants also asked 10 other instructions, which the court refused. The instructions given and refused took a wide range, and, so far as is necessary, those specifically complained of will be hereafter referred to. At the close of the plaintiff's case, and again at the close of the whole case, the defendants demurred to the evidence. The court overruled the demurrers, and the defendants excepted.

1. The first error assigned is that the petition stated no cause of action, in this: that it does not allege that the defendants were granted authority to collect the purchase money. This is an action for money had and received, and not an action upon a special contract. The gravamen of the petition is that the defendants received \$4,907.10 for the use of the plaintiff, and retained the same, and refused to pay it to the plaintiff, or to account to him therefor. "The law is that when a person who has received money for the use of another neglects or refuses to pay it over to his cestui que trust the person entitled thereto may maintain an action against him for money had and received. * * * It is of no importance how the money came into his hands if the plaintiff is legally entitled thereto. The beneficiaries are legally entitled to recover it of the receiver by an action for money had and received." *Clark v. Bank*, 57 Mo. App., loc. cit. 285. One who receives money for the use of another, even without any prior authority to so receive it, is liable to the person to whose use it was received; and it is no defense that the receiver had no previous authority.

2. The second contention of the defendants is that the petition alleges a written contract, whereas the proof showed a verbal contract. If there was any merit in this contention, the defendants have not put themselves in a position to insist upon it in this court. They filed no affidavit such as is required under

the statute (Rev. St. 1899, § 655), and the point is not, therefore, open for review in this court. *Fisher Real Estate Co. v. Staed Realty Co.*, 159 Mo. 562, 62 S. W. 443.

3. The defendants' next contention is that the trial court erred in overruling the demurrers to the evidence. There was substantial evidence adduced by the plaintiff tending to establish the allegations of the petition and to support the plaintiff's theory of the case. This therefore is not a case of total failure of proof, such as is defined in *Chitty v. Railroad*, 148 Mo. 64, 49 S. W. 868. There was no error in the ruling of the court in this regard.

4. The fourth error assigned is the action of the trial court in permitting the plaintiff to cross-examine the defendants as to the value of the land and as to the meaning of the letters written by the defendants to the plaintiff. The trial court admitted the evidence as to the value of the land as bearing upon the wrongful conduct of the defendant in representing to the plaintiff that they could not sell the land for more than \$20 an acre, and thereby inducing him to agree to a modification to that extent of the contract. No such issue was properly in the case, but at the request of the defendants the court instructed the jury that, if they believed that the plaintiff consented to a modification of the contract as claimed by the defendants, their verdict should be for the defendants. Whatever harm was done to the defendants by the admission of the evidence complained of was neutralized by the instruction asked by the defendants. As to the cross-examination of the defendants concerning the letters written by them to the plaintiff, it may also be properly said that there was no such issue in the case, but it is inconceivable how the defendants were prejudiced thereby. On the contrary, they were thus afforded an opportunity of explaining the meaning of their letters. The plaintiff would have had a right to object to the defendants adding anything to their letters explanatory thereof, but how the defendants could be injuriously affected by the plaintiff permitting them or requiring them to explain them does not manifest itself.

5. The next error assigned is that no demand, before the action was instituted, was shown. Section 1575, Rev. St. 1899, provides that: "It shall not hereafter be available to a party as an objection that no demand for the subject matter of the suit was made prior to its institution, unless it is expressly set up by way of defense in the answer or replication, and is also accompanied with a tender of the amount that is due; in which case, if the plaintiff will further prosecute his suit, and shall not recover a greater sum than is tendered, he shall pay all costs. This provision shall be applicable as well to actions for property as for money. When property is tendered, the damages for its

detention, if any, shall also be tendered." The defendants in this case set up no such special defense, and make no tender, but, on the contrary, filed a general denial.

6. Plaintiff's first instruction is claimed to be erroneous on the ground that it directed the jury, in determining the weight and credibility to be given to the testimony of any witness, they should take in consideration the character of the witness, and because there was no evidence adduced in the case affecting the character or reputation of any witness who testified in the case. There is a vast difference between the character of a witness and the reputation of a witness. Webster's International Dictionary defines "character" as follows: "3. The peculiar quality or sum of qualities by which a person or thing is distinguished from others; the stamp impressed by nature, education and habit; that which a person or thing really is; nature; disposition. 4. Strength of mind; resolution; independence; individuality; as, he has a great deal of character. 5. Moral quality; the principles and motives that control the life; as, a man of character; his character saves him from suspicion. 6. Quality, position, rank or capacity; quality of conduct with respect to a certain office or duty; as, in the miserable character of a slave; in his character as a magistrate; her character as a daughter." The same author defines "reputation" as follows: "1. The estimation in which one is held; character in public opinion; the character attributed to a person, thing or action; repute. (Law) The character imputed to a person in the community in which he lives. It is admissible evidence when he puts his character in issue, or when such reputation is otherwise part of the issue of a case." "Synonyms given are "credit; repute; regard; estimation; esteem; honor; fame." Speaking of character and reputation, the same author, quoting from Abbot, says: "It would be well if character and reputation were used distinctly. In truth, character is what a person is; reputation is what he is supposed to be. Character is in himself; reputation is in the minds of others. Character is injured by temptation and by wrongdoing; reputation by slander and libels. Character endures throughout defamation in every form, but perishes when there is a voluntary transgression; reputation may last through numerous transgressions, but be destroyed by a single, and even an unfounded, accusation or aspersion." Instructions embodying the point here involved were given in the following cases: *State v. Gee*, 85 Mo. 647; *State v. Brooks*, 92 Mo., loc. cit. 557, 5 S. W. 257, 330; *State v. Herrod*, 102 Mo., loc. cit. 598, 15 S. W. 373; *State v. Hillsabeck*, 132 Mo., loc. cit. 358, 34 S. W. 38; and *State v. Hudspeth*, 159 Mo., loc. cit. 200, 60 S. W. 136. In none of these cases, however, was there any point made as to the jury taking into consideration the character of the witnesses, nor was the question

directly discussed, but the correctness of the instruction in this regard was tacitly conceded by counsel, and passed unchallenged by the court. In view of the contentions of each party hereto with respect to the testimony of the other party, it was proper for the court to give the instruction complained of. The jury was a jury of the vicinage, and had the parties before them, and could see the witnesses, and also heard, from the accounts of the witnesses concerning themselves, of what manner of men the witnesses were, could observe their individuality, intellectuality, and conduct, could read the character of the witnesses from their appearance, bearing, and manner. There was no error in the instruction.

7. The plaintiff's second instruction is charged to be erroneous. This instruction told the jury that the plaintiff was not bound by the insertion of July 15, 1898, unless he ordered, directed, or consented thereto; and that, if such modification of the original contract was made by the defendants without the plaintiff's consent, it rendered the whole contract void. In *Kelly v. Thuey*, 148 Mo., loc. cit. 434, 45 S. W. 302, this court said: "It is the firmly rooted doctrine of this court, and has been ever since the ruling made in *Haskell v. Champlon*, 30 Mo. 136, that it is not permitted to a payee or obligee to make a change in a paper which he holds, and then assert, when caught, that he meant no harm by it, and that it is immaterial. Hitherto we have tolerated no alteration in a contract; and we have always regarded, and still regard, any change on the face of the paper as a nullifying alteration. By this holding, we intend to make the payees or obligees of money-bearing or title-bearing obligations honest, whether that inclination accords in their natural inclinations or not." There is no room for controversy that the insertion of July 15, 1898, in the original contract, was a material alteration of the contract. That authorized the sale of the land at a price different from that fixed in the original contract, and materially increased the amount of commission and profits the defendants might make out of the sale of the land. The positions and theories of the parties in this case illumine the radical differences between the original contract and the altered one. Those differences were the very matters in issue before the jury. The instruction complained of properly told the jury that, unless the plaintiff agreed or consented to the alteration, that act of alteration nullified the whole contract. The converse of that instruction is contained in the defendants' third, fourth, sixth, eighth, ninth, and eleventh instructions, all of which were given for the defendants by the court.

8. The plaintiff's third instruction is assigned as error. That instruction proceeds on the same lines as the second instruction, above discussed, and is especially complained of because it tells the jury that the plain-

tiff is not bound by the alteration of July 15, 1898, unless he was present in the office of the defendants at the time the alteration was made; and it is argued very properly that the real question is whether he consented to the alteration, and not whether he did so in the office of the defendants or elsewhere. Inasmuch as the defendants' whole contention is that the agreement to alter was entered into at the defendants' office, and there is no evidence tending to prove that such alteration was proposed, made, or agreed to at any other place, it is difficult to see how the jury could have been misled by limiting the agreement or consent of the plaintiff to the alteration to matters that occurred in the defendants' office. The criticism of the instruction does not commend itself to the impartial mind, nor is it tenable in the circumstances of this case.

9. Plaintiff's fifth instruction is complained of. The gist of that instruction is that, though the plaintiff gave the defendants authority to sell the land at \$20 an acre, still such authority did not excuse the defendants from selling for the best price obtainable and accounting to the plaintiff for the full purchase price, less such compensation as may have been agreed upon. The criticism of this instruction is that it makes the agent exceed the instructions of his principal, and makes him liable if he does not do so. The criticism is not tenable. The price fixed for the sale of the land was the minimum price at which the plaintiff was willing to sell. The obligation of the defendants under their contract necessarily was that they would sell at the best price obtainable; and, whatever may have been the true arrangement, whether original or amended, between the parties, the plaintiff was entitled to know the truth concerning the sale, and, if the plaintiff's version is true—as the jury has found that it was—the plaintiff was entitled to receive the full amount for which the land sold, less the commission agreed to be paid to the defendants.

10. The plaintiff's seventh instruction is assigned as error. That instruction told the jury that, even if they found that the plaintiff signed the original contract, yet if they believed that he never read it, and that in reading it to him the defendants fraudulently deceived the plaintiff as to its true contents by misstating the price as to which the contract recited that the land should be sold, then the contract is not binding on the plaintiff. The objection urged to the instruction is that this is not an action for the cancellation of a contract on the ground that it was procured by fraud, and that, even if it had been procured by fraud, a court of law has no power to set it aside. It is true this is not an action to cancel the contract, nor is it an action on the contract. The contract was only a portion of the evidence in the case, and it was proper for the court to tell the jury whether or not it was binding up-

on the plaintiff. The defendants rely upon the contract, as they claim it had been amended, as the corner stone of their defense. The plaintiff's position was that the contract was not binding upon him, because he had been fraudulently induced to enter into it by the act of the defendants in not correctly reading it to him, and also that the original contract had been nullified by the unauthorized alteration thereof.

11. The plaintiff's eighth instruction is claimed to be erroneous on the ground that there is no evidence to support it; that is, that there is no testimony in the case fixing the defendants' commission at 5 per cent. on the first \$1,000 and $2\frac{1}{2}$ per cent. on the remainder of the purchase price. This must be a misapprehension of counsel, for the original contract specified that the commission of the defendants should be the sums named. This was some evidence bearing upon that question.

12. The plaintiff's eleventh instruction is assigned as error. That instruction tells the jury that it is admitted that the defendants received from Scroggins \$24,320, and that the plaintiff admits that the defendants are entitled to retain out of that sum a commission of 5 per cent. on the first \$1,000 and $2\frac{1}{2}$ per cent. on the remainder; and that, if the jury should find for the plaintiff, they should deduct the commission from the amount received, and should also deduct \$19,019.40, which the plaintiff admitted he had received from the defendants on account of the sale, and the remainder would be the amount due the plaintiff, unless the jury believed that the plaintiff had agreed to give the defendants all they could sell the place for in excess of \$20 per acre. The criticism of this instruction is that there was no admission, either in the pleadings or evidence, that defendants had received \$24,320. The petition charges that the defendants had received \$24,645.50—that is, \$25 an acre—for the land, and the evidence shows that the land was sold for \$25 an acre, and that defendants received \$15,000 on the 14th of October, 1898, and that subsequently the purchaser turned over to the plaintiff a check or draft for \$9,320, and that the plaintiff turned the same over to the defendants, and that the defendants gave the plaintiff their check for said amount. \$15,000 plus \$9,320 aggregates \$24,320, which is the sum stated in the instruction complained of. The discrepancy between that sum and \$24,645.50, the true sum due, is nowhere explained in the evidence; but the defendants were not prejudiced thereby. The fact that Scroggins turned over to the plaintiff the check for \$9,320, and that the plaintiff turned the same over to the defendants, and they gave him their check therefor, does not, as the defendants contend, render the instruction erroneous because of the statement therein contained that the defendants received from Scroggins \$24,320. The in-

struction fairly presented the matter to the jury.

13. In his final argument to the jury plaintiff's counsel commented upon the fact that the original contract, which was before the jury, appeared to be in five different hand-writings, and called the jury's attention specifically to the several parts that appeared to have been written by different persons. Defendants' counsel objected to the remarks. The court overruled the objection, and the defendants excepted, and now assign the same as error. It is urged that, as the attention of the witnesses was not called specifically to the alleged difference in hand-writings, and as there was no evidence that the contract had been changed in any respect except as to the alteration of July 15, 1898, the remarks of counsel were not a legitimate argument. The contract was itself in evidence, and was therefore a proper subject for comment or debate with respect to any matter that appeared on the face thereof. Even if the attention of the witnesses had been called to the difference in hand-writings contained therein, and even if the witnesses had said that it was written by the same person, or if expert witnesses had so testified, it would still have been the province and duty of the jury to decide the fact as to whether the different portions of the contract had been written by different persons or not. The contentions and theories of the respective parties were distinctly and clearly defined before the jury, and the argument of counsel was a legitimate argument upon the whole facts before the jury.

14. The refusal of the court to give the defendants' first instruction is assigned as error. That instruction told the jury that if they believed that the plaintiff had authorized the defendants to sell his farm for \$23 per acre, and to give defendants 5 per cent. on the first \$1,000 and 2½ per cent. on the remaining purchase price, and all over \$23 per acre the defendants might sell the plaintiff's farm for, and afterwards authorized the defendants to sell the farm for \$20 an acre, then the plaintiff could not recover. There was no evidence to support such a theory, nor was the case tried on such a theory by either of the parties hereto, and therefore the instruction was properly refused.

15. The refusal of the court to give defendants' instructions Nos. 2, 5, 6, 7, 8, 9, and 10 is assigned as error. It is unnecessary to reproduce, even in substance, the instructions referred to, or to more specifically refer to them, to determine the action of the court in reference thereto, than to say that they either stated propositions which were fully covered by the 11 instructions given for the defendants, or else they were predicated upon hypotheses which had no foundation in either the facts or the theories upon which the defendants tried their case.

16. Lastly, it is contended by the defendants that the preponderance of the evi-

dence in their favor is so strong as to show that the verdict is the result of passion, prejudice, and partiality of the jury. It is not the practice of this court to weigh the evidence in law cases. If there is substantial evidence to support the verdict, this court does not interfere therewith. *James v. Mutual Life Ins. Co.*, 148 Mo. 1, 49 S. W. 978. Where a verdict shows on its face that it is the result of passion, prejudice, or misconduct of the jury, this court has set aside verdicts; but such cases are rare. The mere fact that the preponderance of the evidence may, in the opinion of this court, be against the verdict, is no foundation for the charge that the verdict is the result of passion, prejudice, or misconduct. This court can only read the evidence that is preserved in the record or abstract of the record, and what might appear from that to be a preponderance of the evidence might be a totally erroneous impression, for the preponderance of the evidence does not mean the greater number of witnesses. Many other considerations enter into the calculation as to the preponderance of evidence. The character of the witnesses, their manner and deportment on the stand, their appearance, their character, which nature has stamped upon their countenances, are all matters which enter into the calculation as to the preponderance of the evidence, and are matters which the jury and the trial court have before them and which this court does not see. The testimony in this case is of that character usually found in cases and controversies of the nature of this case, and the manifest bitterness of the parties exhibits itself in every line of the record. This case is a striking illustration of the wisdom of the rule or practice of this court that leaves the determination of controverted questions of fact to the jury.

With the findings of fact in this case in favor of the plaintiff, and failing to find any prejudicial error in the law of the case as applied by the trial court, it follows that the judgment herein must be affirmed. It is so ordered. All concur.

UKMAN v. DAILY RECORD CO.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. LIBEL—TRIAL—QUESTION FOR JURY—NONSUIT.

Under Const. art. 2, § 14, leaving the question of libel to the jury, the court may direct a nonsuit, though it cannot coerce a verdict for plaintiff.

2. SAME — IMPUTATION OF DISHONESTY IN TRADE.

A false publication, impairing the credit of a merchant or trader by imputing insolvency, dishonesty, or trickery touching his trade or occupation, is libelous per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 87.]

3. SAME—PLEADING—INNUENDO.

Where the meaning of an alleged libel does not plainly appear in the words used, the ex-

trinsic facts should be alleged by way of inducement, and the libelous charge should be followed by an innuendo applying the words to the matter pleaded.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 187-197, 205-208.]

4. SAME—INNUENDO—ENLARGEMENT.

Where plaintiff in a libel suit alleged that defendant in certain mercantile reports published that plaintiff had sold his stock in trade for \$1, "meaning to charge that plaintiff had transferred his business for a nominal consideration," it was an enlargement of the meaning as set forth in the innuendo to claim that the words signified dishonesty in a business way.

5. SAME—DEFENSES—TRUTH.

If the publication that defendant had sold his stock in trade for a consideration of \$1 should be construed as imputing insolvency, it was not libelous, if defendant was insolvent at the time of the transfer, under Rev. St. 1890, § 636, making the truth a defense in actions for libel.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 152.]

Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action by Henry Ukman against the Daily Record Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Bass & Brock, for appellant. W. B. Homer, for respondent.

LAMM, J. Suit for damages for an alleged libelous publication. At the close of plaintiff's case the court gave an instruction in the nature of a demurrer to the evidence, whereupon plaintiff took a nonsuit with leave. After an unlucky motion to set the nonsuit aside, plaintiff, on proper steps, perfected an appeal and brought his case here.

The paper issues may be formulated thus:

The petition alleges that plaintiff was engaged in selling cigars in St. Louis under the name of A. G. Ukman Cigar Company, and in the conduct of his business had established and maintained an excellent credit with the business world at home and abroad; that defendant is a domestic corporation doing business in the city of St. Louis, printing, publishing, and circulating among business people generally, including the business men having dealings with plaintiff, a daily paper known as the St. Louis Daily Record, and in an issue of that paper of date the 3d of February, 1902, "did utter, publish, and circulate, of and concerning the plaintiff, the following false, malicious, and libelous words: 'Bills of Sale.—A. G. Ukman, 612 Chestnut, to Miss A. Handschlegel, cigar outfit, \$1.00.' Meaning by said words to charge the plaintiff with having transferred his said business and stock of cigars for the nominal consideration of \$1 to the person aforesaid." It was further alleged that defendant distributed said paper containing said libel among the business people aforesaid, and they believed the libel to be true, and thereby plaintiff had been injured in his business, credit, and reputation, and people from whom he had bought cigars stopped them in

transit, and persons from whom he had borrowed money or who had given him credit refused to lend him money or give him credit, and persons from whom he wished to buy goods on credit refused to sell him the same, so that, being unable, by reason of defendant's said libel, to pay his creditors the debts he owed, he was compelled on the 21st day of March, 1902, to file a petition in bankruptcy, and was damaged in the premises in the sum of \$10,000.

The material averments of the amended answer, borrowed from the summary formulated by appellant, are as follows: "First. It admitted the defendant to be a corporation, and its chief place of business in St. Louis, state of Missouri, and denied each and every other allegation in plaintiff's petition. Second. It alleged that the defendant published a daily newspaper devoted to the publication of the records of the courts of the city of St. Louis; that said paper also sets forth transfers recorded in the recorder's office in the city of St. Louis; that it is the custom of the recorder of deeds to furnish the defendant memoranda of transfers recorded in said office; that the recorder of deeds will not permit the defendant to take such information from the records, but required the defendant to receive the same from an agent of the recorder of deeds. Said answer further stated: That on the 1st day of February, 1902, the said agent furnished to the defendant a memorandum, under the heading 'Bills of Sale,' in the following language: 'A. G. Ukman, 612 Chestnut street, to Miss A. Handschlegel, cigar outfit, \$1.00.' That on the 3d day of February, 1902, the defendant published the same, but did not mean to charge the plaintiff with having transferred his business and stock of cigars for consideration of one dollar, and did not mean to charge that the plaintiff had transferred his business and stock of cigars for any consideration. That as soon as the defendant learned that the consideration stated in the bill of sale was in fact \$700, instead of \$1, it at once published a correction of said error, under the same heading, with equal prominence, for two successive days. Third. Said answer further alleged that the plaintiff did, by bill of sale dated the 31st day of January, 1902, convey to Miss A. Handschlegel a certain stock of cigars and cigar fixtures, such as counters, showcases, wall cases, etc., located at 612 Chestnut street, city of St. Louis; that said publication was not libelous and did not injure the plaintiff; that the said cigar business of the plaintiff was conducted by him merely for the purpose of enabling him to sell some old fixtures and at a loss; and that at the time of the alleged publication the plaintiff was insolvent and in a failing condition, and that said publication could not and did not injure the plaintiff. Fourth. The answer further stated, by way of mitigation of damages, that the business of the plaintiff was under-

taken and conducted by him merely for the purpose of enabling the plaintiff to dispose of some old fixtures; business was conducted at a loss; that the plaintiff was in a failing and insolvent condition at the time of the publication, and was not injured; that as soon as the defendant learned that the bill of sale was in fact executed, not for a consideration of \$1, but for \$700, it at once published a correction of said error."

The reply was in usual form.

The facts are as follows: Ukman, having gathered experience by connection with tobacco concerns for several years, in 1900 commenced business in a venture of his own under the name and style of the A. G. Ukman Cigar Company with a present capital of \$600, and thereafter did a wholesale cigar business, first at 805 North Fourth street, and then at 409-411 Morgan street. In November, 1901, he started a retail cigar store at 612 Chestnut, and seems to have moved his wholesale business there and to have conducted it in the rear of that stand. Prior to starting his retail store, and preparatory thereto, and thereafter, up to and inclusive of December, 1901, he bought goods on credit in the East to the rise of \$4,000. It seems the retail store was conducted at a loss during November and December, 1901, and January, 1902, and his evidence was to the effect that the wholesale department (during said period, at least) showed a small monthly increment of profit, say from \$75 to \$100. The amount of loss in the retail department is not shown by the record, nor is it shown how the accounts of the two departments were kept in order to arrive at the aforesaid gain; that is to say, the rents, taxes, licenses, living and other expenses, and outgoes are not pointed out or apportioned between the wholesale and retail departments, and are wholly left to conjecture. It is certain from Ukman's testimony that his affairs on February 1, 1902, were radically embarrassed. At what precise time he had approached the brink of insolvency may only be guessed at, but on that day he had fallen over the brink and was entirely insolvent; for he owed over \$4,000 mercantile debts in the East, and possibly some confidential debts at home, and the evidence indicates that he owed some small business debts there also. He had in assets, as near as we can ascertain, \$1,000 of goods and fixtures in his wholesale department, plus the goods and fixtures in his retail department. On that date he sold his retail store to Miss Handschiegel for \$700—half cash in pocket, and half on time, the deferred payments being evidenced by paper, subsequently discounted by him and realized on; said transfer being evidenced by a sale bill stating the true consideration and spread of record. He then moved his wholesale department to the International Bank Building, and conducted a wholesale business at that stand until March 21, 1902, when he filed two petitions

—one in the federal court, having for its purpose to be adjudged a bankrupt, his assets administered upon, and to be discharged of his debts, and the other this suit against respondent for \$10,000 damages for libel.

It is admitted in the pleadings, and established by the proof, that respondent on February 3, 1902, printed and published the matter complained of, and that it was correct in all details, except that the consideration was printed as \$1, when it should have been \$700; and it was shown that three weeks thereafter appellant complained to respondent of the mistake in the publication, and it was at once corrected and published in correct form for two successive days. It was furthermore proved that the Daily Record is a newspaper devoted to the gleanings and publication of facts from the current records, possibly of the courts, but certainly of the records kept by the recorder of deeds of the city of St. Louis, as news, and, moreover, that it had a list of subscribers of from 1,200 to 1,300 in and about St. Louis, who were lawyers and real estate and business men. Between February 1 and March 21, 1902, appellant sold \$700 worth of his remaining goods, and was left with a stock valued at \$300 and \$200 or \$300 in uncollected accounts when he went into bankruptcy, claiming and was allowed the stock on hand as exempt, and turning over said account to the trustee. At the date of bankruptcy none of his Eastern indebtedness was due, and it all remained unpaid. He had, however, paid off possibly his confidential and personal debts and all his local business debts, except a few small bills which were overdue and unpaid to the amount of \$200 or \$300. There was no evidence that any cigars were stopped in transit as alleged in the petition. There was evidence that he was refused credit in the East, but there was no evidence that the Daily Record was circulated there, or that any of his Eastern creditors saw the publication in question, or that his line of credit there was weakened thereby. On this head it may be said, in passing, that suits were brought by appellant against Dun's and Bradstreet's Mercantile Agencies, presumably based on publications made by them affecting his standing in commercial circles at large.

It was shown that appellant bought very little, if any, in St. Louis, and it was not shown that his buying credit in St. Louis was affected one way or the other. That he had been in the habit of borrowing small sums from a limited circle of local acquaintances to tide over matters and pay overdue bills is shown, and also that this custom increased somewhat immediately before the publication in question; and it was testified by appellant that he had applied to some of his local friends after the publication and had been refused credit. Appellant testified he had a line of credit with one Goldman, with one Kaminsky, with one Friedman, with

one Graber, with one Alt, and with one Garfingle, from whom severally he had borrowed small sums on short time prior to the publication; that a short time after the publication, say two weeks, he tried to borrow from Graber, Alt, Grafingle, and Friedman for the purpose of paying debts, but whether he succeeded or not he does not say. Called on to explain what had become of his assets, he testified that he was losing money because he could not take the road to sell goods, and that he had fallen behind as much as \$1,500 on account of sickness in his family; but when these expenses on account of sickness occurred the record does not enlighten us.

Appellant called Friedman, Alt, Garfingle, and Hiram B. Morse, publisher of the St. Louis Daily Record and president of the respondent company, to the stand. By Friedman he proved that his credit was very good prior to the 3d day of February, 1902; that witness had loaned him at divers times sundry small amounts, which had always been promptly repaid; that he had not seen, but had heard of, the publication in question, and, when asked what he understood by the words of the alleged libel, said that he understood by those words "that plaintiff naturally wanted to defraud everybody, and he would naturally put it that way to a business man." On cross-examination witness said he had sold appellant goods on credit and that he "paid nicely right along." Being pressed, however, he admitted he had never sold appellant any goods "directly," but said he had "indirectly." Further pressed, he explained "indirectly" to mean that he had sold goods to appellant's brother. He further stated that he had never heard of "a dollar" consideration, when it did not mean that it was the real consideration in a business transaction; that at the times he had made loans to appellant he had made no inquiries into his financial condition, had taken no security for the loans; and that appellant had told him at these times that he had to pay bills, and was short of money, and was not able to meet his bills, and wanted the money until he made collections. By Alt it was shown that he was appellant's physician; that his credit was good for small sums; that he had advanced him such sums without note or security during the year previous, and had been repaid; that about two weeks after the publication appellant came to witness and inquired if he had any money, and witness replied that he did not have any. On being asked his reason for this reply, his answer was that he had lost confidence in appellant, because he had heard that he had sold out for \$1. On cross-examination witness said that the last loan he had made before February 3, 1902, was \$100; that it was a "strict confidential loan accommodation"; that he was a friend of Ukman, but took no interest in him; made his loans for accommodation, and not "as business at all." By Garfingle it was shown that appellant's credit was good

with witness; that he had loaned him money every three or six months in modest amounts, and had taken his unsecured notes, which had always been paid on time; that two weeks after the publication appellant tried to borrow \$500 of witness, which he refused, for the reason that he had seen in the St. Louis Daily Record he had sold out for \$1, and witness thought that appellant wanted to cheat his creditors and had failed. When he saw appellant after the publication, he told him about it, and appellant explained to witness that he had sold out for \$700, but witness had it in his mind that he did not want to trust him any more; that, the idea conveyed to witness' mind by what he read in the Daily Record was the appellant had failed, and had turned over his property, so that his creditors could not touch it. By Hiram B. Morse, among other things, it was proved that he was the business manager and president of respondent company; that he was familiar with the way considerations are stated in deeds, and had noticed statements where the consideration was \$1 on many occasions; that when the consideration is stated at \$1 in a bill of sale, witness would understand that the parties do not care to tell what the exact amount was, and their reasons for not doing so are as various as the individuals. Witness understood that the \$1 mentioned does not represent the exact value of the goods transferred; had never known an instrument where \$1 was used as the consideration where the value of the goods conveyed was represented as that sum; would not infer that a man was giving away his property simply because the consideration was \$1; would not understand from such publication that the party selling out was disposing of his property to defraud his creditors; would never understand it that way. This witness further testified that he did not see the publication on the morning it was published; that his attention was called to it some 20 days later through one Wurtz, connected with respondent's office, whose attention had been called to it by Ukman; and that thereupon the item was republished correctly for two successive days, stating the consideration at \$700.

As respondent introduced no evidence on its answer, the affirmative allegations appearing therein relating to the custom of the recorder of deeds in furnishing respondent memoranda of transfers recorded in said office, and in not permitting respondent to search the records for itself, and in requiring respondent to take its information from an agent of the recorder, and that an agent furnished respondent a memorandum under the head of "Bills of Sale" of the exact character published, were not proved. It will be noted, also, that appellant does not ask for punitive damages; the amount of no smart money demanded being stated separately, as required under section 594, Rev. St. 1899.

Did the court err in applying the law to the

foregoing facts, under the issues in the pleadings? We think not, for the following reasons: Libel cases are *sui generis*, in that the gist of Fox's libel act, imbedded in our Constitution (section 14, art. 2, Bill of Rights), leaves to the jury the issue of libel or no libel; and from this certain peculiar results logically flow and are recognized by the courts, to wit, that a defendant in a libel suit has two strings to his bow, the one the jury and the other the court, whereas the plaintiff has but one, and, if he succeed, must win a verdict from the jury. Stated in a different way, if the defendant can get either the court or the jury to be in his favor, he succeeds, while the prosecutor or plaintiff cannot succeed unless he gets both the court and the jury to decide for him. From this condition of things it further follows that the court may direct a nonsuit, but cannot coerce a verdict for plaintiff. *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457; *Duncan v. Williams*, 107 Mo. App. 539, 81 S. W. 1175; *Banks v. Henty*, L. R. 7 Appeals Cases (House of Lords) 741. In the case at bar the court forced a nonsuit, and the question here is the correctness of that action of the court. In considering the matter certain settled propositions of law may be assumed as postulates, thus:

First. A libel differs from a slander, in that a publication may be libelous when, if spoken orally, it would not be slanderous. *Nelson v. Musgrave*, 10 Mo. 648; *Price v. Whitley*, 50 Mo. 439; *Hermann v. Bradstreet Co.*, 19 Mo. App. 227; *Manget v. O'Neill*, 51 Mo. App. 35. This distinction is said by the books to be based upon the grounds that a vocal utterance does not import the same quality of deliberation, and is more prone to be the ebullition of fleeting passion, mere effervescence or lack of mental equipoise, and to be accepted as indicative of feeling, rather than of conviction, and, therefore, not so much gravity is allowed to it as to words deliberately written down and published; the latter justifying the inference that they are the expression of settled conviction and affect the public mind correspondingly. So, too, an oral charge merely falls upon the ear, and the agency of the wrongdoer in inflicting injury comes to an end when his utterance has died on the ear, but not so with the written or printed charge, which may pass from hand to hand indefinitely, and may renew its youth, so to speak, as a defamation as long as the libel itself remains in existence, and hatch a new crop of slanders, to be blown hither and yon like thistledown at every sight of the libel, so that a printed slander, when published, takes a wider and more mischievous range than mere oral defamation, and is more reprehensible in the eye of the law. *Cooley on Torts* (2d Ed.) 240; *Odgers on Lib. & Sl.* (2d Ed.) 3; *Dexter et ux. v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,867. Thus, for instance, to publish of a man that he is a "skunk" (*Mas-*

suere v. Dickens, 70 Wis. 83, 35 N. W. 349), a "swine" (*Solverson v. Peterson*, 64 Wis. 193, 25 N. W. 14, 54 Am. Rep. 607), a "drunkard," a "cuckold," a "tory" (*Giles v. State*, 6 Ga. 276), "I look on him as a rascal" (*Williams v. Karnes*, 4 Humph. 9), "an imp of the devil and a cowardly snail" (*Price v. Whitley*, 50 Mo. 439), or that he has been "in collusion with ruffians" (*Snyder v. Fulton*, 34 Md. 129, 6 Am. Rep. 314), are each and all libelous.

Second. Not only do words which are slanderous *per se* become libelous *per se* when printed and published, but, because of the distinction between libel and slander heretofore noted, many words which would not be slanderous *per se* become libelous *per se* when printed and published. *Cooley on Torts* (2d Ed.) p. 240.

Third. Being a commercial people, and credit being of the lifeblood of commerce, our law has ever had a tender regard for merchants or traders and therefore a false publication impairing the credit of a merchant or trader, by importing insolvency, dishonesty, or trickery touching their trade or occupation, is held libelous *per se*, the malice being supplied by implication of law; and though special damages may be, yet they need not be, alleged and proved. *Newell on Sl. & Lib.* (2d Ed.) p. 74; *Mitchell v. Bradstreet*, 116 Mo., loc. cit. 239, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592; *Minter v. Bradstreet*, 174 Mo., loc. cit. 488, 73 S. W. 668. Thus, for instance, to falsely publish of a brickmaker that "he is in the hands of the sheriff" (*Hermann v. Bradstreet Co.*, 19 Mo. App. 227); of a trader that "we know Sullivan very well and firmly believe that he has misinstructed his St. Louis bank here in order to make interest on your money. We sincerely hope, for your own good and ours, too, that you will never have any more to do with Sullivan when the business has to come through our hands, as we do not like his business methods, and we are afraid to deal with him" (*Sullivan v. Com. Co.*, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859); to falsely publish of a commercial firm that it has "assigned" (*Mitchell v. Bradstreet Co.*, 116 Mo. 236, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592), to falsely publish of merchants that "the opinion is expressed that a local bank has been secured," and that "their present condition is not regarded as particularly flattering and seems to suggest cash dealings" (*Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 668)—are each and all libelous *per se*.

Fourth. Where the alleged libel is claimed to bear a hidden or latent meaning, which can only appear from extrinsic circumstances, the complaint should set forth in prefatory allegations by way of inducement such extrinsic facts, and the libelous charge should be followed by an innuendo applying the words to the matter pleaded by way of inducement, and such innuendo should not be a forced but a reasonable construction and ap-

plication of the words used. *Legg v. Dunleavy*, 80 Mo. 558, 50 Am. Rep. 512; *Townsh. on S. & L.* (4th Ed.) § 335 et seq. For example, in *Bank v. Henty*, *supra*, decided by the House of Lords, H. & Sons, brewers at Chichester, had a squabble with the manager of a certain bank, and as a result thereof issued a printed circular to their tenants and customers, who knew nothing of the squabble, to the effect that they, H. & Sons, would not receive payments in checks drawn on any branch of the bank, and where the meaning ascribed to the circular by the innuendo was "that the plaintiffs were not to be relied on to meet the checks drawn on them, and that their position was such that they were not to be trusted to cash checks for their customers," a run was made upon the bank, and it sued H. & Sons for libel. The jury disagreed at the first trial, and an issue of law was then raised as to whether the circular was libelous, and whether, on the pleadings, the court ought not to give a judgment for defendants, and it was said: "In construing the words to see whether they are a libel, the court, where nothing is alleged to give them an extended sense, should put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation." It was held that no imputation of a libelous tendency, as, for instance, insolvency, could be reasonably inferred from the matter complained of, and judgment was given for defendants. The correct rule in construing words seems to be that they are to be taken, not in *mitiori sensu*, but in their fair English meaning; that if the meaning is fairly ambiguous, and one allowable meaning is libelous, the case may go to the jury. If, however, the meaning is unambiguous, and will not reasonably admit of a libelous construction, the question is for the court. *Odgers on Lib. & Sl.* (2d Ed.) 94 et seq.; *Newell on Sl. & Lib.* (2d Ed.) p. 290, § 4. Applying this latter principle it was held in *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9, that the following was not libelous on its face: "Wanted—El. R. Zier, M. D., to pay a drug bill." And it has been held that the publication of a foreclosure advertisement, under a trust deed that had been satisfied, which advertisement narrated that the bond was past due and unpaid, was not libelous, without proof of special damages. *Spurlock v. Lombard Inv. Co.*, 59 Mo. App. 225.

Applying the foregoing principles of law to the pleadings and facts of this case, we see that the words of the news item in hand, in and of themselves, bear no libelous sting or edge. We see, further, that by way of innuendo it was averred that the words meant that plaintiff had sold his business and stock of cigars for the nominal consideration of \$1 to Miss Handschlegel. Here it

is contended that these words impute insolvency or dishonest trickery in a business way. But by this contention of appellant it is sought to enlarge the meaning of the words as set forth in the innuendo, which he may not do. 13 *Ency. Pl. & Pr.* p. 55; *Townsh. on S. & L.* § 338. If appellant desired to attribute such a meaning to the words, he should have so framed his innuendo. But, waiving that, if it be admitted by way of strained construction and arguendo that the words impute insolvency, yet under the evidence appellant was shown to be insolvent at the time of the publication, and the truth is a defense in libel. *Rev. St.* 1899, § 636. And a charge of insolvency is fully met by proof of the fact. See *Mitchell Case*, 116 Mo. 228, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592; *Minter Case*, 174 Mo. 444, 73 S. W. 668.

Again, if appellant be allowed to go outside his innuendo in attributing a meaning to the words, then do the words by fair construction bear a meaning of a charge of dishonest trickery in a business way? It seems to us not. Many reasons fair on their face might be given for a nominal consideration in a transfer, and all of them harmless. For example, if a transaction be a private business dealing, it might be dealt with throughout as such, and the parties thereto not care to advertise the true consideration. Again, a nominal consideration is the usual method of indicating that there are other considerations which are not mentioned; the consideration of a contract being always open to explanation, and the expression of a nominal consideration being a sign and notice to all outsiders interested in the transaction that it is not the true one, and that inquiry should be made of the contracting parties, if knowledge of the facts be desired. A dealer desiring to defraud his creditors would not naturally blazon the fact abroad that he had sold out for \$1; for that would be an open invitation to challenge the transfer, so that, to our mind, a charge of fraud or trickery cannot be fairly imputed as a meaning to the item published, and, even if the innuendo had been broad enough to include such charge, no damages would likely result to plaintiff from the harsh and unnatural conclusion placed on the publication by those of his intimate friends who testified. The loans of money sought for, if refused on account of the publication, in no wise damaged plaintiff. His business had got beyond help from makeshifts of that sort, and the small loans, if consummated, would have only benefited existing creditors and transferred the ultimate damage, not to plaintiff, but to the confiding friends who continued to trust him in the desperate straits he was in.

Perceiving no error, the judgment is affirmed. All concur, except MARSHALL, J., not sitting.

KESSNER et al. v. PHILLIPS et al.

(Supreme Court of Missouri, Division No. 1.
May 24, 1905.)

1. SPENDTHRIFT TRUSTS.

Spendthrift trusts are recognized in Missouri.

2. SAME—CREATION.

A deed conveyed the title to the grantee on condition that the land should not be liable for any debts of the grantee then existing, or that he might contract during a specified number of years, and that the grantee should have no right to incur or dispose of the land for a certain period except to dispose of it by will. *Held*, that a spendthrift trust was not created, there having been no trust estate, the grantee not having been limited to the enjoyment of the income, his right not being limited to support, he having taken an absolute fee and having had the right of possession.

3. DEED—NATURE OF ESTATE.

Where a deed granted, bargained, sold, and transferred the land to the grantee, but provided that the conveyance was made on condition that the land should not be liable to any debts of the grantee then existing or contracted during a specified period, and that he should have no right to sell or incur the land for a certain period except to dispose of it by will, the grantee took a fee, and the other provisions were void as repugnant thereto.

4. EJECTMENT—EVIDENCE.

Where, in ejectment, plaintiffs claimed under an execution sale, and under the issues tendered by defendants, and conceded by plaintiffs the judgment under which the execution issued was alleged to be final judgment, it was incompetent for defendants to contradict them.

5. HOMESTEAD—SELECTION.

Rev. St. 1899, § 3617, provides that when an execution is levied on a homestead the homesteader shall have the right to choose the part to which his exemption shall apply. *Held* that, unless the sheriff gives the homesteader an opportunity to make his selection, the sale is void.

6. EXECUTION—SALE—SHERIFF'S DEED.

Rev. St. 1899, § 3617, provides that when an execution is levied on a homestead the homesteader shall have the right to designate and choose the part of the land to which the exemption shall apply, and that proceedings with respect to the homestead shall be stated in the return to the execution. *Held*, that it is not necessary that the sheriff's deed contain the recitals which the statute requires the execution return to set out.

7. ACTION AT LAW.

In ejectment the defense was that the land involved, which was claimed by plaintiff under an execution sale, was the corpus of a spendthrift trust, in which the judgment debtor had been the beneficiary, but no affirmative relief was asked. *Held*, that the action was one at law, and not in equity.

8. APPEAL—OBJECTIONS WAIVED.

Where a defendant failed to take any exception to the transfer of the cause to the equity docket, but acquiesced therein, and tried the cause as if one in equity, he could not complain of the transfer on appeal.

Appeal from Circuit Court, Jackson County; John W. Henry, Judge.

Action by Helen Kessner and others against Shelby Phillips and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

A. N. Adams, John N. Southern, and Scarritt, Griffith & Jones, for appellants. Paxton & Rose, for respondents.

MARSHALL, J. This is an action in ejectment, instituted on the 20th of September, 1899, to recover 70 acres of land in township 50, range 30, Jackson county, Mo. The petition is in the usual form, and the ouster is laid as of September 20, 1899. The action is against Phillips, the tenant in possession, and Joseph Lamertine Hudspeth, the owner. The defendants answered jointly. The answer is a general denial, coupled with a special defense particularly set forth, the substance of which is that the conveyance to the defendant Hudspeth of the land in controversy created a spendthrift trust, whereby said Hudspeth was prohibited from alienating the land, and whereby it was attempted to place the same beyond the reach of his creditors. The answer further sets up that in 1898 the plaintiff Kessner obtained a judgment for \$5,000 against the defendant Hudspeth, under which the property in controversy was sold on execution and the plaintiffs became the purchasers thereof; and it is alleged that they thereby acquired no right, title, or interest in the same. The reply admits the conveyance to Hudspeth, but denies that it created such a trust; admits the judgment aforesaid, and the sale thereunder; and asserts that the plaintiffs obtained a good title to the property. Upon motion of the plaintiffs the case was transferred to the equity docket of the court "for the reason that defendants have filed an answer setting up an equitable defense, and the case is now triable by this court." It does not appear from the abstract of the record that the defendants objected thereto, or saved any exceptions to the ruling of the court. The trial court entered judgment for the plaintiffs for possession, 1 cent damages, and \$20 monthly rents and profits. After proper steps, the defendants appealed.

The case made is this: Robert N. Hudspeth, the uncle of the defendant Joseph Lamertine Hudspeth, was the owner of the property. On the 13th of March, 1871, he executed his will, by which he devised all of his property, including that in controversy, to his brothers and sisters; that is, one undivided half to his brother Joel E. Hudspeth, and the other undivided half to his brothers George W. Hudspeth, Silas B. Hudspeth, and his sister, Malinda P. Bell, share and share alike. Thereafter, in March, 1885, Robert N. Hudspeth died; and afterwards, on June 15, 1885, his said brothers and his said sister made, executed, and delivered to the defendant Joseph Lamertine Hudspeth a deed to the property in question, being a part of the property devised to them, and which deed recited that, "in consideration of love and affection, and in pursuance to the verbal request of their brother Robert N. Hudspeth, now deceased, whose

heirs and devisees they are, under and by virtue of his last will and testament, * * * and, upon the condition precedent as herein set out, and in consideration of the sum of one dollar (\$1.00) to them paid by Joseph Lamertine Hudspeth, * * * they have granted, bargained, sold and transferred, and do by these presents, grant, bargain, sell and transfer, unto the said Joseph Lamertine Hudspeth, upon the terms and conditions hereinafter set forth," certain property, amounting to 120 acres, and covering the 70 acres here in dispute. The deed contained the following further provisions: "This conveyance being made upon the express condition that the above described real estate shall not be liable to any debts that the said Joseph Lamertine Hudspeth may now have, or that he may contract during the period of thirty years from the date hereof. And the said Joseph Lamertine Hudspeth shall have no right, power or authority to, in any manner, sell, incumber or dispose of said real estate or any part thereof for the period of thirty years from the date hereof, except to dispose of the same by his last will and testament. After the expiration of said thirty years, as aforesaid, said real estate shall vest absolutely in the said Joseph Lamertine Hudspeth, free and clear of all the conditions herein named, to use and enjoy and dispose of in any manner he may deem proper. The said Joseph Lamertine Hudspeth to have the use and enjoyment and the income therefrom from this date upon the terms and conditions above named. But should he sell, or attempt to sell or incumber, said premises at any time during the said thirty years, then in that event the title to the above-described premises shall immediately vest in the said first parties, their heirs or assigns." The plaintiffs offered in evidence the sheriff's deed under the judgment aforesaid. The defendants objected to the introduction of the deed upon two grounds: First, because the deed does not show on its face that the law in reference to the setting apart of a homestead had been complied with; and, second, that the judgment under which execution was issued was not a final judgment, and therefore the clerk had no right to issue the execution. The court overruled the objection, and the defendants saved exception. The sheriff's deed showed that commissioners were appointed to set out the homestead of the defendant Hudspeth, and that they did set apart to him 50 acres of the tract as a homestead, and that the remaining 70 acres were sold to the plaintiffs. The plaintiffs also offered in evidence the amended petition in the case wherein the judgment aforesaid was rendered, which showed that the plaintiff Kessner was the wife of Joseph W. Kessner, and that the defendant Hudspeth had willfully shot and killed him, for which she sued for \$5,000 damages. The plaintiffs also showed the rental value of the land, and then rested. On their behalf the defendants offered in evi-

dence a certified copy of the judgment aforesaid, which also contained a recital of the fact that the defendants had filed motions for new trial and in arrest of judgment. The record did not show affirmatively that said motions had been overruled or acted upon. The plaintiffs objected to the introduction of the said certified copy of the judgment on the ground that the defendants' answer admitted that the judgment was a final judgment, and, further, because the certified copy did not purport to be a copy of the whole record or proceedings in the case. The court sustained the objection, and excluded the record on the ground that the defendants' answer pleaded the judgment as a final judgment and the plaintiffs' reply admitted the same. The defendants excepted to the ruling of the court. The defendants then offered in evidence the will of Robert N. Hudspeth, which, so far as is material here, devised the property in controversy to the brothers and sister of the testator absolutely, as stated. The defendants then called Edward P. Gates, one of the attesting witnesses to the will, and over the objection of the plaintiffs the court permitted him to testify that at the time the testator executed the will he apprehended some difficulty, which might result in his sudden death. But the witness testified that no such occurrence took place, and that the testator lived a number of years afterwards. The defendants also called Mrs. Malinda Wood, née Bell, the sister of the testator, and one of the grantors in the deed to the defendant Hudspeth, and over the objection of the plaintiffs the court permitted her to testify that she and her brothers executed the deed to the defendant Hudspeth in conformity to the verbal direction of the testator that they should convey the property to the defendant Hudspeth, and should fix it so that it could not be taken for his debts for a period of 30 years, and so that he could not alienate it. She further testified that the defendant Hudspeth paid nothing for the land. This was all of the testimony in the case. As before stated, the trial court entered a judgment for the plaintiffs, and after proper steps the defendants appealed.

1. The crucial question in this case is what interest the defendant Hudspeth had in the land in controversy. The defendants contend that Robert N. Hudspeth, by verbal directions to his brothers and sister, created a spendthrift trust for the defendant Hudspeth, and that said brothers and sister effectuated the trust by the execution of the deed to him, and that the proper construction of that deed is that the land could neither be alienated by the defendant Hudspeth or taken in invitum by his creditors until the expiration of the period of 30 years limited in the deed, and hence that the sale of the land under execution to the plaintiffs was void, and conveyed no title. On the other hand, the plaintiffs contend that an express trust in land can only be created, under the

statutes of this state, in writing, and that the deed of the defendant Hudspeth is in no sense the creation of a spendthrift trust, and only limits the sequestration of the land for debts contracted by Hudspeth, and does not prevent the land from being sold to satisfy a judgment based upon a tort of said Hudspeth. In view of the conclusion herein reached, it is not necessary to follow the able and ingenious argument of counsel in reference to the creation of an express trust by the verbal direction of the donor and the subsequent written declaration of the trustee or grantee. The doctrine of spendthrift trust is recognized in this state. *McIlvaine v. Smith*, 42 Mo. 55, 97 Am. Dec. 295; *Partridge v. Cavender*, 96 Mo. 457, 9 S. W. 785; *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780, 2 L. R. A. 113, 9 Am. St. Rep. 358; *Pugh v. Hayes*, 113 Mo. 424, 21 S. W. 23. But whether a conveyance created a spendthrift trust is always the question primarily for consideration. A "spendthrift trust" is the term commonly used to designate a trust created for the maintenance of the cestui que trust and to secure the fund against the improvidence of the cestui que trust. The English rule, which has been adopted in most of the states of this Union, is that it is against the policy of the law for the grant to be so limited that a donee shall have the possession and enjoyment of the property, but shall not have the power of alienation, or that the property shall not be liable for his debts. Under the English law it is competent to make the estate determinable, as upon the bankruptcy of the donee, in which event the estate is to revert to the donor, or to some person specified in the grant. In such case the creditor is deprived of the estate by the act which deprives the donee thereof. But where no such provision for the determination of the estate is contained in the grant the property will pass to the assignee in bankruptcy. The American doctrine differs from the English rule, and is thus stated in 26 Am. & Eng. Enc. of Law [2d Ed.] p. 139: "This doctrine is that it is lawful for a testator or grantor to create a trust estate for the life of the cestui que trust, with the provision that the latter shall receive and enjoy the avails at times and in amounts either fixed in the instrument or left to the discretion of the trustee, and that such avails shall not be subject to alienation by the beneficiary nor liable for his debts." The most learned discussion of the subject and of the difference between the English and the American doctrine is that of Mr. Justice Miller in *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254. The Am. & Eng. Enc. aforesaid, at page 140 et seq., has collected the arguments pro and con bearing upon the two doctrines, but it is not necessary to the determination of this case to pursue the inquiry further. In order to create a spendthrift trust certain prerequisites must be observed, to wit: First. The gift to the

donee must be only of the income. He must take no estate whatever, have nothing to alienate, have no right to possession, have no beneficial interest in the land, but only a qualified right to support, and an equitable interest only in the income. Second. The legal title must be vested in a trustee. Third. The trust must be an active one, not a mere dry trust, which may be executed under the statute of uses. 26 Am. & Eng. Enc. of Law [2d Ed.] p. 142 et seq.; *McIlvaine v. Smith*, 42 Mo. 55, 97 Am. Dec. 295; *Partridge v. Cavender*, 96 Mo. 457, 9 S. W. 785; *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780, 2 L. R. A. 113, 9 Am. St. Rep. 358; *Kingman v. Winchell* (Mo.) 20 S. W. 296; *Ehriswan v. Sener*, 162 Pa. 577, 29 Atl. 719; *Keyser's Appeal*, 57 Pa. 236; *Rife v. Geyer*, 59 Pa. 393, 98 Am. Dec. 351; *Upham v. Varney*, 15 N. H. 462; *Lear v. Leggett*, 2 Simons, 479; *Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Bank v. Davis*, 21 Pick. 42, 32 Am. Dec. 241. "On the other hand, where the cestui que trust has an absolute right to the fund or its avails, such as a right to keep the land and to receive the income therefrom, * * * or where it is absolute property, and may therefore be alienated by him," to where the land is conveyed upon a simple condition that it shall not be subject to the grantee's debts, no spendthrift trust arises or is created, and the donee's interest may be sold under execution, or sequestrated in equity. 26 Am. & Eng. Enc. of Law (2d Ed.) p. 144; 1 Jones on Real Property, § 663; *Gray's Restraints on Alienation*, § 259; *Potter v. Merrill*, 143 Mass. 190, 9 N. E. 572; *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376; *Smeltzer v. Goslee*, 172 Pa. 298, 34 Atl. 44; *Young v. Easley*, 94 Va. 193, 26 S. E. 401. The deed to the defendant Hudspeth, here involved, falls radically short of the requirements of the rule as to the creation of spendthrift trusts, and especially so in the following particulars: First, no trust estate is created; second, no trustee is appointed; third, Hudspeth's interest is not limited to the enjoyment of the income, nor is his right simply a right to support; fourth, an absolute estate in fee simple is vested in Hudspeth; fifth, Hudspeth is given the right of possession, of managing and controlling the property, and of receiving the whole income therefrom without let or hindrance. In short, the conveyance to Hudspeth is of the whole legal title, with all the incidents and rights appurtenant thereto, with only a futile attempt to annex repugnant conditions thereto to the effect that the land shall not be liable for the payment of any debts he had or might thereafter contract during a period of 30 years, and that he should not have power to sell, incumber, or dispose of the property for a like period except by will, and with the further qualification that if he sold, or attempted to sell or incumber, the property during that period, the title

shall immediately vest in the grantors. Ever since the statute of *qula emptores* was enacted, the rule of law has been that, "after an absolute conveyance in fee simple, a clause providing that the grantee shall not mortgage or dispose of the property is repugnant and void." *Lawrence v. Singleton* (Tenn.) 17 S. W. 265; *Hall v. Tufts*, 18 Pick. 455; *Gleason v. Fayerweather*, 4 Gray, 348; *Walker v. Vincent*, 19 Pa. 369; *Laval v. Staffel*, 64 Tex. 370. So, also, "a condition that land conveyed shall not be subject to the grantee's debts is in restraint of alienation and void. Notwithstanding such condition, the land is subject to levy on execution, and passes to an assignee in bankruptcy. Liability for debts is an incident of property, just as the right to convey it is." 1 *Jones on Real Property*, § 663. In *Tillinghast v. Bradford*, 5 R. I. 205, Ames, C. J., said: "Certainly no man shall have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purpose of pleasure or profit shall be also amenable to the demands of justice." It follows that the deed in question, whether executed in pursuance of either a written or verbal direction of Robert N. Hudspeth or by the grantors of their own motion, wholly fails to create a spendthrift trust. Unless, therefore, the conditions annexed to the absolute grant are sufficient and legal, the land in question was subject to the debts of the defendant Hudspeth.

The defendants tacitly concede that such general limitations, even with a provision for cesser, cannot have the effect in law of cutting down the absolute grant, or of withdrawing the property from the reach of the grantee's creditors; but they contend that it is legal to limit the right of the grantee in fee simple to convey, mortgage, or dispose of the property, and likewise to prohibit it from being seized by the grantee's creditors, for a limited period of time. In support of their contention the defendants cite and rely upon 2 *Washburn on Real Property* (5th Ed.) p. 9; *McWilliams v. Nisley*, 7 Am. Dec. 654; *Langdon v. Ingram's Guardian*, 28 Ind. 360; *Stewart v. Brady*, 3 Bush (Ky.) 623; *Stewart v. Barrow*, 7 Bush (Ky.) 368. *Washburn* lays down the rule that a fee may be limited so as to restrain the conveyance for a certain time. The *Pennsylvania* case cited holds that, while a general or perpetual restraint of alienation is repugnant and void to a fee simple, nevertheless a partial restriction for a particular time or against conveying to a particular person is good. The same general doctrine is stated in the *Indiana* case cited, although the real estate there involved was a trust estate, and the direct question here involved was not there decided. In *Stewart v. Brady*, 3 Bush (Ky.) 623, the land was devised subject to a limitation upon alienation until the devisee attained the age of 35 years, and it was held a valid restriction against her voluntary disposition of the

property, but insufficient to prevent the land being sold for the payment of her debts. On the other hand, *Jones on Real Property*, § 662, points out that a condition attached to an absolute fee that the grantee shall not alienate within a limited time has been held void in *Murray v. Green*, 64 Cal. 203, 28 Pac. 118; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61, and *McCleary v. Ellis*, 54 Iowa, 311, 6 N. W. 571, 37 Am. Rep. 205. In *Overman's Appeal*, 88 Pa. 276, the Supreme Court of Pennsylvania, speaking to this subject, said: "It contravenes that general policy which forbids restraints on alienation and the nonpayment of honest debts."

* * * Property tied up for half a century contributes nothing to the general wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly, it is against public interest that the property of a future generation shall be controlled by a deed of a former period, or that nonpayment of debts should be encouraged." It is the policy of the law in this state to permit the creation of spendthrift trusts, and to allow the owner of property to apply a portion or the whole thereof to the maintenance and support of those he wishes to provide for, and who are not able to control and manage their own affairs. So long as such a conveyance does not offend against the law of perpetuity, and so long as the conveyance is a proper trust, the courts will observe the wishes of the donor. So, too, it is competent for the owner to convey or devise property in trust for the benefit of those the donor wishes to befriend, and such trusts may continue for a limited period, or even during the life of the beneficiary. In all such cases, however, the beneficiary has only an equitable interest, and not the fee in the land. Such rules, however, do not apply where the conveyance is absolute to the donee, coupled with either a perpetual or limited power of alienation, or attempts to place the property beyond the reach of the creditors of the donee. The better rule and the better reason is that such limitations or conditions cannot be grafted upon a fee-simple estate, because they are repugnant to the absolute ownership incident to the fee. Donors who have such limited confidence in their donees, should create spendthrift trusts, and not, as here, attempt to evade and violate fundamental and wise provisions of law in reference to mere legal estates. It follows that the conditions against alienation or liability for debts in the deed here involved are void, because they are repugnant to the absolute ownership granted by the deed to the grantee.

2. Defendants next contend that the trial court erred in excluding the certified copy of the judgment. The gist of this contention is that the certified copy showed that the judgment was not a final judgment, because

the motions for new trial and in arrest had not been acted upon at the time the execution was issued. The trial court properly excluded the evidence offered, for the reason that under the issues tendered by the defendants and conceded by the plaintiffs, the judgment under which the execution issued was alleged to be a final judgment. Such being the issues, it was incompetent for the defendants to contradict them.

3. Lastly, the defendants contend that the sheriff's deed is void, for the reason that it does not affirmatively appear therein that the defendant Hudspeth was afforded an opportunity to select the portion of the land which he would hold as his homestead. The deed in question recites that commissioners were appointed, and that they set apart 50 acres as a homestead for the defendant. The deed does not affirmatively show that prior to the appointment of the commissioners the sheriff gave the defendant Hudspeth an opportunity to choose that portion of the land he would select as his homestead. It is also true that the defendants offered no evidence whatever tending to prove that the sheriff had failed in his duty in this regard. Section 3617, Rev. St. 1899, which was the law in force at the date of the levy and sale under the execution in this case, provides that when an execution is levied upon a homestead the homesteader shall have a right to designate and choose the part of the land to which the exemption shall apply, "and upon such designation and choice, or in case of a refusal to designate and choose, the sheriff levying the execution shall appoint three disinterested appraisers, who shall, first being sworn to the faithful discharge of their duties, fix the location and boundaries of such homestead, and the sheriff shall then proceed with the levy of such execution upon the residue of such real estate, as in other case; and such proceedings in respect to the homestead shall be stated in return upon such execution." This court has frequently held that, unless the sheriff gives the homesteader a fair opportunity to make his selection, the sale is void, and that until such opportunity is afforded and such homesteader refuses to make a selection the sheriff has no power to have a homestead set apart. *Macke v. Byrd*, 181 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649; *Brewing Association v. Howard*, 150 Mo., loc. cit. 450, 51 S. W. 1046; *Keene v. Wyatt*, 160 Mo. 81, 60 S. W. 1037, 63 S. W. 116. Ordinarily, the law is that an officer is presumed, in the absence of a showing to the contrary, to have performed his duty. Under this general presumption, a sheriff, except for the provisions of the statute, would be presumed to have performed his duty and to have given the homesteader an opportunity to designate and choose the portion of the land he desired to retain as his homestead. But a homestead is purely a statutory creature, and the statute in this state has prescribed the steps which must

be taken before land, which is in whole or in part a homestead, can be lawfully subjected to seizure and sale. The section of the statute quoted requires the sheriff, first, to give the homesteader a fair opportunity to make a choice and selection, and only authorizes the sheriff to have the homestead set apart after the homesteader has refused to designate or choose. If the statute stopped here, the general presumption of law that an officer has performed his duty would obtain. But the statute expressly requires that, "Such proceedings in respect to the homestead shall be stated in return upon such execution." This statute destroys the general presumption of law aforesaid, and expressly requires that all of the preliminary steps provided to be taken before property in which a homestead right exists can be sold must be stated in the return upon the execution. But, whilst such are the provisions of the statute as to the return, there is no provision in the statutes that the sheriff's deed shall contain all of the recitals which the statute requires the return or execution to set out. The return of the sheriff on the execution in question here is not contained in the record, nor is there any evidence that it did not fully comply with the requirements of the statute. The defendants therefore have wholly failed to afford the foundation upon which the statute bases their right to make the objection to the validity of the sale here contended for. From such failure so to do it is fairly inferable that no such basis existed, and, as the statute does not require such recitals in the sheriff's deed, and only requires them to be stated in the return on the execution, this contention of the defendants must be resolved against them.

4. It is said by defendants that the trial court erred in treating this case as a case in equity. The answer of the defendants set up an equitable defense, but asked no affirmative equitable relief. The case therefore is a case at law, and not one in equity. *Martin v. Turnbaugh*, 158 Mo. 172, 54 S. W. 574. The defendants, however, failed to preserve any exception to this action of the court, but, on the contrary, acquiesced therein, and tried the case as if it was one properly cognizable in equity. They are therefore not in position now to assign this as an error. In view, however, of what is hereinbefore said, it is immaterial whether the case be treated as one in equity or one at law, for in either event the result would be the same.

The 70 acres of land in dispute were sold by the sheriff for the insignificant sum of \$50, and it would appear a great hardship to the defendant to lose the land for such a price, and therefore this court has sought with great care to find some ground upon which to set aside the sale, to the end that the land may be made to realize its full value; but, after a careful and painstaking examination of the case, the court is unable

so to do, and the defendant Hudspeth must suffer the consequences of his own failure to see at the proper time that the land brought its full value.

Finding no error in the record, the judgment of the circuit court is affirmed. All concur.

REED BROS. v. NICHOLSON et ux.

(Supreme Court of Missouri, Division No. 1.
May 24, 1905.)

1. FRAUDULENT CONVEYANCES — HOMESTEAD EXEMPTIONS.

As, under Rev. St. 1899, § 3616, a homestead is exempt from attachment and execution, a conveyance thereof by a husband to his wife is not fraudulent as against his creditors.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 118-123.]

2. HOMESTEAD—MORTGAGED PROPERTY.

Where the land is subject to a mortgage, the homesteader is entitled to a homestead to the amount of the exemption in what remains of the total value of the land after the mortgage is deducted.

3. SAME—SELECTION.

Under Rev. St. 1899, § 3617, conferring on a homesteader the right to designate and choose the part of the land which shall be exempt from execution under section 3616, a wife is entitled to select the particular part of land conveyed to her by her husband, to the value of the amount of exemption which she will retain as a homestead.

4. SAME—ILLEGAL SALE ON EXECUTION.

Under the further provision of said section 3617 making it the duty of the sheriff, on such designation or choice being made, or on refusal to make the same, to appoint three disinterested appraisers to value and set apart the homestead, and then to levy the execution on the residue of the real estate, where these prerequisites of the statute have not been observed any sale by a sheriff is void.

5. SAME.

The fact that a proceeding to set aside a conveyance by a husband to his wife of land as in fraud of creditors is one in equity does not change such homestead rights, and authorize a court of chancery to order the whole land sold, and the homestead exemption to be turned over to the homesteader in cash, instead of land, as even courts of equity are bound by the homestead laws of the state, and cannot order the homestead interest paid to the homesteader in cash, instead of allowing him to designate the particular piece of the land he will hold as such homestead.

6. SAME—SETTING APART.

Where a house is located on one of the 40's of land consisting of 160 acres, 120 acres of which, including the house site, is covered by a mortgage, it is possible for the homesteader to designate and choose lands of the value of the exemption, exclusive of the mortgage, out of the whole tract, and for commissioners appointed to value and set apart to him such a homestead in kind.

7. SAME—VALUATION.

Whether land subject to a mortgage exceeds in value the \$1,500 homestead exemption, over and above the mortgage, can only be ascertained by commissioners appointed to value the land, as the statutes do not confer power on the court—even on a court of equity—to determine the question.

8. SAME.

In a proceeding in equity to set aside a conveyance of land by a husband to his wife

as in fraud of creditors, the power of the court is limited to a finding that the money which purchased the land belonged to the husband, except a portion thereof belonging to the wife; and, on such finding, where the land is occupied as a homestead, the court is limited in its decree to directing the sheriff to give the homesteader the right to select the particular land he desires to hold as a homestead, and to appoint commissioners to value and set apart the same to him, and thereafter to direct the sale of any land in excess of area or value of the exemption, and the payment from the proceeds of the amount due the wife, and the application of the balance to plaintiff's judgment.

9. HUSBAND AND WIFE — POSSESSION OF WIFE'S PROPERTY.

In such action, evidence examined, and held insufficient to show a reduction by the husband to his possession of the wife's money invested by him in the land, so as to entitle him to such money under the rules of the common law.

Appeal from Circuit Court, Lawrence County; Henry C. Pepper, Judge.

Bill by Reed Bros. against R. D. O. Nicholson and wife. Decree for plaintiffs, and defendants appeal. Reversed.

Henry Brumback and Gibbs & Henson, for appellants. Jos. M. McPherson and Wm. B. Skinner, for respondents.

MARSHALL, J. This is a bill in equity to set aside a deed made by the defendant R. D. O. Nicholson to his wife, Nancy E. Nicholson, on the 27th of March, 1896, conveying to her the southwest quarter of the southeast quarter of section 26, township 29, range 25, and the west half of the northeast quarter and the southeast quarter of the northwest quarter of section 35, same township and range, in Lawrence county, Mo., on the ground that it was made to defraud the creditors of the husband—the plaintiffs among the number. The circuit court entered a decree in favor of the plaintiffs, and the defendants appealed.

The case made is this: On the 16th of October, 1895, the husband executed his note for \$360 to one J. A. Fretwell or bearer, payable at six months; the consideration being the right granted to him to sell in Greene county, Mo., a certain patented beef brace. The note was not paid, but before maturity had passed into the hands of the plaintiffs herein, who on the 7th of July, 1896, instituted suit against the husband thereon, which resulted in a judgment in favor of the plaintiffs on the 28th of August, 1896, for \$381.60. In the meantime the husband had made this deed, here sought to be set aside, to his wife, and after the return of the execution nulla bona the plaintiffs instituted this suit to set the same aside on the ground that it was fraudulent as to the husband's creditors. Upon the trial of this case the plaintiffs introduced the deed in question, and the records and files in the case of the plaintiffs against the husband on the note aforesaid, together with the execution and the return thereon. The plaintiffs then called the de-

fendant Nicholson, the husband, and had him identify a statement sworn to by him before appraisers who had been selected by the sheriff to appraise and set apart to him such property as was exempt under the law, in which he stated that he had no property at all. Thereupon the plaintiffs rested. The defendants then called R. D. O. Nicholson, the husband, who testified that he married the defendant Nancy on the 29th of July, 1866; that when they were married his wife's father deeded 80 acres of land in Greene county to her (on cross-examination he stated that the deed was made to himself and his wife jointly), and that her father also gave her a mare, 10 hogs, 8 head of sheep, a cow, and a calf; that they afterwards sold the 80 acres of land in Greene county for \$800, and, her father having died, she received from his estate \$450, and later personal property to the value of \$200; that she sold some of the personal property for \$40; that with the proceeds of such sale, to wit, \$800 for the land, \$450 received from her father's estate, the \$200 worth of personal property, the sale of the mare for \$130, and \$500 realized from the sale of a wagon and team of mules, together with what had been earned on the farm, they purchased 120 acres in Lawrence county and 80 acres in Greene county for \$2,500 or \$2,600, paying thereon \$2,000; that there was a vendor's lien on the land for \$500 or \$600, which was afterwards discovered, in consequence of which the purchase was rescinded, and they received back nearly all the money they had paid therefor; that afterwards, in 1874, they purchased 120 acres, being the west half of the northeast quarter of section 35 and the southwest quarter of the northwest quarter of section 35, in Lawrence county (a part of the land here in controversy), and paid therefor \$2,600; that they afterwards purchased 40 acres additional from the railroad (being the northwest quarter of the southeast quarter of section 26); that he took the deeds to the land in his own name; that his wife had always kept the money, keeping it sometimes in her bosom, and at other times in other places, but that he generally conducted the trades; that at the time of his marriage he had no property at all, except a horse, a saddle, and a bridle, and had acquired none thereafter, except such as was made from farming the land. Immediately upon acquiring the land, in 1874 (being the land in question here), he and his wife moved onto the same, occupied it, and used it as a homestead, and have continued so to do ever since. The house is located on the northwest quarter of the northeast quarter of section 35. The total land consists of 160 acres. The husband testified that he had never reduced the wife's money or property to his possession, but that when it was invested in the land the title was taken in his name, and the understanding between him and his wife was that she

should have her money or the land at any time she saw fit. The consideration expressed in the deed from the husband to the wife, here sought to be set aside, was \$4,500. The defendant husband testified that he figured up the amount of money which belonged to his wife, and which had gone into the purchase of the land, added 8 per cent. interest thereto, and that it aggregated \$4,800, and that, in order to make that sum good to her, he conveyed the land to her, at a valuation of \$4,500, and turned over to her personal property, consisting of cattle, mules, etc., to the value of \$300. He testified that the land is worth \$17 to \$18 an acre, and it was shown that there is a valid deed of trust on the land for \$1,400. The defendants called two other witnesses, one of whom said the land was worth \$17.50 an acre, aggregating \$2,800, and the other said it was worth \$20 an acre, aggregating \$3,200. In rebuttal the plaintiffs called four witnesses, three of whom said the land was worth \$25 an acre, aggregating \$4,000, and one of them said it was worth \$30 an acre, aggregating \$4,800. It was further shown that the land lies a quarter of a mile south of the road on the north, and a mile north of the road on the south.

The trial court found that the conveyance from the husband to the wife was fraudulent, and set the same aside. The court further found that the defendant husband is entitled to a homestead in the premises to the value of \$1,500, and that the wife is entitled to the sum of \$450, which she received as a gift from her mother in 1895, and which had never been reduced to possession by the husband with the written consent of the wife, and further found that there was a valid deed of trust on the 120 acres which lie in section 35 for \$1,400, with interest at 6 per cent. thereon. The court thereupon ordered that the land be sold, subject to said deed of trust, and that out of the proceeds there be first paid to the wife the sum of \$450, and then to the husband \$1,500, as his homestead interest in the premises, and out of the balance, if any, there be paid the costs and the plaintiffs' judgment. The court further ordered that unless the premises should bring the sum of \$1,500—the homestead interest of the husband, subject to the deed of trust as aforesaid—then the premises, or any part thereof, should not be sold.

After proper steps, the defendants appealed.

1. It is a conceded fact, which was also found to be a fact by the trial court, that the land in controversy constituted the homestead of the defendants. The total tract does not exceed 160 acres. There was a conflict in the evidence as to the value of the land. The defendant husband and his witnesses valued it at less than \$2,900. There is a valid mortgage covering 120 of the 160 acres, and embracing the part on which the house stands,

for \$1,400. The husband, as the head of the family, was entitled to a homestead in the equity of redemption of the land; that is, he was entitled under section 3616, Rev. St., 1899, to a homestead not to exceed 160 acres in area, or to exceed a total value of \$1,500. The value must be taken out of the excess over the mortgage; that is, the amount of the mortgage must be first deducted from the total value of the land, and the homesteader allowed a homestead to the value of not exceeding \$1,500 in what remains of the total value after the mortgage is deducted. Such homestead is exempt from attachment and execution, under the section of the statute quoted. Upon the theory, then, that the land was the land of the husband, and that the wife had no interest in it, the conveyance to the wife cannot be regarded as fraudulent in law, for, not being subject to attachment or execution, it was beyond the reach of the creditors of the husband. Any conveyance thereof could in no sense hinder, delay, or defraud the creditors. *Bank of Versailles v. Guthrey*, 127 Mo. 195, 29 S. W. 1004, 48 Am. St. Rep. 621; *Rose v. Smith*, 167 Mo., loc. cit. 86, 66 S. W. 940; *Balz v. Nelson*, 171 Mo., loc. cit. 690, 72 S. W. 527. The only matter, then, of importance upon the issues joined under this view of the case, is whether the land was worth more than \$1,500 in excess of the mortgage on the same. There was a conflict in the testimony as to value. The trial court ordered the land to be sold, and \$1,500 in money to be turned over to the husband in lieu of the homestead. That decree was erroneous, for two reasons: First. Because the husband had conveyed his homestead interest to his wife, and she was entitled thereto, and to the proceeds of any sale thereof. The deed of the husband to the wife, of a homestead, is valid even as against the husband's creditors. Second. The wife was entitled to select the particular part of the land, of the value of \$1,500, which she would retain as a homestead. Section 3617, Rev. St. 1899, confers the right upon the homesteader to designate and choose the part of the land which shall be exempt from execution under section 3616; and the statute makes it the duty of the sheriff, upon such designation or choice being made, or upon a refusal to make the same, to appoint three disinterested appraisers to value and set apart the homestead, and then to levy the execution upon the residue of the real estate, and this court has announced the rule that any sale by a sheriff where these prerequisites of the statute have not been observed is void. The fact that this is a proceeding in equity does not change the rights of the homesteader, as above defined, in any respect, and does not authorize a court of chancery to order the whole land sold, and the homestead exemption to be turned over to the homesteader in cash, instead of land. Counsel for plaintiffs realize this rule, for

they say that the order of sale was proper, because it was impossible to set out the homestead in kind. In this, however, counsel are manifestly in error, for the land consists of 160 acres. The house is located on one of the 40's. It is therefore not only possible, but absolutely certain, that the homesteader could designate and choose lands of the value of \$1,500, exclusive of the mortgage, out of the 160-acre tract, and it is equally clear that the commissioners could set apart to the homesteader such a homestead in kind. The trial court therefore was in error in ordering the land sold. Even courts of equity are bound by the homestead laws of this state, and cannot order the homestead interest paid to the homesteader in cash, instead of allowing him to designate the particular piece of the land he will hold as such homestead. The judgment of the lower court must therefore be reversed for this reason.

2. The defendants contend that the land in question rightfully belonged to the wife, because her money bought the same, and that the conveyance of the husband to the wife was simply placing the title where it should have been put in the first place. The plaintiffs contend that when the land that was given to the wife by her father was converted into cash, and when the property she received from her father's estate was converted into cash, and when such cash was reduced to possession by the husband, prior to the enactment of the married woman's act of 1875, the cash became the property of the husband, by virtue of his marital relations, and therefore the property purchased with such cash was the property of the husband, and was subject to his debts. As to the \$450 received by the wife as a gift from her mother after the passage of the married woman's act, and not reduced to the possession of the husband by the written consent of the wife, but by the husband invested in the land and the improvement thereof, the plaintiffs concede that the wife is entitled thereto. These considerations, however, under the issues joined, become important only in the event that it should be ascertained that the land exceeded \$1,500 in value, over and above the mortgage. This fact could only be ascertained by commissioners appointed to value the land, and to set apart the specific land selected by the homesteader as a homestead. The statutes do not confer power upon a court—even a court of equity—to determine that question. In such a case as this the power of a court of equity is limited to a finding that the money which purchased the land was the money of the husband, and not of the wife; and upon such a finding, where the land is occupied as a homestead, the court is limited in its decree to directing the sheriff to give the homesteader the right to select the particular land he desires to hold as a home-

stead, and to appoint commissioners to value and set apart the same to him, and thereafter, if there is any land in excess of area or value of the statutory homestead exemption, to direct the sheriff to sell the same, and in that event out of the proceeds to pay the wife the \$450, which was her separate property, and to apply the balance to the payment of the plaintiffs' judgment against the husband. Upon the question whether the money with which this land was purchased was the money of the husband or of the wife, there is no conflict whatever in the evidence. The uncontradicted evidence is that the husband had no means whatever, except a horse, a saddle, and a bridle. All the other money which was employed to purchase the land was money which the wife received from her father and her mother as gifts, or was derived as an inheritance from her father's estate. All of it except \$450 was so received and derived prior to the passage of the married woman's act of 1875. At common law the husband was entitled to the choses in action of the wife, but it was necessary for him to reduce them to his possession. Whether he had so reduced them to possession was always a question of law under the particular facts of each case. In this case the testimony is uncontradicted that when the land that was given to the wife by her father was sold, and when the personal property she received from her father's estate was sold, the money was turned over to the wife, and she retained the possession thereof until it was invested in other lands, and when the trade for such other lands was rescinded, and the money refunded to her, she retained the possession thereof until it was invested in the land in controversy. The evidence in this case is not sufficient to show a reduction by the husband to his possession of the wife's money, so as to entitle him to the same under the rules of the common law. If, therefore, upon a trial anew of this case, the facts should appear as they now appear herein, the trial court should dismiss the bill. If, however, the facts appear otherwise than as they now appear, and if it should be shown by competent evidence that the husband had reduced the money of the wife to his possession prior to the passage of the married woman's act of 1875, and had invested it in a homestead, then the course above indicated as to setting aside the homestead in favor of the wife, by virtue of the conveyance of the homestead by the husband to the wife, and the sale only of the land that exceeded in area and value the statutory exemption for the wife, should be ordered, and the proceeds thereof distributed between the wife and the plaintiffs as above indicated.

For the foregoing reasons, the judgment of the circuit court is reversed and the cause remanded, to be proceeded with in accordance herewith. All concur.

BAKER v. CITY OF ST. LOUIS et al.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

APPEAL—FINAL JUDGMENTS.

Defendant R. answered by a general denial, and the other defendants entered a demurrer, on which judgment was entered in their favor. Plaintiff then dismissed as to R., and the other defendants objected, and moved to set aside the dismissal. *Held* that, while this motion was pending, the judgment as entered was not final as to all the parties, and an appeal therefrom by plaintiff was premature.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Minnie A. Baker against the city of St. Louis and others. From a judgment on a demurrer entered by part of defendants, plaintiff appeals. Appeal dismissed.

Jamison & Thomas, for appellant. Chas. W. Bates and Wm. F. Woerner, for respondents.

BRACE, P. J. This is an action by Minnie A. Baker, plaintiff, against the city of St. Louis and the following officials of said city, viz.: Amand Ravold, bacteriologist; William C. Tiechman, city chemist; Max C. Starkloff, health commissioner; and Rolla C. Wells, Max C. Starkloff, Joseph L. Hornsby, Andrew F. Blong, Albert N. Merrill, and Henry N. Chapman, members of the board of health of said city—defendants. The petition is in five counts. The first and second each ask \$5,000 damages for the death of two of plaintiff's minor children, and the other three counts each ask \$2,000 damages on account of sickness of three of plaintiff's children, all caused, it is alleged, by the negligence of defendants in furnishing plaintiff with improperly prepared and noxious diphtheria antitoxin. The answer of defendant Ravold to the petition was a general denial. The other defendants demurred thereto, their demurrer was sustained, and judgment thereon rendered in their favor. Thereupon plaintiff dismissed as to Ravold, and the defendants other than Ravold filed the following motion: "Now come all the defendants in the above-entitled cause (except Amand Ravold), and particularly the city of St. Louis, and object to and except to the action of the court in permitting the plaintiff to dismiss the cause as to Amand Ravold, and move the court to set aside said dismissal, for the following reason, to wit: It appears from plaintiff's petition that the alleged cause of action sued for arises from the wrongful and unauthorized acts and carelessness and negligence of said Ravold, if there be any liability at all on the part of any of the defendants, and that by reason thereof only is the city of St. Louis made a party to the cause. It further appears that said Ravold was duly subject to service in this state, and actually had been served by

the plaintiff, and is a codefendant contemplated by Session Acts of Missouri for 1901, pp. 78, 79, and that the defendant city of St. Louis has a right, and hereby insists, on said Ravold being retained as a defendant in this case so long as it, the said city of St. Louis, remains party thereto; and plaintiff, having voluntarily brought said Ravold into the cause as a party thereto, will not now be permitted to dismiss as to him, and thereby compel this defendant to go through the useless formality of again making him a party thereto, as provided in said act above referred to." And thereafter on the same day, without any disposition having been made of this motion, the plaintiff perfected her appeal.

As this motion is still pending in the circuit court, there has been no final disposition of the case as to the defendant Amand Ravold, and as there can be but one final judgment in a civil action, which must dispose of all the parties to the cause, the appeal was prematurely taken, and must be dismissed. *Rock Island Imp. Co. v. Marr*, 168 Mo. 252, 67 S. W. 586; *Seay v. Sanders*, 88 Mo. App. 478.

For this reason the motion of respondents to dismiss the appeal will be sustained, and the appeal dismissed. All concur.

MAY v. MAY et al.

(Supreme Court of Missouri, Division No. 1.
May 24, 1905.)

1. GUARDIAN AND WARD—FINAL SETTLEMENT.

The final settlement of a guardian stands upon the same footing as a judgment, and is conclusive as to all proper subjects of account included and involved.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 542.]

2. SAME—EXHIBIT OF ACCOUNT—NOTICE.

Under Rev. St. 1899, § 5329, providing that a guardian, on final accounting, shall make a just and true exhibit of the account between himself and his ward, and file the same in court, and cause a copy of the exhibit, together with a written notice stating the day on which and the court in which settlement will be made, to be delivered to the ward, etc., a settlement made when no exhibit was filed or notice given is not conclusive as a final settlement, but has no greater force than an annual settlement, being mere prima facie evidence of the facts contained therein.

3. PARTITION—MONEY JUDGMENT.

In an action by a ward against her guardian for the partition of certain land, which the guardian purchased with the ward's money, it was improper to make a further sum, owing by the guardian to the ward, a lien upon other land held by the guardian as a homestead.

Appeal from Louisiana Court of Common Pleas; D. E. Eby, Judge.

Suit by Claudia May and others against Sarah W. May. From a judgment for plaintiffs, defendant appeals. Reversed.

Pearson & Pearson, for appellant. Ball & Sparrow and Robert A. May, for respondents.

BRACE, P. J. This is an appeal from a decree in partition. The cause coming on to be heard in the court below was referred to Hon. E. W. Major, who was "directed to hear and decide the whole issue, and to report his findings of fact and conclusions of law" to the court; in pursuance of which order the referee, having heard the evidence, made a voluminous report, setting out at great length his finding of facts and conclusions of law upon every conceivable issue in the case. The following excerpts therefrom furnish a sufficient statement for the purposes of this decision:

"Upon the evidence adduced I find the facts and my conclusions of law to be as follows: That Dr. James D. Harris died intestate in the town of Wentzville, St. Charles county, Missouri, on January 6, 1886. That he left surviving him as his heirs at law Sarah W. Harris, his widow, plaintiff in this case, she having since the death of Dr. Harris married Thomas May, of Louisiana, Pike county, Missouri; Claudia Harris, his daughter, who afterwards married Robert A. May, both of whom are defendants herein; and Warren Harris, his son. That Sarah W. Harris, now Sarah W. May, is the mother of Claudia Harris, now Claudia W. May, and Warren Harris. That at the time of the death of James D. Harris, his widow, Sarah W. Harris, was twenty-nine years of age, and his two children, Claudia Harris and Warren Harris, were both minors. * * * That Warren Harris died intestate, and while yet a minor, at the town of Wentzville, St. Charles county, Missouri, in the early part of the year 1893, leaving as his only heirs at law his mother, Sarah W. May, and his sister, Claudia W. May, each of whom I find and conclude inherited one-half of his estate. That James D. Harris at the time of his death was the owner of and possessed in fee-simple title of a farm of 84.72 acres, being part of the west half of section 13, township 47, range 1 east, in St. Charles county, Missouri. Also lot No. 1 in block No. 20 in the Railroad Addition to the town of Wentzville, St. Charles county, Missouri; and that the same was the residence and dwelling house of said James D. Harris at the time of his death. * * * Also the northeast corner lot 1, block 3, in the original town of Wentzville, said piece of ground having a front of 22 feet and running back 66 feet. Also the southeast corner of said lot and block in said town, being 22 feet wide and running back 54 feet, in Wentzville, St. Charles county, Missouri, and known as the 'drug store building.' That at the time of the death of Dr. James D. Harris the reasonable cash market value of the farm aforesaid was \$1,500, and the reasonable cash market value at the time of his residence was \$1,500, and the reasonable cash market value at the time of the real estate in lot 1 of block 3 of said town, and known as the 'drug store building,' was \$600. That Sarah

W. Harris administered on her said husband's estate, and made final settlement thereof on the 9th day of May, 1893, in the probate court of St. Charles county, Missouri, and that on said final settlement the estate owed her the sum of \$4.12. That Sarah W. Harris, plaintiff in this cause, made no election as to what interest she would take in the real estate of her husband, James D. Harris, and that, as a homestead interest exceeds in value a dower in the third part of her husband's lands which she might hold and enjoy during her natural life, I find that her homestead exceeds in value her dower interest in said real estate, and therefore find and conclude as a matter of law that she did then and does now take a homestead interest, the same being the larger interest, and which homestead at the time was and is all of lot No. 1 in block 20 of the town of Wentzville in the county of St. Charles and state of Missouri, and which is part of the land sought to be partitioned by her in this cause. And I further find and conclude that, as she took a homestead interest under the law she had no dower or other interest in any of the other lands. I further find and conclude as a matter of law that Claudia W. Harris, now Claudia W. May, inherited one-half of her father's real estate, except the homestead, one-half of which she inherited subject to her mother's homestead interest. I further find and conclude as a matter of law that Warren Harris inherited one-half of his father's real estate, except the homestead, one-half of which he inherited subject to his mother's homestead interest. I further find that on the 8th day of February, 1886, Sarah W. Harris, now Sarah W. May, was by the probate court of St. Charles county, Missouri, appointed guardian and curator of Claudia W. Harris and Warren Harris, her minor children. * * * I further find that both sureties on both bonds are now insolvent, and that plaintiff, outside of her interest in the property herein sought to be partitioned, has but a small estate, not to exceed \$500 or \$600, perhaps. I further find that James D. Harris at the time of his death carried an insurance policy on his life in the Ancient Order of United Workmen for \$2,000, payable to Sarah W. Harris, his wife, Claudia W. Harris, his daughter, and Warren Harris, his son, in equal parts. I further find that Sarah W. Harris, as guardian and curator of Claudia W. Harris and Warren Harris, collected for each of said wards their proportional part of said insurance in said company, to wit, \$666.67, each. I further find that as guardian and curator of her said minor children, Sarah W. Harris, for the purpose of reinvestment, sold by order of the probate court the east one-third of lot 1, block 3, in said town of Wentzville, St. Charles county, Missouri, having a front of 22 feet by 120 feet, and being the drug store property, for the sum of \$600, which she received in full, and that the entire proceeds was the

property of her said wards. That the said probate court of said county approved said sale on the 18th day of November, 1888. I find that Sarah W. Harris, as guardian and curator of Warren Harris, made final settlement in his estate on May 9, 1893, which was a short time after his death, he having died in March, 1893. I further find that in said settlement she only accounted for and charged herself with \$666.67, the one-third interest in said life insurance, and \$200 as his interest in the proceeds of said drug store, which was sold for \$600. I find she credited herself with the sum of \$7.35 costs and \$600 for six years' board, clothing, tuition, and maintenance, showing a balance due his said estate of \$259.32, one-half of which she took as her part of her son's estate and one-half thereof, to wit, \$129.66, she received as guardian and curator of her daughter, Claudia W. Harris. I find that she, the said Sarah W. Harris, kept one-third of the proceeds of the sale of said drug store as her own, whereas I find and conclude as a matter of law that she was not entitled to any part thereof, and had no legal interest therein. I further find that the entire amount of money she received from the insurance for the said Warren Harris and Claudia W. Harris was by her loaned to Charles J. Walker on March 1, 1887, at the rate of $7\frac{1}{2}$ per cent., and that he paid her the annual interest thereon and kept same continuously until August 26, 1892, and that during all of said time the \$666.67 of Warren Harris and the \$666.67 of Claudia W. Harris was by said curator loaned as stated at the rate of $7\frac{1}{2}$ per cent., and that all of said interest was collected by said curator, and that she failed to account to Warren Harris and his estate for said interest, and failed to account to Claudia W. Harris for said interest. I further find and conclude that on May 9, 1893, and being the time that Sarah W. Harris made final settlement of Warren Harris' estate she should have charged herself with the following items:

To one-third life insurance.....	\$ 666 67
To interest thereon for five years, 5 months, 25 days at $7\frac{1}{2}$ per cent.....	274 30
To one-half proceeds sale of drug store.....	300 00
To interest thereon for 4 years, 5 months, 26 days at 6 per cent.....	80 80
Total	\$1,321 77

"I further find that she took credits as follows:

By probate costs.....	\$ 7 35
By six years board, clothing, tuition, and maintenance	600 00
Total	\$ 607 35

"Balance in curator's hands is \$714.42, being the difference between \$1,321.77 and \$607.35. One-half of this amount I find and conclude belonged to Sarah W. Harris, and one-half thereof, to wit, \$357.21, belonged to Claudia W. Harris. * * *

"I find that Sarah W. Harris made final settlement of the James D. Harris estate on May 9, 1893, and made final settlement of Warren Harris' estate May 9, 1893, and

made a so-called final settlement of Claudia W. Harris' estate May 9, 1893; all three estates being settled at the same time and in the same court. I find that Sarah W. Harris in her so-called final settlement on May 9, 1893, as guardian and curator of Claudia W. Harris, only charges herself with the following items, to wit: To proceeds from life insurance, \$666.67; and to \$200 as her interest in the sale and proceeds of said drug store, which she sold for \$600; and to \$129.66 as her part of the estate of her brother, Warren Harris, deceased. I further find she credited herself in said settlement with the sum of \$7.35 costs and \$600 for six years' board, clothing, tuition, and maintenance, showing a balance due said Claudia May of \$388.98. I further find that the said Sarah W. Harris kept one-third of the proceeds of the sale of said drug store as her own, whereas I find and conclude as a matter of law she was not entitled to any part thereof, and had no legal interest therein. I further find and conclude that on May 9, 1893, and being the time that Sarah W. Harris made her so-called final settlement of Claudia W. Harris' estate, she should have charged herself with and accounted for the following items:

To one-third life insurance.....	\$ 666 67
To interest thereon for 5 years, 5 months, and 25 days at $\frac{7}{8}$ per cent.....	274 30
To one-half proceeds sale of drug store.....	300 00
To interest thereon for 4 years, 5 months, and 25 days at 6 per cent.....	80 80
To amount inherited from Warren Harris' estate	267 21
Total	\$1,078 98

"I further find she took credits as follows:

By probate costs.....	\$ 7 35
By six years' board, clothing, tuition, and maintenance	600 00
Total	\$ 607 35

Balance due Claudia W. Harris, \$1,071.63.

—Which said amount of \$1,071.63 I find and conclude the said Sarah W. Harris owed her said ward Claudia W. Harris on May 9, 1893, instead of the amount she claimed to owe of \$388.98.

"I further find and conclude that these items making the difference in both the estates of Claudia and Warren Harris, minors, were not included in nor embodied in the said settlements of Sarah W. Harris, curator, and were not passed upon by the court in its actions in said estates, and were not adjudicated by said court. I further find that Claudia W. Harris at the time of said so-called final settlement was of age, and executed to the said Sarah W. Harris a receipt for \$388.98 in full payment and satisfaction of her interest in the estates of James D. Harris and Warren Harris, and in full settlement of her accounts as guardian and curator of Claudia W. Harris. I further find that the said Sarah W. Harris filed said receipt in the probate court of St. Charles county, Missouri, and that the court made an order of record on that day, to wit, May 9, 1893, discharging said curator. I further find that the said curator, Sarah W. Harris,

did not pay to the said Claudia W. Harris the said sum of \$388.98, or any part thereof, or any other amount or moneys. I further find that said ward was not informed as to her estate and its conditions, and signed the receipt because asked to do so by her mother and her lawyer, and that she did not waive any of her statutory rights. I further find that said probate court of St. Charles county, Missouri, on the 31st day of May, 1901, after hearing the motion of Claudia W. May, formerly Claudia Harris, late a minor, and which I find she filed in said court, asking said court to set aside and vacate the order of final settlement and discharge of her guardian, Sarah W. May, formerly Sarah W. Harris, and compel her to make a full and complete settlement of said estate, and after being fully advised in and concerning said matter, made an order and judgment of record on said day sustaining said motion, and ordered, adjudged, and decreed that the order of final settlement and discharge of said guardian made by the court on the 9th day of May, 1893, be vacated and set aside. I further find that said Sarah W. May did not serve any notice of her final settlement upon her ward Claudia May, nor of her intention to make such settlement or ask for a discharge, and that said ward did not waive her right to such notice. I therefore find and conclude that said so-called final settlement and order of discharge of said guardian and curator, Sarah W. May, formerly Sarah W. Harris, was and is vacated and set aside, and that such settlement was not and is not a final settlement.

"I further find as aforesaid that the amount due Claudia W. Harris, now Claudia W. May, on May 9, 1893, was \$1,071.63. I further find that she is entitled to interest thereon at the rate of eight per cent from that date to August 13, 1896—3 years, 3 months, and 4 days—which is \$279.50. I further find that on the ——— day of July, 1896, Sarah W. Harris and Claudia Harris sold the farm herein mentioned in St. Charles county, Missouri, for \$1,205.70, and that the entire amount was paid to Sarah W. May, formerly Sarah W. Harris. I find and conclude that Sarah W. Harris was entitled to one-fourth of the proceeds from the sale of said farm and Claudia Harris to three-fourths of the proceeds of the sale of said land. I find that the amount due Claudia Harris from the sale of said land is \$904.27; making the total amount due and unpaid Claudia Harris, now Claudia May, from Sarah W. Harris, now Sarah W. May, on August 13, 1896, as follows:

To amount due Claudia Harris on final settlement of her estate May 9, 1893.....	\$1,071 63
To interest on said amount from that date to August 13, 1896, at 8 per cent.....	279 50
To three-fourths proceeds of sale of farm....	904 27
Total amount due.....	\$2,255 40

"I further find from the evidence that the real estate described in plaintiff's petition as being situated in the county of Pike and

state of Missouri, to wit, all of lot 25 in block No. 107 in Baker's Claim Addition to the city of Louisiana, except five feet off west side of said lot, reserved for alley purposes, was purchased by plaintiff for the sum of \$2,200, which said sum was paid therefor on the 13th day of August, 1896, and consisted of defendant Claudia May's share of the proceeds of the sale of said farm, and the balance of which purchase money of said Louisiana property consisted of trust funds collected by and held in the hands of the plaintiff, Sarah W. May, as guardian and curator of defendant Claudia May; all of which purchase money of the said Louisiana property was money due and belonging to said Claudia May from plaintiff, and were funds of said Claudia W. May held as trust funds by said plaintiff, and which went into and paid for said Louisiana property, the ownership of said purchase money being in said Claudia W. May. * * * I further find that Sarah W. May has a fee-simple title to an undivided one-half interest, so far as the record title is concerned, in the land described in her petition as located in Louisiana, Pike county, Missouri, but further find and conclude that she holds said title and interest in trust, however, for the benefit of Claudia W. May. * * *

"I find and conclude as a matter of law that Sarah W. May is entitled to and owns a homestead interest in lot No. 1, in block No. 20, in the Railroad Addition to the town of Wentzville, in St. Charles county, Missouri, and described in plaintiff's petition and is also entitled to and owns an undivided one-fourth interest in fee simple in and to the remainder interest in said lot. I find and conclude as a matter of law that Claudia W. May is entitled to and owns an undivided three-fourths interest in fee simple in and to lot No. 1, in block 20, in the Railroad Addition to the town of Wentzville, St. Charles county, Missouri, subject to the homestead interest of Sarah W. May. I find and conclude as a matter of law that Claudia W. May is also entitled to and owns all of lot No. 25, in block No. 107, in Baker's Claim Addition to the city of Louisiana, Pike county, Missouri, except five feet off of the west side of said lot reserved for alley purposes. I find and conclude that she is the owner in fee by purchase of an undivided one-half interest in the said property last above described, and is entitled to and the owner of the other half interest in fee, the record title to which is in Sarah W. May, by reason of the fact that said Sarah W. May purchased said one-half interest with the funds of Claudia May as hereinbefore found, and placed title thereto in her own name. I further find and conclude that she took and now holds the same in trust for the benefit of the said Claudia W. May. I further find and conclude that Sarah W. May is indebted to Claudia W. May on August 13, 1896, over and above the trust funds which she used in

the purchase of the said Louisiana property, in the sum of \$55.40, being the difference between the amount then due said Claudia W. May of \$2,255.40 and the \$2,200 used in the purchase of said Louisiana property, which is the said sum of \$55.40, and should pay interest thereon at the rate of 8 per cent. * * *

"I find from the nature and amount of the property to be divided that partition in kind of the same cannot be made without great prejudice to the owners thereof. I therefore recommend that partition be had herein, and that lot No. 1 in block No. 20 in the Railroad Addition to the town of Wentzville, St. Charles county, Missouri, be sold according to law to the highest bidder for cash, and that the proceeds of said sale be partitioned and divided between the parties herein according to their respective interests as herein found, and that plaintiff pay to Claudia W. May the sum of \$55.40 and interest thereon at the rate of 8 per cent. from August 13, 1896, out of her interests in the proceeds of said sale, and that her interest in the proceeds of said sale be charged therewith. I further recommend that title in fee to all of lot No. 25 in block 107 in Baker's Claim Addition to the city of Louisiana, Pike county, Missouri, except five feet off the west side of said lot, reserved for alley purposes, be adjudged and decreed in Claudia W. May, and that plaintiff be divested of any and all title therein."

Upon the coming in of the report plaintiff filed objections thereto, which, having been heard, were overruled, the report in all things approved, and the following decree entered:

"It is therefore considered, ordered, adjudged, and decreed by the court that plaintiff, Sarah W. May, formerly Sarah W. Harris, be, and she is hereby, divested of any right, title, or interest, whether legal, equitable, certain, or contingent, or present or in reversion or in remainder, in and to lot No. twenty-five (25) in block No. one hundred and seven (107) in Baker's Claim Addition to the city of Louisiana, Missouri, except five (5) feet off of the west side of said lot, reserved for alley purposes, and that the absolute fee-simple title to said premises be, and the same is hereby, adjudged and decreed to be in defendant Claudia May; and the prayer of plaintiff for partition of the same is hereby denied. It is further considered, ordered, and adjudged by the court that plaintiff, Sarah W. May, be, and she is hereby, entitled to and is the owner of a homestead interest in and to lot No. 1 in block No. 20 in the Railroad Addition to the town of Wentzville, St. Charles county, Missouri, and that, in addition thereto, she be, and is hereby, entitled to and is the owner of an undivided one-fourth interest in fee simple in and to said premises. It is further considered, ordered, and adjudged by the court that defendant Claudia May be, and she is hereby, entitled to and is the own-

er of an undivided three-fourths interest in fee simple in and to said lot No. 1, in block No. 20 in the Railroad Addition to the town of Wentzville, St. Charles county, Missouri, subject, however, to the homestead interest hereinbefore adjudged in favor of plaintiff, Sarah W. May; and the court decrees partition of said premises in accordance with the rights of the parties as hereinbefore determined. It is further considered, ordered, and adjudged by the court that said lot No. 1 in block No. 20 in the Railroad Addition to the town of Wentzville, St. Charles county, Missouri, is not susceptible of division in kind among the parties in interest without great injury to the owners thereof; and the appointment of commissioners to divide said real estate in kind between plaintiff, Sarah W. May, and defendant Claudia May, and to report the advisability and practicability of a partition in kind of said real estate between them, is hereby dispensed with. It is therefore considered, ordered, and adjudged by the court that so much of said real estate above described as is situated in St. Charles county, Missouri, to wit, lot No. 1 in block 20 in the Railroad Addition to the town of Wentzville, be sold by the sheriff of said St. Charles county, for cash in hand, on some day during the regular March term, 1903, of the circuit court of said St. Charles county, in accordance with the laws governing such sales of real estate in partition, and that said sheriff make full, true, and complete report of the sale of said real estate and of his acts under this order to this court at its next regular term. It is further considered, ordered, and adjudged by the court that upon the sale of said real estate aforesaid the homestead interest hereinbefore adjudged in favor of plaintiff, Sarah W. May, be commuted to its present cash value. It is further considered, ordered, and adjudged by the court that defendant Claudia May have and recover from the plaintiff, Sarah W. May, the sum of fifty-five and forty-hundredths dollars (\$55.40), together with interest thereon from August 13, 1898, at the rate of eight (8) per cent. per annum, and that the interest of said Sarah W. May in and to said premises aforesaid, or in and to the proceeds of the sale herein ordered to be made of the same, is hereby charged with the lien of this judgment for the above amount."

From this decree the plaintiff appeals, her counsel contending here, as they did through the whole trial before the referee and the court below, that in determining the amount of moneys that came into the hands of plaintiff as guardian and curator of her daughter, and which, with the proceeds of her interest in the farm which she inherited from her father and brother, went into and constituted the purchase price of the Louisiana property, the referee and the court were concluded by the settlements made by her as such guardian and curator. And this is substantially the only ground upon which a reversal of the

decree is asked for. This contention is based upon the theory that such a settlement was a final settlement, as it purported to be, and if it was so in fact then the trial court committed error in the admission of evidence de hors the settlement, and the decree is obviously erroneous, for no principle is better settled in this state than that final settlements of guardians, executors, and administrators stand upon the same footing as other judgments of courts of competent jurisdiction, and are conclusive as to all matters the proper subject of account included in such settlements and involved in the final settlement. *State ex rel. v. Gray*, 106 Mo. 526, 17 S. W. 500; *Smith v. Hauger*, 150 Mo. 437, 51 S. W. 1052; *Patterson v. Booth*, 103 Mo. 402, 15 S. W. 543; *Garton v. Botts*, 73 Mo. 274. But, in order that a settlement shall have such conclusive force and effect, it must be a final settlement, made in accordance with the requirements of the statute in force at the time settlement is made. In this instance that statute required the plaintiff as guardian and curator of her daughter, for the purpose of making such a settlement, to make a just and true exhibit of the account between herself and her ward, and file the same in the court having jurisdiction thereof, and cause a copy of such exhibit, together with a written notice stating the day on which and the court in which she would make such settlement to be delivered to her ward at least four weeks next before the first day of the term of the court at which settlement was according to the terms of such notice to be made, and only upon satisfactory proof of the delivery of a copy of such exhibit and written notice of such settlement to her ward was the court authorized to make a final settlement of her account with her ward. *Rev. St. 1889, § 5329*. This statute was not complied with in making the settlement in question, as is apparent on the face of the record, and affirmatively shown by the evidence. The exhibit was not filed and the notice was not given as required by the statute; nor was there any waiver, if such a thing could be, by the appearance of the ward to the settlement. Hence it was not a final settlement, and cannot have the force and effect of one. *Mead v. Bakewell*, 8 Mo. App. 549; *Folger v. Heidel*, 60 Mo. 294; *State, v. Hoster et al.*, 61 Mo. 544; *Berkshire v. Hover*, 83 Mo. App. 435. The last case was decided under the statute in force when this settlement was made, and whilst it is therein noted that the letter of that statute as a whole is not identical with the statute in force under which the previous decisions were made, it is aptly remarked that the spirit is the same, and the construction is a fair and wholesome one. As a settlement without notice, it could have no other or greater force than an annual settlement, and as such would be merely *prima facie* evidence of the facts therein contained—evidence which might be

rebutted and overcome, as was overwhelmingly done in this case, by competent and credible evidence.

Plaintiff's contention cannot be maintained, and, but for the last paragraph of the decree, in which a judgment for \$55.40 is rendered against the plaintiff and charged against her homestead, the decree would be affirmed. We do not perceive, however, upon what principle the plaintiff's homestead can be charged with an indebtedness to her ward in an action in partition. That indebtedness has nothing to do with the res of the suit. It was only with the ward's money that went into the land to be partitioned that the chancellor had to do in this action. Hence for that error in the decree the same will be reversed, and the cause remanded to the Louisiana court of common pleas, with directions to that court to strike that paragraph from the decree, and proceed with the case to final judgment. All concur, except MARSHALL, J., not sitting.

CITY OF ST. LOUIS v. LAWTON et al.
(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. BILL OF EXCEPTIONS—TIME FOR FILING.

Where no bill of exceptions was filed during the term, or within an extension of time then granted, the exceptant could not incorporate the proceedings in a bill filed at a subsequent term.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, §§ 49-51.]

2. NEW TRIAL—MOTION—SCOPE—REVIEW.

Where, at one term, an order was made setting aside a report of commissioners on damages in condemnation proceedings and appointing a new commission to inquire into the damage, and no exception was taken to such action, on the report of the new commission at a subsequent term, the party dissatisfied therewith could not acquire a right to have the validity of the appointment of the commission reviewed by making the motion for new trial include the proceedings of the prior term.

3. EMINENT DOMAIN—MUNICIPAL CORPORATIONS—PROCEEDINGS—DISMISSAL.

Under St. Louis City Charter, art. 6, § 7 et seq., providing that, on a petition to condemn lands and appointment of a commission to assess damages, opportunity shall be given to report to the municipal assembly "for its information and approval," the disapproval of the report does not of itself operate as a dismissal of the proceedings.

4. SAME—DAMAGES—TRIAL BY JURY.

Under St. Louis City Charter, art. 6, § 7, providing that, on exceptions to the report of commissioners assessing damages in proceedings to condemn land, the court may make such order as justice may require, and may order a new appraisal, an order making changes in the benefit assessment was not an infringement on the right, given by Const. art. 2, § 21, to have the damages assessed by a jury or commission of freeholders.

Appeal from St. Louis Circuit Court; Selden P. Spencer, Judge.

Proceedings by the city of St. Louis against Joseph Lawton and others. From a judgment assessing damages and benefits to de-

fendants in the condemnation of land, one of them appeals. Affirmed.

Sears Lehmann and Boyle, Priest & Lehmann, for appellant. Chas. W. Bates and O. R. Skinner, for respondent.

VALLIANT, J. This is a proceeding to open a street, condemning land to be taken for that purpose and assessing benefits. The St. Louis Fair Association is one of the property owners whose land is taken and is the appellant. The petition was filed April 24, 1897. Commissioners were appointed, who filed their report October 24, 1899. Time was given to report to municipal assembly, and exceptions to the commissioners' report were filed. On April 30, 1900, during the April term, it is said in appellant's abstract that the city counselor filed a statement showing that the municipal assembly had disapproved of the commissioners' report, and that on the same day the court made an order setting aside the report and appointing a new set of commissioners to make a new assessment of damages and benefits. The order contains no finding or recital of facts as its base, but simply sets aside the report and appoints a new commission. At the October term, 1900, the second set of commissioners filed their report, awarding appellant \$1 damages for the land taken, and assessed against it amounts aggregating \$4,261.65, for benefits, and against the city as for benefit to the general public \$100, to which report appellant filed exceptions: First, that the damages assessed in appellant's favor were inadequate; second, the benefit district should have been extended further; third, the benefits assessed against the city were too small; fourth, that the failure of the municipal assembly to approve the report of the former commissioners operated as a withdrawal of the proceedings, and therefore this report is without warrant of law. The exceptions came on to be heard on evidence at the June term, 1901, when the court sustained the exceptions to the extent of reducing the aggregate assessment of the benefits against the appellant \$1,200, and adding that sum to the assessment against the city, and, after so modifying the report, approved it, and rendered final judgment of condemnation of appellant's property accordingly. Appellant in due time filed a motion for a new trial, assigning three grounds: First, error in modifying report and entering judgment thereon; second, under the evidence the exceptions should have been sustained and the report set aside; third, admitting illegal evidence for the plaintiff and excluding legal evidence for the exceptor. The motion was overruled, and leave to file bill of exceptions on or before October 7th next was granted, which bill was filed in due time. On the trial the evidence for the exceptor tended to show that the amount of damages assessed was inadequate, and con-

tra, for the plaintiff, that the land proposed to be embraced in the street had in fact already been a public road many years.

1. The first and main proposition of appellant is that the disapproval by the municipal assembly of the report of the first set of commissioners was in effect the end of the suit. All that the court did thereafter was outside of its jurisdiction. The learned counsel on both sides of this controversy are agreed on the proposition that no action of the trial court is reviewable on appeal, unless it was presented to the trial court in a motion for a new trial, or a motion in arrest, or unless it appears on the face of the record proper. There was no motion in arrest, but appellant insists that the point was preserved in the motion for a new trial, and also that it is on the face of the record proper. The only bill of exceptions we have is that which covers the trial at the June term, 1901. The order of the court setting aside the report of the first set of commissioners and appointing a new commission was made at the April term, 1900, and there was no bill of exceptions filed at that term, and no extension of time asked or given to file one. The proceedings of the court at that term were not excepted to. The bill of exceptions taken at the June term, 1901, undertakes to go back to the April term, 1900, and brings into it the order made at that term, and says, "to which action of the court this exceptor and defendant, the St. Louis Fair Association, then and there duly excepted." But when the April term, 1900, closed, and no bill of exceptions was filed then, or within an extension of time then granted, its book was sealed, and the party cannot incorporate into a bill of exceptions covering the proceedings of a subsequent term that which should have been preserved in a timely term bill. Therefore the recital in this bill that the party excepted to the ruling of the court at the former term cannot be considered.

Appellant contends that this point is preserved in the record in this way: In the exceptions filed to the report of the second commission, the fourth ground is that the failure of the assembly to approve the report of the first commission operated as a withdrawal of the proceedings, and in the motion for a new trial at the June term, 1901, one of the grounds is that the exceptions should have been sustained. But a motion for a new trial should be based on what occurred at the trial. It cannot go back to the proceedings and rulings of the court at a former term, and bring them in to impeach the regularity of the proceedings on the trial under review. If parties submit to a ruling without exception, they will be presumed to have acquiesced in it. If the proceedings under this second commission had been entirely satisfactory to appellant, it would not have desired to question the authority of the court to appoint a new commission. It cannot acquiesce until the report comes in against it, and then go

back and object. The point relied on is not preserved in this bill of exceptions. What is above said relates, of course, to matters in pais. If the alleged infirmity is in the face of the record, it needs no bill of exceptions to bring it up for review. Does it appear in the face of the record proper that the court committed error in setting aside the first report and awarding a new appraisalment? It is argued for appellant that the court based its order on the action of the municipal assembly in refusing to approve the report. But that does not appear on the face of the record proper. The order itself contains no finding or recital of fact, and all reference in this bill of exceptions to what occurred at the April term, 1900, is to be disregarded. There is, therefore, nothing in the record of which we can take notice that shows any action of the municipal assembly in reference to the report of the first commission. The record proper shows that exceptions were filed to the report, and the charter provides in such cases (section 7, art. 6) that the court shall hear the exceptions and make such order in the case "as right and justice may require, and may award a new appraisalment upon good cause shown." There was, therefore, express authority for the court to do just what it did.

Perhaps, after what we have said, it is unnecessary to consider what would have been the effect of the refusal of the municipal assembly to approve the first report, if the second properly showed such refusal; but, lest our silence on that point might give a wrong impression, we deem it proper to say that whilst the charter (section 9, art. 6) requires that opportunity be given the city counselor to report the matter to the municipal assembly "for its information and approval," and that no action be taken on the report by the court until the municipal assembly has acted, it does not say what effect the disapproval of the report by the municipal assembly shall have. The same section in that connection goes on to say that the city may dismiss or withdraw the proceedings on payment of costs, and when it does so it shall not begin the action again for 10 years. That language contemplates motion by the city in court or before the clerk in vacation to dismiss the suit. In fact, when a suit of any character is pending in court, it cannot be dismissed by the action of a party outside and independent of the court or its officers. The code of procedure provides how a suit may be dismissed in term or in vacation. Sections 639, 797. It may be that the action of the municipal assembly in refusing to approve a report would furnish a basis on which to found a motion to dismiss (as to which we express no opinion); but the action itself does not dismiss the suit. The charter might have given it that effect, if it had so provided; but it does not so provide. In the next section (10) it is provided that when

the report is confirmed and final action taken by the court the result shall be certified to the comptroller, and he report it to the assembly, which at its next session shall make the necessary appropriation, and a failure of the assembly "to make such appropriation shall operate as a dismissal of such proceedings, and no future action for such condemnation for a period of ten years," etc., showing that the framers of the charter had the subject in mind, and if they had intended to make the failure to approve the report of the commissioners a dismissal of the suit they would have said so.

2. Appellant's next point is that the modification by the court of the report of the second commissioners was a usurpation of appellant's constitutional right to have its damages assessed by a jury or a commission of freeholders, as declared in section 21, art. 2, of the Constitution. No suggestion was made to the trial court that appellant's constitutional rights in that particular were being disregarded, and if there had been the point would have been conclusively answered in the language of this court in *St. Louis v. Buss*, 159 Mo. 9, 59 S. W. 969. In that case, as in this, the award of the commissioners on the question of damages was not molested; but some changes were made in the benefit assessments. The court construed the section of the charter (section 7, art. 6) above referred to, and held that, under its requirements "to make such order therein as right and justice may require," the court was authorized to modify the benefit assessments, and in so doing did not infringe on the party's rights under the clause of the Constitution specified.

Appellant dwells with earnestness on the general result, which gives it \$1 for its compensation for a strip of land 30 feet wide and 100 or more feet long, and taxes its adjoining property more than \$3,000 as for benefits. If that were all there was of it, no court would allow such an award to pass into judgment. But there was evidence tending to show that this 30-foot strip had been used as a public street or road from a date as far back as 1861, and that in this proceeding a strip on the north of it was taken from other property owners to make this street about 60 feet wide along the north boundary of a large tract of land belonging to appellant in an already thickly settled portion of the city. The modification of the report by the court was, as far as it went, entirely to the advantage of appellant. It reduced the benefit assessments against its property \$1,200, and added that sum to the sum the city should pay. We do not see in the facts of the case anything so shocking to the sense of justice as to authorize an appellate court to invade the realm of the trial court on a question of fact.

There is no error in the record. The judgment is affirmed. All concur, except MARSHALL, J., not sitting.

FISCHER v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREETS—PERSONAL INJURIES—NEGLIGENCE—QUESTION FOR JURY.

In an action against a city for injuries caused by falling over a stone step leading to private premises and projecting under the street, evidence held to justify submission to the jury of the question whether defendant was negligent.

2. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a city for injuries caused by falling over a stone step leading to private premises and projecting under the street, evidence held to justify submission to the jury of the question whether plaintiff was guilty of contributory negligence.

3. SAME—INADEQUATE DAMAGES.

Where plaintiff sustained a broken ankle, which, because of her age, failed to heal properly, so that she could walk only by artificial aid, a verdict for \$1 in an action for the injury should be set aside as the result of prejudice.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 370, 396.]

Appeal from St. Louis Circuit Court; Selden P. Spencer, Judge.

Action by Mary Fischer against the city of St. Louis. From a judgment for plaintiff for less than her demand, she appeals. Reversed.

Hickman P. Rodgers, for appellant. Chas. W. Bates and Wm. F. Woerner, for respondent.

LAMM, J. Action against respondent city for personal injuries predicated on its alleged negligence in permitting the half of a millstone or grindstone of considerable dimensions to be and remain in the footway or sidewalk of one of its thoroughfares—Second street. Damages laid at \$5,000. Tried to a jury. Verdict, \$1.

Asserting dissatisfaction over this small verdict, appellant filed a motion for a new trial challenging the verdict, because, she says, it was the result of passion, prejudice, or misconduct on the part of the jury; because the verdict was inadequate, and not commensurate with the injuries received; and because the jury failed and refused to heed the instructions of the court, in that having found the issues in favor of plaintiff, it failed to fairly compensate her for her injuries. The court below disallowed this motion, and plaintiff duly appeals here, assigning said ruling as error.

It is disclosed by the record that the pleadings are unexceptionable, and the instructions are unassailed; that at the close of appellant's case respondent challenged the sufficiency of her evidence to make a case, and the trial court overruled a demurrer thereto; and that the jury was commanded by the court, *inter alia*, as follows: "That if you find for the plaintiff you will assess her damages in such a sum as, from the evidence, you believe will be a fair and reasonable re-

compense for the injuries received by her. In fixing the amount of such damages, you will take into consideration the nature and extent of the physical injuries received, the pain and mental anguish endured, as well as the pain and inconvenience, if any, which you believe from the evidence will reasonably result from said injuries in future."

The undisputed facts follow: Second or Columbus street is a public street of St. Louis. At a certain place in this street, close to its junction with Duchoquette street, there is a sidewalk or a footway of cinders, which walk at other points along the street was made of other material. One Smith owns a tenement abutting on this cinder walk. The street line of his premises is about 18 inches higher than the level of the walk. Smith's house stands back from the street, and is approached from the street by a gateway. In front of this gate, at the outer street limit, is a half of a grindstone or millstone extending along the outside street line 3 or 4 feet, and projecting therefrom over into the sidewalk, in extreme limit, 2½ feet. This stone, because of the uneven lay of the walk, or for some other cause only to be guessed at, is flush with the plane of the walk at the gate, but 5 inches above the plane of the walk at the point of farthest projection into the footway, so that a person walking in the footway close to the gate might meet with little or no obstruction, but the same person walking 2 feet 4 inches away from the gate would meet an obstruction 5 inches high. Defendant introduced evidence, not controverted, that this millstone had been there for 27 years, and filled the office of a stepping stone to enter the premises of Smith. The evidence indicated that the walk was of considerable width, and that there was ample room for pedestrians between the millstone and the curb. The evidence also indicated the nearest city light was 200 feet away. The character of this light was not shown, but it appears that at the point in question at the time in question the stone was obscured by darkness.

Appellant is an old washerwoman, burdened with the weight of 68 years. Her daughter lived adjacent to the premises of Smith, and had resided there for three years. She had visited her, say, a dozen times, and a few times—say three—had passed by this stone on said visits. It stands confessed that she was familiar with the location and character of the obstruction. On the evening of January 5, 1902, appellant visited her daughter. On returning home, accompanied by her husband, after 9 o'clock p. m., in the dark, she fell over this stone, thereby breaking and dislocating her left ankle, wherefrom she was confined to her bed for several months, suffered the pains and distress naturally incident to such injuries, and, as reasonably to be expected at her time of life, the broken bones did not knit by first im-

pression, nor did her injuries heal kindly, but she remained crippled, and, so late as October, 1902, at the trial, was obliged to walk with artificial aid. No question whatever is raised about the extent or character of her injuries and resulting pains. The old lady told her story on the stand in a broken way, with the idioms and phrasing of her German mother-tongue, and with a consequent lack of clearness on cross-examination, needing and appealing for a touch of sympathetic intelligence to clear away obscurity. Substantially and briefly she testified that as she was walking that night on the street, she, in a general way, had the stone in mind, but that in the darkness she was confused as to its location, and as to her proximity to it, and her distance from the street line, and that in this condition of things, while intending to avoid the obstruction, and thinking she was well outside the line of danger, she fell over it, and suffered said hurts.

The foregoing is the whole story in small compass, and presents the only facts and issues for our adjudication. And on this record it is self-evident that, if appellant was not guilty of such want of care as would, as a matter of law, be contributory negligence, and if, under the evidence, as a matter of law, it cannot be said that respondent was not guilty of negligence in permitting the character of obstruction indicated to be and remain in the footway for pedestrians in one of its streets, we must avow judicial sympathy with the contention of appellant; and that sympathy has its root in the following condition of things: The jury found the issues for appellant. Now, the only allowable meaning of that finding when logically analyzed and interpreted is (1) that the jury found that respondent was negligent; (2) it found that appellant was using due care; and (3) it found that her injuries resulted from respondent's negligence. There is one other allowable hypothesis, and that is that the jury under the facts intended to and did, in all but name, find for defendant, but shrunk from meeting the issues, and put its verdict in the form it did on the question of costs. In the evolution of a trial a verdict of a jury may be likened to a correct conclusion in a syllogism, and, if the conclusion be not correct, it would put the law to open shame if a court, having due regard always for the independence of the jury and its power within bounds, did not apply a correcting hand to see that a perverted conclusion was corrected. Here we have a venerable woman coming into a court of justice for redress. Her very simplicity and humbleness and age bespeak tenderness at the hands of the law. It is adjudged that her serious injuries were the result of respondent's negligence, and were suffered without her fault; and yet for a broken and dislocated ankle and a long period of mental and bodily distress she is given a bagatelle.

Courts should be diligent to see that the law, which is itself reason and common sense, be applied with the aid of right reason to produce a reasonable result in the everyday affairs of life. The gravity necessary in the administration of justice to entitle the law to respect necessitates that mere caprice and practical jokes have no part or parcel therein, and it results that, if there was substantial unimpeached evidence upon which the jury could find that appellant was exercising due care and that respondent was negligent, this verdict, considering the grievous hurts of appellant, disturbs the moral sense, and should be brushed aside.

Respondent recognizes the delicacy of the situation, and insists (1) that there was no evidence of negligence, and hence plaintiff should have been nonsuited; (2) that appellant's evidence affirmatively shows that she was not exercising due care, and hence she should have been nonsuited; and (3) that the verdict, fairly considered, is a verdict for respondent on all the issues, and was the result of blandness on the jury's part in the matter of costs. Of these in their order.

1. On the issue of the negligence of respondent in allowing the stone to remain in the street, it is insisted that the premises of Smith were higher than the level of the sidewalk, that the stone was a proper stepping stone to reach these premises, and that the city was in no wise negligent in permitting it to remain and be so used, considering the width of sidewalk left unimpeded for pedestrians. We are not called upon to pass on the question whether or not in a wide sidewalk, where ample room is left for foot travelers, and where houses have been so built, flush with the street, that stepping stones become necessary for convenient ingress and egress, because of the street grade or for other reasons, a suitable stepping stone permitted on the edge of the sidewalk would create a nuisance in the street, and render a city responsible for injuries to a pedestrian stumbling thereon in the dark. This case is not such a case, and must stand on its own facts. The evidence shows that no reason exists why the step should not have been inside the building line, for Smith's house was not flush with the street, but set back; that there was a rise of 18 inches from this stone to his premises; that the plane of the sidewalk at the outside street line coincided with the plane of the stone, and that the maximum rise in the step, so called, was in the street, over two feet away from the gateway, and thus it would happen that a person stepping on this stone from the street, designing to enter Smith's premises, would have to take practically another step before he reached the gateway, and when he reached that point he would have to step up 18 inches to get into Smith's premises. Vice versa, a person leaving Smith's premises by this gateway would step down eighteen

inches to the stone, and when that step was taken he would be practically on the level of the sidewalk at that immediate point. He would then take a forward step on the stone, and would be at the edge of the step off of five inches to the sidewalk at that point. So that, while we are not called upon to decide that a suitable stepping stone might not have been legally placed to enter Smith's premises, we are prepared to say that the character of stepping stone permitted in that sidewalk, projecting, as it did, an unnecessary distance into the walk, presents a case where the question of negligence was properly sent to the jury. Indeed, the stone might well be considered more of a snare than a stepping stone; for, if it were not there, a person entering or leaving Smith's gateway would have practically no more or no less of a step up or down to enter or leave than he would have with the stone in place. The long period of time that this condition of things was allowed to exist does not tend to render it sacred in the eyes of the law, for an original sin of negligence will not ride into the wilderness on a scapegoat of mere time; and it must not be lost sight of that to pedestrians the mere fact that a condition has existed for a long time is of no significance, except it speaks to the point of notice and knowledge, which necessarily varies as to each one.

We are cited to two cases by the learned counsel of respondent as sustaining its contention, but neither, in our opinion, lays down any principle determinative of the issues under this record. In one of them, a Kentucky case (*Teager v. City of Flemingsburg*, 109 Ky. 746, 60 S. W. 718, 53 L. R. A. 791, 95 Am. St. Rep. 400), a street was on a grade, and a step of a few inches was built or permitted by the city across a sidewalk to equalize this grade, and to serve as a watershed, throwing the surface water of the street from the pavement; and the question was whether the building and maintenance of a sidewalk with a step, which, from the nature of the grade, the city government deemed necessary and proper, is of itself such negligence as will warrant a recovery by one injured in a fall caused by the step. It will be seen at a glance that the Kentucky case is not on all fours with the case at bar. There a city, using its best engineering judgment, adopts a plan to level the grade and to serve as a watershed, and in so doing acted within its delegated discretion and power to subserve public ends, there being no evidence the step was out of repair or unskillfully constructed. The same principle has been applied in this state by this court and the other appellate courts in proper cases. In a New York case—*Dubois v. City of Kingston*, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804—it appeared that at a place brilliantly lighted at the time, Dubois, running to a fire, in the nighttime, stumbled over a stone that was placed along the curb

of a street in front of the post office as a convenience to persons entering and alighting from carriages and having business at the post office. In that case, as in this, there was ample room for the use of pedestrians left. The stone was 3 feet 4 inches in length, 20 inches wide and 14 inches high. It laid lengthways with the curb, and at the north end of the stone was a lamp post of about one-half the width of the stone. The most that can be said for the New York case is that it was therein held that a stepping stone on the edge of a curb for the comfort and convenience of the public did not constitute a nuisance, in the absence of evidence justifying the conclusion that it was dangerous to travelers passing along the street, and in the absence of evidence that the city authorities were chargeable with negligence in allowing it to remain where it was located. In that case, too, it was held that plaintiff was chargeable with negligence contributing to his injury. He was well acquainted with the locality, and, as said, it was brilliantly lighted at the time, and, if he had been careful in exercising his faculties, he would have avoided the accident. The cause was reversed, and a new trial granted, with costs to abide the event. So that the facts are dissimilar, and the case does not announce any doctrine that might not be granted, and yet leave this case a proper one for a jury, as, in our opinion, it was, on the issue of negligence.

2. Was appellant guilty of such want of care as defeats her recovery as a matter of law? On the facts set forth—and they are undisputed—we cannot so hold. The place was dark, and while she knew of the location and character of the obstruction, and, being not forgetful at the time that she was in proximity to it, made conscious effort and intended to avoid it, yet it was clearly a question for the jury whether she, in the confused surrounding circumstances, acted with the prudence of a reasonable person while and in proceeding along that sidewalk at that time. The danger was not known to her as so obvious and glaring as to compel her to cease the use of the sidewalk and take to the street or to the other side; and, if it be allowed that the city was negligent, it cannot be contended that it had the right to place upon appellant the hard necessity of an absolutely infallible judgment in the darkness. The following cases, with many more, support this view: *Graney v. St. Louis*, 141 Mo. 180, 42 S. W. 941; *Flynn v. Neosho*, 114 Mo. 568, 21 S. W. 903; *Loewer v. Sedalla*, 77 Mo. 431. The case, then, was properly sent to the jury on the issue of due care in appellant, and the jury had substantial evidence upon which to base a finding that due care was exercised.

3. But it is stoutly contended by respondent that on all the facts of the case the jury should have found for respondent, and that a dollar verdict in substance and effect

amounts to that, merely taking the peculiar form it did out of regard for appellant on the question of costs. "Raking in the dead ashes of antiquated cases," to borrow the animated language of Chancellor Kent in discussing the earlier cases pertaining to the rule in *Shelley's Case*, it may be found that a notion once prevailed that in an action founded in damages sounding in tort the court might set aside a verdict excessively great as indicating passion, prejudice, or misconduct on the part of a jury, but would not meddle with a verdict immoderately small. This doctrine was illogical, and, being based on no substantial reason, is exploded. The true rule seems to be that a court with great hesitation will invade the provinces of a jury and interfere with a verdict for damages sounding in tort for personal injuries, crim. con., seduction, slander, libel, and other cases; especially where malice is an element, and smart money or exemplary damages are allowed. But judges have never renounced their right, as an element in the administration of the law, to set aside a verdict either excessive in bigness or ridiculous in littleness, where the result reached shocks the understanding, and cannot be fairly justified on any hypothesis except misconduct or prejudice or willful disregard of instructions. In arriving at a conclusion, however, the presumption is in favor of the good conduct of the jury, and therefore, if, on the whole record, the case preponderates in favor of the defendant, or is evenly balanced in the scales, or where, as in a case of assault, there was strong provocation, and where, as in case of slander, etc., there were facts tending to prove mitigation of damages, the courts have refused to interfere with nominal verdicts, although on first blush they may appear illogical. It would serve no useful purpose to collate the cases, or undertake to distinguish them, for they abound in nice refinements, and, after all, each case depends upon its own merits, and cannot be settled offhand on a mere general rule. The various propositions asserted above may be found discussed and applied in *Weinberg v. Ry. Co.*, 139 Mo. 286, 40 S. W. 882; *Haven v. Ry. Co.*, 155 Mo. 216, 35 S. W. 1035; *Dowd v. Westinghouse Air Brake Co.*, 132 Mo. 579, 34 S. W. 493; *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557; *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941; *Watson v. Harmon*, 85 Mo. 443; *Gregory v. Chambers*, 78 Mo. 294; *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265; *Bogges v. Ry. Co.*, 118 Mo. 329, 23 S. W. 150, 24 S. W. 210; *Gbetz v. Ambs*, 22 Mo. 170; *Fairgrieve v. City of Moberly*, 29 Mo. App. 141; *Choquette v. Ry. Co.*, 152 Mo. 257, 53 S. W. 897.

In *Pritchard v. Hewitt*, 91 Mo., loc. cit. 550 et seq., 4 S. W. 437, 60 Am. Rep. 265, after quoting approvingly the reasons for the general rule of noninterference from *Graham and Waterman on New Trials*, to the effect

that: "The reason for holding parties so tenaciously to the damages found by the jury in personal torts is that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury governed by a sense of justice. * * * To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining the facts and circumstances and valuing the injury and awarding compensation in damages. The law that confers on them this power and exacts of them the performance of this solemn trust favors the presumption that they are actuated by pure motives, * * * and it is not until the result of the deliberation of the jury appears in a form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose"—Brace, J., speaking to the point, says: "Of course, it goes without saying that actions *ex delicto*, wherein the damages may be measured with some degree of certainty, are not within the rule, and that those cases where the damages, under the circumstances, are such as to shock the 'understanding,' and induce the conviction that the verdict was the result of either passion, prejudice, or partiality, are exceptions to this rule."

In *Haven v. Ry. Co.*, *supra*, the court nisi set the verdict aside for inadequacy, and its action was sustained by this court. Marshall, J., discussing the matter now in hand, said: "In other words, where a jury has returned a verdict for nominal damages in a case where the plaintiff is not entitled to any damages, the verdict will not be set aside in the appellate court at the instance of the plaintiff."

When it is determined, as it must be in the case at bar, that there was persuasive evidence of the negligence of respondent city, and when it is determined, as it must be, that there was little or no evidence showing a want of care on the part of appellant, and that all the evidence in that behalf fell from her own lips, and, when fairly considered, does not show want of due care, and when the serious character of the injuries of appellant stands confessed, as here, it follows, we think, that the verdict of the jury in this case ought not to be attributed to a benevolent disposition on the jury's part toward appellant in the matter of costs, and as a finding for respondent city based on the substantial evidence, but must be attributed to whim and arbitrariness and a disposition to play fast and loose with the law and the substantial rights of appellant, and should be explained alone as the product of prejudice or some kindred motive.

Holding these views, we conclude the learned circuit judge erred in not sustaining appellant's motion for a new trial, and therefore the cause is reversed and remanded,

with directions to the lower court to set aside the order overruling appellant's motion for a new trial, to sustain that motion and grant appellant a new trial, and for further proceedings in the cause. All concur, except MARSHALL, J., not sitting.

STEVENSON et al. v. SMITH et al.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. RESULTING TRUST—EVIDENCE—SUFFICIENCY.

In a suit by heirs to declare and establish a resulting trust in land, evidence held to show that defendant purchased the land partly with money furnished by plaintiffs' intestate, taking the title in his own name, and that intestate had, and died with, an interest therein corresponding to the amount of her payment.

2. SAME.

Where land is purchased by one in his own name with money of another, a resulting trust is created by implication of law, which follows the ownership of the money; and where only a part of the purchase money is furnished by the beneficiary the trust is for a proportionate share of the land bought.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 102, 111.]

3. LACHES—DEFENSE.

The court will refuse to apply the doctrine of laches to dealings of an old mother with her son, who was her confidential business manager, and with whom she resided, except in a pronounced case; and, not being allowable as a defense against her, it may not be available against her heirs suing timely on her demise.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 191-195.]

Appeal from Circuit Court, Linn County; Jno. P. Butler, Judge.

Action by George Stevenson and others against William Smith and others. From a judgment for defendants, plaintiffs appeal. Reversed.

West & Bresnahan, for appellants, cited. *inter alia*, *Richardson v. Champion*, 143 Mo. 538, 45 S. W. 280; *Rice et al. v. Shipley et al.*, 159 Mo. 399, 60 S. W. 740; *Crawford v. Jones*, 163 Mo. 577, 63 S. W. 838; *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261; *Bowen v. McKean*, 82 Mo. 594; *In re Ferguson's Estate*, 124 Mo. 574, 27 S. W. 513.

E. R. Stephens and A. W. Mullins, for respondents.

LAMM, J. Rebecca Smith died intestate in October, 1901, in Linn county, owning no property in her own name, and leaving the respondent William Smith, a son, and certain other sons and daughters, and the descendants of those dead, her only heirs at law. Certain of her surviving children, together with certain of her adult grandchildren, and certain minors of the same blood kin through their curator, brought this suit in August, 1902, against William Smith and certain minor nonresident grandchildren, and one Jackson Fyke and one J. C. Meacham, the object and general nature of which was to

declare and establish a resulting trust in said William Smith in 120 acres of land in Linn county, described as follows: The N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 3, township 57, range 19; containing 120 acres, more or less—in favor of the heirs of said Rebecca. The interest of Jackson Fyke in the land remains undisclosed. The interest of defendant Meacham is alleged by the petition and admitted by the answer of William Smith to be that of a present purchaser of said real estate, together with an adjoining tract of 120 acres, lying adjacent and south of the land in question, and owned by respondent William, from him, without notice of the said trust or the equities of Rebecca Smith's heirs, under an executory contract of purchase for \$8,400, on which Meacham paid \$250 as an advance payment—the balance of the purchase money being due on March 1, 1903—and which contract of purchase the said Meacham was entitled to enforce, and by which it is alleged in the petition he obligated himself to pay one-half the entire purchase price, or \$4,200, for so much of the said real estate as was held in trust.

The petition is a voluminous pleading, which, in substance and effect, after setting forth the relationship of the parties, and alleging their respective aliquot interests as heirs of Rebecca Smith, avers that Rebecca was the owner in fee of said 120 acres of land; that the legal title at her death and for many years prior thereto was, and still is, in the name of her son William, and that he held the same in trust for the use and benefit of Rebecca, his mother, and since her death in trust for her heirs; that in 1884 Rebecca Smith owned a large amount of money and personal property, and placed \$3,500 thereof in the hands of her son William to invest in real estate in Linn county for her use and benefit; that the said William purchased the described real estate with \$2,400 of the said money and means of his mother, in pursuance of an understanding with her to that effect, but took the legal title in his own name, and thereafter held it in trust as aforesaid; that William, ever since said purchase, and until the death of his mother, acknowledged and recognized the trust relation; that in 1898 he borrowed \$3,000, and secured it by a trust deed covering the said trust estate, as well as the said tract of 120 acres lying immediately south and adjoining the same, and which said borrowed money remains unpaid, and which said trust deed is alive and in force; that the security of said trust deed should be first enforced and exhausted against the 120 acres of land owned by William in fee; that William Smith is insolvent; that the \$4,200 to be paid by Meacham for the land held in trust, the premises considered, constitutes a trust fund belonging to, and subject to division between, the heirs of Rebecca Smith; that defendant William refuses longer to recognize the trust relation,

and refuses to account to the other heirs for the proceeds of any part of the said real estate, and threatens to and will convert the same to his own use. The prayer is for a decree that William Smith holds the legal title to said first-mentioned real estate in trust for the use, benefit, and enjoyment of the heirs of Rebecca Smith; that the said heirs be decreed entitled to the proceeds of one-half of the Meacham sale in the proportion stated in the petition; that \$4,200 of the Meacham purchase money should be decreed paid into court for the use and behoof of said heirs, and that upon such payment into court of said trust fund, and the payment by Meacham to William Smith of the share of the purchase money arising from the sale of Smith's own land, the title to all the land be decreed vested in Meacham, and that the share of the purchase money impressed with the said trust be partitioned among the heirs of Rebecca Smith in proportion to their respective interests; and that the \$3,000 deed of trust be decreed to be first enforced against William's moiety of the land, or be satisfied out of his share of the proceeds of the Meacham sale.

The separate answer of the defendant William Smith raises the only issues (the other defendants defaulting), and, after admitting the death and intestacy of Rebecca Smith as alleged, it denies she was the owner of the real estate in question, and avers that, had she died seised or possessed of any estate, then the plaintiffs and defendants, together with Oscar Crossland and one — Preston, grandchildren of hers, and entitled as such to certain interests in her estate, would be the heirs at law of Rebecca Smith. The answer then alleges that on the 29th day of May, 1884, the defendant William contracted to purchase of James O. Crandall all the real estate in question, consisting of 240 acres, for the price and sum of \$4,800, and received Crandall's title bond for a conveyance to be executed on the 1st day of March, 1885; that, in compliance with said bond, the said Crandall and his wife on the 27th day of November, 1885, executed a general warranty deed to defendant to all said real estate; that Rebecca Smith was possessed of certain money and means acquired out of the estate of her deceased husband, defendant's father, on account of her dower interest in his estate in Illinois, where her husband died. And the answer then proceeds as follows: "That after said defendant purchased said 240 acres of land aforesaid, a part of which is described in plaintiffs' petition, said defendant received from his mother, said Rebecca Smith, her dower money aforesaid, to the amount of \$1,500, and that amount only, and which he used in part payment for said 240 acres of land, and that it was agreed between him and his mother that she was to have an interest in said land, the same, and that only, as a dower interest therein, for and during her

natural life, the same as she had owned in her deceased husband's estate in Illinois, in consideration of said money so furnished said defendant, and at her death said right and interest in said land was to absolutely terminate and end. That, by a subsequent arrangement between said defendant and his mother, she, with one of her sons, a brother of said defendant, occupied and used a part of said 240 acres of land for a considerable period of time, and that while they so occupied and used said land, said defendant furnished his mother, upon her request so to do, a large amount of money, stock, and farm supplies, used and consumed by herself and said son, with whom she was then living; amounting in the aggregate to the sum of \$1,760, and more. That said defendant also paid out for his mother, with his own money and means, the further amount of \$450.45, in the aggregate, after he had received said sum of \$1,500 from her. That said defendant's mother and her son with whom she undertook to carry on farming and stock raising for a time on said land made a failure in their said attempt, and lost substantially all his mother had invested in said business, to the amount, and more, as aforesaid; and having made such failure, and having used up and expended largely more money and means furnished by said defendant than the \$1,500 he had theretofore obtained from her, she returned to said defendant's home, where she had resided before undertaking said farming business, and thereafter resided with said defendant until her death, and that during said time, after her return to his home, said defendant kept, maintained, cared for, and supported her at his own expense, and entirely out of his own means, and that at her death he had her remains conveyed back to the state of Illinois for interment, and paid all the expenses connected therewith. That when said Rebecca Smith returned to said defendant's home to reside, after her failure in farming, she disclaimed any further interest in said land, or any part thereof, as dower, or any other interest therein, for the reason and because said defendant had fully and entirely paid her back all the money, and largely more, than she had furnished him, as aforesaid, and in further consideration that said defendant would continue to support, maintain, and care for her as aforesaid, and at her death give her remains proper interment at his own expense, and which undertaking said defendant says he faithfully carried out, and in every respect kept and fulfilled." It is next alleged that, at the time Crandall and his wife executed the deed to respondent William, Rebecca Smith was present, knew about the making of said deed, and knew it was made solely and absolutely to him (William), and fully acquiesced therein, and that furthermore Rebecca was present when the defendant William executed a deed of trust on the 240 acres of land for the purpose of

securing \$2,500 of borrowed money to complete the payment to Crandall of the original purchase money, and that she interposed no objections to his doing so, but approved the same. After admitting the contract of sale to Meacham at the price and on the advanced payment alleged in the petition, and on the terms stated therein, and that Meacham, on full payment, would be entitled to a deed, the answer denies every allegation of the petition not theretofore specifically admitted to be true.

The reply denied every allegation in the answer setting up new matter, and on issues thus outlined the cause was heard in October, 1902, and the chancellor rendered judgment dismissing plaintiffs' bill, from which judgment plaintiffs, in due form, appeal here.

Was the equitable problem submitted to the chancellor solved correctly? We think not, and this for the following reasons:

There was no proof that Oscar Crossland and ——— Preston were grandchildren and heirs of Rebecca Smith, as alleged in the answer. Nor was there any proof that the estate, if any, of Rebecca Smith in the Crandall land was to follow and be impressed with the limitation on her estate in her deceased husband's land in Illinois, and thus become a dower interest, lapsing at her death, as alleged in the answer; nor was there any satisfactory proof forthcoming supporting the averment in the answer to the effect that at a certain time she disclaimed any further interest in the land in consideration of past support and the undertaking of respondent William to support her in the future, and maintain and care for her until her death, and give her remains proper interment at his own expense, and hence these defenses may be ignored.

At the very threshold of the consideration of the case on review lies the issue of fact as to what money, if any, was turned over by Rebecca Smith to her son William, and by him used in the purchase of the Crandall land, the investigation of which leads us to the state of Illinois, and to the estate of Johnson Smith, there situate; the said Johnson being the ancestor of the plaintiffs and of the defendant William, and the deceased husband of Rebecca. It seems that Johnson Smith died in the state of Illinois, intestate, seised of certain real estate there lying, and leaving a widow, Rebecca, and seven heirs. The statutes of Illinois relating to dower and descents were not introduced in evidence, and in the absence of such proof the "system of unwritten law not evidenced by statutes, but by tradition and the opinions and judgments of the sages of the law" (Riddick v. Walsh, 15 Mo., loc. cit. 556), known as the "common law," must be assumed to be in force there, for divers reasons; e. g., because, prior to our independence, Illinois was a part of the dominions of the King of Great Britain; because it was settled by English-speaking people, who brought all the principles of the

common law applicable to their situation with them, as an inherited birthright; and because Illinois was a part of the Northwestern Territory, and by the provisions of the Ordinance of July 13, 1787, ceding that territory, the common law became the law of the land (*Penny v. Little*, 4 Ill. [3 Scam.] 301; *Flato v. Mulhall*, 72 Mo. 525; *White v. Chaney*, 20 Mo. App., loc. cit. 396). Assuming, then, the existence of common-law dower in Rebecca Smith, it seems her dower never was formally adjudicated as admeasured and assigned. It seems, furthermore, that several of the heirs of Johnson Smith conveyed to their brother William their several undivided interests in said real estate, and, moreover, that on the 13th day of August, 1884, the respondent William Smith and his wife, together with a sister, Adelaide, and his mother, Rebecca, conveyed the real estate of Johnson Smith to one Harrison. According to the record before us, William Smith had shortly theretofore acquired the interest of his sister Samantha Kent, of his sister Hannah Wilson, and of one other heir, for \$650 each. These three interests acquired by purchase, together with his own, by descent cast, he, as said, conveyed by deed in which his mother, Rebecca, and one other sister joined, the consideration being \$7,200. Harrison purchased the undivided interest of another heir, Aurelius, for \$800. How Harrison acquired the title of the seventh heir, one Jasper Smith, is not shown by the record. But as both parties proceed on the theory that the whole fee passed to Harrison for \$8,000, we may assume such to be the fact. Assuming the most favorable theory for William Smith, the result will be that the respective interests of the children, subject to the mother's dower, were valued at \$800 each at the date of the conveyance on August 13, 1884, aggregating \$5,000; thus leaving for the widow's share \$2,400. What property, if any, William possessed, independently of his interest inherited and acquired in said real estate, does not appear with any certainty, and the same may be said of the personal property owned by the widow; but it is testified that she had personal property, and that William had personal property, the character and extent of which may only be guessed at. We infer from the record that the heirs of Johnson Smith were adults, and, this being so, it is but reasonable to conclude from the facts shown that the dower interest of the mother, by some domestic arrangement, was commuted into cash and turned over to her as a result of the Harrison sale, and there is evidence that she brought to Missouri so much as \$3,000.

William Smith, by answer, admits that \$1,500 of this money was turned over to him, and was invested in the Crandall farm. Appellants concede that the condition of the proof is such that there is no satisfactory evidence of more than that sum having been so employed, and in this situation it becomes

material to ascertain, if possible, under what arrangement this money was turned over to William Smith, and so used by him. Appellants contend it was under an understanding that the widow was to pay half of the purchase price of the Crandall farm, and was to have the north 120 acres thereof, on which was a dwelling house, and that William Smith was to pay the other half, and was to own the south 120 acres of the Crandall tract, on which was another dwelling house. Appellants concede that the widow did not pay one-half of the purchase price, but they contend that the investment was made under such circumstances that, to make her own a moiety, the widow should bear the burden of one-half of \$1,800, the balance of the purchase price, which was merged into a certain mortgage indebtedness due an insurance company, presently to be considered. On the other hand, respondent contends in his brief in this court (somewhat at variance with his pleading) that, while he received \$1,500 from his mother to invest, it was never invested in the land, but was repaid to her by him under circumstances presently to be considered. This brings us to the question of what arrangement existed between William Smith and his mother at the time of this investment, and what were the circumstances surrounding the parties prior to and at the time of the conveyance of the Crandall land, which was made on the 27th day of November, 1885, and made solely to William Smith, as grantee.

As prone to happen in family compacts, when the parties deal with each other loosely under the close and tender confidence of the domestic relation, and not at arm's length and face to face, under the safeguards of correct business form, it becomes a delicate task to reconstruct ancient matters with fidelity and in true perspective when some of the actors are dead; when memory is twisted by self-interest, and conclusions, as wishes father to the thought, usurp the office of facts. Such troubles exist in this case, where grains of fact, as wheat, are hid in bushels of chaff, as conclusions; but we think the record places beyond reasonable doubt the ultimate fact that the aforesaid money of the mother was not taken over by William as a loan, and then repaid, and was not placed with him for investment, and returned to her prior to investment; and this is predicated of the following condition of things:

It appears that in the May preceding the Illinois sale, to wit, in May, 1884, William Smith came to Linn county, Mo., and negotiated the purchase of the Crandall tract for \$4,800. Some of the evidence indicates that he agreed to pay \$19.50 per acre for 240 acres, amounting to \$4,680. Other evidence indicates that he agreed to pay over \$5,000. The answer avers the purchase price was \$4,800, and the cause is practically submitted to us on both sides of the theory that such is the correct amount. The original

contract of purchase, if one were entered into, is not in evidence; but a bond was executed by Crandall on the 29th day of May, 1884, and it is not uninformative to give heed to its recitals, which are, *inter alia*, that the real estate was to be conveyed to William Smith on the 1st day of March, 1885; that the sum of \$4,350 remained due on the purchase price (the bond being silent as to the advance payment); that this balance was evidenced by two notes—one for \$2,550, and due on or before October, 1884, and one for \$1,800, due in five years from date, with 8 per cent. interest from March 1, 1885; and said bond was conditioned on the conveyance by Crandall to William Smith of the whole tract of 240 acres on said 1st day of March, 1885, when the balance then due Crandall was to be secured by a deed of trust or mortgage.

There is a controversy as to the ownership of the money, conceded to be \$450, paid Crandall as an advance payment, and ingenious speculation is indulged in, *pro* and *con*, as to that ownership. *A priori* reasoning would seem to result in the conclusion that it is more likely to have been a payment out of a common fund than otherwise, but we consider the question more curious than decisive, and therefore discard its consideration, further than to say that in our opinion the onus was on appellants to show that the mother participated in this payment, and that they failed to carry that burden satisfactorily to the legal mind.

The precise time that William and Rebecca Smith and their respective families entered into possession of this land is not disclosed, but by reasonable inferences, fairly to be deduced from proved facts, it may be arrived at that either in the fall of 1884, or in the early winter or spring of 1885, Rebecca Smith and her son Jasper took possession of the north 120 acres, and William Smith and his family took possession of the south 120 acres, moved into the dwelling houses thereon, and supplied themselves with the necessary implements of husbandry, provisions, and stock incident to carrying on farming operations independently of each other. Serving no useful purpose, we shall not undertake to present here the evidence in detail, but it shows that possibly during the entire year of 1885 Jasper Smith and his mother farmed the 120 acres they took possession of, and it seems that Jasper fell into trouble, executed chattel mortgages on the personal property of his mother, and otherwise involved her as well as his brother William in financial embarrassment, and, having done so, left the country toward the end of 1885 or the commencement of 1886. His irregular dealings caused substantially all of his mother's stock and farming implements to be subsequently swept away under mortgages, and not only so, but William paid other debts for him—we infer, unsecured ones. The construction we place on the record before us is that it is the contention of respondent that his payments of

Jasper's debts created a present indebtedness of the mother to him, and that thereby, and before the Crandall conveyance was executed, all the money furnished by Rebecca Smith towards the purchase of the farm was offset or repaid to her, so that, in consequence thereof, when Crandall made his conveyance, it was made to William as grantee because Rebecca had lost all interest in the matter. But we cannot persuade ourselves to accept this view of the testimony. In the first place, the contention is in the nature of a confession and avoidance, and the laboring oar was held by respondent. In the second place, the evidence is not satisfactory that payments made on behalf of Jasper were made prior to the making of the Crandall conveyance. In the third place, the record does not satisfy us that all the payments made by William Smith on behalf of his brother Jasper were made under such circumstances as created a legal liability upon the mother to refund the money so paid by William; nor is there evidence that the mother legally bound herself to repay such sums to William, or that the adjustment of Jasper's affairs, to sustain the family honor, had the effect of wiping out the entire estate of the mother. To the contrary, there is evidence persuading us that William Smith was somewhat involved by Jasper's inadvertences on his own personal behalf, and that the entire burden thereof ought not to be shifted to and rest upon the shoulders of the mother. In the fourth place, the Crandall conveyance was not made on the 1st of March, 1885, as nominated in the bond, but, as said, was executed on November 27, 1885. There is no testimony before us as to when the \$2,500 note mentioned in the bond was paid, but there is testimony that, as part of the arrangement for the Crandall conveyance, a \$2,500 loan was negotiated with the Mutual Benefit Life Insurance Company of Newark, N. J., evidenced by notes and coupons executed alone by William Smith, and secured by a deed of trust to one Toms, trustee, on the whole Crandall tract, and that, out of the money so procured, \$1,800 or \$1,900, the remainder of the purchase money, was paid to Crandall, and the transaction with him closed by his conveying directly to William Smith. The mother was present at this conveyance and at the execution of this trust deed, and therefore knew the whole title passed to her son William, and that his credit and the land were alone pledged for the insurance company's loans. But we do not attribute to the transfer to William, instead of to the mother and William, and to her knowledge of that fact, the radical significance attached by respondent. Respondent contends that the foregoing facts indicate that his mother had lost all interest in the land. But the very fact that the mother was present and had these matters explained to her is evidence that she had, or was thought to have, a material interest in the trans-

action. At that time William Smith said that his brother Jasper "had done some bad work, and he had to meet that. There was no one else to pay it." The amount thereof was placed by one witness at \$350, and the evidence indicates that some of the money borrowed from the insurance company went in that direction. At that same time Mrs. Crandall, who signed the deed with her husband to William Smith, testified: That Rebecca Smith made no objection to making the deed to William, and seemed to favor it; that she heard it read over, and that she said her son William was her main dependence; that Jasper had got away with so much money that she had to depend upon William, and he was the only son that she could depend upon. We are of the opinion the record bears out the notion that the embarrassments caused by Jasper's conduct changed the original intention of the parties, which possibly was to pay half and half on the land, so that it left of the mother's money only \$1,500 therein, and that, as William was assuming the burden of a mortgage indebtedness, and the mother was growing old, the title was placed in him until such time as the mortgage could be paid off and the equities could be adjusted. This view is fortified by evidence to the effect that the mother, at a time afterwards, asked William for a deed, and he gave the mortgage as an excuse for not making one. After the Crandall deed was made, and after Jasper Smith went away, Hannah Wilson, a married daughter of Rebecca Smith, came with her family, and for some time farmed this land with the mother—possibly for a year or more—with indifferent success, and then Hannah moved elsewhere. Thereupon it seems that William Smith assumed control of the whole tract, except five acres, with the dwelling house, and used the farm to pay the accruing mortgage interest; and there is evidence to the effect that its use did not more than pay such interest. Subsequently Hannah Wilson returned and lived with her mother for a series of years on the five acres referred to, and finally, within a few years of her death, when broken with old age, the mother went to the home of William; residing with him, and at intervals with her daughter Hannah, until she died; William caring for her, aided somewhat by Hannah Wilson, and taking her remains to Illinois and burying her there at his own expense. During all these years the evidence shows that William Smith referred to the north 120 acres as his mother's farm and as his mother's place, and that she, in his presence, spoke of it as her farm; that it was assessed in her name; that at least on one occasion William Smith was consulted by the assessor about the valuation of one 40 acres of it, and gave his estimate of it, knowing that it was being assessed as his mother's, and that he was being consulted as her business man; and that he never claimed the fee till her death. There is further evidence

that commencing prior to the Crandall purchase, and continuing down to the end, except for a short time while Jasper was on the farm, William was his mother's business man, managing agent, and confidential adviser. The record shows that at another time she asked William Smith for a deed, and he again excused himself by claiming that some boy had carried away his papers.

Rebutting the showing made by appellants is evidence from the sons and daughters of respondent to the effect their grandmother, on returning to their father's home, frequently referred to herself as "broken up." But we are inclined to the notion that these expressions, taken with all the surrounding facts and circumstances, were rather indicative of the emotions of an old lady who had fallen on evil and reminiscent days, rather than as assertions of a settled business fact. And to sum up, in our opinion the record strongly preponderates in favor of the contention of appellants that Rebecca Smith had, and died with, an interest in the land corresponding to the amount of her payment of \$1,500 on its purchase. This being so, we do not think the state of proof and the equities of all parties require us to hold that the heirs of Rebecca Smith are entitled to one-half the real estate, or the north half, and that their interests therein should be impressed with the amount of one-half of the \$1,800 or \$1,900 paid out of the insurance loan, as contended by appellants; but we think the very right of the case will be more justly attained in disentangling the complications by giving the heirs such proportion of the land as \$1,500 bears to \$4,800, i. e., $\frac{15}{48}$ or $\frac{5}{16}$, but this should be free of all mortgage liens. And this holding is abundantly warranted by the adjudicated cases (see authorities cited in the respective briefs of counsel), which authorities announce the doctrine, neatly formulated by appellants' counsel, that, "where land is purchased by one in his own name with the money of another, a resulting trust is created by implication of law, which follows the ownership of the money. And where a part only of the purchase money is furnished by the beneficiary, the trust is for a proportionate share of the land bought."

The foregoing view leaves out of account respondent's contention of laches, urged here as a justification of the finding of the chancellor nisi, which contention will now receive attention. It will be noted that the statute of limitations is not pleaded as a defense. Evidently the learned counsel for respondent deemed such defense not applicable to the facts of the case, and therefore did not plead the statute, as is necessary, if relied on as a defense, in possibly all cases except ejectment suits. Neither does the answer plead laches or staleness as a defense. On this score it may be said that while it has been held that it is necessary to plead laches, in order to invoke it as a

defense (*Bliss v. Prichard*, 67 Mo., loc. cit. 191), yet the better doctrine seems to be that the defense of laches is one of which it is not necessary to take advantage by the pleadings; and, if the case as it appears at the hearing is liable to such objections, the court may, and usually will, remain passive, and refuse relief, and decline to entertain the suit. 12 Ency. Pl. & Pr. 829, and cases cited; *Murphy v. De France*, 105 Mo., loc. cit. 69, 15 S. W. 949, 16 S. W. 861, et seq. But there is another proposition that must be reckoned with in this connection, viz., that laches is a question of fact on the evidence, determinable upon the particular facts and circumstances of the case. *Pike v. Martindale*, 91 Mo., loc. cit. 235, 1 S. W. 858. In this particular courts treat laches the same as they do the kindred question of negligence; that is to say, there is no cast-iron rule for determining what negligence is, or what laches is, but the matter is necessarily left open, so that the court may determine such question from the circumstances of each case and the immediate surroundings of the parties. We must avow a judicial indisposition to apply the doctrine of laches with close particularity to the dealings of an old mother with her confidential business manager, a son, with whom she resided, and on whom she depended for the solaces of filial ministrations. We are inclined to the notion that a court of conscience would better subserve the interests of domestic happiness and welfare by refusing to apply the doctrine of laches to relations and dealings of the kind here indicated, except in a pronounced and unequivocal case, and such a case is not the case at bar; and it goes without saying that, if laches be not allowed as a defense against the mother, it is unavailing in the case for any purpose, since it may not be imputed to plaintiffs, who sued timely upon their ancestor's death.

The record does not satisfy us of the existence of the mortgage for \$3,000 pleaded in the petition. If proof thereof was offered, it has escaped us, although the case was submitted on the theory that it existed. The chancellor should take proof on this issue of fact. If such mortgage exists, it should be satisfied solely out of the interest of William Smith in the real estate, if the same be of sufficient value to pay it off. Neither can we say that the executory contract of Meacham looking to the purchase of the land will be consummated. It may be it cannot be specifically enforced. Proof on this question should be taken by the chancellor. Nor are we satisfied at this time to grant a partition and distribution of the proceeds of the Meacham sale, should they be paid into court. Such partition and distribution should await an administration upon the estate of Rebecca Smith, because the interests of her children by descent cast are subject to the payment of her debts; and

while that question is not here, and therefore we do not pass upon it, yet it may be that respondent William Smith, at least for funeral expenses of his mother and her interment in Illinois, may be able to establish legal claims against her estate.

The cause is reversed and remanded, with directions to the court below to take proof on the present existence of a mortgage on the whole tract; to decree that the mortgage, if existing, be paid by William Smith, and, as between him and the other heirs, should become a lien on his interest in the real estate, and be satisfied therefrom in the first instance; to decree, further, that the heirs of Rebecca Smith, including the respondent William, are entitled to an undivided five-sixteenths of the land described in the petition; and to make such decree in regard to the Meacham sale as the facts warrant; and to otherwise proceed in accordance with this opinion. All concur.

CHAMPAGNE v. HAMEY.

(Supreme Court of Missouri, Division No. 2.
June 20, 1905.)

1. RAPE—ACTION FOR DAMAGES—INSTRUCTIONS.

In an action for damages owing to plaintiff's having been ravished by defendant and caused to become a mother, it was error to refuse to instruct that if at the time of the assault or within a reasonable time thereafter plaintiff had an opportunity to make an outcry and she did not do so, and did not do so as soon as an opportunity offered, or at any time prior to the birth of her child she did not complain of the assault, and that she continued on friendly relations with defendant, the jury should take such facts into the case in determining whether the defendant did have carnal knowledge with plaintiff by force, and that if the defendant did not have sexual intercourse with plaintiff, or even if he did with her consent, he was not liable.

2. APPEAL—REVIEW—ARGUMENT OF COUNSEL—BILL OF EXCEPTIONS.

Alleged erroneous argument of counsel cannot be reviewed on appeal unless timely objections and exceptions are made and the same appear with the matter complained of in the bill of exceptions.

3. RAPE—NECESSITY FOR CORROBORATION OF PROSECUTRIX.

Corroboration of prosecutrix is not necessary to make out a charge of rape either in a criminal or a civil case.

4. RAPE—EVIDENCE—SUFFICIENCY.

In an action for damages owing to plaintiff's having been ravished by defendant and caused to become a mother, evidence considered, and held insufficient to show that any rape was committed.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by Jessie Champagne against John Hamey. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This cause is here upon an appeal from a judgment against the defendant in the Buchanan county circuit court. The cause of action upon which this judgment rests is thus stated by the plaintiff:

"Plaintiff, for cause of action, states that she is an infant of the age of 17 years; that she was on the 7th day of June, 1899, just a few days past 16 years old; that her mother is dead, and that Mrs. Erwin was her foster mother and took her when she was about two years old; that she lived with her foster mother until the latter part of March, 1900.

"That the defendant is the son-in-law of her foster mother, and married her foster sister; that her foster mother, defendant, and her foster sister live almost in the same yard; that during all her lifetime plaintiff had at times helped her foster sister and worked for her sister, and looked to the defendant and plaintiff's foster sister for protection, and was given by consent under their control.

"That her foster mother lived on the property belonging to the defendant, and relied on defendant for support; that the house in which the plaintiff and her mother lived was close to the house in which defendant and his wife, plaintiff's foster sister, lived.

"Plaintiff further states that in the evening, on or about the 7th day of June, 1899, defendant came to the house where plaintiff lived with her foster mother, and found plaintiff alone, and found plaintiff's foster mother was away from home; that defendant, finding plaintiff alone, caught plaintiff and threw plaintiff on the bed, and took a large pillow and placed it over plaintiff's face, so that plaintiff could not holloa, and threatened plaintiff, and forcibly ravished plaintiff and had intercourse with plaintiff; that plaintiff fought until she was exhausted, but that defendant accomplished his purpose; that on account of said aforesaid act plaintiff became pregnant with child, and on the 3d day of March, 1900, a child was born, being the child of defendant.

"Plaintiff further states that on account of said aforesaid act of defendant plaintiff's life is ruined, and that plaintiff is disgraced, and that she is compelled to support her child, all of which is caused by said defendant by his criminal acts as aforesaid; wherefore, plaintiff says she is damaged in the sum of twenty thousand dollars. Wherefore plaintiff prays judgment in the sum of twenty thousand dollars (\$20,000), and for such other and further relief as the court may deem proper."

The answer was a general denial.

The facts upon which this judgment is sought to be supported were substantially as follows:

The plaintiff testified that she was 16 years of age in May, 1899. The alleged assault occurred June 7, 1899. Her mother having died, Mrs. Erwin, the defendant's mother-in-law, took her to raise when she was two years old, and from that time on she lived with Mrs. Erwin in a two-story house on a farm belonging to the defendant's father. The defendant was raised on

the same farm. He was a married man, 36 years of age, and his family consisted of his wife and children, the oldest 11, and the youngest 3 years old at the time of the alleged assault. The defendant, his wife and children, the defendant's father and the plaintiff's father, lived in a two-story house on the same farm in the same yard, about 80 feet from the house in which Mrs. Erwin and plaintiff resided.

The testimony of the plaintiff is that on the evening of June 7, 1899, she was alone in her home. About 8:30 o'clock she was standing in the front room combing her hair. It was dusk, and getting dark. Some one entered and threw his arms around her waist and kissed her. She jerked free, and, turning, recognized the defendant. She ran towards the door, but before she could escape he caught her again, dragged her to a bed in the room, and threw her upon it. She struggled to get away from him, but she could not. She tried to scream, but he forced a pillow over her mouth and prevented her. She testified that she resisted, but he raised up her clothes and raped her; that she fainted, and when she regained consciousness the defendant was standing by the side of her bed. He helped her up, saying, "My God, Jess, don't tell my wife," but she says she didn't say that she would or that she would not. Then he went over to his house, while she went out on the porch and sat down. She testified that at the time she was a pure, innocent girl, a few months past 16 years old, strong and healthy; that she had never had intercourse with any man. Upon cross-examination plaintiff testified that the doors and windows to her home and defendant's home were open, and that at the time her foster mother, her father, defendant's father, and his wife were in the other house in the same yard, not more than 80 feet away.

The plaintiff made no complaint that she was under restraint or influence of threats, or that she apprehended any violence from the defendant. It further appears that she made no complaint or outcry during the struggle before the pillow was placed over her mouth or after its removal, nor was there any indication or exhibition of anguish on the part of the plaintiff after it is claimed that this outrage was perpetrated upon her, but it does appear that she went out on the front porch and sat down to cool off. When the inquiry upon cross-examination was made of the plaintiff as to why she didn't make an outcry after the pillow was removed from her mouth, her reply was that "she didn't know." She further testified that the defendant held the pillow over her mouth with one hand and she had hold of his other arm with both of her hands, and, upon inquiry as to how the defendant effected an entrance, she replied she didn't know, that she supposed she fainted.

There is an entire absence of any testi-

mony as to the result of the outrage charged to have been committed upon plaintiff. There was no testimony that any of her clothing was disordered or torn; there was no evidence of any indication of any laceration of her private parts, or that she bled, or that her person was scratched or showed any signs of violence; and it may be added that there is an absence of any testimony showing the physical condition and mental anguish which would ordinarily follow. It is also shown by the evidence that her foster mother came home 10 or 15 minutes after the occurrence, and that plaintiff made no complaint to her, nor were there any signs or indications, as testified to by her mother, that she had been outraged. Plaintiff made no complaint to her father, to the defendant's wife or his father, nor to any other person. Her conduct and actions toward the defendant subsequent to the alleged commission of the outrage upon her person were the same as before the assault was made. They frequently met, and were upon friendly terms. It also developed that she never spoke to the defendant about the commission of this assault until about three months after her child was born. Then, she says, for the first time she mentioned it to him. She went out in the field where he was ploughing and asked him to support the child. He refused. Then she said to him, "This is your child," and he replied, "Oh, no, Jessie, you can't come that." And then, according to her own story, he said to her, "Did you tell your father about this?" and she said, "No." "And he said, 'Well, let us go right over here and see your father now,' didn't he? A. That is what he said; yes, sir. Q. And he walked over there with you, and you saw your father? A. Yes, sir. Q. With you? A. Yes, sir. Q. This man that ravished you? A. Yes, sir."

Mrs. Erwin, the plaintiff's foster mother, testified that after the date of the alleged assault the plaintiff and defendant were just as friendly as they were before; that she noticed no difference in them, and they continued to live as one big family; that the plaintiff never mentioned the occurrence to her; and that at no time upon her return home did she find the plaintiff in an excited condition.

The defendant denied that he had ever had sexual intercourse with the plaintiff, or that he ever knew or heard of any claim that he had been intimate with her until about three months after the child was born. Then one day she came to him in the field where he was ploughing. The plaintiff's father was ploughing in the same field "about 40 rows away." She first said to defendant, "I came to see how much you would give to help support that child." She hesitated for a moment. The defendant thought she was "begging." He made no reply. Then she said, "You know it is yours." To which the defendant replied: "You know it is not; I

thought you were begging, but this way I won't give you anything. Q. Then what did she say? A. Well, she didn't say much of anything. I asked her if she had told her father, and she said 'No'; and I said, 'Let's tell him.' We walked up to where he was, she on the inside of the fence and me on the other side. I walked up and told him what she had said. He said she ought to know. He didn't know. He couldn't tell. She lived there till March or April, 1900. I saw her over at our house several times. I always spoke to her, and she to me. We were just as friendly as we had always been, and I didn't notice any difference in her conduct. I never had any idea that I was accused of having anything to do with her."

The defendant and his father both testified that on the evening of June 7th, from the time the defendant came in from the field about 7 o'clock until about 9, they were both at home. The defendant and his father both refreshed their memories as to the fact that they were at home on the evening it was alleged this outrage occurred by reason of some insurance policies having been procured by the father on that evening, and the date of the policies and check and receipt given in respect to them were introduced in corroboration of their testimony as to what they had said in reference to being at home on that evening.

At the close of the evidence the court gave the following instructions at the request of the plaintiff:

"(1) The court instructs the jury that if you believe from the evidence that the defendant did on or about the 7th day of June, 1899, forcibly ravish plaintiff and against her will, and as a result thereof plaintiff became pregnant, and that there was a child born of said illegal act on the 8d day of March, 1900, then your verdict will be for the plaintiff.

"(2) The court instructs the jury that, if you find for the plaintiff, you will find for her in such sum as you may believe from all of the evidence in proof that she has been damaged, taking into consideration the illegal act complained of, the result of said act, the disgrace and wounded feelings of the plaintiff; and you will find for her in such sum as you may believe she has been damaged, not to exceed the sum of twenty thousand dollars.

"(3) The jury are the judges of the evidence and credibility of the witnesses, and you may give to the testimony of any witness such weight as they may deem it entitled to under all the facts and circumstances in proof; and, if the jury believe that any witness has willfully sworn falsely to any material fact in the case, they are at liberty to disregard the whole of the testimony of such witness. And in reconciling the conflicting testimony, if there be any, the jury are not confined alone to the direct statements of the witnesses, but may take into consideration all of the facts and circumstances as shown by the evidence.

"The court instructs the jury that it is not essential to a recovery that plaintiff should prove by the direct testimony of eyewitnesses that defendant did debauch and carnally know the plaintiff forcibly and against her will; such fact may be proved by the proof of the facts and circumstances from which it may be reasonably and satisfactorily inferred. If, therefore, the jury believe from all the facts and circumstances in proof that defendant did have sexual intercourse with plaintiff at about June 7, 1899, without the consent of plaintiff, and forcibly and against her will, they would be warranted in so finding, and the verdict should be for the plaintiff."

At the request of the defendant, the jury were instructed as follows:

"(1) You are instructed that the burden of showing by a preponderance of the evidence, to the reasonable satisfaction of the jury, that the defendant assaulted and ravished the plaintiff forcibly and against her will, is upon the plaintiff, and, unless she has done so, your verdict must be for the defendant.

"(2) The court instructs the jury that even though you may believe from the evidence that the defendant did have sexual intercourse with the plaintiff, yet if you believe from the facts and circumstances in evidence that the plaintiff consented to have sexual intercourse with the defendant, then the defendant is not liable in any sum to the plaintiff, and your verdict must be for the defendant. And if you believe that the defendant did have sexual intercourse with the plaintiff, then, in determining whether such intercourse was against the will of plaintiff or whether it was with her consent, you must take into consideration the reasonableness or unreasonableness, the probability or improbability, of the testimony of the witnesses, and all of the other facts and circumstances in the case.

"(3) The court instructs the jury that if you believe from all the facts and circumstances in evidence in this case that the defendant did not have sexual intercourse with the plaintiff, then your verdict will be for the defendant.

"(4) The jury are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony; and, in determining such weight and credibility, you should take into consideration the probability or improbability, the reasonableness or unreasonableness, of the witness' statements, the interest, if any, which such witness has in the result of the trial, together with all the facts and circumstances detailed in the evidence."

The defendant requested the court to give the following instructions, which were refused:

"(a) The court instructs the jury that, under the pleadings and evidence in this case, your verdict must be for the defendant.

"(b) If the jury believe from the evidence

that at the time the alleged assault on plaintiff is alleged to have been committed, or within a reasonable time thereafter, the plaintiff had an opportunity to make an outcry, and that she did not do so, and did not as soon as an opportunity offered, or at any time prior to the time her baby was born, complain of the alleged assault to any person, and that she continued on friendly relations with the defendant after the date of said alleged assault, then the jury should take these circumstances into the case in determining whether the defendant did in fact have carnal knowledge of the plaintiff by force and against her will; and if you believe from all these circumstances and all the evidence in the case that the defendant did not have sexual intercourse with the plaintiff, or even if you believe that he did have sexual intercourse with her by her consent, then the defendant is not liable in this case, and your verdict must be for the defendant.

"(c) The court instructs the jury that the burden is upon the plaintiff to establish to your satisfaction that the defendant had sexual intercourse with the plaintiff by force and against her will. And the court instructs you that in this case the law presumes that the defendant is innocent, and that he did not have sexual intercourse with the plaintiff, and before you are authorized to find for the plaintiff the evidence in favor of the plaintiff should be strong enough, in your opinion, to overcome not only the testimony and evidence offered by the defendant, including all the facts and circumstances in this case, but also the presumption which the law raises that the defendant did not commit the assault alleged in the petition."

The cause was submitted to the jury upon the evidence and instructions, as herein indicated, and they returned a verdict finding the issues for the plaintiff, and assessed her damages at the sum of \$10,000. From this judgment defendant, in proper form and due time, prosecuted the appeal, and the cause is now before us for consideration.

Culver, Phillip & Spencer, for appellant.
Grant S. Watkins, for respondent.

FOX, J. (after stating the facts). Numerous errors are assigned as grounds for the reversal of the judgment in this cause.

The defendant requested the court to give the following instruction, which was by the court refused: "(b) If the jury believe from the evidence that at the time the alleged assault on plaintiff is alleged to have been committed, or within a reasonable time thereafter, the plaintiff had an opportunity to make an outcry, and that she did not do so, and did not as soon as an opportunity offered, or at any time prior to the time her baby was born, complain of the alleged assault to any person, and that she continued on friendly relations with the defendant after

the date of said alleged assault, then the jury should take these circumstances into the case in determining whether the defendant did in fact have carnal knowledge of the plaintiff by force and against her will; and if you believe from all these circumstances and all the evidence in the case that the defendant did not have sexual intercourse with the plaintiff, or even if you believe that he did have sexual intercourse with her with her consent, then the defendant is not liable in this case, and your verdict must be for the defendant." The refusal of the court to give this instruction is one of the errors assigned by appellant as grounds for the reversal of this judgment.

In *State v. Witten*, 100 Mo. 525, 13 S. W. 871, an instruction substantially the same as the one refused in this cause was requested and refused, for which action of the court the judgment in that cause was reversed. Black, J., speaking for the court, said: "An outcry and resistance are important elements of evidence, and a want of these circumstances, where they may reasonably be expected, go far to disprove the charge of rape (*State v. Cunningham*, 100 Mo. 382, 12 S. W. 376); and a concealment of the injury, where there is an opportunity for early disclosure, may lead to a like inference. The evidence, as a whole, tends strongly to show that this is one of those cases where there has been a mutual gratification of desires and passions, and that the notion of force on the part of the man, and want of consent on the part of the woman, is an afterthought. No disclosure was made by the woman until discovered to be pregnant, and the first charge of force was made more than a year after the alleged outrage. Under these circumstances, the instruction should have been given. The judgment in the case of *State v. Wilson*, supra, was reversed alone because a like instruction was not given as it was asked, and we must either overrule that case or reverse the judgment in this one."

In *State v. Wilson*, 91 Mo. 410, 3 S. W. 870, an instruction in the following form was requested, and by the court modified as hereinafter stated, and given: "Although the jury may believe from the evidence that the defendant had intercourse with Cora Leis, yet unless that intercourse was forcible on the part of the defendant, and against the consent of Cora Leis, the jury will find the defendant not guilty; and, in arriving at a conclusion as to the question of force and consent, the facts that the said Cora Leis made no complaint at the time, or within a reasonable time thereafter, and that pregnancy followed a single sexual connection, are legitimate subjects of inquiry in determining whether there was force on the part of said defendant, or consent to the intercourse by the said Cora Leis." The court gave this instruction in a modified form by adding after the word "connection," when it

last occurs in the instruction asked, the words "in connection with the other testimony." It was ruled in that case that the instruction should have been given as requested, and that the modification of it was error, and the cause was reversed. To the same effect is the case of *State v. Patrick*, 107 Mo. 147, 17 S. W. 666.

In *State v. Baker*, 136 Mo. 77, 37 S. W. 810, an instruction similar in form to that requested in the cases herein cited was refused, and it was held not to be error; but an analysis of that case demonstrates that the action of the court was predicated upon the peculiar facts developed upon the trial. Her father was charged with the offense; she had no mother or sister near her, and was completely under the dominion of her father, and he had threatened to kill her if she divulged what had occurred. She had no female friends to whom she could talk about the outrage that had been perpetrated upon her. Upon this state of facts, the court very properly ruled that it was not error to thus refuse the instruction, and the correctness of the ruling, so far as the instructions were involved in the Patrick Case, was expressly recognized.

In *Young v. Johnson*, 25 N. E. 365, an instruction of the same import as the one under discussion was given, and the Court of Appeals of New York, in discussing its correctness, said: "The court, at the request of the defendant, instructed the jury, in substance, that the fact that plaintiff did not disclose the assault complained of within a reasonable time after the opportunity presented itself for her to do so was in itself a reason for impeaching the veracity of her story. It was undisputed that the plaintiff delayed disclosing to her female friends the alleged conduct of the defendant towards her until she was satisfied of her pregnancy, though she met them frequently, and under circumstances that furnished a very favorable opportunity for her to do so. This was a circumstance bearing upon the plaintiff's credibility and the general merits of her case that was proper for the jury to consider, and the charge of the court in that respect was correct. *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530."

It is insisted by respondent that this instruction is only applicable to criminal causes; hence there was no error in the refusal in this, a civil cause. We are unable to agree with learned counsel for respondent upon this insistence. Plaintiff's cause of action is predicated upon an assault upon plaintiff with force and violence, and by such means, against her will, ravishing her. The purpose of the trial in this cause is to ascertain if it is a fact that plaintiff was forcibly ravished, and it is clear that the same purpose is sought in a trial upon a criminal charge of rape. The same evidence is admissible tending to show the commission or noncommission of the act charged. The jury are the

trials of the facts, and if in a civil or criminal case the commission of the same act is being investigated, and the jury are required to respond by their verdict as to whether or not the act has been committed, we are unable to assign any reason why they are not entitled to the same instructions upon the evidence, tending to show that the act was or was not committed, to guide them in reaching a conclusion, in a civil as in a criminal case. The case of *Young v. Johnson*, supra, was a civil case, and it will be observed that the New York court cited in support of its conclusions *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530, which was a criminal case, doubtless, upon the theory that the principles were applicable in civil and criminal cases alike. Instruction "b," properly declared the law, and should have been given, and it was error for the court to refuse it.

It is insisted by appellant that certain remarks of counsel for plaintiff in argument of the case to the jury constituted error. This insistence is directed to the statements, as shown by affidavit on file, by counsel to the jury, that "the defendant has been indicted for this offense." Upon this question it is only necessary to say that the error complained of is nowhere properly preserved for review in the bill of exceptions. While it is shown by affidavit that counsel made this statement, and doubtless it was made, yet the complaint to its being made cannot be preserved by a mere affidavit. The argument of counsel is a part of the trial and occurs during the progress of the trial, and any errors in respect to such argument this court is only authorized to review when they are preserved by timely objections and exceptions made at the time, all of which must be made to appear in the bill of exceptions. It not being disclosed by the bill of exceptions that the remarks of counsel complained of were objected to at the time they were made, such alleged error is not before this court for review. *State v. Meals*, 83 S. W. 442.

There are many other errors urged by counsel for appellant as reasons for the reversal of this judgment, but with the view entertained by this court, that the evidence in this cause is insufficient to support the verdict, we will direct our attention to the overshadowing error complained of; that is, the refusal of the court to direct the jury to find the issues for the defendant. To entitle plaintiff to recover in this action, it must be shown by some substantial evidence that the defendant, by force and violence and against her will, ravished her. We have read in detail all the evidence introduced upon the trial of this cause, and, after a careful consideration of it, we are unable to escape the conclusion that the verdict should not be permitted to stand. The statements of plaintiff as to this occurrence must be viewed in the light of all the surrounding facts and cir-

cumstances. If the physical facts and all the circumstances appearing in evidence, together with the surrounding conditions, absolutely negative and destroy the force of such statements, then, in contemplation of law, such statements do not amount to any substantial evidence of the facts to which they relate. We do not mean by this that the prosecutrix must be corroborated, for such is not the law of this state (*State v. Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095); but we do hold that statements made by a witness that are not only in conflict with the experience of common life and of the ordinary instincts and promptings of human nature, but negatived as well by the conduct of the witness and the conditions and circumstances surrounding the occurrence to which they have application, are not sufficient to support the grave and serious charge of rape, and this is true whether the charge is made in either a civil or criminal proceeding. The plaintiff in this case was past 16 years of age, strong, healthy, and vigorous, was not under the dominion of the defendant, nor was her conduct restrained, so far as the testimony discloses, by threats, fear of violence, or duress on the part of the defendant. The proof of the charge of rape as alleged in the petition rests entirely upon the version given of the occurrence by the plaintiff. It is claimed by respondent that plaintiff was ravished by force and violence, in a room with the doors and windows open, within 90 feet of the home of defendant in the same yard; that in the house of defendant, situated as herein indicated, there were, at the time it is said that this rape was committed, the father and wife of the defendant, as well as plaintiff's foster mother; that the windows and doors of the house of defendant were open, and nothing to prevent the occupants of it from hearing even the slightest noise. No outcry was made either before it is claimed the pillow was placed over her mouth, or after its removal. But this is not all; a few minutes after plaintiff claims this terrible outrage was perpetrated upon her, the foster mother appears upon the scene, and not a word does plaintiff utter to her as to the heinous offense committed by defendant. The mother testified that she observed no evidence of excitement or agitation on the part of the plaintiff. No greater outrage can be perpetrated upon a young, innocent girl than the one charged in this petition, and yet the record discloses that about a year elapsed before any complaint was made by the plaintiff that this terrible crime was committed upon her. If she was ravished in the manner as stated, the instincts of girlhood innocence to make complaint to her father and mother, in the absence of any threats of violence or duress, would have instantly been asserted, and the outrage disclosed. On the other hand, if the sexual intercourse was by consent, the persistent

and continued concealment of such illegitimate intercourse can be readily reconciled with the conduct of plaintiff; and, if there was sexual intercourse between them, that is the only theory upon which her conduct can be reconciled. The conditions and circumstances surrounding this occurrence, as related by plaintiff, the absence, immediately after it is claimed the offense was committed, of the usual and ordinary indications of the perpetration of such an outrage, and the course of conduct and manner of the defendant in respect to such occurrence, are amply sufficient to destroy all probative force or effect of plaintiff's statement concerning the force and violence that was related by her.

The correctness of the conclusions reached in this case is emphasized by the expression of the views of this division of the court, when substantially the same facts were in judgment before it, in *State v. Hamey* (Mo. Sup.) 85 S. W. 946. The facts as to the outrage complained of in this case were fully presented to this court in that case, and while the charge in that case was not that of rape, yet all the facts were developed at the trial, and, if there was any substantial difference with the facts in the case at bar, it is that the facts in the criminal case were stronger than in the one now being considered. Gantt, J., in speaking of the facts in *State v. Hamey*, above cited, thus expressed his views. He said: "For my part I do not believe there was sufficient evidence in this case to establish the crime of rape; but there was evidence to sustain the charge that defendant, a person over the age of 16 years, had carnal knowledge of an unmarried female of previously chaste character between the ages of 14 and 18 years of age." It is clear, if the testimony was insufficient in that case to establish the crime of rape, nothing having been added to the facts as presented in the case at bar, it is insufficient in this case. Counsel for respondent, however, contends that the fact that the case in which Judge Gantt expressed his views as to the facts was a criminal case, and the testimony must show the guilt of the defendant beyond a reasonable doubt, whereas in this case it is only necessary to establish the facts by a preponderance of evidence. That is true, but that in no way conflicts with the principle that in either a civil or criminal case there must be sufficient evidence to establish the charge. The rule in respect to submitting a cause to the jury, which has been uniformly adhered to by the courts, is: Where there is substantial testimony upon the charge in the information or indictment, or, in a civil case, upon the allegations in the petition, the cause is submitted; if there is an absence of substantial testimony, the court directs a verdict for the defendant. In either case the court must first determine whether or not there is sufficient testimony to authorize its

submission to the jury. The only distinction after the court determines that there is substantial testimony which warrants its submission to the jury, is as to the weight of the testimony, and its effect upon the minds and consciences of the jurors of the fact. In a criminal case, the testimony should leave no reasonable and substantial doubt touching the guilt of the party charged; in a civil case, it is only required that the allegations constituting the cause of action should be established by a preponderance of the evidence. The question of doubt in a criminal case, where there is substantial testimony, is always directed to the jurors of the fact, and they are instructed on that subject; but the court, in either civil or criminal cases, determines in advance whether there is sufficient testimony to authorize the submission of the cause to the jury. There can be but one conclusion drawn from the remarks above noted by Gantt, J., upon the facts in that case, and that is that, while the evidence may be sufficient to show sexual intercourse, which was unlawful by reason of the age of the prosecutrix, it is insufficient to show that such intercourse was accomplished by force and violence and against the will of the plaintiff. Sherwood, J., in discussing the facts of that case, after reviewing the authorities applicable to charges of the nature contained in the petition in this action, said: "Acting in the light of these authorities, and, indeed, of the experience of common life, and of the ordinary instincts and promptings of human nature, we hold that a verdict based on such evidence as above offered by the state should not be permitted to stand. That evidence is contrary to all rational belief and all prior observations of human action in like circumstances." While court in banc affirmed the judgment of the trial court as to the charge (Gantt, J., delivering the opinion), there is nothing in the opinion affirming the judgment that there was any change of views as to the insufficiency of the evidence to establish the charge alleged in the petition, which is essential to warrant a recovery in this action.

We repeat, what was suggested in the discussion of the facts of this case when being considered by this court in the criminal proceeding, that the plaintiff for 12 months never, by word, sign, or syllable, indicated to a single human being that she had been ravished; no complaint whatever as to the terrible outrage for which she now seeks to recover damages; no indication, immediately after she says the offense was committed, of excitement, mental distress, or anguish; an entire absence of any disordered or torn condition of her clothing, or bruises or scratches upon her person. After diligent search, we are unable to find a judgment for the plaintiff, either in a civil or criminal case, that has been permitted to stand upon testimony of the nature and character disclosed in this record. It may be that plain-

tiff was outraged as charged in the petition; if so, we confess that it was unfortunate that her conduct was so in conflict with the ordinary instincts and promptings of human nature as to absolutely negative any such conclusion as that she was forcibly ravished. As to whether she was or not, it is unnecessary for us to express an opinion; it is sufficient to say that the testimony introduced did not warrant any such conclusion, and we are unwilling to sanction the verdict returned by the jury in this cause.

Entertaining the views as herein expressed, it results in the conclusion that the judgment in this cause should be reversed, and it is so ordered. All concur.

MORROW v. PIKE COUNTY.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. COUNTIES—CONTRACTS—RECORD ENTRIES—SUFFICIENCY.

Rev. St. 1899, § 6759, requires county contracts to be in writing, and subscribed by the parties or their duly authorized agents. Section 6760 requires such contracts to be executed in duplicate, and one copy to be filed with the clerk. *Held* that, conceding that a contract entered into by the county court must appear on its record, it is not necessary that the record entry thereof set forth all the terms of the contract, and an entry of a contract reciting the employment of an attorney in a certain case, described by its title, to defend the same to final determination in the courts of last resort—the compensation to be paid out of the permanent school fund—is sufficient to make the contract binding on the county, without reciting the details thereof as shown by the written contract drawn up in duplicate between the county and the attorney.

2. SAME—SCHOOL FUND—PROTECTION AGAINST ATTACK—EXPENSES.

Where an attorney is employed by a county to defend against an attack on the county public school fund provided for by Rev. St. 1899, § 9824, the expenses of such defense, including the payment of the attorney's compensation, should be borne by the school fund, and not by the general county revenue.

3. SAME—CONTRACTS—NECESSITY OF RECORD ENTRY.

A contract made by the county court for the employment of an attorney, not evidenced by any record entry, is void.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, § 183.]

4. SAME—CONTRACTS ON PAST CONSIDERATION—VALIDITY.

A contract made by the county court providing for payment of fees to an attorney "in consideration of services rendered and to be rendered" is totally void, both as to the county and the attorney, under Rev. St. 1899, § 6759, prohibiting counties from making any contract except upon a consideration wholly to be performed subsequent to the making of the contract.

5. INTEREST—COMMENCEMENT OF PERIOD—CONTINGENT ATTORNEY'S FEE.

Under Rev. St. 1899, § 3705, providing that when money is to become due under a written contract, and no rate of interest is provided, interest runs at 6 per cent. from the time the money is due, a fee owed to an attorney under a written contract providing for the payment of the fee on the express condition of a successful defense of the suit in the circuit court, and any other court to which the case should be ap-

pealed or otherwise taken, becomes due on, and bears interest from, the final determination of the case in the court to which it is last taken.

6. APPEAL—INSUFFICIENT JUDGMENT.

The fact that judgment against appellant is for too small a sum is not reversible error.

7. JUDGMENTS—RESTRICTION.

Where a contract for the employment of an attorney to defend the county school fund provides for the payment of the attorney out of that fund, a judgment in the attorney's favor on the contract should provide for its satisfaction out of the school fund, and a general judgment against the county is erroneous.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by Julia M. Morrow, executrix of the estate of William H. Morrow, deceased, against Pike County. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

John W. Jump, Ball & Sparrow, El. W. Major, Geo. W. Emerson, and J. D. Hostetter, for appellant. N. W. Morrow, Pearson & Pearson, and Dempsey & McGinnis, for respondent.

LAMM, J. To the notable and marking embellishments gracing Pike county in history and tradition, in story as well as song, there was added a spice of uniqueness in a gift by the General Assembly of Missouri, by an act approved January 25, 1847 (Laws 1846-47, p. 198), in favor of Watson Seminary, there situate, in the form of fines then in the treasury of the county, and of all moneys thereafter accruing to said county by way of fines, penalties, or forfeitures—the principal to be kept intact as a permanent fund, and the accretions of interest to be used for the current purposes of said seminary, all under the supervision of the county court—the details of which the curious may find dug out of the dust of the past and spread of record by this court in *Watson Seminary v. County Court of Pike County*, 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 875.

In 1859 (Laws 1858-59, p. 46) the Legislature repealed so much of the act of 1847 as diverted said fines, penalties, and forfeitures from the school fund of Pike county, and gave them as a bounty to Watson Seminary. This repealing act, we infer, was possibly for a spell ignored by the county court, as unconstitutional. In 1893, however, that court refusing longer to permit such diversion of the school fund, but keeping trace of the amount of fines, penalties, and forfeitures thereafter accruing in a fund designated as the "Rejected Fund," used the same to swell the corpus of the common school fund as provided in the Statutes at Large. Thereupon sharp litigation sprang up, *Watson Seminary* suing out a writ of mandamus against the county court of Pike county; seeking by such moving writ to coerce that court into setting aside all said fines, penalties, and forfeitures for the benefit of the seminary's permanent fund. When things were in this fix, on the 3d day of August, 1896, the court

entered into a contract with Wm. H. Morrow, an attorney of the Pike bar, to take care of the interest of the county public school funds involved in that suit, and to assist the prosecuting attorney in their defense. The order made in the premises is as follows:

"It is hereby ordered by the county court that W. H. Morrow, attorney heretofore in charge of the defense on the part of Pike county in the suit pending against it, and prosecuted by Watson Seminary as plaintiff in mandamus proceedings in the circuit court of Pike county, be, and is hereby, employed by this court, pursuant to an agreement this day entered into with him by the court, to defend said suit to a final determination thereof in the court or courts of last resort to which the same may be taken. Compensation agreed on and expenses and costs to be paid out of permanent school fund."

And as a part of the business arrangement then made the following contemporaneous written contract was executed:

"State of Missouri, County of Pike—ss.: County Court of said County, August Term, 1896. In consideration of services to be rendered by W. H. Morrow, Attorney at Law, in the suit or action now pending in the Circuit Court of Pike county, Missouri, in Watson Seminary, Pl's vs. the said County of Pike and the Judges thereof, Def'ts, by mandamus to compel the payments therein claimed, the said County of Pike, by and through its County Court, in regular session convened, agrees and obligates itself to pay to said W. H. Morrow the sum of twenty-five hundred dollars, upon the express condition, however, that said Morrow shall successfully defend said suit in the said Circuit Court and in any other court or courts to which said cause shall be appealed or otherwise taken pursuant to law; and the said W. H. Morrow agrees and obligates himself to render such services as is necessary, according to the best of his ability, in defending said suit or action. It is further expressly understood that if said suit or action be, in the end judicially determined in favor of the plaintiff therein and against the defendant therein, then this obligation to be void; it is understood and agreed, however, that the said County of Pike is to advance and pay, when required, such sum or sums of money in the defense of said suit necessary and requisite to pay all costs and expenses of court fees and printing expenses of transcript or records and briefs prepared in said cause on the part of defendant.

"Made in duplicate and signed and sealed this 3rd day of August, 1896.

"J. W. McIlroy,
"Presiding Judge.
"J. R. S. McCune,
"Associate Judge.
"Eugene W. Stark,
"Associate Judge.
"W. H. Morrow."

In pursuance of that employment, Morrow ably and fully performed his part of the contract, tried the case nisi, and won it there, followed it to this court on appeal, and won a crowning victory here on the 28th day of March, 1899. 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675. This court decided all issues in favor of the county court, and, by holding the repealing act constitutional, released the county from liability for fines, penalties, and forfeitures accruing after 1893, designated as the "Rejected Fund," and in effect overturned and struck to the ground the title of Watson Seminary to all that portion of the permanent fund thereof remaining in the hands of the court, and which had accrued prior to 1893 from such fines, penalties, and forfeitures after the repealing act aforesaid—the amount involved, by and large, being many thousands of dollars.

While this litigation was running its course, on the 9th day of February, 1898, Morrow and the judges of the county court undertook to make a new agreement. The material alteration from the original contract consisted in a provision that while, as in the original contract, Morrow was to be paid nothing if the litigation was adverse, he was to be paid \$1,250 out of the rejected fund and \$1,250 out of the permanent fund in case of success as to both funds, but only \$1,250 in case of success as to one fund; and the original contract was, in set terms, abrogated. This new arrangement also referred to past as well as future services as the consideration on Morrow's part, but it was not spread of record, nor was any order made of record authorizing it to be made, or referring to it; and it is only evidenced by a written memorandum signed by the judges and Mr. Morrow.

Some four months—to be exact, on August 9, 1899—after the opinion of this court in the mandamus case was handed down, the county court issued its warrant in favor of Morrow for \$1,250, to be paid "out of any money in the treasury appropriated for any ordinary county expenses or rejected Watson fund," and this warrant was cashed by him. He then applied for \$1,250 more to be paid him out of the permanent fund "as per contract," but nothing was done beyond filing the claim with the county clerk, and shortly thereafter he died. Refusing to settle with his widow as executrix, she sued the county on the modified contract. Presumably ascertaining that the county court had failed to make any record of the last so-called contract, and defendant by answer denying the contract counted on, she dismissed that suit, and brought the present one, for \$2,500 and interest after March 28, 1899, counting on the original contract.

On a trial to the court sitting as a jury, the foregoing facts appeared; and it was shown, moreover, that, after the final disposition of the mandamus case, counsel for Watson Seminary shrewdly conceived the notion of making such a show of further lit-

igation as would force some compromise in regard to the permanent fund accruing from fines prior to 1893. Accordingly they appeared before the county court of Pike county, with Morrow present, and sought a compromise; contending that the force of the former adjudication was spent upon the rejected fund alone. Per contra, Morrow contended that the effect of the opinion was to destroy the right of Watson Seminary to any fines, penalties, or forfeitures accruing after the repealing act, and hence all portion of said accumulation nominally set apart to the permanent fund of Watson Seminary prior to 1893 became, by virtue of the decision of this court, a part of the common school fund of Pike county. The county court took Morrow's view, and refused to compromise. Subsequently, and after Morrow's death a suit was brought to give color of claim to a compromise; and the court, as then constituted, bought its peace by making some settlement, the character of which does not appear in the record, but of a trivial sort, as contended ore tenus by counsel.

The trial below resulted on the 15th day of November, 1902, in a general judgment for the executrix in the sum of \$1,553.61 against the county, and to reverse that judgment Pike county appeals, after the conventional preparatory steps.

Sundry contentions were made below, and exceptions saved, which are sifted out and now abandoned; the following alone remaining for our consideration: First, appellant asked and was refused a mandatory instruction, and insists here that it should have been given, because, it says, the original contract was invalid, in that the record entry pertaining thereto was not "broad enough," and did not contain the terms of the contract, and in that the said entry shows that the attorney's fees were to be paid out of the permanent school fund; second, because, although the second contract was void as to the county, yet it was binding upon Mr. Morrow, had been acted upon by him, and by its terms it superseded the original contract now sued upon; third, because the verdict is excessive, in that the court erred in computing the interest. Of these, *seriatim*.

1. It will be seen that the original contract is assailed only because the record entry is not "broad enough," and does not set forth all the terms of the contract, and because thereby Morrow's compensation was to come out of the permanent school fund. This contract is not attacked by the county or its learned counsel because of any inherent or statutory lack of power in the county court to make a contract employing an assistant attorney. The power of the court to contract being conceded, we are relieved from the necessity of examining into the right of a Missouri county court to make a contract for an attorney to assist its prosecuting attorney in civil business, and of construing and applying sections 4951, 5003, Rev. St. 1899, and

of considering those cases construing the legislative enactment (Laws 1873, p. 18) approved March 11, 1873, giving all county courts authority to hire lawyers, but which was repealed by not being included in the Revised Statutes of 1879 (Butler v. Sullivan County, 108 Mo. 639, 18 S. W. 1142), and upon which enactment the decisions in Thrasher v. Greene County, 87 Mo. 419, and Thrasher v. Greene County, 105 Mo. 244, 16 S. W. 955, were based, and which cases were cited as authority for the holding in Reynolds v. Clark County, 162 Mo. 680, 63 S. W. 882, all of which cases are suits against counties on contracts of employment by attorneys for services.

Attending, then, to the assignments of error in this behalf presented for our consideration, and construing the statute relating to county contracts (section 6759, Rev. St. 1899), it will be seen that a contract made by the county court must be in writing, and must be made upon a consideration wholly to be performed or executed subsequent to the making of the contract. This statute does not require the contract, when made, to be spread of record, but its spirit seems to be observed if the action of the court be evidenced by a record that in some apt way refers to the subject-matter of the written contract executed in pursuance thereof. So that, if it be conceded that the action of the county court must appear by its record (Riley v. Pettis County, 96 Mo. 318, 9 S. W. 906; Johnson County v. Wood, 84 Mo. 489), yet the execution of the contract by Morrow could not be proved by an *ex parte* record, but must appear from his own act in signing the written contract. Taking the scope and purport of that statute into consideration, no reason is apparent to us why the whole contract should be spread of record in the absence of express provision requiring it. The record entry ought properly, as this one does, to identify the subject-matter of the contract and give the outlines of it, but it would certainly be a vain and useless thing to copy the whole contract upon the record. The statute (section 6760) provides that the contract should be executed in duplicate, and one copy filed with the clerk, and the other is intended, presumably, for the opposite party; and the object to be subserved by this provision seems to preclude the necessity of recording the contract itself, or all of its provisions. In this case the record entry shows a suit was pending against the county, the character and style of the suit, and by whom prosecuted, and in what court. It is not pretended that there were two or more suits pending, and the reference to the suit as a mandamus suit and to the court in which it was pending was a sufficient identification of the subject-matter. It is said therein that Morrow contracted to defend the suit into the courts of last resort, and what more was necessary for the sensible and orderly transaction of the county business? To our mind, the objection that

the entry was not broad enough is without merit.

But the further contention is made under this head that the entry shows Mr. Morrow's compensation was to be paid out of the permanent school fund, and that therefore the contract was invalid. It will be seen that the written contract does not provide what fund Mr. Morrow's compensation should be paid from, but such fund is wholly left to be regulated by the application of correct principles of law. The county court, however, did order that it should be paid out of the "permanent school fund"; thereby meaning either the "county public school fund" referred to in Rev. St. 1899, § 9824, or meaning the account which was carried on the county books as the "permanent fund" of Watson Seminary. It matters little which fund was referred to, for they are precisely the same in contemplation of law; i. e., the permanent fund of Watson Seminary, held by the county, which resulted from fines, penalties, and forfeitures since the repealing act of 1859 aforesaid, became *ipso facto* and *eo instanti* by that repeal a part of the public county school fund. The county court properly placed the burden of protecting this fund upon the fund itself, and this arises from the following propositions: The public school fund does not belong to the county in a technical sense. It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund. *Ray County v. Bentley*, 49 Mo., loc. cit. 242. It may not divert the general county revenue to its protection, and, on the other hand, it cannot apply the school fund to the payment of ordinary county debts. *Knox County v. Hunolt*, 110 Mo., loc. cit. 75, 19 S. W. 628. But it is fundamental that, conceding the right to make the contract in question, the burden of protecting the trust fund should fall upon the fund itself, on well-recognized equitable principles. And so it has been held by this court. For example, *Township Board of Education v. Boyd et al.*, 58 Mo. 279, was a case of this sort. The Martins purchased a school section in Washington county, and gave their note, which remained unpaid; and the county court claimed waste upon the land, and, demanding additional security, obtained an injunction against the Martins, and two of the justices of the county court (Boyd and Johnson) signed the injunction bond. The injunction being dissolved, judgment was obtained against Justice Boyd, as surety on the injunction bond, in a certain sum of money, which he paid. Whereupon the county court, by its order on the county treasurer, reimbursed him out of the funds pertaining to the school township. Relators, constituting the board of education, thereupon demanded an order directing the treasurer to reimburse their township school fund, thus depleted, out of the county treasury, in the sum so paid to

Boyd. On refusal of the court so to do, a mandamus was sued out, which being refused below, an appeal was taken here, and the judgment was affirmed on the ground that "the unreasoning procedure by mandamus is unfitted to solve" a case so full of doubt. Whereupon another suit was instituted, in the name of Washington county, to recover the sum of money so paid from the members of said county court. *Washington County v. Boyd*, 64 Mo. 179. And it was held that the plaintiff could not recover. It was said, among other things, that the court was a mere agent of the state for the management of a trust, and that: "It is authorized to sell lands, to lease them, to receive and sue for the purchase money, and, if there be danger of loss of a debt contracted for the purchase of these lands, the court, we think, might resort to those extraordinary remedies provided for creditors generally. It might sue by attachment; and, if the purchaser is stripping the land of its timber, and thereby endangering the security for the debt, must the agent of the state stand by and witness this spoliation, and trust to the criminal law to indemnify the township by the fine imposed against persons committing the waste on such lands? Five hundred dollars is the extreme penalty, while the timber destroyed might be worth five times that amount. As careful and honest agents, they will guard the interests of their principal as if the property were their own; and, as long as they are actuated by an honest purpose to subserve that interest, to hold that they must answer, out of their own means, for any costs or expenses honestly incurred in the endeavor to protect that interest, would tend far more to jeopardize these funds, than to hold them entitled to remuneration for such outlays when they have been judiciously and honestly made." It was held furthermore that the money paid out by Boyd should have been repaid him, and that it was properly repaid, and that, if it had not been repaid, he could have sued, and recovered it from the school fund of the township interested in that particular fund.

The direction of the county court in the entry complained of that the expense of preserving the integrity of the school fund held in trust should be placed as a burden upon the fund itself, instead of making the contract illegal, in our opinion, placed the burden directly where it belonged; and, had that provision been in the written memorandum signed by Morrow, it would not have rendered the contract invalid.

2. But it is said that the second contract made in February, 1898, while void as to the county, is binding upon Mr. Morrow. That the second contract is void in toto appears from two propositions. One proposition is that there is no record entry evidencing the action of the county court. The other proposition is that, in the teeth of section 6759, Rev. St. 1899, the contract was not made upon

a consideration wholly to be performed or executed subsequent to the making of the contract, but narrates in set terms that it is made "in consideration of services rendered and to be rendered by W. H. Morrow," etc., in the Watson school fund matter. It will be noted that Mr. Morrow had been in the employ of the county court for a year and six months, in and about the matter in hand, at the time the second contract was made. We are referred to no principle of law that renders a void contract between two persons capable of contracting, and not performed, void as to one, and enforceable as to the other. The new contract abrogated in terms the former contract, and we are asked to give effect to that provision in the new contract, and, having done so, to hold that the contract has no further efficacy, so far as Pike county is concerned. Such conclusion, it seems to me, would be a solecism in the law. A contract in a form forbidden by law is absolutely void—in other words, is of no legal effect—and all its provisions are afflicted with the same vice; and courts would not be so unfair and unjust as to pick and choose between the parties to such contract, and enforce it as to one, and not as to another. The second contention of appellant is therefore disallowed.

3. The next assignment of error is that the verdict is excessive. No express time is mentioned in the contract when this fee became due. It is payable on condition of performing certain services, and the law will read into the contract that the amount became due when the services were rendered. Those services were consummated when the final decision was rendered in the mandamus case in this court. This, under the showing made in the record, was on the 28th day of March, 1899. When money is to become due under a written contract, and no rate of interest is provided, the interest runs at 6 per cent. from the date the money is due. Rev. St. 1899, § 3705. The circuit court gave judgment for \$1,553.61; thus allowing \$908.61 as accrued interest up to the date of judgment, November 15, 1902. Computing the interest on the principal sum of \$2,500 from March 28, 1899, up to the date of the payment on August 9, 1899, and crediting the payment of \$1,250, and computing interest on the remainder until the date of judgment, shows the amount for which judgment should have been given on the 15th day of November, 1902, to be \$1,560.28. So that the judgment was for too little, rather than for too much; but, as this is an error in appellant's favor, the cause cannot be reversed on that account.

The judgment, however, is erroneous in form, as it is a general judgment against Pike county, instead of being a judgment to be paid out of the public school fund of the county benefited by the services of Mr. Morrow. It is accordingly modified so as to be satisfied out of the proper school fund, and, as modified, is affirmed. All concur, except MARSHALL, J., not sitting.

BLUNDELL v. WILLIAM A. MILLER ELEVATOR MFG. CO.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. MASTER AND SERVANT—MASTER'S DUTY—SAFE APPLIANCES.

A master must furnish reasonably safe appliances, considering the character of the work, but they need not necessarily be the latest or best.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 172, 178, 180-192.]

2. SAME—ASSUMPTION OF RISK.

A servant assumes the risks that ordinarily and usually are incident to the business being conducted by the master.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 538, 550.]

3. SAME—RISK OF MASTER'S NEGLIGENCE.

The risks assumed by a servant do not include subsequent negligence of the master.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 541.]

4. SAME—KNOWLEDGE OF DANGER.

Where a master fails to furnish safe appliances, and the servant knows, or by ordinary care could know, that the appliances are not reasonably safe, he is not obliged to refuse to use them or quit the service, if he reasonably believes that by the exercise of proper care he can safely use the appliances.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 574-592.]

5. SAME—OBVIOUSLY DANGEROUS APPLIANCE.

Where an appliance furnished a servant is obviously so dangerous that no reasonably prudent man would try to use it, or if the danger threatens immediate injury, the use of the appliance is contributory negligence.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 708.]

6. SAME—INSUFFICIENT FORCE FOR WORK.

Where plaintiff was employed by defendant to erect an elevator in the latter's building, and before going to work he asked for a helper, but was told that one could not be furnished him until the afternoon, and the manner of doing the work was left entirely to plaintiff, who was an expert, he assumed the risk of doing the work without a helper.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 566.]

7. SAME—APPLIANCES—EVIDENCE.

Where plaintiff, on going to work to put in an elevator for defendant in the latter's building, found a ladder lying close to the materials which were to be used in the construction of the elevator, but it was not shown who put it there or to whom it belonged, there was no showing that the ladder was one of the appliances which the master had furnished.

8. SAME—SAFE APPLIANCES—LADDERS.

It was not negligence for a master to fail to provide a ladder with prongs or safety hooks at the bottom, though the ladder was to stand on a granitoid floor.

Appeal from St. Louis Circuit Court; Horatio D. Wood, Judge.

Action by William H. Blundell against the William A. Miller Elevator Manufacturing Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Wm. H. Clopton, for appellant. Thos. G. Rutledge and Seddon & Holland, for respondent.

MARSHALL, J. This is an action for \$10,000 damages for personal injuries alleged to have been received by the plaintiff on the 17th of May, 1899, while in the employ of the defendant, and engaged in the work of erecting a hand-car freight elevator in a building (No. 21 South Third street) in the city of St. Louis. At the close of the plaintiff's case the court sustained a demurrer to the evidence. The plaintiff took a nonsuit, with leave, and, after proper steps, appealed to this court.

The Issues.

The petition states that the defendant is a domestic corporation, and that on the 17th of May, 1899, the plaintiff was employed by the defendant to erect an elevator in a building on the west side of Third street, in the city of St. Louis; that, in order to properly do the work, it was necessary for the plaintiff to ascend a ladder from the basement to the second (first) floor; that he requested the defendant to furnish him the usual and necessary laborers or helpers to assist him, together with necessary tools and appliances, but that defendant "willfully, carelessly, and negligently failed either to furnish said helper, or to furnish him with the necessary and proper tools and appliances to enable him to properly and safely do said work, in this: that the ladder furnished by defendant, and which he was directed to use and did use, was not so constructed as to prevent it from slipping or giving way when placed upon a granitoid flooring, or any smooth surface; that, in doing the work, he ascended the ladder, resting the base thereof on the granitoid floor of the basement; that the ladder slipped and fell," and he sustained the injuries complained of. The answer is a general denial, with a plea of contributory negligence and of assumption of risk.

The case made is this: The plaintiff was engaged in the business of constructing elevators, or, more properly speaking, doing the millwright work in the erection and construction of elevators. He had been engaged in that business about 25 years, and prior to the accident had worked for the defendant many times, and also for other persons and companies that were engaged in such business. The day before the accident he applied to the defendant for work, and was told that he would be employed the next morning. Accordingly, on the next morning, when he presented himself for work, he was employed to put up a hand-car freight elevator in the building No. 21 South Third street. Said elevator was to extend from the basement to the first floor, a distance of 10 feet. When employed, one of the officers said to him: "Pick up your tools, and come with me, and put up a hand-car elevator." Accordingly the plaintiff went to his tool chest and picked up such tools as he thought he would need, and then asked where the helper was. The officer answered: "Well, they are busy just

now, and I can't let you have a man until noon time." The officer of the defendant then accompanied the plaintiff to the building, and pointed out to him some materials that were lying on the floor of the building, and told him to go ahead and put up the guideposts that run on each side of the platform, and he would send a man to help him at the heavier work upstairs. The hatchway had not been completed by the carpenters who were engaged in the construction of the building, and the plaintiff first proceeded to complete the hatchway in the floor of the first story for the elevator. After so doing he went into the cellar, the floor of which was made of granitoid. He made a hole through the granitoid for one of the posts to rest in, and set up the post. He then went up to the first floor of the building, and found a ladder 12 feet long, which was lying with, or in close proximity to, the materials intended to be used in the construction of the elevator. He placed this ladder in the hatchway; the lower end resting on the granitoid floor of the basement, and the upper end extending above the floor of the first story. The end of the ladder which rested on the granitoid was rounded. The plaintiff then got onto the ladder for the purpose of completing the work of setting up the guidepost, and while so engaged the ladder slipped, and he fell and was injured. Respecting the ladder, the only testimony in the case is that of the plaintiff himself, who testified as follows: "Question. Now, you don't know whom this ladder belonged to, do you? Answer. I don't know. It was lying there with the elevator material. That is all I know about it. Mr. Hackman told me that was the material I was to use, and the ladder was lying there. I supposed it belonged to Mr. Miller, but I wasn't sure about it, and don't know now who it belonged to. Question. And you took this ladder and put it down to the basement floor? Answer. Yes, sir. Question. The ladder itself was perfectly sound, was it? Answer. It looked to me to be sound; yes, sir. Question. Was it sound? Answer. From all appearances, it was sound." The plaintiff says he placed the foot of the ladder at a distance of about 2½ or 3 feet from the wall; that the reason the ladder slipped was because it was not equipped with prongs. "Question. Now, when you picked this ladder up and took it down there, you saw, didn't you, that there was no fastenings or anything of that kind on the bottom of it? Answer. There was no iron on the bottom of it. Question. You saw that yourself? Answer. Yes, sir." The plaintiff further testified that he was familiar with the use of ladders, and understood how to handle them. He further testified that at no time prior, when he had worked for the defendant, had the defendant ever used or furnished a ladder with a prong or fastening attached thereto, to keep it from slipping. The testimony showed that the building in which the ele-

vator was to be constructed was in process of construction, and that there were other men and carpenters engaged in doing other work on the building; some of them making the staircase between the first floor and the basement.

The gravamen of the plaintiff's case is that the defendant willfully, carelessly, and negligently failed to furnish the plaintiff with a helper, and likewise furnished him with a ladder that was not so constructed as to prevent it from slipping when one end thereof was placed upon a granitoid floor.

The learned counsel for the parties hereto have collated a great number of decisions of the courts of this and other states bearing upon the question of the assumption of risks, and the duty of the master to his servant. It would serve no good purpose to attempt to reconcile the adjudications upon the subject of assumption of risks. The prior state of adjudication will be found fully discussed in the following Missouri cases: *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113; *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; *Winkler v. St. Louis Basket Co.*, 137 Mo. 894, 38 S. W. 921; *Bradley v. Railroad*, 138 Mo. 302, 39 S. W. 763; *Hamman v. Coal Co.*, 156 Mo. 232, 56 S. W. 1091; *Pauck v. St. Louis Dressed Beef Co.*, 159 Mo. 467, 61 S. W. 806; *Grattis v. Railroad*, 153 Mo. 380, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721; *Connolly v. St. Joseph Press Printing Co.*, 166 Mo., loc. cit. 463, 66 S. W. 268; *Minnier v. Railroad*, 167 Mo., loc. cit. 112, 66 S. W. 1072; *Holmes v. Brandenbaugh*, 172 Mo., loc. cit. 66, 72 S. W. 550; *Haviland v. Railroad*, 172 Mo., loc. cit. 112, 72 S. W. 515; *Curtis v. McNair*, 173 Mo., loc. cit. 279, 73 S. W. 167; *Parks v. Railroad*, 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425; *Mathias v. Kansas City Stockyards Co.* (Mo. Sup.) 84 S. W. 66.

The rules deducible from these cases may be briefly stated to be as follows: First. The master is entitled to conduct his business in his own way, and with such appliances as he sees fit, subject to the qualification that the appliance shall be reasonably safe, considering the character of the work to be done, but need not necessarily be the latest or best appliance for doing such work. Second. The servant, in entering the service of the master, assumes the risks that ordinarily and usually are incident to the business being conducted by the master, and the wages paid include compensation for injuries received from such risks. Third. The risks thus assumed by the servant do not include subsequent negligence of the master, but cover only the risks that ordinarily and usually attend the doing of the particular business the master is engaged in, in the manner, place, and with the appliances employed and used by the master at the time the servant enters the employment, or such as are afterwards employed by the master, and which the servant had actual or constructive notice of,

and used without protest, and which he believed could be used by the exercise of care and caution. Fourth. If the master fails in his duty, and if the servant knows, or by the exercise of ordinary care could know, that the appliances furnished are not altogether or reasonably safe, the servant is not obliged to refuse to use the appliances, or quit the service, if he reasonably believes that by the exercise of proper care and caution he can safely use the appliances, notwithstanding they are not so reasonably safe; and if he does so, and exercises ordinary care and caution, and is injured, he does not waive his right to compensation for injuries received in consequence thereof, nor is he guilty of negligence. But if the appliance furnished is obviously so dangerous that a reasonably prudent man would not attempt to use it, or that it cannot be safely used even with care and caution, or, otherwise stated, if the danger of using the appliance is patent, or such as to threaten immediate injury, and the servant uses the same, he is thereby guilty of contributory negligence, and the master is not liable, notwithstanding his prior failure of duty. Fifth. The master is not an insurer of the safety of the place or of the appliances furnished, and his duty is discharged when he has exercised ordinary care in this regard. Sixth. There is a vast difference between the doctrines of assumption of risk and contributory negligence. The first rests in contract, and the second arises out of the negligence of the servant. The result to the person injured is the same in both cases, but the underlying principles are radically different, and should be carefully borne in mind in every case. The maxim, "*Volenti non fit injuria*," cuts off a recovery where the injury is caused by one of the risks incident to the business which the servant assumes when he enters the employment. The right of recovery is cut off in the second case under the rule of law that prohibits a recovery where the negligence of the person injured contributes thereto.

Cases very similar to the one at bar have arisen and undergone adjudication in other jurisdictions. In *Borden v. Dalsey Roller Mill Co.*, 98 Wis. 407, 74 N. W. 91, 67 Am. St. Rep. 816, the plaintiff was engaged in putting up some millwright work in the defendant's flour mill. When so doing, he was obliged to use a ladder. While he was standing on the ladder, it slipped and fell, and he was injured. He sued the master, alleging the ladder to be defective for want of spikes in the ladder to prevent its slipping on the floor. He recovered in the trial court. That court instructed that the master was liable because the ladder was not equipped with such spikes. The judgment of the circuit court was reversed by the Supreme Court, where it was said: "A ladder is one of the most simple contrivances in general use. The danger attending such a use is a matter

of almost common knowledge, and is particularly within the knowledge of men engaged in such work as that in which plaintiff was employed when injured. Under all the circumstances, in view of the very simple character of such a tool, the ease with which plaintiff could have informed himself as to whether there were points on the bottom of it, the obvious danger which would naturally suggest to such a person the necessity of familiarizing himself with its character in that regard before using, and to guard against its tendency to slip on the floor, and many other things that may be mentioned, clearly the court was not warranted in finding, as a matter of law, that the officers and agents of the defendant, whose duty it was to act in this behalf, in the exercise of ordinary care, ought reasonably to have apprehended that some person who might use the ladder in and about defendant's work might be injured as a natural and probable result of its condition. This is an essential test of actionable negligence."

Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56, was an action for damages for personal injuries received by the plaintiff in consequence of the slipping of a ladder used by him in lighting the gas lamps in front of defendant's building. Previous to the accident the plaintiff had spoken to the defendant's superintendent, and insisted that the ladder ought to be hooked and spiked, and the superintendent promised to have it done, but failed so to do, and the plaintiff told him that unless it was done there would be an accident. On the occasion of the accident, the plaintiff had lighted seven of the lamps. The night was stormy. Sleet, rain, and snow were falling, and a high wind prevailed. In attempting to light the eighth lamp, the ladder slipped, and the plaintiff was injured. The plaintiff recovered in the trial court. The Court of Appeals reversed the judgment, saying: "The right of the plaintiff to maintain this action is founded upon the alleged negligence of the defendant in not furnishing a proper ladder for the use of the plaintiff in the work he was engaged to perform. It rests upon the principle that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish proper, perfect, and adequate machinery for the proper work. * * * As a general rule, it is to be supposed that the master who employs a servant has a better and more comprehensive knowledge of the machinery and materials to be used than the employé, who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the performance of the service required of him. The rule stated, however, is not applicable to all cases, and where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work devolving upon him,

and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof. In considering the application of the rule just stated, due regard must be had to the limited knowledge of the employé as to the machinery and structure on which he is employed, and to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from injury, and selecting the agent from which it may arise.

* * * In cases, however, where persons are employed in the performance of ordinary labor, in which any machinery is used, and any materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employé has full knowledge and comprehension, cannot be regarded as making it a case of liability within the rule laid down. A common laborer, who uses agricultural instruments while at work upon a farm or in a garden, or one whose employ in any service not requiring great care and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence, if, in using a utensil which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has a superior knowledge, and has thereby imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and if he is thereby injured, it is by reason of his own fault and negligence. The fact that he notified the master of the defect and asked for another instrument, and the master promised to furnish the same, in such a case, does not render the master responsible if the accident occurs. * * * Even if it be considered that a right of action exists in this case in favor of the plaintiff, under any circumstances, we think that the evidence would not justify a recovery, for the reason that the defendant did not fail in furnishing a proper ladder for the use of the plaintiff in lighting the lamps. The rule is that a master does not owe to his servant the duty to furnish the best known or conceivable appliance. He is only required to furnish such as are reasonably safe and suitable—such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances. * * * The defendant has procured a ladder which ordinarily would be regarded as safe for the purpose for which it was used. The plaintiff had used it for a long time without any accident or danger, and on the very night of the accident it had been placed in position and used several times successfully. That it failed at last for any reason does not es-

tablish that it was unfit for use. It might perhaps have been more perfect if it had had hooks and spikes, but this improvement was not absolutely essential to relieving the defendants from liability. It was enough that it was reasonably safe and suitable within the rule cited, and under such circumstances the action will not lie." This case was cited and followed in *Cahill v. Hilton*, 106 N. Y., loc. cit. 518, 18 N. E. 341, where it was said: "A ladder, like a spade or hoe, is an implement of simple structure, presenting no complicated question of power, motion, or construction, and intelligible in all its parts to the duller intellect. No reason can be perceived why the plaintiff brought into daily contact with the tool used by him, as he was, should not be held chargeable with the defendants, with knowledge of their imperfections."

Wood v. Tleiston, etc., Co. (Mass.) 65 N. E. 810, was an action for damages received by the plaintiff while using a ladder, by reason of the slipping thereof. The ladder was used to reach a platform about eight feet above the floor. The ends of the ladder were so cut that they rested horizontally on the floor, and had a tendency to slip. At the foot of the ladder the cleat split and the ladder slipped, causing the plaintiff to fall. There was a verdict for the defendant, and the plaintiff appealed, with the result that the judgment was affirmed; the court holding that the risk was incident to the manner of doing the business as the defendant conducted it, and that the plaintiff assumed the risk when he entered the employment. Many other cases illustrative of the principle here involved might be cited, but, after all, there is not so much diversity of opinion as to the underlying principles as there is as to the application of the legal principles to the facts in judgment in the particular cases.

It only remains to apply the rules of law to the facts of this case.

The first negligence assigned is that the defendant failed to furnish the plaintiff with a helper. Of this it is only necessary to say that at the time the plaintiff entered the service of the defendant, and undertook to do the work in this case, he was expressly informed that he could not have a helper until noon, and was told to go on with the work until that time, when a helper would be furnished to help do the heavier part of the work. The manner of doing the work was left entirely to the plaintiff, who was an expert in that department of work. He was not required to do anything that would or could result in injury. He was left free to do the work in any manner he saw fit, with the instrumentality and appliances and assistance which were furnished him at the time he entered the employment. He knew he was to have no helper until afternoon. There were, concededly, other parts of the work which he could have safely done, and

which were necessary to be done, without the assistance of a helper, and without incurring any risk of injury. The plaintiff therefore took the risk of doing the work with the appliances and help that were furnished, and cannot now be heard to charge negligence or failure of duty on the part of the master.

The second negligence assigned is that the ladder had no prongs to prevent it from slipping while resting on the granitoid floor of the basement. There is no evidence in this case that the ladder was furnished by the defendant. The plaintiff says he found it in the building lying with or close to the materials which were to be used in the construction of the elevator, but that he did not know who put it there, or to whom it belonged. The plaintiff therefore has failed absolutely to show that the ladder was one of the appliances which the defendant furnished. But assuming that the ladder was furnished by the defendant, the failure of the defendant to provide prongs or safety hooks to keep the ladder from slipping is not sufficient to make the defendant liable in this case. The ladder was a very simple appliance—one that is familiar to every grown man. Its liability to slip when not resting firmly or securely is a matter known to all men. Yet ladders are constantly used, and very few of them have prongs or safety hooks thereon. There is a total absence of any evidence in this case showing that the ladder furnished was not a reasonably safe appliance, and could not have been safely used for the purposes to which it was applied or intended to be applied. There is nothing in the case which in any manner made it obligatory upon the plaintiff to use the ladder. The elevator was only to extend from the basement to the first floor, a distance of 10 feet. The guirupost was to rest in the hole the plaintiff had cut in the granitoid flooring, and necessarily was to extend above the first floor. The plaintiff could have reached the first floor from the basement by means of the staircase in process of construction. There was therefore no necessity for the plaintiff to use the ladder at all. But even if this be not true, no reason appears why the plaintiff could not or did not fasten the ladder so as to prevent it from slipping before ascending it. This he could have done by attaching it to the floor of the first story, if it was not possible to arrange it at the bottom to prevent it slipping by reason of the flooring being made of granitoid. There is no evidence in the case tending to show that the master directed or intended that the plaintiff should use the ladder, nor that the master prescribed or limited the manner of its use. There is no claim that the ladder itself was not otherwise perfectly sound and safe.

Reduced to its last analysis, the plaintiff's case rests upon the proposition that a ladder is an unsafe appliance to be used in going

from the basement to the first story of the building, unless it has prongs or safety hooks attached thereto to keep it from slipping. No case supporting such a proposition has been cited by counsel, and none has fallen under the observation of the court. On the contrary, among the cases hereinbefore cited there are several where the claim here made was distinctly denied by the court; and in other cases a ladder without prongs or safety hooks has been held to be a reasonably safe appliance for the master to furnish the servant for such uses as ladders are generally applied to. The fact that the ladder rested upon the granitoid floor of the basement could not render it any more insecure than if it had rested on a plank floor. The liability to slip would be equally as great in the one case as in the other.

The judgment of the circuit court was clearly right, and it is therefore affirmed. All concur.

STANDARD SCALE & FOUNDRY CO. v. KANSAS CITY FURNACE CO.

(Kansas City Court of Appeals. Missouri. June 5, 1905.)

JUSTICES OF THE PEACE — PLEADING — FILING OF WRITTEN INSTRUMENTS.

Rev. St. 1899, § 3852, requiring a written instrument, when made the basis of suit before a justice, to be filed with the justice, does not require the action to be brought specifically on such instrument, but, if the subject-matter of the action is such that it may be stated in an account, plaintiff may state his case in the form of an account, and need not sue on the contract, and may offer the contract in evidence.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 307, 335.]

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by the Standard Scale & Foundry Company against the Kansas City Furnace Company. From a judgment for plaintiff, rendered on appeal from a justice, defendant appeals. Affirmed.

Wm. T. Jamison, for appellant. Karnes, New & Krauthoff and Jno. N. Davis, for respondent.

ELLISON, J. This action was brought before a justice of the peace on an itemized account. The defendant filed before the justice an itemized counterclaim in the shape of a written answer, in which credits are set up by which, in at least one item, a contract between the parties is referred to. For these items defendant claims that he should have credit, though they sum up more than the balance claimed by plaintiff. No objection appears to the statement of plaintiff's cause of action being stated in the form of an account until at the close of his evidence on appeal in the circuit court, when defendant moved to dismiss for the reason that it appeared by plaintiff's testimony that

there was a written contract covering the items of the account. The court overruled the motion, and defendant has made such action the principal ground of his appeal.

When a suit is upon a written instrument, the statute (section 3852, Rev. St. 1899) requires that it shall be filed with the justice. But if the subject-matter is such that it may be stated in an account, the plaintiff need not sue on the contract, and may state his case as an account, the contract being evidence in his behalf. *Kingsland & Ferguson Mfg. Co. v. St. Louis Malleable Iron Co.*, 29 Mo. App. 523. If there is a verbal contract, the action may be stated in the form of an account sufficiently definite to apprise the opposite party of the matter in controversy and to bar another action. The action need not be brought specifically on the contract. *Barham v. Colp*, 87 Mo. App. 152, 156. The statute only requires a written instrument to be filed when the action is upon such instrument. If the cause of action is such that it may be maintained as on an account, it may be so brought. In this case the account is a full statement of the items which go to make it up, and a judgment thereon would undoubtedly bar any other action involving such items.

We are of the opinion that the instructions for plaintiff given over defendant's objections were correct. There is no good ground of objection to the third one on the subject of defendant's counterclaim. Certainly, if the hypothesis therein submitted was believed, the finding on that subject should be as directed.

The judgment is affirmed. All concur.

HENSLER v. STIX et al.

(St. Louis Court of Appeals. Missouri. May 16, 1905.)

1. CARRIERS—ELEVATORS—INJURY TO PASSENGERS—CARE REQUIRED.

Persons operating elevators for public use in stores are common carriers of passengers, and bound to exercise the highest practicable care used by prudent men in operating elevators to prevent injury to passengers.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 966, 1092, 1194.]

2. SAME—NEGLIGENCE.

In an action for injuries to a passenger by the operation of an elevator, the court should have charged that defendants were liable for slight negligence on the part of their employé in charge of the elevator.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1092, 1194, 1333.]

3. SAME—ACTION FOR INJURY—PLEADING.

Where, in an action for injuries to an elevator passenger, the instructions did not authorize a verdict for plaintiff on a finding that the elevator was carelessly started from the landing, the failure of an allegation in the petition that the operator started the car before plaintiff's dress was released from the door to allege that the car was negligently started was immaterial.

4. SAME—DIRECTION OF VERDICT.

Where there was evidence that defendants' employé carelessly closed the door of an ele-

vator on plaintiff's dress, and at the same moment started the elevator, and negligence in that respect was well pleaded, it was not error to refuse to direct a verdict for defendants, in that there was a total failure of proof, though some of the grounds of negligence alleged were not proved.

5. SAME—NEGLIGENCE—QUESTION FOR JURY.

Defendants' elevator operator shut the elevator door on plaintiff's dress while she was standing in the car, and lowered the elevator at the same instant. The operator, seeing plaintiff's peril, suddenly reversed the lever, which resulted in the car suddenly turning upward, causing plaintiff's injuries; the operator claiming that, unless he acted as he did, the descent of the elevator could not have been stopped quickly enough to save plaintiff from harm. *Held*, that whether the operator was negligent in handling the elevator after he saw plaintiff's danger was for the jury.

6. SAME—PROXIMATE CAUSE OF INJURY.

The movement of the elevator upward, as distinguished from the negligence of the elevator operator in moving the elevator when he knew or should have known that plaintiff's dress was caught in the door, was not the proximate cause of the accident, as a matter of law.

7. SAME—ACTION FOR INJURY—INSTRUCTIONS.

In an action for injuries to an elevator passenger, an instruction declaring that negligence on plaintiff's part, directly contributing to the injury, would not bar her right to recover, if defendants' agent or servant, after discovering plaintiff's danger, might, by the exercise of ordinary care, have prevented the injury to her, was erroneous, as misleading, and as requiring of the operator no more than ordinary care to save plaintiff after he discovered her peril.

8. SAME.

The instruction was also objectionable as eliminating defendants' liability in case the elevator operator was negligent in not sooner discovering plaintiff's peril.

9. SAME—MANAGEMENT OF ELEVATOR—NEGLIGENCE.

Plaintiff's dress was caught in the door of an elevator as the door was closed after she entered it, and, the elevator being caused to descend immediately thereafter, the operator discovered plaintiff's peril, and reversed the elevator; and, before it could be stopped, plaintiff was injured by being caught between the elevator floor and the ceiling. *Held*, that as any negligence on plaintiff's part must have occurred, if at all, before the elevator began to descend, and the operator being charged with the duty to exercise unusual vigilance for plaintiff's safety, if by the exercise of such vigilance he could have seen that plaintiff's dress was caught in time to prevent injury to her, defendants were liable.

10. SAME—INSTRUCTIONS.

An instruction that defendants were liable, if plaintiff's injury was caused by "any failure" on their part to exercise care and precaution in the management of the elevator, as distinguished from a failure of duty "shown by the proof" was error.

11. SAME—LIABILITY FOR INJURY TO PASSENGER—ACCORD AND SATISFACTION—INFANCY.

Where plaintiff was injured by the operation of an elevator in which she was being transported from one floor to another in defendants' store, her failure to reply to a letter proposing that defendants would continue to pay for her board and attention at a hospital, if she assured them she would make no additional demand on account of her injury, did not constitute an accord and satisfaction; she being a minor until after she left the hospital.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Mary Hensler against Charles A. Stix and others. From a judgment for plaintiff, defendants appeal. Reversed.

Seddon & Holland, for appellants. J. E. Egger and J. E. Hainer, for respondent.

Statement of the Case.

GOODE, J. The defendants are a firm of retail merchants in the city of St. Louis. Plaintiff was injured in an elevator accident while in their store as a customer, and on an elevator used to carry passengers to the different stories of the building. The accident occurred as the elevator descended from one of the floors. The evidence is contradictory as to which one, nor is the fact material. The elevator runs in a shaft. Each floor of the building has a sliding door attached to the floor and detached from the elevator, but opening into the shaft, and affording an entrance to and an exit from the elevator car. The car itself has an opening or doorway in the south side about three feet wide. When the car stops at a floor its doorway is immediately opposite the sliding door, which is pushed back for passengers to go in and out of the car, and closed before the car starts again. The testimony for the plaintiff is that just as she entered the elevator the youth who operated it told her to step back from the door, but instantaneously, and before she had time to step back, closed the door and started the elevator downward. It immediately appeared that her dress was fastened at the floor they were leaving, for when the car had descended about four feet the dress stretched taut, and plaintiff was lifted from the floor of the car and suspended between the floor and the top. The car was about seven feet high, and, if it had descended three feet farther, plaintiff would have been struck by the roof of it, and in all probability killed or seriously injured. The operator discerned her peril, and reversed the movement of the car, thereby causing it to shoot upward. The sudden upward movement threw the plaintiff's left leg through the open doorway of the car, and it was caught between the floor of the car and the ceiling beneath the story it approached in rising—the same story it had left. The elevator operator gave this account of the accident: "When I descended about four feet I noticed Miss Hensler was caught, and quickly reversed the elevator on the 'up,' and the elevator— It was too short a distance for the elevator to go slow, and it went up quickly, and her leg was caught between the under portion of the floor and the upper portion of the elevator. * * * Why, I could never have stopped the elevator in time to save her from instant death. I couldn't stop the elevator in time. So there was only one way, and that was to quickly reverse the elevator. * * * Well, after I left the third floor, I descended about the distance of four feet, and I noticed that Miss Hensler's dress was caught, and I

quickly reversed the lever on the 'up,' and in going up the jolt was too quick. It was too great for the engine of the elevator, and it shot up a little swifter than it usually ought to if you would run the elevator right; and, in going up, it threw her leg out, and her leg was caught between the upper portion—well, you can say the portion of the ceiling and the upper portion of the elevator—and it was drawn through. It was drawn through, and when we got to the third floor, why, her leg was out by that time." The resultant injury was a compound fracture of the limb below the knee. Defendants sent plaintiff to a hospital, and paid for her board and treatment until she was discharged. Some of the testimony tends to prove the elevator was at the fourth floor, instead of the second, as plaintiff swore, and that, in the teeth of warnings, she persisted in standing close to the open entrance, in consequence of which imprudence her dress caught at the third floor.

Negligence is charged against defendants in the petition as follows: "The plaintiff states that the defendants, unmindful of their duties in the premises, failed to carry plaintiff well and safely between said floors heretofore mentioned, in this: that, as plaintiff was standing in said elevator, defendants' agent, without fault on plaintiff's part, carelessly and negligently suddenly closed the door of said elevator so as to catch said plaintiff's dress in the door and entangle it in the wheels of the elevator, which said wheels were carelessly and negligently exposed and uncovered; and defendants' agent then started said elevator before said dress was disentangled from said door and wheels, whereby plaintiff was thrown with great force and violence against the side and top of said elevator, whereby plaintiff was mangled, bruised, and greatly injured, her leg was broken," etc.

The following letter was offered by defendants and excluded:

"St. Louis, February 2d, 1901. Miss Mary Hensler, Care of St. Luke's Hospital, City—Dear Miss Hensler: Referring to the accident that befell you at our plant some time ago, we beg to state that as a matter of generosity we have for some time been paying the expenses of your room, board, nurses and physician. These expenses we can assure you are very considerable. We have done this with pleasure and are willing to contribute to pay all these expenses until you are well as a matter of favor, provided that your attitude toward us is friendly. We have received intimations, however, of late that look as though there is a prospect of your ultimately making some claim against us through an attorney. Of course, if this is your intention, we shall expect you to inform us at once, so that we can discontinue the large expense which we are at present put to. Had we thought that you would possibly have maintained this atti-

tude, we should not have done as much as we have done.

"At any rate, if you have any such plan for the future, we wish you would let us know at once, so that we may discontinue the expenses of hospital and physician right away. We are confident that you will deal with us in this matter in perfect frankness. In other words, if you have no idea of employing a lawyer and making a further demand upon us, we are willing to continue your treatment until you get well. If, however, you have in mind the bringing of a claim against us later, we want to stop all expenses now.

"Please advise us at once and oblige,

"Very truly yours,

"Stix, Baer & Fuller,

"Per O. Stix."

These instructions were given for the plaintiff over defendants' objection:

"(1) The court instructs the jury that it was the duty of the defendants and their agents and servants, in the management of their elevator, to exercise reasonable care and precaution to prevent any injury to persons in or upon said elevator, and any failure on their part to exercise such care and precaution would be such negligence as to make defendants liable for the injuries to plaintiff resulting from such negligence, unless the jury believes that the plaintiff's contributory negligence was the proximate cause of the accident; and, in passing upon the question of negligence of the defendants' agents and servants, and the contributory negligence of plaintiff, you should take into consideration all the facts and circumstances as proved by the evidence to have existed at the time when and the place where the injuries occurred, and you should give to each fact and circumstance, and to the testimony of each witness, such weight only as you may deem such fact, circumstance, or testimony entitled to, in connection with all the evidence in the case.

"(2) If the jury finds that the plaintiff was injured by the negligent or careless closing of the elevator door by defendants' servant, or by negligence or carelessness on the part of the defendants' servant in reversing and returning the elevator after the plaintiff's dress was found to be caught, then the plaintiff is entitled to recover.

"(3) If the jury finds that the contributory negligence of the plaintiff was the proximate cause of the catching of her dress in the elevator door, but finds that the injury to her person might have been prevented by a careful reversal and return of the elevator by the servant of the defendants after the dress was found to be caught, then the plaintiff is entitled to recover.

"(4) By the term 'negligence,' as used in these instructions, is meant the want of that degree of care that any ordinarily prudent person would have exercised under the same or similar circumstances."

"(7) By the term 'contributory negligence' is meant any negligence on the part of the plaintiff directly contributing to her injury; but such negligence on her part, if the jury finds the same to have existed, will not bar her right to recover, if defendants' agent or servant, after discovering the danger in which plaintiff was placed by her negligence, might have, by the exercise of ordinary care, prevented the injury to plaintiff."

The following instructions were given for defendants:

"(5) The court instructs the jury that there is no evidence of any negligence on the part of the defendants in connection with the equipment of the elevator.

"(6) The court instructs the jury that by the words 'ordinary care,' as used in these instructions, is meant such care as a person of ordinary prudence would exercise under the same or similar circumstances.

"(8) The court instructs the jury that the burden of proof is upon the plaintiff to prove that the injuries complained of by plaintiff were due to negligence on the part of the defendants, and the plaintiff, in order to recover, must prove this by the preponderance or greater weight of the evidence."

These instructions were requested by defendants and refused:

"(a) The court instructs the jury that, in order to find a verdict in this case, each and every one of your number must agree to said verdict.

"(b) The court instructs the jury that if you believe from the evidence that the plaintiff was guilty of a failure to exercise ordinary care, which directly contributed to cause her injury, then you will find for the defendants.

"(c) The court instructs the jury that the plaintiff is not entitled to recover in this case unless you find from the evidence, first, that the man in charge of the elevator of defendants was guilty of negligence that contributed directly to plaintiff's injuries; and, second, that the plaintiff herself was not guilty of any negligence that directly contributed to cause any injuries complained of."

Verdict and judgment were entered for the plaintiff, and defendants, who had saved exceptions to all adverse rulings, appealed.

Opinion.

1. Persons who operate elevators for the use of the general public, in stores and other buildings, are treated as common carriers of passengers, and held to the exercise of the highest practicable care, and such as prudent men use in operating elevators, to prevent injury to passengers. *Lee v. Knapp*, 155 Mo. 610, 56 S. W. 458; *Becker v. Lincoln, etc., Co.*, 174 Mo. 248, 73 S. W. 581; *Luckel v. Century Bldg. Co.*, 177 Mo. 608, 76 S. W. 1035. It is the duty of a passenger on an elevator, and hence it was plaintiff's duty, to use ordinary care to keep from getting hurt. *Becker Case*, 174 Mo., loc. cit. 250, 76 S. W. 1035.

The latter proposition was declared by the trial court, but the defendants were not held responsible by the instructions for slight negligence on the part of their employé in charge of the elevator, as they should have been. This error affords defendants no ground of complaint, but is noticed because the case may be retried.

2. The petition contains an averment that the operator started the car before plaintiff's dress was released. That averment is said to be no statement of an independent act of negligence or separate cause of action, because it is not charged that the elevator was started negligently. Neither the word "negligently," nor any of similar import, is used as descriptive of the act of starting. Nevertheless a cause of action might be founded on the starting of the elevator when the operator knew, or by using due care could have known, plaintiff's dress was caught in the door. The operator stood right by the door, and had a good chance to observe that her dress was caught. It was his duty to use great care to have the passengers in safe positions before he moved the elevator. But the instructions authorized no verdict for the plaintiff on a finding that the elevator was carelessly started from the landing. Therefore any fault in the allegation about starting is immaterial. If negligence in that regard is to be relied on as a separate ground of recovery, the averment about it should be completed by the addition of the fact that the operator knew or ought to have known her dress was caught when he started the machine.

3. Plaintiff's pleading does not fit the facts disclosed by the evidence in all respects. The negligent acts mentioned in the petition as the cause of the casualty are, first, closing the door on plaintiff's dress so that it became entangled in the wheels of the elevator; second, carelessly leaving the wheels exposed; and, third, starting while plaintiff's dress was fastened. The petition avers that by those acts plaintiff was thrown against the top and side of the elevator and injured. Plaintiff was not injured in that way, but, as all the evidence shows, by her leg getting caught between the floor of the elevator and the edge of the ceiling of one of the stories of the building. Neither did exposed wheels have anything to do with the casualty, nor was there any proof that the wheels of the machinery were exposed. Counsel for defendants insist the accident was due proximately to reversing the elevator, thereby causing it to ascend again, and not to its descent, or exposed wheels, or closing the door on plaintiff's dress; further, that the petition says nothing about the reversal of the movement of the elevator, and therefore plaintiff could not recover on her pleading, which specified only acts of negligence that in no way contributed to the accident. The conclusion is deduced that the court should have directed a verdict for the defendants.

When analyzed the above argument is found to resolve itself into the proposition that there was a variance between the petition and the proof, though the point is not presented in that form. All the evidence regarding the accident went in without objection, and the question of variance was never raised during the trial in the way provided by the statutes (Rev. St. 1899, § 655). The theory of defendants' counsel is that the court had no right to instruct for a verdict for the plaintiff on a finding of the jury that the downward movement of the elevator was negligently changed, because that fact is not counted on in the petition, and no right to instruct for a judgment in her favor on a finding of negligence in any other particular, because changing the course of the elevator was shown conclusively to have been the sole proximate cause of the accident; that in this dilemma the only proper ruling was to deny a recovery. There was abundant testimony to show defendants' employé carelessly closed the door on plaintiff's dress, and at the same moment started the elevator. Now, negligence in that respect was well pleaded in the petition, and therefore the proof did not entirely fail to sustain one of the causes of action, or, rather, grounds of recovery, alleged. Hence, if the court had ordered a verdict for the defendants on the theory of total failure of proof, it would have been erroneous.

4. Granting there was evidence that starting the elevator upward was the proximate cause of the accident, an inquiry arises as to whether the court properly submitted it as a ground for a verdict for the plaintiff, when there was no allegation in the petition regarding the fact, but evidence about it had been received without objection. We discussed this question recently, and held that the statutes prescribe several lines of procedure in such a contingency, and that which line ought to be followed in a given case depends on the extent of the variance presented between the pleading and the proof. *Litton v. R. R.* (Mo. App.) 85 S. W. 978. The provisions of the Code on this subject are clear and ample. If there is a total failure to sustain an allegation stating a distinct and independent ground of recovery, as where the fact proved negatives the one alleged, a failure of proof occurs, instead of a variance, and the plaintiff's case, in so far as it rests on the unproved allegation, must fail. Rev. St. 1899, § 798. A party cannot sue on one cause of action and recover on another. *Chitty v. R. R.*, 148 Mo. 64, 75, 49 S. W. 868. If a variance occurs, it may be either material or immaterial. If immaterial, the trial court, in the exercise of its discretion, may direct the facts to be found according to the evidence or order an immediate amendment without costs. Rev. St. 1899, § 656. The professional eye likes to see pleadings and proof agree exactly, and an amendment is preferable, but not imperative. To contend, as is sometimes done, that in no case of variance can the

court instruct on the evidence, is to ignore the very words of the section of the statute last cited, which expressly authorize the court to give instructions according to the evidence unless the variance is material. What shall be deemed a material variance is prescribed in the Code. It is one which has misled the opposing party to his prejudice. Rev. St. 1899, § 655. And in the Code, too, is prescribed how it shall be made to appear a party has been misled. If the evidence does not correspond strictly to the allegations, it is the duty of the opposite party to satisfy the court by affidavit that the discrepancy is harmful to him, whereupon the court may order the pleading amended on terms. Rev. St. 1899, § 655. Now, during a trial a party may object to evidence when it is offered, on the ground that it is irrelevant to the issues, or he may raise the question of variance after it is introduced. If he does neither, and the discrepancy between the allegations and the evidence does not amount to a failure of proof, we fail to see how the trial court can be denied the right to instruct on the evidence, without expunging certain provisions of the statutes. This doctrine has been declared repeatedly by the courts, though not without inconsistent decisions. *Fisher, etc., Co. v. Realty Co.*, 159 Mo. 562, 62 S. W. 443; *Heffernan v. Legion of Honor*, 40 Mo. App. 605; *Farmers' Bank v. Assurance Co.*, 106 Mo. App. 114, 80 S. W. 299. The real difficulty in practice is to say whether the evidence is so unlike the facts averred as to constitute a failure to prove the averments in their entire scope and meaning, or merely constitutes a variance; and, if there is any touchstone for this problem, we would gladly see it. Rulings on the question must be more or less arbitrary. In the present case the substance, scope, and meaning of the cause of action stated are that the plaintiff was hurt by the negligent handling of the elevator by defendants' employé. Proof that the precise manner in which the hurt was inflicted was by reversing the elevator's movement carelessly would establish the gist of the petition (i. e., negligent operation of the machine), but would vary from the particulars of the petition. We hold it would be a variance, and not a failure of proof. Our chief reliance for this ruling is the recent case of *Chouquette v. R. R.*, 152 Mo. 257, 53 S. W. 897, in which it was held that a variance, and not a failure of proof, occurred. The petition alleged the plaintiff was thrown off a car in a rush of the passengers to escape a live wire, and the testimony showed the plaintiff went to the platform and jumped off. This general topic is well discussed in *Pomeroy on Code Remedies* (4th Ed.) § 447 et seq. We collected some instructive authorities in *Litton v. R. R.*, supra, and reasoned about the principles which ought to control the decision in cases presenting various aspects.

5. Our main difficulty has been to decide whether there was any room for the infer-

ence that changing the direction of the elevator caused the injury. No doubt, plaintiff would not have been hurt in the manner she was if the course of the machine had not been changed. But that is a very different proposition from saying that changing the course was, legally speaking, the proximate cause. If the car had been simply stopped at the point where it was turned upward, the mischief would have been averted. The operator swore it was impossible for him to stop it there without reversing the power; that is, throwing the lever back as far as it would go. No expert opinion on the subject was introduced, and, though the evidence is very impressive that nothing short of a complete change of movement would have caused a cessation of the downward movement in time to save plaintiff, we are unwilling to pronounce on the question as one of law. The correct answer depends on the speed and momentum of the car, and the quickness with which it responded to a proper effort to stop it. Concerning those matters there is no testimony, except the statement of the operator that he could not stop soon enough without reversing the movement. It is certain that, if the elevator had descended three feet more, the top would have struck plaintiff while she was in a position to be killed by the blow. The testimony is that she would have been killed instantly. The situation was one of extreme peril, and called for instantaneous action on the part of the operator. He had to decide and act in a flash, and probably adopted the most effective expedient. He was bound to exercise high care in the emergency, considering the trepidation he must have felt when he realized plaintiff's peril. In his own statement he said the only way he could save plaintiff from instant death was quickly to reverse the elevator, but said, also, that "in going up the jolt was too quick, and * * * the engine * * * shot up" quicker than it ought to if run right. In the Luckel Case, 177 Mo., loc. cit. 637, 76 S. W. 1035, the Supreme Court held that, although the passenger was caught in the door of the elevator by the operator's negligence, the passenger would have escaped injury but for the negligent lowering of the elevator on him, which act, therefore, was the cause of the injury. It was shown that after that elevator had ascended two feet it was stopped. When it stopped the plaintiff was still unhurt, and could have been extricated from his position of peril easily. But the operator let the elevator down until the top caught him, crushing his ribs and otherwise injuring him. Two facts in that case are obvious: That lowering the elevator was a negligent act, and that it alone was the cause of the injury. In this case the elevator had not stopped, with plaintiff safe, before the operator turned its course upward. We have concluded it was for the jury to decide whether the operator handled the elevator with reasonable prudence after he saw plaintiff's danger.

6. Though defendants' counsel insist the reversal of the elevator was the proximate cause of the accident, they by no means concede that this action was a negligent one. Their position seems to be that, whether negligent or not, it was the sole cause of the injury, and plaintiff could not go behind it for a ground of recovery. In our judgment, this position involves a misconception of what is meant in the law of negligence by the "proximate cause of an accident." The expression "proximate cause" frequently signifies, not that act in a chain of causation nearest to the injury complained of, but the culpable act nearest to the injury. Wharton, *Negligence*, §§ 88, 138; Shearman & Redfield, *Negligence* (5th Ed.) § 36; *Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 898; *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932; *Pastene v. Adams*, 49 Cal. 87; *Scott v. Shepherd*, 2 W. Blackst. 892, 2 C. 3 Will. 408. When a person's conduct is negligent, and brings another person into a position where damage is the natural outcome, the introduction of a nonculpable act between the original negligence and its mischievous result will not prevent the original negligence from being treated as the proximate cause of the mischief, if it contributed to produce it, even though the intervening act was the immediate cause. This principle is illustrated by the cases we have cited. The incidents in one or more of them were the culpable acts of a municipality in letting a board in a sidewalk be loose, whereby injury resulted to a pedestrian by his companion stepping on one end of the board and causing it to rise. Stepping on the end of the board was the immediate, but not the proximate, cause of the accident. Now, in the present case, it is palpable that some one, by catching plaintiff's dress in the door, or starting the elevator while it was caught, had put her in danger before the elevator was reversed; and unless the reversal itself, or the way it was done, was a careless act, and injured the plaintiff, the law will recur to the previous carelessness as the proximate cause of the injury. And this is reasonable, because, if there was no negligence in the return of the elevator, the circumstances considered, then every subsequent incident, including the injury, was the natural result of the first careless act. But if the operator, by catching plaintiff's dress in the door, or moving the elevator when he should have known it was caught, had put plaintiff into a position where he could not avoid hurting her, defendants ought not to escape liability because some subsequent careful act of the operator actually inflicted the hurt. Therefore we reject the conclusion that the upward movement of the elevator was the proximate cause of the accident, no matter whether it was careful or careless.

7. Plaintiff herself could have been to blame for her injury in one particular only;

that is, in not exercising ordinary care to keep her dress from catching in the door. Even if she was to blame for that circumstance, it was the duty of the operator to use care to see that she and the other passengers were safely placed before he started the elevator; and the defendants are responsible if he was remiss in the performance of that duty. Our conclusion regarding the possible causes of the accident is that the plaintiff alone may have caused it by catching her dress; that the operator may have caused it either by closing the door on plaintiff's dress, or starting the elevator when he knew or ought to have known her dress was caught; and that possibly he caused it by handling the elevator carelessly after discovering plaintiff's danger. As indicated above, we think the latter a weak theory, for, though absolutely perfect management of the elevator might have averted the accident, it was hardly possible to manage it perfectly in the excitement and urgency of the moment. If the operator carelessly closed the door on her dress, that incident may be treated as the proximate cause of the injury, for everything done after he closed the door would have proved harmless if her dress had been free. Neither starting the elevator down, nor returning again, would have injured her any more than it did the eight or more other persons in the car. Moreover, the operator swore he closed the door and started the car at the same instant, and, if her dress was caught by his action, all that followed could have been anticipated as a necessary consequence. If the plaintiff was not to blame for the catching of her dress, she was not to blame at all, and no negligence of hers contributed to her injury.

8. The seventh instruction given for the plaintiff correctly says that by the term "contributory negligence" is meant, in this case, "any negligence on the part of the plaintiff directly contributing to her injury." Immediately after that definition the instruction declares that "such negligence on her part [that is to say, negligence on her part which directly contributed to the injury] will not bar her right to recover if defendants' agent or servant, after discovering the danger in which plaintiff was placed by her negligence, might have, by the exercise of ordinary care, prevented the injury to plaintiff." Taken as a whole, that instruction was apt to impart an erroneous opinion about the effect on plaintiff's right to a verdict of a finding that she had been guilty of contributory negligence. It was misleading. The last clause was erroneous in requiring no more of the operator than ordinary care to save plaintiff after he discovered her peril. He was bound to use high care. Besides, in the circumstances shown, he might have been remiss, so as to lay his employers liable, by not discovering plaintiff's peril. As she could have put herself in peril in no way except by catching

her dress, the instruction on this branch of the case will instruct the jury best by telling them that, although they find plaintiff herself was to blame for her dress catching in the door, yet if they also find the operator knew, or by exercising the high degree of care incumbent on him could have known, it was caught, in time to prevent the injury to plaintiff, defendants are liable. The first part of the instruction authorized a verdict for plaintiff in a given contingency, though she was found guilty of negligence which directly contributed to her injury. We deem that charge erroneous, as no evil feeling on the part of the operator was shown. It is not easy to refute the proposition that one who carelessly gets himself into a situation of danger, and unwittingly remains there until hurt, contributes to his injury. But the initial negligence of a party, which brought him within range of harm from what another was doing, is regarded often as having only remotely contributed to the accident, because none would have happened if the injuring party had done his duty. The principle of liability is that the duty of using caution not to inflict injury is owed to careless as well as careful people. I have no more right negligently to hurt a man who has carelessly gone where I can hurt him than I have to kill a man intentionally who is trying to kill himself. In situations where the rule in question is applied, the conduct of the party exposed to risk does not release others from the duty of being careful of his safety, nor lower the standard or lessen the quantity of care required. But if his own conduct in exposing himself to peril by the act of another, or failing to avoid peril when he could, contributes to the injury he received, and the other's negligence (not recklessness or willfulness) contributes also, the latter is not answerable. He is not answerable, because the law refuses to compare the negligence of the parties, or to attempt an apportionment of their respective influences in bringing about the result, not because the defendant was released from the duty to be careful by the plaintiff's neglect. It is not contended in this case that the elevator operator was reckless in conduct or guilty of willful wrong. Therefore plaintiff's right to recover notwithstanding her own negligence may be determined most satisfactorily by answering the question of whether her negligence directly contributed to cause the accident; that is, was the proximate cause. Any negligence of which she was guilty will not debar her unless it contributed to the injury; and it did not contribute, legally speaking (directly contribute), if subsequent to it the operator had a last clear chance to prevent harm by exercising high care. The doctrine finds application to cases wherein it appears the defendant saw the plaintiff's peril in time to save him, and to those wherein, the circumstances considered, the defendant ought to have seen the peril in time. Hence we hold in this case

that if the operator saw, or by high vigilance would have seen, plaintiff's dress was caught, in time to prevent the harmful result, the defendants are answerable. There is an antinomy between the doctrines of contributory negligence and of discovered peril (or the last clear chance) that has resisted all attempts to formulate a theory adequate to indicate clearly in border-line cases which of the two doctrines should control the decision. Yet students of the subject realize that there are circumstances under which an injured party should recover damages, notwithstanding the fact that his own want of care had something to do with bringing about the injury by affording the opportunity for it to occur. The case in hand contains testimony to establish facts which the last clear chance rule fits. The vital facts in this connection are that the operator was charged with the duty to exercise unusual vigilance for plaintiff's safety, and, if she was guilty of negligent conduct which endangered her, such conduct did not continue until the instant her leg was broken, nor could she by her own exertions escape the danger in which she had placed herself. Any negligence on her part must have occurred, if at all, before the elevator began to descend. By catching her dress, she was put in a position of danger; and, if she caused it to catch, she put herself in that position. But it is a reasonable inference that the operator, by using vigilance to see that his passengers were properly placed before starting, might have averted harm to the plaintiff from what he was doing (running the elevator), though her dress was caught. Had he looked to see if she was safe, and, seeing she was not, held the elevator motionless until her dress was detached, all would have been well. And if this precaution could have been taken by the operator, then, plainly, plaintiff's negligence only remotely, and not directly, contributed to her injury, and it was unnecessary to tell the jury she might recover if they found it directly contributed. The instructions should have presented in a concrete way the rule of law regarding the right of a party who has carelessly exposed himself to peril to recover for an injury needlessly inflicted by another person. The general and abstract character of the first part of the seventh instruction went beyond the necessities of the case, and was incompatible with the defense of contributory negligence.

9. The first instruction given for the plaintiff held the defendants responsible if plaintiff's injury was caused by any failure on their part to exercise care and precaution in managing the elevator—an erroneous view. Not any failure of duty by the defendants, but only such as there was proof of, should have been submitted to the jury as ground for a verdict in plaintiff's favor. Different acts of negligence were alleged in the petition, and some of these were supported by evidence. Plaintiff's right to recover depended on satisfying the jury that defendants were

guilty of one or more of those acts. *Allen v. Transit Co.* (Mo. Sup.) 81 S. W. 1142; *Lesser v. R. R.*, 85 Mo. App. 328.

10. Error is assigned because of the exclusion of the letter defendants wrote plaintiff while she was in the hospital. The defendants received no reply to the letter in question, and did not seek one or pursue the matter further. They say that, as plaintiff remained at the hospital at their expense after receiving the letter, she must be held to have accepted the proposition submitted. This proposition was that the defendants would continue to pay for her board and attention at the hospital, provided she assured them she would make no additional demand on account of her injury. Arguing that plaintiff's conduct amounted to a tacit acceptance of their offer, defendants' counsel present the supposed acceptance as a settlement of the present cause of action. We will say no more on this point than that, in our judgment, there is no ground for the conclusion that plaintiff accepted the proposition, or in any way released her claim. She made no response to the letter, and defendants could not rest with the negotiation in that state, and insist afterwards on a constructive assent by plaintiff. Besides, all the evidence went to show she was a minor when she left the hospital, and incapable of entering into an accord and satisfaction. The court committed no error in excluding the letter.

The judgment is reversed, and the cause remanded. All concur.

ELAM v. WESTERN UNION TELEGRAPH CO.

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. TELEGRAPHS — MESSAGES—MEANING—EVIDENCE.

Where, in an action against a telegraph company for damages for failure to deliver a message whereby plaintiff ordered a shipment of potatoes, it appeared that the message read, "Two hundred Rose two hundred Ohio one hundred Triumph," it was proper to permit the addressee to testify that he would have understood the message to be an order for a certain number of bushels of certain kinds of potatoes.

2. SAME.

In an action against a telegraph company for failure to deliver a message whereby plaintiff ordered potatoes from the addressee, it was proper to permit him to testify that, if he had received the message, he would have complied with the order.

Appeal from Circuit Court, Barton County; H. C. Timmonds, Judge.

Action by N. B. Elam against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

McIndoe & Thurman, for appellant. Cole, Burnett & Moore, for respondent.

BROADDUS, P. J. The plaintiff's suit is for damages for the failure of defendant to

deliver a certain telegram for the purchase of potatoes. The petition was in three counts. The two first were for damages, and the third for the statutory penalty. The plaintiff dismissed as to the first, and recovered \$97.50 on the second, count. The finding was for defendant on the third count. The defendant appealed from the judgment on the second count.

The facts are as follows: On the 24th day of February, 1904, in response to plaintiff's inquiries by telegraphic communication had over defendant's telegraph lines as to the price of certain kinds of potatoes at the then market price, he received from J. H. Kennedy, who was engaged in the wholesale grain and potato business at Minneapolis, Minn., the following telegram, viz.: "N. B. Elam, Lamar, Mo.: Rose dollar four Ohio dollar fourteen Triumph dollar twelve sacked Lamar. J. H. Kennedy." On the 25th of said month plaintiff delivered to defendant's agent and operator in charge of its office at Lamar, for transmission to said J. H. Kennedy, at Minneapolis, the following telegram: "J. H. Kennedy, Minneapolis, Minn.: Two hundred Rose two hundred Ohio one hundred Triumph. N. B. Elam." Plaintiff paid to defendant's agent 50 cents, the regular charge for such service. Through defendant's fault, the message was never delivered. The plaintiff at the time had contracts to sell in lots to different dealers in potatoes 200 bushels of Rose, 200 bushels of Ohio, and 100 bushels of Triumph potatoes. As the telegram to Kennedy was not delivered, he did not ship to plaintiff any potatoes whatever, in consequence of which, plaintiff was compelled to buy on his home market other potatoes at an advanced price—the difference being \$97.50—to comply with his said contracts of sale. It was shown that the word "hundred," in the telegram, meant bushels; that "Ohio" meant Ohio potatoes; "Rose," Rose potatoes; and "Triumph," Triumph potatoes; and that they were so understood by Kennedy. The latter was permitted to testify that, had he received the mislaid and undelivered telegram sent by plaintiff, he would have shipped the potatoes called for, as he understood the telegram called for potatoes of the kind and quantity stated.

The first contention of defendant is that "Kennedy should not have been permitted to testify what he would have done, or that he would have accepted and filled the order in case the message had been delivered. Nor should he have been permitted to testify what he would have understood it to mean. What he would have done is speculative, remote, and contingent." Many cases are cited to sustain defendant's position. In *Reynolds v. Tel. Co.*, 81 Mo. App. 223, the court held that it was competent to explain abbreviations in words. "A wife signed a statement made in the partnership book of her husband and another party to the effect

that she ratified certain accounts in the book so far as any of her property was concerned. It was held that 'parol evidence was admissible to show all the facts and circumstances under which the writing was signed, so that the court could determine what was probably meant by the language [*Newberry v. Durand*, 87 Mo. App. 290].'" In *Thompson v. Thorne*, 83 Mo. App. 241, it is held that it was competent to explain the uncertain meaning of terms used in an insurance policy. It is well known that, for the purpose of convenience and economy, people resorting to the telegraph for business or other purposes very generally use only so many words as may be necessary to make known to the recipient the meaning intended to be conveyed by the message. This mode of correspondence results in both the contraction and omission of words ordinarily used. The use of the telegraph is an improved and rapid means for distant communication. The courts are bound by the very necessity of the conditions to apply existing legal principles to the interpretation of telegraphic messages. For instance, if terms are used in a message, the meaning of which is obscure, and such terms are in general use and understood among those engaged in the business to which it refers to have a definite meaning, the court will receive such evidence for the purposes of making certain that which was uncertain. And also, upon the same principle, it is competent in other instances to show that, as between the sender and the recipient of a message, the communication is mutually understood.

The contention of defendant that it was error in permitting Kennedy to testify that he would have accepted and filled plaintiff's order, had the message been delivered, we do not think is supported by authority. We are of the opinion that defendant's statement of the question is misleading. It was not a question what he would have done, but what he was legally bound to do, under the circumstances. If the telegram had been delivered, it seems to us that it constituted a contract, for Kennedy had offered to plaintiff the kind and quantity of potatoes at fixed prices; and the message, if received, was an acceptance of the offer, and, as such, was a contract in writing, binding on the parties. If Kennedy had received the message, and delivered the potatoes in sacks to plaintiff at Lamar, he would have been legally bound to accept and pay for them at the prices designated. If plaintiff would have been so bound to Kennedy, then there was a corresponding obligation upon his part to deliver the potatoes to plaintiff. The case is different from that where a customer merely makes an order on his merchant for goods, which does not constitute a sale until the goods are delivered or the order accepted. "A contract is made when both parties agree to it. If the offer is made by letter, then it is made where the party receiving the prop-

osition puts into the mail his answer accepting it, or does any equivalent act." *Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385. An offer and acceptance constitute a bargain. *Stotesburg v. Massengale*, 13 Mo. App. 226. On this question we take it for granted that it is not necessary to quote authorities. We will not comment on the authorities cited by appellant to sustain its position, for the reason that they do not apply.

As the plaintiff had contracts binding him to deliver potatoes of the kind and quantity described, and as he was compelled to go on the market and purchase others for the purpose of complying with his contracts, he was entitled to the difference between what he was to pay Kennedy and what he was compelled to pay for them in the market. The damages were not in any sense speculative, but were actual and certain in amount.

The case was tried upon the correct theory, and there was no error in giving plaintiff's instructions.

Affirmed. All concur.

MOFFATT COMMISSION CO. v. UNION PAC. R. CO.

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. CARRIERS—INJURY TO GOODS—ACT OF GOD.

While a carrier is responsible for an injury caused by the concurrence of its negligence with an act of God, yet such injury must be a natural and probable consequence of the negligence, and not an unusual and unanticipated consequence, such as an injury to goods caused by an unprecedented and unforeseen flood, to which the carrier's negligent delay in moving the goods subjected them.

2. SAME—BREACH OF CONTRACT.

A carrier is not liable, on the theory of breach of contract, for the destruction, by an unforeseen and unanticipated flood, of goods which it delayed to transport, as such consequence was not in the contemplation of the parties as a probable result of the breach.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by the Moffatt Commission Company against the Union Pacific Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Harkless, Cryslar & Histed, for appellant. N. H. Loomis and I. N. Watson, for respondent.

ELLISON, J. This action is to recover damages by reason of the negligence of defendant in delaying the delivery of two cars of wheat, whereby they were destroyed by a flood of such unprecedented character as to be admitted to be an act of God. The judgment in the trial court was for the defendant.

It appears that two cars of wheat were shipped by different persons over defendant's road to Kansas City, Mo.; that one car was consigned to the Murphy Grain Company, and the other to the Benton Grain Company.

Each of these companies had samples of the grain on May 28, 1903, at the board of trade. Plaintiff bought the wheat from these samples on that day, and ordered the grain companies to send the cars to the yards of the Hannibal & St. Joseph Railroad Company. It is a matter of dispute as to what time in the afternoon of the 28th the defendant got the order. It was the custom of the company, and perhaps the expectation of parties dealing with it, to "card" such cars for transfer next day when the order was given before 4 o'clock the preceding afternoon. If the order was given after 4 o'clock, it could not be carried out until the second day. The cars could have been transferred the next day (the 29th) after the order given at the board of trade, but on the next day (the 30th) the great flood of 1903, caused by the overflow of the Missouri and Kansas rivers, suddenly advanced to such unprecedented stage as to make it impossible to move the cars, and it finally reached such height as to practically destroy the grain. Plaintiff does not claim that the cars could have been moved on or after the 30th, but bases its right to recover solely on the charge that defendant was negligent in not transferring them on the 29th.

1. In view of our conclusions as to the law of the case, we will assume that defendant got the order to transfer the cars from its track to the yards of the Hannibal Company in time on the afternoon of the 28th to have made the transfer, in usual course of such business, on the 29th, and that in not doing so it was guilty of negligence. Is the defendant liable on account of such negligence for a loss occasioned by the act of God? It is generally stated to be the rule of law, and it is so held in this state, that where there is negligence concurring with the act of God, and but for such negligence the injury would not have occurred, the person guilty of the negligence will be liable. *Davis v. Ry. Co.*, 89 Mo. 340, 1 S. W. 327; *Pruitt v. Ry. Co.*, 62 Mo. 540; *Coleman v. Ry. Co.*, 36 Mo. App. 476. But the injury must not be too remote. It must be a natural and probable consequence of the negligence. That is to say, the injury must have some natural connection with the negligence, in the probable course of affairs. *Holwerson v. Ry.*, 157 Mo. 231, 57 S. W. 770, 50 L. R. A. 850; *Brewing Ass'n v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538. If the injury, as a consequence of the negligence, is beyond the usual experience and expectation of mankind, there ought not to be a liability. It would not be improper to ask the question, what are the probable consequences which might happen from the neglect?—not, what are the possible consequences. *Stone v. Ry. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794. In *Scheffer v. Ry. Co.*, 105 U. S. 249, 26 L. Ed. 1070, Scheffer was injured through the negligence of the railway company, so that he became insane and committed suicide. It was held that the death in that manner was not the natural

and probable consequence of the negligence, and could not reasonably have been foreseen or expected. It might be negligence to delay putting certain goods under shelter in the month of July to protect them from rain or thieves; but if left out, and the unheard-of occurrence (in this climate) of a freeze at that season was to occur and destroy them, would there be any natural connection between the neglect and the loss? And so it has been held in this state there where the carrier negligently delayed the transportation of goods, so that the public enemy came upon them and took them from him, he was not liable; it not being shown that he knew of the presence of the hostile force. *Clark v. Ry. Co.*, 39 Mo. 184, 90 Am. Dec. 458; *Balentine v. Ry. Co.*, 40 Mo. 491, 93 Am. Dec. 315. The same principle is announced in an interesting case in Pennsylvania. *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695. And in *Denny v. Ry. Co.*, 13 Gray, 481, 74 Am. Dec. 645, which, as in this case, was where a flood injured goods which would not have been exposed but for the carrier's delay, yet he was held not liable. And so in the like case of *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909. In *Morrison v. Davis*, supra, the court, after stating that one is only liable for the natural and proximate results of his negligence, gives this illustration: "A blacksmith pricks a horse by careless shoeing. Ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use, but it could not anticipate that by reason of the lameness the horse would be delayed in passing through a forest until a tree fell and killed him or injured his rider; and such injury would not be a proper measure of the blacksmith's liability." And (borrowing the idea from an illustration in counsel's brief) if a train should for two hours be negligently delayed in leaving a station, and meantime a storm should arise, and lightning strike a car and destroy property, the carrier would not be liable. The result would be beyond natural expectation, not within the thought or foresight of any one, and altogether fortuitous and disconnected from the negligent act of delay. So the rule may be stated to be this: That the act of God must be the sole cause of the loss or injury, and, whenever the negligence of the carrier mingles with the act of God, as a co-operative cause, he is liable, provided the resulting loss is within the probable consequences of the negligent act; otherwise it will be too remote and disconnected to be considered the proximate cause. As is said in *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 237, 11 Sup. Ct. 554, 35 L. Ed. 154, it would be considered "simply as one of a series of antecedent events, without which the loss could not have happened." If, as said in *Wolf v. Express Co.*, 43 Mo. 421, 97 Am. Dec. 406, the act of God might have been avoided by foresight

or diligence (with reference, of course, to such act), then there is liability. It follows that, if there was no notice or expectation of such visitation of God, there is no liability, for in such case there is no concurrent negligence at time and place. The immediate injury and result in this case was occasioned by the sudden great and unprecedented flood of 1903. It was a result almost altogether out of the course of nature. Its like had probably not occurred in the memory of any one living. Loss from such a cause was wholly unlooked for, and was not to be expected or even taken into consideration by the most cautious.

2. So, if we should regard the case as one arising from a breach of the contract to transfer the freight from one yard to another for delivery to the assignee of the consignee, the result would be the same. The consequences of a breach of contract must be such as were or should have been in the contemplation of the parties as a probable result of the breach. *Hyatt v. Ry. Co.*, 19 Mo. App. 287, 300; *Pruitt v. Ry. Co.*, 62 Mo. 527; *Murdock v. Ry. Co.*, 133 Mass. 15, 43 Am. Rep. 480; *Walsh v. Ry. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Hobbs v. Ry. Co.*, 10 Law Rep. (Q. B.) 111. In the last case it is said that: "What infinite difficulty there would be in attempting to lay down any principle or rule which shall cover all such cases! But I think that the nearest approach to anything like a fixed rule is this: That, to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the probable result of the breach of the contract. Therefore you must have something immediately flowing out of the breach of contract complained of—something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of." *Archibald, J.*, in the same case, expressed his view in the same way: "I concur in the observations which have been made by my lord and my learned brothers, and I would only add, without expressing anything in the form of a rule, that, in case of breach of contract, the party breaking the contract must be held liable for the proximate and probable consequences of such breach; that is, such as might have been fairly in the contemplation of the parties at the time the contract was entered into."

Since the foregoing was written, an opinion by Judge Goode in the case of *Grier v. Ry. Co.*, 108 Mo. App. 565, 84 S. W. 158, has been reported, in which we find support for what we have said in the first division herein.

Approving the view taken by the trial court, we affirm the judgment. All concur.

WHALEY v. COLEMAN et al.

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. SERVANT'S INJURIES—CONTRIBUTORY NEGLIGENCE.

A servant is not precluded from recovery for injuries sustained by the negligence of the master if the risk, which was known to the servant, is not of such a character that a reasonably prudent person would not continue in the service.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600.]

2. SAME—EVIDENCE.

Where in a mine it was customary to push giant powder into holes in the rock by means of pieces of gas pipe with wooden plugs driven in the end, and a miner, finding that the pieces of gas pipe were in use by others temporarily, placed a stick of powder by means of a shank of a steel drill belonging to himself, and was injured by an explosion from a spark resulting from the contact between the steel drill and the flinty rock, he could not recover, because of his contributory negligence.

Appeal from Circuit Court, Jasper County; Hugh C. Dabbs, Judge.

Action by J. N. Whaley against M. L. Coleman and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Thomas & Hackney and Edw. J. White, for appellants. Howard Gray and H. H. Bloss, for respondent.

BROADBUSH, P. J. The plaintiff's suit is for damages alleged to have been sustained by him while in the employ of defendants, a zinc mining co-partnership. The plaintiff, an experienced miner, was injured on August 5, 1902, by the premature explosion of a stick of giant powder, which the plaintiff's assistant, under his direction, was pushing into a drilled hole, using for the purpose the shank of a steel drill. It was shown that the holes, after being drilled, were usually filled with the explosive late on each day, and exploded before the next shift of miners began their work. The hole into which plaintiff and his helper, a man by the name of McKinley, were putting the explosive, was drilled in flint rock. It is conceded that a spark of fire was thrown off from the flint when it was struck with the steel drill, which spark, coming in contact with the giant powder, caused the explosion. The steel drill was not an instrument intended for the purpose of what the miners call "loading the drill holes," or "shoving the powder" into them. But sections of gas pipes with wooden plugs in the ends were generally used, because they were less liable to cause explosions. At the time in question plaintiff endeavored to get a certain piece of gas pipe for his purpose, but, as it was being used by other workmen, he substituted the steel drill. It is shown, however, that he could have obtained the former by waiting a short while. All the miners were aware of the danger of using a steel drill for loading or tamping the drilled holes. It was also shown that gas pipes, unless they

had a wooden plug driven in the end, were a little less dangerous than steel. It appeared that defendants had furnished two of the latter and several others without the wooden plugs. However, it was a fact that at times plaintiff and others used the steel drill with the knowledge and consent of defendant's foreman, and when plaintiff called his attention to the matter, and requested to be furnished with gas pipes, he said: "All right; go ahead, and use the steel. It will be all right; but don't punch the powder." Plaintiff did not request the foreman to furnish him a gas pipe with a wooden plug, but one about 10 feet long, as he had objections to some of those in use because they were not sufficient in length. At the close of plaintiff's case, and also at the close of all the evidence, the defendants asked the court to instruct the jury to find for them, which the court refused to do. The verdict and judgment were for plaintiff, from which defendants appealed.

The contention of defendants is that the plaintiff's injuries were the result of his own negligence, and that he assumed the risk; that the court admitted incompetent evidence; and that it committed error in giving and refusing instructions. It is conceded that the steel drill used by plaintiff's helper under his direction was unsafe and dangerous, of which plaintiff, an experienced workman, was fully aware. But he seeks to avoid the responsibility of using the instrument on the ground that he had called the attention of defendants' foreman to the matter, and that he continued to use it under a promise that he would be furnished one safer and more suitable for the work. The general rule in such cases is that, if the servant continues his employment, he is not precluded from recovering for injuries sustained by reason of the negligence of the master if the risk is not of such a character that a reasonably prudent person would not continue in the service. *Nash v. Dowling*, 93 Mo. App. 156; *Holloran v. Iron Foundry Co.*, 133 Mo. 470, 35 S. W. 260; *Weldon v. Ry.*, 93 Mo. App. 668, 67 S. W. 698; *Hamilton v. Mining Co.*, 108 Mo. 377, 18 S. W. 977; *Wendler v. Furniture Co.*, 165 Mo. 528, 65 S. W. 737. And whether a servant would be justified in continuing his services under the circumstances is a question for the jury. *Francis v. Ry. Co.*, 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; *Williams v. Ry. Co.*, 109 Mo. 475, 18 S. W. 1098; *Ry. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; *Hamman v. Coal Co.*, 156 Mo. 232, 56 S. W. 1091; *Adams v. Harvesting Co.* (decided by us, but not yet officially reported) 86 S. W. 484. But there are exceptions to all general rules. Where there is no conflict, but the evidence is all one way, and there can be but one conclusion, the matter becomes a question of law for the court. The use of the steel drill by the plaintiff was an act of the grossest negligence. It is a matter of common experience that where

steel and flint are forcibly brought in contact the result will be sparks of fire, and that fire coming in contact with powder produces an explosion. And no one knew such to be the case better than plaintiff. He was not authorized by anything that was said by the foreman to use the drill, because he was equally as well informed of the danger as the foreman. On the face of things, the risk was so glaring, and at all times impending to such a degree, that no person of ordinary prudence could for a moment have believed that the drill could be used, by the exercise of ordinary care, with safety. A servant is not bound to obey the master when he has reason to anticipate that danger in the service is always impending, and that he is liable to suffer injury at any moment, which the greatest care and caution on his part will scarcely avert. And besides, he was not bound to use the steel drill. He could have waited for the gas pipe a short time, it being only in temporary use by others. But he voluntarily selected the steel drill, the most dangerous implement for the purpose. There is no dispute on that point. It was his own implement. For which reason he was not entitled to recover. *Nolan v. Schickle*, 69 Mo. 330; *Moran v. Brown*, 27 Mo. App. 487. His excuse was that it was as well that he should use the steel as for the others to do so. A servant who, as between two methods, selects that which is the most dangerous, and is injured in consequence, is guilty of negligence, and not entitled to recover. *Moore v. Ry. Co.*, 146 Mo. 572, 48 S. W. 487. As the plaintiff was not entitled to recover, the court committed error in not sustaining defendants' demurrer to the evidence. As the question already determined is decisive of the case, other questions raised become immaterial.

For the reason given the cause is reversed. All concur.

WHITE v. GIBSON.

(Kansas City Court of Appeals. Missouri.
June 3, 1905.)

1. FRAUDULENT CONVEYANCES — EVIDENCE — QUESTION FOR JURY.

The question as to whether the garnishee had collected and held moneys which he retained in fraud of defendant's creditors held, under the evidence, one for the jury.

2. SAME—EVIDENCE.

Where there was evidence to show conspiracy between defendant and the garnishee to defraud the defendant's creditors, it was error not to permit plaintiff to introduce the application of defendant to the federal court; the offer reciting that defendant applied for a discharge in bankruptcy in order to restrain further action on the garnishment proceedings until after his discharge.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by William M. White against James A. Gibson, garnishee of William E. Gibson.

From a judgment in favor of the garnishee, plaintiff appeals. Reversed.

Street, Eastin & Corby, for appellant. R. L. Spencer, for respondent.

BROADBUSH, P. J. On May 1, 1902, plaintiff recovered judgment against the defendant William E. Gibson for \$3,217.83. Execution was issued thereon, directed to the sheriff, who on the 23d day of said month summoned James A. Gibson as garnishee. The latter filed a general denial. During the course of the proceeding plaintiff filed an amended denial to garnishee's answer, and garnishee filed an amended reply thereto, upon which the cause was tried. The court, after the close of the evidence, instructed the jury to find for the garnishee. A verdict was accordingly rendered, and judgment given thereon, from which plaintiff appealed.

The allegations of plaintiff's pleading are that defendant entered into various contracts, with the knowledge and consent of the garnishee, from which certain indebtedness accrued to him, and that said garnishee collected the proceeds of said contracts, and now retains them in fraud of defendant's creditors. One of these contracts was to construct certain walls and abutments for the St. Joseph Stockyards Company, entered into on the _____ day of _____, 1902, and one for paying a certain street in the city of St. Joseph. Plaintiff alleges that the garnishee collected and had on hand from said contract the following amounts of money, to wit: June 2, 1902, \$305.10; June 16, 1902, \$463.80; and on May 26, 1903, \$500 from the St. Joseph Stockyards contract; and on October 3, 1903, \$1,160.75 from the street-paving contract. The garnishee answered substantially that defendant became so involved financially that he was unable to finish said street contract, and that he assigned the same to one Solomon Connett; that it was agreed by said Connett at the time he took said assignment that he would reimburse to the garnishee the sum of \$250 for labor already performed on the contract, and for which he had assigned labor claims for work done on the same; and that afterwards, in May, 1902, said Connett entered into an agreement with the garnishee by which the latter took an assignment of said contract, and in consideration thereof he released defendant and the said Connett from their obligation to repay to him said sum of \$250; and that garnishee entered into and performed said street-paving contract at his own expense, and that the money arising therefrom is now on deposit to await the disposition of this suit, as agreed by the parties hereto. The defendant also sets up as a defense that W. E. Gibson was on the 13th day of January, 1903, duly declared a bankrupt by the United States District Court at St. Joseph, and on April 9, 1904, received his discharge from said court, and that thereby

the judgment of plaintiff against W. E. Gibson was discharged, which in law is a bar to this action against him. The other allegations of the petition he meets by a general denial.

It appears from the evidence that the contract for the street paving was made by plaintiff and defendant some time in the year 1901, and that in November of that year the partnership of plaintiff and defendant W. E. Gibson was brought into court, and their property placed in the hands of a receiver, who, under authority from the court, sold several car loads of the firm's stone, then at Hallard, Mo., to defendant, a part of which was used on the street improvement contract. Other stone was shipped in March and April, 1902, from Hallard by defendant, and used on said street. The receiver's report shows that on March 20, 1902, he collected from W. E. Gibson \$81.15 for crushed rock and gutter stone. The report of the receiver also shows that between the 3d day of March and the 2d day of April, 1902, defendant purchased from him and shipped from the quarry at Wathena nine cars of rubblestone, which was also used on said street. Some work was done on the street in question in the fall of 1901, and the greater part finished during the months of March, April, and May of the next year. The books of Farmer & Dunn, who furnished material for the street work, showed that material was furnished from June 25th to July 12th, and charged to defendant, but that the garnishee paid for it. A person who represented the property owners along the street stated that he did not know that the garnishee had anything to do with the work until it was completed. The contract for the work on the stockyards also required stone, sand, and lime. The stone came from Wathena, Kan. The waybills show that it was shipped over the railroad in the name of defendant, both as consignee and consignor, until May 23d, at which time the garnishment was served, after which time, for stone shipped, the garnishee was both consignee and consignor. The evidence disclosed that defendant was in charge of the work, and signed receipts for freight. The name of defendant was erased from the receipts after May 19th up to the time the freights were consigned to the garnishee. But it does not appear at whose instance this was done. Sand for the work was bought, charged, and delivered to defendant until May 14th, and after that time to garnishee. And the lime and cement were charged and delivered to defendant until May 19th. The book containing a charge of material to defendant of the date of May 19th was changed by a line drawn through the name of defendant, and by writing the name of garnishee over it. It was shown that plaintiff, after the date of his judgment, employed one Greenfield to assist him in learning what property defendant owned. For that purpose he

visited defendant's house, but gained no information. In a short time thereafter he met the garnishee, and a conversation arose about Greenfield's visit to defendant's house, when the garnishee said to him that plaintiff was welcome to all he could get out of them, as matters had been "arranged" or "fixed." The defendants were father and son. The garnishee offered no evidence.

The assignment of the contract for the street improvement by defendant to Connett in January, 1902, and his subsequent assignment of it to the garnishee in May, without any apparent consideration for the same, indicates that Connett had no interest in the business whatever; and, besides, it is not alleged in garnishee's answer, nor does it appear from the testimony, that at any time he did any work or expended any money on the street improvements, although much work was performed and materials furnished between the time he received the assignment and his assignment of the contract in May to the garnishee, during which time the inference is that the work was being done and the materials furnished by defendant, as he was in charge, and no one else was connected with the business. It is not charged by the garnishee in his answer, nor shown by the evidence, that he paid any other consideration for the contract than the \$250 he held for labor claims, although at that time the greater part of the work had been done, and the greater part of the materials furnished therefor by defendant. On the face of the record, Connett figures as an intermediary, without any interest of his own to serve. And we can see no purpose which he could serve, without the parties to the transaction had something in view that they did not wish to divulge. In view of the admitted pecuniary condition of defendant, the evidence tended to show that the intention was to hoodwink defendant's creditors. And this view is strengthened when we come to consider the fact that defendant received nothing from the garnishee for a great part of the work he had done and materials he had furnished under the contract. The fact that the garnishee had advanced \$250 for labor claims on the work does not account for any sufficient consideration for the assignment of the contract at that time, as it was of much value by reason of the extent of its performance. To say the least of the transaction, it was an unusual way of doing business, and, as such, was a badge of fraud. *Snell v. Harrison*, 104 Mo. 158, 18 S. W. 152. It was a circumstance tending to show fraud. *Burgert v. Borchert*, 59 Mo. 80; *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392. The change of consignor and consignee at once from defendant to garnishee, of materials shipped to be used in the work, so soon after the service of garnishment, the almost constant supervision of the work by defendant, and the language of the garnishee to Greenfield, that plaintiff was welcome to

all he could get out of them, as matters had been "arranged" or "fixed," taken in connection with other matters referred to, furnished sufficient evidence to entitle the plaintiff to go to the jury. It was incumbent on the garnishee to explain the matters, if it was in his power, and to show that his conduct was consistent with fair dealing.

The plaintiff at the trial offered to introduce the application of defendant to the United States court, which offer recited that he had applied for a discharge in bankruptcy, to restrain further action on the garnishment proceeding until after his discharge in bankruptcy. The court rejected the offer. This was error. After the showing that plaintiff had made that there was a conspiracy between defendant and garnishee to defraud the creditors of the former, the tender was admissible. *Hart v. Hicks*, 129 Mo. 99, 31 S. W. 351; *State v. Walker*, 98 Mo. 95, 9 S. W. 648, 11 S. W. 1133; *Williams v. Casebeer*, 53 Mo. App. 644.

It is not apparent to us that the deed to certain real estate from defendant to Spencer had any bearing on the case, and it was properly rejected as evidence.

The cause is reversed and remanded. All concur.

NARR v. NORMAN.

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. SALES—WARRANTY—ACTION FOR BREACH—PLEADING IN JUSTICE'S COURT.

A statement in justice's court alleging that defendant guaranteed that certain hogs which he sold to plaintiff were healthy and in good condition, well knowing that they were sick, sufficiently pleads a contract of warranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1241.]

2. SAME—WARRANTY—CAVEAT EMPTOR.

Where a seller expressly warrants the soundness of animals, and the buyer, not aware of their real condition, relies, after a reasonable examination, upon the assurance made by the seller, the rule of caveat emptor is without application.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 84, 401.]

3. SAME—DAMAGES—EVIDENCE.

Evidence that hogs warranted as healthy and in good condition were sick does not, when taken with further evidence that they fully recovered, afford a basis for damages for the breach of warranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 803.]

4. SAME.

In an action for a breach of warranty of soundness of hogs, evidence that there were ten hogs in the lot; that \$82.15 was paid for them, the price being based on their weight; and that, while all of them were sick, two recovered, and eight died—is not sufficient to authorize an award of substantial damages in the absence of evidence as to the weight of the hogs which died.

5. SAME.

The measure of damages for breach of warranty is the difference between the actual value of the article sold and its value in the con-

dition warranted, although its value as warranted exceeded the contract price; but, in case the vendee paid more for the article than its reasonable market value, his recovery is controlled by the purchase price, rather than by the market value.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1284-1286.]

Appeal from Circuit Court, Livingston County; J. W. Alexander, Judge.

Action by William Narr against Albert Norman. From a judgment for plaintiff rendered on appeal from a justice, defendant appeals. Reversed.

Loomis & Hudson and L. A. Chapman, for appellant. Frank S. & Scott J. Miller, for respondent.

JOHNSON, J. This action originated before a justice of the peace. A trial in the circuit court resulted in a judgment for plaintiff in the sum of \$73.89. Defendant sold and delivered to plaintiff ten head of hogs at the price of \$82.15, which plaintiff paid. The evidence shows that at the time of sale the animals were infected and sick with cholera from which, shortly after delivery, eight of them died. The remaining two recovered.

In the statement upon which the case was tried, plaintiff charged that defendant at the time of sale "guaranteed that said hogs were healthy and in good condition, well knowing that they were sick," etc. We do not agree with defendant that the pleading of the contract of warranty is insufficient. It is definite enough to advise the opposite party of plaintiff's purpose to make an express warranty an issue in the case. This is all that is required of a pleading in a justice of the peace court.

Substantial evidence was introduced tending to show that defendant expressly warranted the soundness of the hogs, and that plaintiff, not aware of their real condition, after a reasonable examination, relied upon the assurances made. Under such circumstances, the rule of caveat emptor is without application. *Galbreath v. Carnes*, 91 Mo. App. 512.

But the case must be reversed and remanded because of failure of proof relative to the value of the eight hogs that died. The only evidence touching the subject appears in the following portion of plaintiff's testimony: "Q. What did you pay for these hogs? A. \$82.15. Q. Did you buy them by the head? A. No, sir; by the hundred pounds. Q. Did they all die? A. All but two. Q. What became of these two? A. I have got them. Q. What is their condition? A. They are healthy, I think. Q. And all right? A. Yes, sir; as good as any hogs I ever had. Q. Were they ever sick? A. Yes, sir. Q. How long were they sick? A. One only a little while, and I thought I would lose the other." The fact of the sickness of the two hogs that survived, in the absence of other evidence, does not furnish any basis upon which to estimate the amount of damage caused thereby;

nor does it, in view of the admission that the animals fully recovered, even support an inference that any damage resulted. It was error to permit a recovery on account of these two hogs. As to the other eight, it appears from the testimony quoted that they were bought by the pound, and, as their weight is not disclosed, the fact alone that \$82.15 was paid for the whole ten is not enough from which to ascertain the purchase price of the eight. The presumption cannot be indulged that the ten hogs all weighed the same. No other evidence relating to their value appears in the record, and there was nothing to submit to the jury upon the issue of substantial damages. The basic principle controlling the measure of damages in such cases is full compensation for the actual loss sustained by the injured vendee. *Chandelor v. Lopus, Smith's Lead. Cases*, vol. 1, pt. 1, p. 365; *Reggio v. Braggiotti, 7 Cush. (Mass.) 169*. Hence the rule generally followed of permitting a recovery for the difference between the actual value of the article sold and its value in the condition warranted. *Brown v. Weldon, 99 Mo. 564, 13 S. W. 342*. The purpose of the rule is to give the vendee the benefit of his bargain, as a part of his actual loss, should it appear that the market value of the article, as warranted at the time and place of delivery, exceeded the contract price. *Sutherland on Damages, § 670*. But it is not true, as urged by defendant, that, in the event it is shown that the vendee paid more for the article than its reasonable market value, his recovery is controlled by the latter amount, and not by the purchase price. In no event is the vendor to be suffered to profit by his wrong. He must reimburse the vendee for the actual loss sustained. It follows, therefore, that the instruction given on plaintiff's behalf, which permitted the jury to "allow him the difference between the price paid for the hogs and the actual value," would have been without prejudice to defendant, had the evidence disclosed the amount paid for the eight hogs. We find no error in the record.

The judgment is reversed, and the cause remanded. All concur.

YOUNG v. VAN NATTA et al.

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. SALES—WARRANTY—BREACH—DAMAGES.

Where the buyer of a bull disclosed his intention to use the animal for breeding purposes, and the seller represented his suitability for that purpose, intending thereby to induce the sale, and the buyer relied upon the seller's representations and the apparent soundness of the animal, an express warranty of the bull for the purpose for which he was intended could be inferred, although no formal words of warranty were used by the seller.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 729, 731, 732.]

2. CONTRACT—CONSTRUCTION.

Where the terms of a contract, written or verbal, are definitely known, and the inference to be drawn therefrom is certain and indisputable, the interpretation of the contract is for the court, and not for the jury.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 767-770.]

3. SALE—WARRANTY.

Where sellers of a bull know that the animal is valuable to the buyer only as a breeder, their positive assurances that he is sound and a good breeder and server cannot be deemed merely commendatory, but must, as matter of law, be taken as words of warranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 731, 732.]

4. SAME—DAMAGES FOR BREACH.

The measure of damages for breach of warranty is the difference between the actual value of the article and its value as warranted, although the purchase price was less than that value.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1284-1286.]

5. SAME.

The buyer of a bull warranted to be sound and serviceable may, in the event of a breach of warranty, recover interest, and expenses incurred in shipping the animal, and for medical treatment employed in endeavoring to restore him to health.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1290, 1293.]

Appeal from Circuit Court, Jackson County; A. F. Evans, Judge.

Action by Louis L. Young against W. S. Van Natta and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Flournoy & Flournoy, for appellants. Frank H. Woods, Cyrus Crane, and Wm. A. Knotts, for respondent.

JOHNSON, J. Action upon an alleged warranty of a Hereford bull sold by defendants to plaintiff. The petition contained three counts; the causes of action pleaded being founded, respectively, upon express warranty, implied warranty, and false and fraudulent representations. At the trial the last two mentioned causes were voluntarily abandoned, and the cause went to the jury upon the issue of an express warranty. Plaintiff recovered judgment, and defendants appealed.

The contract between the parties involved in the controversy was made in the manner following: Plaintiff, a cattle breeder and raiser doing business in Nebraska, wrote defendants, engaged in like business in Indiana, upon the subject of purchasing a Hereford bull, to be used in breeding. Defendants answered by letter under date of July 17, 1899, offering for sale the animal afterwards purchased, and describing him in this language: "Almont will weigh about 2,400 lbs., is a rich dark red, a very little white on top the neck, pure white face, low down long body, straight top and bottom lines, smooth hips, broad and deep in the twist, good in rear and fore flanks, good head with slightly drooping horns, a long silky curly coat, rather extraordinary back and loin, a very quick

server and sure getter. * * * We have retained this bull and used him extensively in our herd and are still using him. We have a lot of his get. * * * We have never before offered this bull for sale, but we have a lot of his get and have a half-brother to him. Price, \$1,000. Now, if you want a herd bull that is as good as the very best, large and quality from end to end, whose breeding is as good as any contained in the herdbooks, and you can see a lot of his get and judge of their quality for yourself, you have an opportunity that you will seldom get. He is a better bull than either 'Wild Tom' or 'Salisbury.' Shortly after the receipt of this letter, plaintiff went to defendants' place, in Indiana, to inspect the bull; arriving there in the afternoon of August 9, 1899. On the 11th the sale was consummated at the price fixed in the letter. Plaintiff's inspection before closing the trade was most thorough. In appearance the animal seemed to merit the high praise bestowed upon him, and there was nothing to indicate to the eye of experience the presence of a secret malady, nor that the bull was not a "good server and breeder." Defendants were informed that plaintiff desired the bull for the exclusive use of breeding. Plaintiff testified he told them that he needed a bull to head his herd—to do the main work of serving his cows—and defendants assured him that "this bull is just what you want"; that he is a sure breeder and very active; and that, "when we have a cow hard to get in calf, we always put her to Almont." When asked about his soundness, defendants asserted: "He is all right in every particular. If he was not, we would not sell him to you." Plaintiff said he bought Almont because defendants told him that "he was suitable for me, and the bull I wanted, and needed, and that he would be a good bull for me. I relied solely on what they wrote and told me, except his general appearance. * * * I told Mr. Van Natta I didn't know anything about this bull, and you have bred him and raised him, and have been with him every day, and know all about him." * * * I told him that I would depend solely upon what he said about the bull." One of the defendants testified: "We were aware that he wanted a bull for the head of his herd. We wanted to sell him. We knew Mr. Young was anxious to get a bull to put at the head of his herd. * * * I talked to Mr. Young about the bull. I told him he was a good breeder and a good server. I told him he was all right in every way, as to being a breeding bull, and as to pedigree and everything. I said he was all right in every way. I told him that he was sound, and was suitable to place at the head of any bunch of Herefords in the country." The other defendant said: "I knew Mr. Young wanted a bull to put at the head of a Hereford herd. I had written Mr. Young full about this bull [the letter above noted]. * * * I represented just what I wrote in the letter. I thought this

bull was good enough to head anybody's herd, and I did think so. * * * I told Mr. Young that Almont was a better bull than 'Wild Tom' or 'Salisbury,' and I say it yet. * * * If he hadn't had tuberculosis, I would still say he was a good bull." Plaintiff paid the purchase price, and took the bull to his farm, in Nebraska. On the trip the animal met with some rough treatment in the switching of the car in which he rode, and appeared somewhat used up. After giving him sufficient time to rest, plaintiff endeavored to use him, but found him very slow and unwilling. He was worthless for breeding, steadily declined in health, and died November 8th. A post mortem examination disclosed that his death resulted from tuberculosis of the bowels, and the evidence is convincing that he was infected with this disease at the time of sale to the extent of making him valueless as a breeder.

The intention of defendants to warrant the soundness of the animal for the purpose of inducing the purchase, and the reliance of plaintiff upon the representations made to that end, are sufficient to constitute an express warranty without the use of formal words. *Carter v. Black*, 46 Mo. 384; *Danforth v. Crookshanks*, 68 Mo. App. 311; *Anthony v. Potts*, 63 Mo. App. 517; *Ransberger v. Ing*, 55 Mo. App., loc. cit. 624; *Lindsay v. Davis*, 30 Mo. 406. These facts may be inferred from the nature of the representations made, in connection with the circumstances under which the parties dealt. The facts from which an express agreement to warrant should be inferred are the following: Plaintiff disclosed the special use for which he intended the animal. Defendants represented his suitability for that purpose, intending thereby to induce the sale. The animal apparently was sound and in every way as represented. Plaintiff was compelled to, and did, rely upon the representations made with respect to defects not discoverable upon inspection. It was proper to refuse defendants' request for a peremptory instruction.

The claims of error in the action of the trial court in giving instructions Nos. 1 and 2 on behalf of plaintiff appear to be based upon the idea that the court, in effect, assumed as proven the fact of warranty; and it is urged that as the contract, being in parol, essentially rests upon intention, it is a fact the existence of which is always a question for the jury. The instructions, as framed, are free from the criticisms offered, even under defendants' conception of the law, with which we do not agree. The office of the jury is to weigh evidence, and to decide issues of fact about which reasonable minds might differ; but when an essential fact must be deduced from others, and the basic facts are admitted, and the inference to be drawn therefrom certain and indisputable, the jury has no function to perform, there being nothing for it to act upon. *Burdick on Sales*, § 217; *Mechem on Sales*, § 1244;

Benjamin on Sales (7th Ed.) vol. 2, p. 665. When the terms of a contract are definitely known, whether it be in writing or verbal, its interpretation is a matter of law for the court, not a question of fact for the jury. All the facts necessary to constitute an express contract to warrant being admitted by defendants, they cannot, by injecting into the case their unexpressed mental reservations, make an issue of fact. Knowing that the bull was valuable to plaintiff only as a breeder, their positive, admitted assurances that he was sound and a good breeder and server cannot be considered as merely commendatory, but must be taken as words of warranty, intended when uttered to be so accepted; and the failure of the animal to meet the requirements of the contract thus established, either in point of health or in breeding and serving, raised a cause of action in plaintiff's favor. The court would not have committed error, had it, in the instructions given, treated the agreement to warrant as an admitted fact.

This conclusion disposes of every point made upon this branch of the case.

The court admitted evidence offered by plaintiff fixing the market value of the bull, had it been in the condition as warranted, at a sum exceeding the purchase price paid; and the jury was directed, if they found for plaintiff, "to allow him as damages the difference, if any, between the value of the bull as it would have been, had said bull been of the kind and character as warranted by defendants, or either of them (if you find they did warrant it, as defined in another instruction), and its actual value, if any, as shown by the evidence at the time and place of sale." The rule followed is supported by the great weight of authority. *Narr v. Norman* (not yet officially reported) 88 S. W. 122; *Chandelor v. Lapus*, 1 Smith's Leading Cases, pt. 1, p. 365; *Reggio v. Braggiotti*, 7 Cush. (Mass.) 169; *Brown v. Weldon*, 99 Mo., loc. cit. 569, 13 S. W. 342; *Layson v. Wilson*, 37 Mo. App. 636; *Sutherland on Damages*, § 670; *Benjamin on Sales* (7th Ed.) pt. 2, p. 962. But defendants say the recovery should be limited to the purchase price paid. We do not think so. Plaintiff should be compensated for the actual loss sustained through defendants' wrongful breach of contract. The bargain he made, but failed to realize, is a part of his actual loss, for which he must be reimbursed.

Upon the principle that plaintiff should be made whole, it also was proper to direct the allowance of interest, and the repayment of expenses incurred in shipping the bull, and for medical treatment employed in an effort to restore the health of the animal. *Galbreath v. Carnes*, 91 Mo. App. 515. Interest from the date of demand is treated in cases of this character as a part of the actual damage suffered. As observed by one court, "To afford the party just compensation, since his damages accrued at a definite time, he must

be allowed interest; else the longer the delay, the more inadequate his compensation would prove to be." *Harvester Works v. Bonnallie*, 29 Minn. 373, 13 N. W. 149; *Lachner v. Express Co.*, 72 Mo. App. 13; *Sutherland on Damages*, § 671; *Plow Works v. Scott & Co.*, 90 Wis. 590, 63 N. W. 1013; *Trimble v. Ry. Co.*, 180 Mo. 587, 79 S. W. 678; *Padley v. Catterlin*, 64 Mo. App. 629; *Goodman v. Ry. Co.*, 71 Mo. App. 464. We are of the opinion that plaintiff is entitled to such interest as a matter of right.

No error appears in the record. The judgment is affirmed. All concur.

JAMES v. UNITED STATES CASUALTY CO.*

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. APPEAL—THEORY OF TRIAL.

On appeal the parties are bound by the theory they adopted at the trial.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1053-1069.]

2. ACCIDENT INSURANCE—RISKS INSURED.

Where an accident policy described the duties of insured, who was a queensware merchant, as consisting of "office duties and traveling," and insured against loss of time from injuries, but the parties, on trial of an action on the policy, introduced evidence as to whether plaintiff was disabled from performing any of his duties, the policy should be regarded as insuring against inability to substantially perform the general occupation of queensware merchant, and not merely against inability to perform office duties and traveling.

3. SAME—POLICY — CONSTRUCTION — TOTAL DISABILITY.

A provision in an accident policy that it insured against "total" inability to perform "any part of the duties" of insured, who was a merchant, cannot be construed literally, but means inability to perform any substantial part of the business.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1310.]

4. SAME—INJURIES RECEIVED WHILE A PASSENGER—EVIDENCE—QUESTION FOR JURY.

In an action on an accident policy providing for double payments if insured was injured while a passenger on a street car, evidence held to justify submission to the jury of the question whether plaintiff was a passenger at the time he was injured.

5. SAME—NOTICE OF INJURY—FORFEITURE.

Where an accident policy provided that notice should be given the company within 10 days after the accident, a further provision that no claim should be valid unless the provisions and conditions of the contract were complied with did not work a forfeiture for failure to comply with the provision as to notice.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by J. Crawford James against the United States Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry Lee Jost, for appellant. Ward, Hadley & Neel, for respondent.

*Rehearing denied June 26, 1905.

ELLISON, J. The plaintiff, a wholesale and retail queensware merchant, fell from a street car and suffered injury. He had in force at the time, with defendant company, what is known as an "accident insurance policy," wherein it was stipulated that if he was hurt in certain named ways, which caused certain described disability, he should receive indemnity at the rate of \$50 per week during the time he was disabled, not exceeding 104 weeks. He brought this action on the policy, and prevailed in the trial court.

The chief contention between the parties relates to the construction to be given, under the evidence, to the following provisions of the policy:

"In consideration of the agreements and warranties contained in the application for this policy, which application is made a part of this contract of insurance, and the payment of an annual premium of \$24, does hereby insure, subject to the provisions hereof, J. Crawford James, of Kansas City, Missouri, by occupation a proprietor, wholesale and retail queensware (office duties and traveling only) classified by the company as No. 1.

"Against loss, as hereinafter provided, caused solely and exclusively by bodily injuries, which are immediately, continuously and wholly disabling, and which are effected by external, violent and accidental means. * * * For loss of time per week, for a term not exceeding one hundred and four consecutive weeks, \$25. * * * By wholly disabled shall be understood that the insured is totally unable to perform any part of the duties pertaining to the occupation stated above."

The evidence disclosed: That plaintiff fell from a moving street car and was severely injured on and about the knee. That he was confined to his bed a small part of the time, and went upon crutches all of the time, for which he claims indemnity. That, excepting a time he was absent from the city, he came to his place of business almost daily, where he signed checks, approved orders for goods, and dictated letters. His absence was while he was on a business trip to New York for the purpose of buying goods. But he could not do many of the principal matters pertaining to the business of a queensware merchant. He could not get about the store, and was compelled to sit in his office in a crippled condition. His wholesale house was a building of five or six stories, and his presence was required in all parts of it. His retail place was several blocks away, and his duties required him at each place every day when at home. When in health he looked after customers, sold goods, saw that they were packed and shipped. He supervised the force of employes, including traveling men who sold goods for the house in several states and territories, and with these he frequently took trips. His efforts at business in New York were hampered by his injury. He could only visit a small number of the many houses

he usually dealt with—perhaps only two. He was compelled to travel about in a cab, and to be accompanied by some one to assist him.

The parties were quite liberal in the breadth and scope each allowed the other at the trial of the cause, and that cuts an important figure in the conclusion we have reached, for the rule prevails uniformly in this state that the parties, on appeal, are bound by the theory, mode, and manner they adopt in the trial court. *Hill v. Drug Co.*, 140 Mo. 433, 41 S. W. 909. It appears that the policy did not insure plaintiff against a disabling of the performance of the general occupation of a proprietor of a wholesale and retail queensware merchant, for it specifically limited the insurance to the office duties and traveling of such occupation. And so the question should have been, under such limited view of the clause in question, "Was plaintiff wholly disabled from performing office duties and traveling?" The evidence shows that he was, perhaps, not so disabled, for he did, practically, much of the office duties he could have performed had he not been injured, and he did a part of the traveling. But defendant allowed the issue to broaden into the field of the plaintiff's general occupation as a wholesale and retail queensware merchant, for, while objection was made to plaintiff showing that he was substantially prevented from attending to his business as a queensware merchant, an examination of the record will show that no effort was made to confine such business to the two branches, viz., office business and traveling. In other words, that point on the policy was not made, and plaintiff was permitted by defendant to state the relation the injury had to his performing the whole business, defendant's counsel joining in such examination; that is, the parties have interpreted the policy as covering, generally, the entire business of a wholesale and retail queensware merchant. And plaintiff, not to be outdone in courtesy and liberality, permitted defendant to inquire into plaintiff's various other occupations, such as member of the school board, director of other business corporations, etc., with a view of ascertaining if he was wholly disabled from performing the duties devolving upon him in those parts of his business. One might be very well able to perform the duties of a director in a school or gas company, and yet be wholly unable to travel or conduct the office of a queensware merchant. So we take the case as we find it, and must therefore determine whether the trial court would have been justified, under the evidence, in declaring, as a matter of law, that plaintiff was not wholly disabled from performing the general occupation of a wholesale and retail queensware merchant. If, as appears from a case cited further on, a physician was insured for that occupation, he might receive an injury which would wholly disable him, physically, from going about to visit patients, yet leave him able to dictate prescriptions from a sick

room; or the injury might leave him able to travel around as usual, but mentally unable to give prescriptions. In neither instance would a court be justified in declaring, as a matter of law, that he was not wholly disabled to perform the calling of a physician in the sense of the contract. We therefore hold the contract to mean, not that the assured was rendered absolutely and literally unable to perform any part of his occupation, but that he was disabled from performing substantially the occupation stated in the policy. *Young v. Ins. Co.*, 80 Me. 244, 13 Atl. 896; *Wolcott v. Ins. Co.*, 55 Hun, 98, 8 N. Y. Supp. 263; *Hohn v. Ins. Co.*, 115 Mich. 79, 72 N. W. 1105; *Turner v. Ins. Co.*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428. In the latter case the assured's occupation was that of a real estate agent. His injury was a dislocation of the shoulder, which did not prevent him going to his office every day. Yet the court held that it should not be said, as a matter of law, that he was not wholly disabled within the meaning of the policy. These cases are supported by text-writers. 4 *Joyce on Ins.* § 3031.

But stress is laid by defendant's able counsel upon a part of the clause above set out, which itself assumes to define what is meant by "wholly disabled," wherein it is said that the assured must be "totally" unable to perform "any part" of his duties. We do not consider that such provision has any material control over the other portion of the clause. When parties enter into a contract, it must be assumed that they intended that which in certain events or contingencies would mean something and have some effective force. And so it has been held that if a promissory note reads that A. promises not to pay B. \$100, the word "not" will be disregarded, since the parties must have meant something by the execution of the note. *Story on Promissory Notes*, § 12; 1 *Parsons, Notes and Bills*, 26. The occupation of a merchant calls for both mental and physical exertion. If "wholly disabled" means that he shall, literally, be totally unable to perform any part of his business, then mental capacity exercised in merely directing, in a single instance, a matter the most trivial—as, for instance, to sweep the floor—or the physical effort of doing it himself, would bar a recovery on the policy. Total mental disability means that one must have his mental faculties entirely suspended, and total physical disability means the loss of power to move. It cannot be that the parties intended that before an assured could recover on the policy he should lie the full period of his injury in a state of coma. To interpret the clause in its contractual sense, as defendant seeks to have us do, would render the contract utterly useless to an assured, and would be nothing short, practically speaking, of collecting a premium without rendering a consideration. We therefore find ourselves driven back to the position taken by the authorities on the con-

struction of the first part of the clause, viz., that the disability meant is a disability as to the performance of any substantial part of the business.

The policy provided that if the assured was injured "while actually riding as a passenger on a public conveyance propelled by steam, electricity, or cable," he should recover twice the amount specified in the policy. Defendant denies that plaintiff was a passenger. The question was left to the jury, and the finding was in plaintiff's favor. Beyond doubt, plaintiff was on his way home, which was in another part of the city, and was intending to get there by taking a car when he arrived at the proper street. He saw the car standing at the proper place. He stopped to buy a newspaper of a boy. Seeing the car about to start, he walked rapidly—or, perhaps, ran—and got on the platform just as it was starting. If it had started before he got on, it had not moved more than one or two feet. He says that he got upon the car and rode across the street, to where there was a sharp up-grade, a distance of between 50 and 100 feet; that at such point the car gave a sudden jerk, which threw him to the ground. At one point in his testimony he stated that possibly the unsteadiness of other passengers on the platform may have thrown him off. The whole of his statement indicates that he was not standing firmly upon the car with both feet, but was in a position to have safely ridden but for the sudden lurching of the car. It is common knowledge that what are known as "cable cars" carry passengers in great numbers in a much less secure way than do cars propelled by steam. We are satisfied the court rightly refused to declare, as a matter of law, that plaintiff was not a passenger. On this subject, see *Barth v. Ry. Co.*, 142 Mo. 546, 44 S. W. 778; *Smith v. Ry. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Holt v. Ry. Co.*, 87 Mo. App. 203; *Ins. Co. v. Muir*, 126 Fed. 926, 61 C. C. A. 310.

The policy contained a provision requiring the assured to give notice to defendant within 10 days of the accident. The notice was not given. There was no provision of forfeiture in case notice was not given. There was, however, at another part of the policy, a provision that a claim should not be valid "unless the provisions and conditions of the contract of insurance are complied with by the insured." We do not regard this as an express provision that the policy would be forfeited for want of notice. There should be a clear and an express statement for forfeiture before the courts will enforce it. *Dezell v. Ins. Co.*, 176 Mo. 279-282, 75 S. W. 1102; 4 *Joyce on Ins.* § 3282.

It is next insisted that the trial court's manner towards defendant's counsel was abrupt and unwarranted, and that it prejudiced the jury against defendant's case. The matter relates to what transpired in relation to a subpoena duces tecum for plaintiff's

books and correspondence generally. There was a large collection, requiring the use of a wagon. The trial court reflected somewhat on counsel for not particularizing those wanted, so that they might have been separated from the mass before the moment of needing them. We have no way of judging of what transpired except from the record, and we cannot say that anything occurred to warrant our interference.

We have examined other points made, but have not discovered anything to justify a reversal, and therefore affirm the judgment. All concur.

D. N. LIGHTFOOT & SON v. EDWARD HURD & CO.*

(Kansas City Court of Appeals. Missouri. June 5, 1905.)

ACCORD AND SATISFACTION—DISPUTE AS TO AMOUNT DUE—GOOD FAITH.

Plaintiffs shipped a quantity of eggs to defendant, pursuant to a sale to defendant's agent at an agreed price. Defendant refused to accept all the eggs, contending that the sale related only to eggs shipped from a certain point. Several letters and telegrams were interchanged, in which plaintiffs insisted that the sale included all the eggs, and defendant refused to admit this, and offered to sell the eggs in dispute for plaintiff. This he finally did, and remitted the proceeds by a letter stating that the remittance was in full for the eggs in dispute. Plaintiffs retained the remittance. *Held*, that there was a bona fide dispute, so that plaintiffs' acceptance of the money constituted an accord and satisfaction.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Accord and Satisfaction, §§ 75-82.]

Appeal from Circuit Court, Polk County; Argus Cox, Judge.

Action by D. N. Lightfoot & Son against Edward Hurd & Co. There was verdict for defendant, and from an order granting a new trial he appeals. Reversed.

O. H. Skinker, for appellant. Wm. W. Wood and Mark C. Campbell, for respondents.

BROADDUS, C. J. The plaintiffs are produce dealers, engaged in buying and selling eggs at Humansville, Mo.; defendant, Edward Hurd, is a commission merchant doing business at Chicago, Ill., under the style of Edward Hurd & Co. The evidence was that an agent of defendant, named Smith, who traveled and solicited business for defendant, bought in February, 1902, a quantity of eggs from plaintiff at 27 cents per dozen, or \$8.10 per case. Plaintiffs' evidence went to show that this agent bought all the eggs that plaintiffs would ship to defendant on Sunday—the following day. With this understanding upon their part, plaintiffs on the following day shipped to defendant at Chicago 231 cases of eggs. It was shown that the greater part of these eggs were bought by plaintiffs and shipped from points

other than Humansville. When they arrived at Chicago defendant would accept only those shipped from Humansville, and telegraphed plaintiffs to that effect, and also that they would sell the eggs on plaintiffs' account. But plaintiffs notified defendant that the eggs belonged to him, not to them. On February 24th defendant wrote plaintiffs as follows: "Gentlemen: Monday morning we received 231 cases of eggs from you. Thirty-six cases of these eggs were shipped from Humansville, as per your notification to us of the 22d., and the balance from different towns in your locality. We received a letter from our Mr. Smith stating he had bought what eggs you would get in at Humansville Saturday, February 20th., and understood from you that it would be in the neighborhood of 15 or 20 cases. The shipment we received from you caused us immediately to wire Mr. Smith to come in, as you stated our Mr. Smith had bought the 231 cases, and as he stated he only bought what eggs you had in Humansville we thought it best to have him here on the ground to find out exactly how the purchase was made, and it was made in this sense: that he would take what eggs you received at Humansville, and that it would be from 15 to 20 cases at \$8.10 per case, and he further states that you called him up on the 'phone at the depot and told him that you had another load coming and asked him if he wanted it and he said 'no.' The remainder of the letter refers to his previous notice that he would sell the eggs on plaintiffs' credit, and to express charges. The plaintiffs persisted that defendant's agent had bought all the eggs shipped. On February 25th defendant again wrote to plaintiffs as follows: "Gentlemen: We wired you last night, 'Will not accept the eggs; wire immediate disposition.' We received your wire this morning stating that the eggs were ours and that you had nothing to do with them. In reply we wired you, 'Will sell eggs your account.' We hereby confirm said telegram and hope that the controversy will now be settled. We mailed you check last evening for the 36 cases that were shipped from Humansville." On March 1st defendant wrote plaintiffs the following: "Gentlemen: According to the terms of our telegrams to you of the 24th and 25th ult., we have sold all the eggs shipped by you, excepting those from Humansville, for your account, and after deducting the usual charges, herewith enclose our check for \$1332.70 as the net proceeds in full for the same. The enclosed account of sales shows prices received. Trusting this is satisfactory," etc. The plaintiffs received the check, gave defendant credit on their books, and brought suit against defendant for the difference between the price of the eggs at \$8.10 per case and the amount of the check. At the close of plaintiffs' case the court, at the instance of defendant, instructed the jury to

*Rehearing denied June 26, 1905.

find for defendant. The jury returned a verdict accordingly. The plaintiffs in due time filed a motion to set aside the verdict and grant them a new trial. The court sustained the motion on the ground of error in instructing the jury to find for defendant. From the action of the court in setting aside the verdict and granting plaintiffs a new trial, defendant appealed.

One question only is raised by the parties, and that is, do the undisputed facts show that plaintiffs were not entitled to recover? If so, the action of the court in setting aside the verdict and granting a new trial was error. The position of the plaintiffs is that, when the demand is fixed or liquidated, and the dispute as to the sum due is not in good faith, the rule of tender and acceptance for a less sum does not discharge the debt. And it was so held in *School Board v. Hull*, 72 Mo. App. 403, and *Goodson v. Association*, 91 Mo. App. 339. But we do not think the rule has any application to this case. Here there was a dispute as to the amount of plaintiffs' demand. And there was nothing tending to show in the least degree that defendant's denial of the contract that his agent purchased eggs to be shipped from points other than Humansville was not in good faith. Immediately upon receipt of the eggs he informed plaintiffs of his understanding of the contract, and that he would only receive and pay for the eggs shipped from said point, and that he held the others subject to his order. His agent, Smith, denied that he bought eggs shipped from other points, and affirmed that the extent of his purchases was about 15 cases. However, defendant finally consented to accept and pay for all the eggs shipped from Humansville. As to the residue, he notified plaintiffs that he would sell them on their account. He did so, and sent the proceeds, less charges, and plaintiffs accepted the same, and credited the amount of his account. The rule applicable is found in *Towslee v. Healey*, 39 Vt. 522, and was quoted by Judge Ellison in *St. Joseph School Board v. Hull*, 72 Mo. App. supra, viz.: "That when a sum of money is tendered or offered in satisfaction of a claim, and the tender or offer is accompanied with such acts and declarations as amount to a condition that if the money is accepted it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition, an acceptance under such an offer constitutes an accord and satisfaction, notwithstanding the party, when he took the money, claimed more, or declared that he did not take it in full." "If one accepts a payment upon condition that it is to be received in full satisfaction of his claim, his entire claim has been satisfied, even though he filed a written protest, at the time of accepting the amount paid, notifying the debtor that he would insist on the balance

claimed." *Coal Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563. The general rule is that the tender and acceptance of less than the amount of a disputed claim in settlement of the entire claim is binding, and operates as a satisfaction of the same. *Maack v. Schneider*, 51 Mo. App. 92; *Deutman v. Kilpatrick*, 46 Mo. App. 624. The court was right in instructing the jury under the facts to find for defendant. But it was error to set aside the finding of the jury and grant a new trial.

Reversed, and remanded with directions to restore the verdict of the jury and enter judgment for defendant. All concur.

In re REDMOND et al.
REDMOND v. REDMOND.

(St. Louis Court of Appeals. Missouri. June 19, 1905.)

HUSBAND AND WIFE—SEPARATION—CUSTODY OF CHILDREN—RIGHTS OF PARENT.

Petitioner and his wife, the parents of five living children, separated; the wife taking the children to the home of her mother. She then placed three in Catholic institutions for education, and retained the two younger with her. The wife and her mother were women of culture and refinement, and the latter was a woman of means, who could and did furnish such children with a comfortable home, while the father, though respectable and competent to have their custody, would have had to employ some one to care for them. *Held*, that the present custody of the children would not be interfered with or given to petitioner, but that he was entitled to visit them at reasonable hours, and to correspond with such of them as were away.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, §§ 16-22.]

Habeas corpus, on petition of John H. Redmond against Camilla O. Redmond, to recover the custody of John H. Redmond, Jr., and others. Writ dissolved.

Ragsdale Bros., for petitioner. John Schmoock, for respondent.

BLAND, P. J. The petitioner and respondent were married in the city of St. Louis, November 25, 1891. They continued to live together as husband and wife until February, 1901, when they separated. There were five children born of the marriage: John Henry, age 13 years; Mary Naomi, age 11 years; Lewis Arthur, age 9 years; Camilla Ann, age 7 years; and Charles Francis, age 5 years—all living and all in the custody of the mother. The petition alleges that the three older children have been placed by their mother in close confinement in schools away from Springfield, Mo., where both petitioner and respondent reside, and that petitioner is denied the privilege of visiting or seeing them, and that the two younger children are kept closely confined at the home of Mrs. Herr, the mother of respondent, with whom she and the children make their home, and that petitioner is not permitted to see or communicate with either of them. It is further

alleged that respondent has taught all the children to disrespect the petitioner, their father, and instructed them to run from him when he undertakes to approach them. The prayer of the petition is that the children be discharged from their alleged unlawful confinement.

The return of the respondent to the writ of habeas corpus issued by us alleges that John Henry, through the efforts of respondent, in the spring of 1902, entered Conception College, at Conception, Mo., for a term of five years on a free scholarship, which includes tuition, board, and washing, and that his other expenses at school are being defrayed by the respondent; that Mary Naomi, through the influence and efforts of respondent, is in Sacred Heart Convent, at St. Charles, Mo., under a free scholarship, for 10 years, and that her other expenses are being paid by respondent; that in the year 1903 Camilla Ann entered the same convent, and is being there educated at the expense of respondent; that the two younger children are with the respondent at her home in Springfield, Mo.—the older one in school, the younger being too young to send to school. The return denied the other allegations of the petition, and alleged that respondent was compelled to separate from the petitioner on account of his intemperance, his profligacy, and his cruel and barbarous treatment of respondent and their children, and on account of his failure to provide them with the common necessities of life; alleges that petitioner is an unfit person to have the care, custody, training, and education of the children, and has no proper home to which to take them; alleges that he has tried to inculcate in the minds of the older children the idea that their mother is a faithless, bad woman; that he has dogged the tracks of respondent since the separation, and upon divers occasions has openly insulted her on the streets of Springfield, in the presence of other persons; that he has refused to contribute to the maintenance of any of said children, or to pay any of the expenses of their sickness, and has refused to contribute anything to their support. The petitioner is also charged with immoral conduct and with being a habitual drunkard.

A commissioner was appointed by us to take testimony. Seven hundred pages of typewritten testimony has been taken and filed in the cause. This testimony we have carefully perused; also the many letters and telegrams filed as exhibits. The testimony is too voluminous to be even summarized within the scope of an opinion of reasonable length. It shows that petitioner and respondent are members of the same church (Catholic); that both sustain good characters among their neighbors and acquaintances; that petitioner is not a drunkard nor an immoral man; that he has love for his wife and children; that he has been an unsuccessful man in business, has totally failed in all of his business ventures, and tends to show that, but for aid

furnished the family while living together by Mrs. Herr, respondent's mother, the family would have been in very straitened circumstances, and possibly without the absolute necessities of life. The testimony also shows that petitioner is uncouth in his manner and is lacking in refinement. On the other hand, the evidence shows that respondent is a lady of culture and refinement, that she is a pure, good woman, a devoted and sensible mother, and that she is industrious, energetic, and intelligent. Just why she separated from her husband is not made altogether clear, yet we think the cause or causes are discernible between the lines of her testimony, and while we do not think there was an adequate cause for the separation, there was much provocation for a woman of her type to separate from Mr. Redmond; but we are not called upon to adjudicate this feature of this unfortunate affair. There is much evidence to show that without the shadow of cause petitioner since the separation has contracted the disease of jealousy, and spurred on by this morbid sentiment has on several occasions insulted his wife and treated her with gross indignity. The evidence shows that he has not contributed as much as he might and should have contributed for the support of his children, and that he has contributed nothing whatever toward the support of his wife since the separation; but respondent is in part to blame for this neglect, for she has offered petitioner such indignities as would stir up resentment in the mind of any man of spirit, and there is much evidence showing that, while she has not deliberately and purposely taught her children to disrespect their father, her training of them has been such as to alienate their affections from him, and she has, according to all the evidence, at almost all times and under all circumstances denied the petitioner the privilege of seeing, conversing with, or even corresponding through the mails with his children. According to her evidence this conduct was induced through fear that petitioner would abduct the children, as the evidence shows he had threatened to do, and for the further reason that he would not contribute to their support, though often asked to do so by his wife. We think the evidence shows that want of confidence, ungrounded fears, and unreasonable suspicion of each other has been the fruitful source of most of the difficulties and trouble that has arisen between the parties since the separation, and it is a great pity that two good people, as the evidence shows both to be, after plighting their faith to each other in wedlock and after bringing into the world five children, should stray so far apart and lose their confidence in each other without any real or substantial cause. More is the pity when the children are brought into the controversy. It is with the children we have to deal in this proceeding. The legal rights, the love and jealousy, the wishes, and even

the welfare of petitioner and respondent must be subordinated to the interest of the children; for the welfare of the latter should be the guiding star in reaching a conclusion in this proceeding.

It is not difficult, under the evidence, to arrive at a conclusion in respect to the disposition that should be made of the children, nor to decide to which of the parties their custody should be awarded. The respondent is an only child of Mrs. Herr, who has considerable means, and has a good, comfortable home for herself and children with her mother. As alleged in her return to the writ, the three older children are in school, under the arrangements as stated in the return, and the two younger are with her at her home in Springfield. During the four years of her separation, she has proved, not only her ability and willingness to properly rear, train, and educate her children, but also that she possesses in an eminent degree superior qualities as a mother in the rearing of children. The evidence shows that few mothers, furnished with ample fortunes, have done so well in bringing up their children as has this good woman by her energy, industry, and superior intelligence. The evidence also shows that Mrs. Herr, the grandmother, is devoted to these children. They are undoubtedly in good hands. We do not think the evidence shows that Mr. Redmond is a drunkard, an immoral man, or that he is an unfit person to have the custody of his children; but it does show that he is not prepared to take care of them. He has a house, but no housekeeper. He testified that, if their custody should be awarded to him, he would have to hire a housekeeper to look after their wants. We can never consent to the substitution of a hireling to look after these children in the place of their mother, and we do not think that Mr. Redmond really desires that this should be done. What he especially asks, and what he is clearly entitled to, is that he be recognized as the father of his children by those in whose custody they are, and that he be granted the privilege of seeing them and the opportunity of gratifying his affection for them, and of cultivating theirs for him. It would be cruel and inhuman to deny him this right. But he ought to contribute something more than he has heretofore contributed to their support and education. By doing so, he will in part discharge his legal and moral obligation to support his children, and the more endear both his wife and children to him. But we do not make it a condition that to see his children he shall contribute to their support. His right to see them is a natural right that he has not forfeited.

Our conclusion is that respondent retain the custody and control of the five children; that she have the direction and supervision of their education without let or interference on the part of petitioner, but that he shall at all proper times, as often as once a week, if

respondent will give her consent, have the privilege of visiting the children when at respondent's home; and that his intercourse with the children upon such visits shall be free and not unnecessarily interrupted, and that such visits may be continued at any one time for at least two hours. If the respondent will not give her consent that petitioner may visit his children at her home, then it is ordered that she, at least once a week, if petitioner shall require it, permit the children, when at home in Springfield, to be taken by petitioner to his home in the same city, and that they may visit him for a period not exceeding three hours. We also think the petitioner should have the privilege of writing to and receiving letters from his children when away from home at college, and that respondent should give instructions to the superintendent of such schools to permit the children to correspond with their father and to see him at seasonable hours when he calls at said schools for the purpose of paying them a visit. The costs of this proceeding are adjudged against the petitioner.

NORTONI, J., concurs. GOODE, J., not sitting.

HASBROUCK et al. v. RICH, Sheriff.*

(Kansas City Court of Appeals. Missouri.
May 22, 1905.)

1. FRAUDULENT CONVEYANCE—MORTGAGES—PROVISIONS FOR SALE.

The provision in a deed of trust of a mining company's property, given by it to secure its bonds, that any real property which cannot be advantageously used, or the sale of which shall become necessary, shall on request of the company be sold for not less than the value to be appraised by the trustees, the proceeds to be turned over to and held by them till property of equal value be purchased and held as part of the mortgaged property, does not render the mortgage void as against creditors.

2. SAME—CHATTELS.

A deed of trust of a mining company's property, authorizing the company to dispose of any machinery covered thereby which cannot be advantageously used, it to replace it by other machinery of at least equal value, is not within Rev. St. 1890, § 3397, avoiding deeds conveying chattels to the use of the grantor.

3. SAME—CONDITION OF FORECLOSURE.

A deed of trust is not made void by a provision that foreclosure shall not be had till a certain portion of the holders of the bonds secured so request.

4. ESTOPPEL—TO DENY INCORPORATION OF COMPANY.

Persons whose claims arise out of transactions with a company as a corporation are estopped to assert the invalidity of a deed of trust given by it to others, on the ground that it was not properly organized as a corporation.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by Howard Hasbrouck and others against Albert Rich, sheriff. Judgment for plaintiffs. Defendant appeals. Affirmed.

*Rehearing denied June 28, 1905.

H. W. Currey and Frank L. Forlow, for appellant. Howard Hasbrouck and Howard Gray, for respondents.

ELLISON, J. The plaintiffs are trustees in a deed of trust in the nature of a mortgage given by a mining corporation known as the Missouri Blanket Vein Company, whereby an issue of bonds of certain denomination was secured. Defendant is the sheriff of Jasper county, and as such had seized certain property (covered by the mortgage) under a writ of attachment sued out by certain creditors of the company. The plaintiff trustees brought this action in replevin against the sheriff, and they prevailed in the trial court.

The only question presented by the record is whether the provisions of the mortgage render it void as to creditors as a matter of law. Among the provisions which it is urged make the mortgage void is one which makes it mandatory on the trustees to sell any of the mortgaged property on the written request of the company, whenever the latter deemed that it could not be further advantageously used. But it is provided that, before a sale, the trustees must have the property appraised; and upon a sale at not less than appraisal the money realized shall be paid to the trustees, and held as security for the bonds, until the company shall thereafter have acquired property of equal value to stand instead of the property sold. The provision reads: "Fourth. So long as the company shall not be in default in the payment of any interest or principal, or in the exchange, of any of the bonds issued as herein provided, any of the real or leasehold property subject to this indenture, which cannot be advantageously used in the proper and judicious operation and management of the business of the company, or the sale of which shall become necessary for any cause, may be sold or exchanged for other property; and it shall be the duty of the trustees, or either one of them, upon the written request of the company, to execute suitable instruments releasing the same from the lien and effect of this indenture. But in case of any such sale or exchange the company covenants and agrees as follows: (a) That before any sale or exchange of property shall be made, such property shall be appraised by the trustees, or either one of them, or by an appraiser chosen or approved by said trustees, or either one of them. (b) That in case of a sale of any of said property or of any interest therein, the price or proceeds of such sale, not less than the appraised value of such property or interest sold, shall be paid to the trustees, or either one of them, and held for the further security of the said bonds, until the company shall thereafter have expended money in the erection of buildings, or other permanent improvements on the property of

the company, subject to this indenture, or in the purchase of other real property or mining leases, free from incumbrance, or of leasehold property, at a price not exceeding its or their appraised value, which appraisal shall be made by said trustees, or either one of them, or by an appraiser chosen and approved by said trustees, or either one of them, and until such property shall have been conveyed to the trustees, to be held by them hereunder, as part of the mortgaged premises; whereupon the trustees, or either one of them, on being certified of such facts, shall pay to the company out of any money received and held by them, or either one of them, as the proceeds of property sold as aforesaid, an amount equal to the expenditures so made by the company in order to reimburse it therefor. (c) That, in case of an exchange of real property, other property free from incumbrances, and of an appraised value, which value shall be determined by the trustees, or either one of them, or by an appraiser chosen and approved by the trustees, or either one of them, equal to the appraised value of the property conveyed, shall be received by the company and conveyed to the trustees, to be held by them hereunder as part of the mortgaged premises. The company shall be permitted to alter, remove, or otherwise dispose of any buildings, fixtures, plant, machinery, boilers, tools, pumps, or other personal property covered by this indenture, which cannot, where located, be advantageously used in the judicious operation and management of the business of the company. The company, however, covenants that it will maintain and preserve the value of the mortgaged premises or property from impairment or reduction, by restoring to their original value any buildings, fixtures, plant, or machinery, or personal property, which may be altered or removed from one portion of the mortgaged premises or property to another, and by replacing any buildings, fixtures, machinery, plant, or other property, which may be removed or otherwise disposed of, by other buildings, fixtures, plant, machinery, or other property, of at least equal value, which shall be erected or placed upon or attached to the premises or property hereby mortgaged, either before or promptly after such removal or other disposition."

The statute of this state (section 3397, Rev. St. 1899) avoids deeds conveying chattels to the use of the grantor. That statute has been applied to a variety of cases of attempted disposal of personality, the effect of which was to hinder creditors and to protect the debtor; and defendant urges that the effect of the foregoing clause, enabling the mortgagor company to dispose of personality connected with the mining property, is nothing less than a clause for the immediate benefit of the company, at the expense of general creditors, both prior and subse-

quent. But we do not think so. The personal property involved is not merchandise in constant sale at retail, to be renewed and resold, as in the ordinary mercantile trade; thus enabling the debtor to carry on his business free of molestation by creditors. Such was the character of property in *State, to Use, etc., v. Mueller*, 10 Mo. App. 87, *Oliver-Finnie Grocer Co. v. Miller*, 53 Mo. App. 107, and other cases cited by defendant. The property here referred to is not property to be sold for the benefit of the mortgagor, but it is rather property which may become worn out or otherwise useless in the service of the mortgagees. The mortgage provides that such property may be sold, or otherwise disposed of, provided that other like property shall be immediately substituted and the mortgage security not impaired. Thus, if a machine necessary to mining should become worn and impractical for further use, it could be disposed of and a proper and suitable one substituted, to the end that the security of the mortgagees might not be impaired. But in all this, nothing was to result to the benefit or use of the mortgagor company, in such respect differing from the cases of *McCarthy v. Miller*, 41 Mo. App. 200, *Walter v. Wimer*, 24 Mo. 63, *Stanley v. Bunce*, 27 Mo. 269, and other like cases. We may appropriately borrow the words of Judge Thompson in *Jennings v. Sparkman*, 48 Mo. App. 246: "It is plain that this language does not confer upon the mortgagor any general power of sale, or any general power of substitution by way of sale, but that the only power of substitution which it confers is a power of substitution for the purpose of supplying breakage, loss, or waste of the property. This does not bring the case within the decision of the Supreme Court in *Goddard v. Jones*, 78 Mo. 518, nor within the decision of this court in *State, to Use, v. Busch*, 38 Mo. App. 440. When it is considered that a part of the property covered by the mortgage was a sawmill, portions of which are constantly liable to wear out or get broken, the appropriateness of the language to the subject-matter of the deed is apparent; and it is not at all apparent that the parties intended thereby to make a conveyance to the use of the mortgagor, within the meaning of our decision." See, also, *Cook on Corp.* § 798.

Mortgages of railroad property are analogous to that in controversy. In such conveyances the distinction is made between the character of chattels mortgaged and those more closely pertaining to a mercantile character, such as we have referred to above. It is said by the courts that this kind of property is necessarily undergoing constant wear and consequent destruction, and that mortgages on going concerns would have but little value if the lien could not be made to apply to a renewal of such property; that there was a constant necessity, from the

very nature of the property, to dispose of worn-out ties, rails, machinery, and other property, and replace it; that such necessity naturally forbids an inference of a fraudulent purpose in providing that it may be done; that such provisions were in the interest of the mortgagees, and consequently, as a result, also to the interest of all other creditors. *Butler v. Rahm*, 46 Md. 541; *Ludlow v. Hurd*, 1 Disney, 552, 561; *Pa., W. & B. Ry. v. Woelpper*, 64 Pa. 366, 3 Am. Rep. 596; *Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333.

Those parts of the mortgage which we have quoted which refer to the power to sell real estate are qualified by further provisions requiring the trustees to appraise such property, the sale not to be at less than the appraised value, and the proceeds thereof turned over to the trustees, to be held until property of equal value be purchased and held as part of the mortgaged property to secure the payment of the bonds. Whatever could be said of this part of the mortgage in case of controversy between the mortgagees and persons claiming title, or an interest in the real estate which might be thus substituted, we cannot see any ground for declaring that such provision renders the mortgage void in toto as to creditors. In regard to real estate different considerations enter from those concerning personalty. No actual fraud appears, and there is nothing in the mortgage which shows that any fraud can result to the creditors at whose suit the defendant seized the personal property in controversy. The only ground upon which the defendant can justify in the present case is the absolute invalidity of the mortgage; such invalidity springing from the mortgage being to the mortgagor's use. The provisions as to the sale of the real estate do not sustain such contention.

The defendant presents a great number of other reasons which he urges make the mortgage fraudulent as a matter of law. Those already referred to are all that we care to notice in detail. The others we do not regard as substantial. It was certainly not a fraud upon creditors to provide that, in case of fire, the insurance money should be paid to the trustees, and by them held as security for the bonds, until the company should rehabilitate such property. So the provision that a foreclosure should not be had until a certain portion of the bondholders so requested is not such an one as renders the mortgage void. Indeed, such conditions are believed to be usual, and the only practical way in which to draw a mortgage of like nature.

It is finally insisted by defendant that the mortgagor company was not properly organized and put into shape as a legal entity capacitated to execute a mortgage. It seems that the corporation was organized under the laws of Delaware. The point of objection is that, while the certificate of incorporation was granted by the state of Delaware, the organization was in fact had afterwards in the state of New York, where the board of

directors were elected and entered upon the discharge of duties connected with the management of the affairs of the company. Defendant's point, as disclosed by brief of counsel, is that "the first or organization meeting of the corporation must be held within the state issuing the charter"; that is, the state of Delaware, instead of New York. It is shown by the plaintiffs that the charter of the corporation provides for the meeting of directors and transaction of business outside the original state granting the charter. But be that as it may, we do not see where defendant, as representative of the attaching creditors, has any right to make such defense. The corporation was and is an acting concern, and the creditors have dealt with it as such; and their claims arose out of contracts with the corporation as such. They are now estopped from asserting to the contrary. *Continental Trust Co. v. Toledo Ry. Co.* (C. C.) 82 Fed. 642; *Toledo Ry. Co. v. Continental Trust Co.*, 95 Fed. 497, 507, 36 C. C. A. 155.

We are satisfied with the judgment of the trial court, and order that it be affirmed. All concur.

FIELDS v. MISSOURI PAC. RY. CO.*

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. TRIAL—DEMURRERS TO EVIDENCE—CONSIDERATION OF TESTIMONY.

In considering whether a party is entitled to recover, all the evidence of both parties must be reviewed; and, if there is any substantial testimony in support of his case, it must be submitted to the jury, and their determination is final.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 338-343.]

2. EVIDENCE — CIRCUMSTANTIAL EVIDENCE—CONNECTION OF CIRCUMSTANCES.

In order to support an action based on circumstantial evidence, the circumstances must form a connected chain pointing to a single conclusion, or a number of independent circumstances pointing in the same direction or verging to a common center.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2436.]

3. RAILROADS—FIRES—DESTRUCTION OF PROPERTY—EVIDENCE—SUFFICIENCY.

In an action against a railroad for the destruction of property by fire communicated by sparks from a locomotive, evidence held sufficient to support a verdict for plaintiff.

4. WITNESSES — IMPEACHMENT—CONTRADICTION.

In an action against a railroad for the destruction of a barn by fire, defendant introduced what would be the evidence of a certain person, if present and testifying, that about 30 minutes before the fire strangers, looking like tramps and apparently intoxicated, passed along the road in the direction of the barn, and one of them remarked that they would sleep in the barn that night. Thereupon a witness for plaintiff testified that he was present all the time, and never heard defendant's witness state that he had heard any such remark from the stran-

gers. Held, that the testimony of plaintiff's witness was incompetent to contradict the statement of defendant's witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1276, 1277.]

5. EVIDENCE—UNCONNECTED CIRCUMSTANCES—COMPETENCY.

In an action against a railroad for the destruction of a barn by fire, testimony that about 30 minutes before the fire strangers, looking like tramps and apparently intoxicated, passed along the public road in the direction of the barn, and one of them remarked that they would sleep in the barn that night, was incompetent, standing by itself, to show that the fire was started by the tramps.

6. APPEAL—HARMLESS ERROR.

The admission of incompetent testimony to contradict other incompetent testimony is harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4153-4155.]

7. WITNESSES—IMPEACHMENT—INSTRUCTIONS.

Where the testimony of a witness is wholly discredited, a charge that the jury may reject the testimony of any witness whom they believe has willfully sworn falsely to any material fact is proper.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 490-494; vol. 50, Cent. Dig. Witnesses, § 1080.]

Appeal from Circuit Court, Jackson County; E. P. Gates, Special Judge.

Action by Bettie M. Fields against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Elijah Robinson, for appellant. Geo. B. Strother and Sam B. Strother, for respondent.

BROADDUS, P. J. This is a suit for damages for the destruction of plaintiff's barn and hay therein by fire alleged to have been started by sparks emitted from one of defendant's locomotive engines. The fire occurred at about 5:30 p. m., October 27, 1903, near Lee's Summit, Mo. The testimony shows that the barn in question was situated on the west side and about 850 feet from defendant's tracks, which ran nearly north and south with reference to said barn. No one testified seeing the sparks communicated to the barn. There was evidence that a freight train passed about 4 o'clock p. m., and other evidence that no such train passed at that time, but that a passenger train passed at 4:13 o'clock. The witness who testified that a freight train had passed at the time stated testified also that soon thereafter he saw a small fire burning in the grass near defendant's tracks. No witness saw the barn on fire until about 5:30 o'clock p. m., at which time it had gained considerable headway. Between the railroad track and barn was a field in which were stalks and grass, which was burned over to within 180 to 215 feet of the barn. In order to have reached the barn, the sparks from this burning field necessarily had to pass over this space. It was shown that the wind was blowing from southeast to southwest, which

*Rehearing denied June 26, 1905.

would carry sparks from the field towards the barn. The evidence from the government weather bureau was that at the time named the wind was blowing at Kansas City (about 20 miles distant) from a southeasterly to a southwesterly direction at a velocity of from 7 to 8 miles an hour, and that the speed and direction would be about the same at Lee's Summit, but there might be some difference in the two places. The evidence of witnesses at Lee's Summit was that the wind was, in the language of one of them, "pretty strong." It was shown that the grade at the point where the fire was first seen was slightly upward, and that trains in passing at times threw out sparks.

The contention of appellant is that under the evidence plaintiff was not entitled to recover. If we consider only defendant's testimony its position is correct. But we are to take into consideration all the evidence, that of plaintiff as well as that of defendant; and, if there was any substantial testimony upon which to base the verdict, we are bound by it. And it can make no difference notwithstanding there was much evidence to the effect that the field in question had been burned over before the day in question, and that, if defendant's witnesses are to be believed, the fire could not have been communicated at the time claimed by plaintiff. Nor are we to take as conclusive the evidence of defendant's agents that its engines were in good repair, the netting and appliances in good condition, and consequently its smoke-stack did not emit sparks. The defendant submitted a demurrer to plaintiff's case, which the court overruled.

We are cited to numerous cases by defendant as parallel with this to show that plaintiff was not entitled to recover. But in cases of this kind the facts are nearly always different. Upon a given state of facts the court declares the law. It is the application of the law to the facts that gives rise to difficulties. And, when the question is raised that plaintiff has not proven his case, the court must look to his evidence; and, if there is any substantial testimony to support its allegations, the question is one for the jury; otherwise it is a question for the court. In a case like this, where the action depends upon circumstantial evidence, the rule is that the circumstances must form a connected chain pointing to a single conclusion, or a number of independent circumstances pointing in the same direction or verging to a common center. The chain of circumstances is as follows: The locomotive attached to a freight train was seen to pass going upgrade. In a few minutes a fire is discovered in the dry vegetation along defendant's right of way. An adjoining field is covered with dry grass and cornstalks. This vegetation is found burned over to within 200 feet of plaintiff's barn. Within 1½ hours after the fire was first discovered along the right of way this barn was on fire. During all the while

the wind was blowing from the fire in the direction of the barn.

These circumstances all point one way. From them we may infer that the locomotive going upgrade emitted sparks which fell upon the dry grass and set it afire, which spread and communicated to the dry material in the field, and which fire, driven by the wind which directed it towards the barn, was driven across the intervening space of 200 feet to said barn, setting it afire. That a wind traveling at the rate of 7 miles an hour—much less a strong wind—would carry sparks a distance of 200 feet is a matter of common knowledge. It was not only probable, but it was certain to do so. All the circumstances lead to but one conclusion. It is true that these circumstances might all tend like a chain to lead to one direction only, yet after all, without a single link in the chain missing, the ultimate result, in fact, might be different. But it is not probable.

The fact that the barn was not discovered to be on fire for so great a length of time after it was first seen on defendant's right of way is not a circumstance, when considered in the light of common experience, that tends to overthrow the foregoing conclusion; for it is well known that fires sometimes, even in high winds, travel slowly, especially over fields whereon is found dry grass and stalks in the month of October, for at that season of the year the grass is not all dry and the corn stalks, as a rule, are not so numerous on the ground as to furnish ready material for a continuous and rapid progress of the flame. The case is stronger than in *Kenney v. Railroad*, 70 Mo. 243, and *Torpey v. Railroad*, 64 Mo. App. 382, in which cases the court held that the proof was sufficient. The case of *Peffer v. Railroad*, 98 Mo. App. 291, 71 S. W. 1073, was where the evidence showed that defendant's engine could have set the fire, and nothing more, which was held sufficient to maintain the action.

But it is held that what is probable, or even possible, may be given in evidence, and its probative force is a question for the jury in arriving at their verdict. *Campbell v. Railway Co.*, 121 Mo. 349, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; *Matthews v. Railway Co.*, 142 Mo. 645, 44 S. W. 802. As an original proposition, speaking for myself, I think that what is possible in a given case is entering into an almost limitless field of speculation, and a mere probability would be in a less degree guesswork. These cases are cited to show that, under any theory of the case predicated upon the plaintiff's testimony, the verdict is bound to be upheld.

Defendant introduced what would be the evidence of one Joseph Faust, if present and testifying, to the effect that, about 30 minutes before the fire, three strangers having the appearance of tramps passed along the public road going in the direction of the barn; that they seemed to be intoxicated, and

one of them remarked that they would sleep in the barn that night. Several witnesses were called by plaintiff to contradict Faust's statement. One witness by the name of Nickell was permitted to testify over defendant's objections that he was present all the time, and that he never heard Faust at any time make the statement that he (Faust) had heard any such remark from the strangers. The object of introducing Faust's evidence was to show that the fire may have been started in the barn by supposed tramps. The admission of such evidence to contradict the statement of Faust was error. But it was harmless, as the statement of Faust, in the first place, was incompetent. Standing alone, as it did, and disconnected with any other fact, it proved nothing. As the defendant invited the error, it ought not to complain.

The court, at the instance of plaintiff, gave an instruction that "if the jury believe, from the evidence, that any witness has willfully sworn falsely to any material fact, the jury are at liberty to disbelieve and reject as untrue the whole or any part of the testimony of such witness, or accept and believe such parts as they may believe to be true when considered in connection with all the evidence in the case." Instructions of this kind are not applicable, unless justified by the conduct of the witness or his statement, which indicate that he is knowingly testifying to matters that are untrue. Faust's statement as to what he heard one of the supposed tramps say about their intention to sleep in the barn justified the instruction, as several witnesses who were with him and could have heard what was said testified that they did not hear anything of the kind spoken. He was wholly discredited, and it was proper to call attention to his testimony in the general instruction mentioned.

For the reasons given the cause is affirmed. All concur.

SCHOOL DIST. NO. 1, TP. 24, RANGE 4, v. BOYLE et al.

(St. Louis Court of Appeals. Missouri. June 19, 1905.)

1. BILL OF EXCEPTIONS—FILING—TIME.

A bill of exceptions, not filed within the time granted by the court for that purpose, will not be noticed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2404, 2405.]

2. SAME—EVIDENCE—RECORD.

A recital contained in a bill of exceptions that it was filed in due time, etc., was insufficient to show the facts, since proof that time was allowed to file a bill of exceptions must be shown by the record proper, outside of the bill itself.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2319-2321.]

Appeal from Circuit Court, Howell County: W. N. Evans, Judge.

Action by school district No. 1, township 24, range 4, against Arthur Boyle and others.

From a judgment for defendants, plaintiff appeals. Transferred by Supreme Court to St. Louis Court of Appeals. 81 S. W. 409. Affirmed.

This cause was transferred to this court from the Supreme Court. It originated in the circuit court of Oregon county. The petition counts upon a building contract and bond, and in substance alleges that defendant Boyle, a contractor and builder, entered into a contract with plaintiff school district, whereby he was to erect for plaintiff a certain brick school building as provided in said contract; that the other defendants are sureties on the bond for the faithful performance of the contract; that defendant failed to erect said building in accordance with the requirements of such contract, etc.—and prays judgment for \$5,000, the penalty of said bond, to be satisfied by the payment of the aggregate sum of \$2,286.52, etc. The issues were tried to a jury in the Howell circuit court, to which court the cause had been transferred by change of venue. The finding was for the defendants. Plaintiff appeals.

The appeal is in what is commonly called the long form; that is, a transcript of the entire record is filed in this court over the certificate and hand of the clerk. This record shows the following facts: The trial was completed on February 2, 1901, and on the same date separate motions for new trial and in arrest of judgment, having been filed, were by the court overruled, and on the same day a proper affidavit for appeal to the Supreme Court was filed, whereupon the appeal therein prayed for was granted plaintiff to that court. On the same day and at the same time when such appeal was allowed, plaintiff was granted 90 days in which to prepare and file its bill of exceptions. There is no order in the transcript of the record before us granting further time for the filing of said bill. The only further entry in the record pertaining to the bill of exceptions is that of date May 31, 1901, which shows the filing of said bill on that date, from which it conclusively appears that the bill of exceptions was not filed within the 90 days' time theretofore allowed by the court.

So much for the showing of the record in this behalf. It must be stated, however, that the bill of exceptions, at its conclusion, immediately before the certificate of the judge, contains the following entry, to wit: "And thereafter, to wit, on the —, and before the time originally granted for the filing of the bill of exceptions had expired, the time for filing said bill of exceptions in the above-entitled cause was by an order entered of record in vacation extended thirty days from the expiration of the time originally granted." As said, this quotation is from the bill of exceptions, and it nowhere appears in the transcript, which is certified to us by the clerk under his hand and seal to be a correct transcript of the entire record in said cause. Respondent moves to strike out the bill of

exceptions on the ground that the record shows it was filed more than 90 days after the order granting time to file was made, and upon the ground that there is no record showing that said time was extended so as to include May 31st, the date of filing.

Harris & Norman and A. H. Livingston, for appellant. W. J. Orr, for respondents.

NORTONI, J. (after stating the facts). It has frequently been decided in this state that, unless the bill of exceptions is filed within the time granted by the court for that purpose, it will not be noticed in the appellate court. *State v. Harris*, 121 Mo. 445, 26 S. W. 558; *Butler County v. Graddy*, 152 Mo. 441, 54 S. W. 219; *Dorman v. Coon*, 119 Mo. 68, 24 S. W. 731; *Girdner v. Bryan*, 94 Mo. App. 27, 67 S. W. 699; *State v. Britt*, 117 Mo. 584, 23 S. W. 771; *State v. Apperson*, 115 Mo. 470, 22 S. W. 375; *State v. Scott*, 113 Mo. 559, 20 S. W. 1078. It has also been frequently decided that in cases of this kind there must be a showing in the record proper, and aliunde the bill of exceptions itself, to the effect that time has been granted to file the bill of exceptions, and it must appear that such bill was filed within the time limit granted by the court. *Pepperdine v. Hymes*, 92 Mo. App. 404; *Lucas v. Huff*, 92 Mo. App. 369; *Jordan v. C. & A. Ry. Co.*, 92 Mo. App. 81; *Williams v. Harris* (Mo. App.) 85 S. W. 643; *Ricketts v. Hart*, 150 Mo. 64, 51 S. W. 825; *St. Charles v. Deemar*, 174 Mo. 122, 73 S. W. 469; *Western Storage Co. v. Glasner*, 150 Mo. 428, 52 S. W. 237; *Walser v. Wear*, 128 Mo. 652, 31 S. W. 37; *State v. Harris*, 121 Mo. 445, 26 S. W. 558. All of the authorities hold that the statement contained in the bill of exceptions itself, to the effect that the bill is filed in due time, etc., is insufficient; for the reason that the bill cannot be permitted to prove itself. We must, therefore, hold that the recital in the bill of exceptions in this case, to the effect that the time had been extended for its filing, was insufficient to supply the record in that respect. *Western Storage Co. v. Glasner*, 150 Mo. 428, 52 S. W. 237; *Walser v. Wear*, 128 Mo. 652, 31 S. W. 37; *St. Charles v. Deemar*, 174 Mo. 122, 73 S. W. 469; *Ricketts v. Hart*, 150 Mo. 64, 51 S. W. 825; *Lawson v. Mills*, 150 Mo. 428, 51 S. W. 678; *Williams v. Harris* (Mo. App.) 85 S. W. 643; *Jordan v. C. & A. Ry. Co.*, 92 Mo. App. 81; *Lucas v. Huff*, 92 Mo. App. 369.

This being the adjudicated law on the subject, the bill of exceptions must be stricken from the record; and, as there is no bill before us presenting the evidence and matters of exception had upon the trial, there is nothing to be reviewed by this court other than the record proper. *Lucas v. Huff*, 92 Mo. App. 369; *Pepperdine v. Hymes*, 92 Mo. App. 404; *Lawson v. Mills*, 150 Mo. 428, 51 S. W. 678; *Walser v. Wear*, 128 Mo. 652, 31 S. W. 37; *Butler County v. Graddy*, 152 Mo. 441, 54 S. W. 219. There are no assignments

in appellant's brief leveled against the record proper in this case. The only reasons which he urges for reversal of the judgment are matters of exception contained in the bill which has been stricken from the files, and they are no longer before us for observation. It affirmatively appearing on the record that the bill of exceptions in this case was filed out of time and without authority, it should be treated as equivalent to the filing of no bill at all, and thereupon respondent is entitled to an affirmance of the judgment. *Jordan v. C. & A. Ry. Co.*, 92 Mo. App. 81.

The judgment of the trial court is therefore affirmed. All concur.

STANDARD MFG. CO. v. HUDSON.

(St. Louis Court of Appeals. Missouri. June 19, 1905.)

1. CONTRACTS—EXECUTION — WRITING—PAROL TERMS—PRESUMPTIONS.

Where parties executed a written contract, the contract would be conclusively presumed to contain all of the terms, and constitute a waiver of all matters discussed not included therein.

2. SAME—INVALIDATING WRITING—PAROL EVIDENCE.

Where defendant signed a written contract to purchase certain goods, he would be conclusively presumed to know the contents of the writing, and could not show that he did not read it and agree to all its terms.

3. SAME—EVIDENCE—DUPLICATES.

Where defendant signed an original contract for the purchase of goods, the fact that a purported duplicate of the contract offered in evidence was not the same as the original did not affect his liability.

4. SAME—BURDEN OF PROOF.

On an issue of non est factum, the burden of proof is on defendant to show by a preponderance of the evidence that he did not execute the contract sued on.

5. APPEAL—REVIEW.

Where there was substantial evidence in the record to support a finding in favor of defendant on an issue of non est factum, such finding will not be set aside on appeal, unless it clearly appeared from the record that the finding was arbitrary, or the result of passion, prejudice, or misconduct.

Appeal from Circuit Court, Barry County; Henry C. Pepper, Judge.

Action by the Standard Manufacturing Company against Joseph Hudson. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This action is on a contract for the price of goods sold and delivered. The defendant, a merchant at Cassville, purchased from plaintiff, an Illinois corporation, through its traveling salesman, a quantity of flavoring extracts, perfumes, and toilet articles, etc., for which he signed a written contract agreeing to pay therefor \$173 in four equal installments, two, four, six, and eight months after date. There were a number of provisions in said written contract whereby a showcase was to be furnished and defendant was required to keep the goods constantly on display. Certain profits

were guarantied to defendant, etc., and certain invitation cards were to be furnished him and be mailed out to his customers. Upon the customer returning said card to him, he would redeem the same by giving each holder thereof 25 cents' worth of the goods of plaintiff's manufacture free of charge. This was a means of advertising at plaintiff's expense. There were other provisions, all of which, with those last mentioned, are immaterial here, however, and will not be further noticed. The day the invoice came to hand, defendant wrote plaintiff that he had received the invoice, but that it was not according to contract, and declining to accept the goods. Several letters of complaint passed from defendant to plaintiff. Upon the payments coming due under the provisions of the contract, this suit was instituted in the circuit court of Barry county for the price of said goods.

Defendant's answer admits that plaintiff shipped him the goods mentioned, and avers the affirmative defense of non est factum as follows: "Defendant, for answer to plaintiff's petition, says that he did not sign or deliver to plaintiff the contract filed with plaintiff's petition, nor any contract of which the same is a copy." This answer is verified by the oath of defendant. The issue thus made up, a jury being waived, was tried by the judge. Plaintiff introduced the contract and admission contained in defendant's answer, admitting that the goods had been shipped by plaintiff to him. Thereupon the defendant was put upon the stand. He examined the contract and swore that it was signed by him. Thereupon the plaintiff rested. To sustain the issues of non est factum on his part, defendant testified in substance that he was called upon by plaintiff's agent; that he and the agent had some conversation about the matter, and the agent made the changes in the printed form as to six payments, instead of four, as contended for by defendant, in his presence; that he saw the changes made therein, and that they were made when he signed the contract, and that the contract now appears without such changes in it. Witness Bayless also swore that he saw the agent writing on the contract just before defendant signed it. Defendant testified that the contract was read to him by the agent, with its changes and a so-called duplicate. Anyway a copy of the printed contract with the changes in it, as contended for by defendant, was delivered to him by the agent at the time. This so-called duplicate was introduced in evidence and compared in the trial court, and was as testified to by defendant. The defendant testified positively that, while he was unable to say how the contract had been changed, he had not signed it as it now appeared. "Q. You did not see whether your duplicate and this was just alike? A. They were just the same. Q. You couldn't say there had been any changes in this that you can discover

from reading it? A. You can't get me to say that. I wouldn't say that for the world. It had them changes in it. It was there when I signed it. Q. Will you swear those words in this duplicate were in this when you signed it? A. Yes, sir; was there, but was changed. It was an exact duplicate of the one I have got. Q. How do you know it, if you didn't read it? A. It was changed there before my eyes. Q. Didn't you say you never read anything on it, but relied on the reading of the agent? A. Yes, sir; I say that time I didn't read it. He changed it before I signed it. I wouldn't sign it before he changed it. * * * A. Yes, sir; when he put that in there, he handed it right to me, and he had hold of it when I signed it. He was very careful. * * * A. I know he changed it. Q. You say you did not see any indications of any changes? A. A man can know some things, and I know he changed that contract before I signed it. Then I put my name to it, and then he gave me a duplicate, and then got out quick." Nothing in evidence shows whether the contract was filed out in ink or pencil, except that it was signed in indelible pencil.

The original contract upon which suit was brought, and which was introduced in evidence at the trial, failed to show any of the changes therein as testified to by defendant; that is, it appears to have been the original printed form as printed by the company, without any of the interlineations which defendant insists were made therein before he affixed his signature thereto. If this is true, then the contract sued upon is not the same contract he signed. Both the original contract and the copy thereof furnished defendant by the agent at the time were before the trial court in evidence, and subject to examination and comparison for alterations or erasures, if any had been made therein. A peremptory instruction to find for plaintiff was refused, and five declarations of law given, which will be hereafter noticed. The trial court found the issues for the defendant. Plaintiff appeals to this court, and insists that, inasmuch as defendant admitted signing the contract and failed to point out any interlineations or erasures therein, he failed to sustain his defense of non est factum, and therefore the finding of the court was error.

Peel & Sizer and Davis & Steele, for appellant. George & Landis, for respondent.

NORTONI, J. (after stating the facts). The following declarations of law were given by the court: "(a) The court declares the law to be that all statements, conditions, and understandings of the parties, at the time of executing the contract sued on or discussed prior thereto, including the purported duplicate introduced in evidence, different from the contract signed by defendant, are conclusively presumed to have been abandoned

by the parties; and the contract signed by the defendant is conclusively presumed to contain all that the minds of the parties agreed upon. (b) The court, sitting as a jury, declares the law to be that the defendant is conclusively presumed to know the contents of the contract which he signed, and he will not be permitted to show that he did not read it and agree to all of its terms, and his failure to read it does not alter or change his liability under said contract. (c) The court declares the law to be that even though the court may believe, from the evidence, that the purported duplicate of the contract offered in evidence by the defendant may not be the same, or may be different from the original sued on, yet if the one signed by the defendant has not been changed since signing it, then that fact would not alter or invalidate the one he did sign, and the issues must be for the plaintiff. (d) The court, sitting as a jury, declares the law to be that a party is bound to know the contents of a writing signed by him, and if he signed the same without reading it, or relying upon the representations of a stranger, he is nevertheless bound by the contract, and cannot testify as to his understanding of the contract different from the plain language of the writing. He is bound by his agreement deliberately entered into." These instructions correctly declared the law of the case, as has been settled by former adjudications in this state. See *Crim v. Crim*, 162 Mo. 544, 63 S. W. 480, 54 L. R. A. 502, 85 Am. St. Rep. 521; *Kellerman v. Railway*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; *Mateer v. Railway*, 105 Mo. 320, 16 S. W. 839; *O'Bryan v. Kinney*, 74 Mo. 125; *Snider v. Adams Express Co.*, 63 Mo. 376; *Johnston v. Cov. Mut. Ins. Co.*, 93 Mo. App. 580.

The court also declared the law as follows: "The court declares the law to be that the burden of proof is upon the defendant to show by a preponderance of the evidence that he did not sign the contract sued on, and unless he has shown by a preponderance of the testimony the finding should be for the plaintiff." This is a correct declaration of the law on the subject, and put the burden of proof upon the respondent to show by a preponderance of the evidence that he had not signed the contract as it then appeared, and therefore it was not his deed. The result is, if there is substantial evidence in the record to support the finding of the trial court, we are not authorized to interfere therewith, unless it appears clearly from the record that the verdict is arbitrary, or the result of passion, prejudice, or misconduct; and there is no suggestion to this effect in the case. *Woodard v. Cooney* (Mo. App.) 85 S. W. 598, and cases cited therein. See, also, *Weber v. Amer. Cen. Ins. Co.*, 35 Mo. App. 521; *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Holt v. Johnson*, 50 Mo. App. 378; *Swayze v. Bride*, 34 Mo. App. 414.

There was substantial evidence before the

trial court to support the finding. The respondent was positive that he had caused certain interlineations to be made in the contract before he signed it, and that after the changes were made the contract was the same as the purported copy the agent furnished him. The mere fact that respondent testified at the trial that he could not then discover any signs of interlineations or erasures would not justify this court in setting up its judgment against that of the learned trial judge, who saw and heard the witnesses and had an opportunity to form an intelligent opinion of their credibility and the truth of their statements; for respondent insisted in his testimony that he knew the contract had been changed, even though he could not point out the physical evidence thereof on the paper itself, and in this connection we must remember that the trial court had the original contract and purported duplicate before it, where it could compare the two, and could, and no doubt did, examine closely (with the aid of a glass, if need be) for evidence of prior interlineations and erasures thereof, and that the court took into account the physical appearance of the contract, along with the testimony of respondent, when forming its judgment as to whether or not the contract had been changed, and accordingly found it to have been changed, and therefore not respondent's deed.

Finding no error in the record, the judgment must be affirmed. It is so ordered. All concur.

ZEIGENMEYER v. CHARLES GOETZ LIME & CEMENT CO.

(St. Louis Court of Appeals. Missouri. June 19, 1905.)

1. MASTER AND SERVANT — SAFE PLACE TO WORK—DUTY OF MASTER.

A master is only required to exercise reasonable care to provide as safe a place for the performance of the services by a servant as the character of the work to be done will permit, and is not bound to furnish a safe place, where the danger is temporary or arises from the hazard and progress of the work itself.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 178, 179.]

2. SAME.

Where plaintiff was employed to work in a quarry, and knew of the danger from falling rocks on the setting off of blasts, and, on being warned, stepped into a lime kiln chimney, which he knew was defective, and was there struck and injured by a falling rock thrown out by the blast, defendant was not guilty of negligence in failing to provide him with a safe place to work.

3. SAME—ASSUMED RISK.

Plaintiff, having continued to work with full knowledge of the fact that falling stones of various sizes were thrown out by such blasts, and having voluntarily sought safety in the chimney, when by slight effort he could have obtained adequate protection in other places, assumed the risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 583.]

Appeal from Circuit Court, Franklin County; Wm. A. Davidson, Judge.

Action by James Mitchell, revived after his death in the name of Louis F. Zeigenmeyer, his administrator, against the Charles Goetz Lime & Cement Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action for personal injuries; a stone from a blast having fallen upon plaintiff's head, whereby his skull was crushed. The plaintiff was in the employ of the defendant as a laborer at its quarry. The defendant, a corporation, owns and maintains a stone quarry in Franklin county. The plaintiff's testimony shows the following facts, which are not controverted by the defendant:

Plaintiff resided $1\frac{1}{4}$ miles from the quarry, and in the year 1893 or 1894 had worked in the quarry, and was familiar with the work and its risks. In the latter part of March, 1902, he again employed himself to defendant as a laborer. His business was that of a teamster, hauling wood to the furnaces of the kilns, and hauling stone into the kiln. The site of the quarry is well elevated on a high bluff on the south side of the Missouri river. The Frisco Railway runs along at the foot of the bluff, and between the plant and the river. Defendant's kiln was built between the railway track and the bluff. A bridge about 14 feet wide was built over the roof of the kiln and connected with the bluff. A very large smokestack from the kiln, as much as 10 feet in diameter, protruded above this bridge. It was the duty of the plaintiff to load his cart with stone in the quarry, and drive therewith down the hill onto the bridge immediately over the kiln, and dump or unload the stone into this huge smokestack through two large doors provided in the side of this smokestack. The stone would thus fall into the kiln. The stone in the quarry was raised by blasts with large quantities of explosives, as is usual in quarries. There were two kinds of blasts, known to plaintiff and others who worked there—the squib shots, which were small blasts, and the block shots, which were very large and heavy blasts, in which were used from 10 to 15 25-pound cans of powder each. The duties of plaintiff brought him constantly in and out of the quarry, where he loaded his cart with the stone, and he always knew about the blasts, when a blast was being prepared, and about when it would be discharged. After a blast was prepared, but before it was discharged, defendant had some one of its employes, with a loud voice, go out of the quarry and give several whoops at intervals, which was a warning signal to the employes that a blast was about to be fired. It was the duty, then, of all the men to seek shelter from the flying stones. The protection for those who worked in the quarry was usually a shelter in the bluff, which existed by virtue of an overhanging rock. It would accommodate 50 men, and

there were not one-half that number to use it. It was perfectly safe. At least, no flying stone from blasts had ever gotten in there. Plaintiff usually unloaded his cart on the bridge at the smokestack and then crawled under the cart for protection. At other times, he stepped inside of the smokestack for shelter from the falling stones which resulted from the blasts. On the day of the injury, July 18, 1902, after plaintiff had been in this second employment for more than three months, a block shot of 14 cans of powder was about to be fired. One Shelton gave the usual warning. Plaintiff knew of the preparation for the shot, heard and understood, and acted upon the warning by stepping inside of the smokestack, the topmost joint of which tapered from its 10-foot base, leaving a reasonable outlet for the smoke when the kiln was in blast. This topmost tapering joint constituted a kind of roof over the very large lower portion of the smokestack. The topmost portion of the smokestack, the roof portion thereof, was of sheet iron, and not of very strong material, and on the side next to the quarry a portion thereof had broken loose from the rivets, thus leaving a hole through which falling stone could pass. Of this plaintiff admitted having full knowledge, having seen it before. Upon the firing off the blast or shot in question, a stone fell through this hole in the chimney portion or top of the smokestack, striking plaintiff on the head, thereby crushing his skull into his brain, inflicting a severe, permanent, and painful injury. Plaintiff, in his testimony, stated he might have gone into the bluff and have been safe, where the men from the quarry were; but it was 300 or 400 yards out of his way to have done so, or he might have driven his cart and horse to the barn, by opening gates and going to some trouble, and have been safe there; but he had always sheltered on the bridge, either under the cart or in the smokestack. Plaintiff was wholly familiar with the work. He testified that he had worked at everything about the quarry except drilling, also that there were often rocks thrown from the quarry onto the bridge where he took shelter, but not very large ones. He further testified as follows: "Q. To what extent, if any, was rock thrown by blasts from the quarry past the kiln and out into the river? A. Well, I have seen it go 100 yards out in the river from block shot. Q. What kind of rocks? A. Well, rocks that weighed from one to three pounds, depending on the size of the shot. Q. What do you know about it throwing rock across the river? A. Well, recently, I do not know. Q. Well, how far do you know of it throwing the rock in the river? A. It has gone as far as 300 yards that I know. * * * Q. What did you say were the sizes of the rock that fell there at the bridge? A. Well, from the size of your fist down." He further testified

that neither the foreman nor any one representing the company had ever ordered him or suggested to him that he take refuge on or about the bridge, but that such had always been his custom, and the foreman knew it. All of the evidence goes to show that plaintiff or none of the employes were required or expected to proceed with their work while blasts were being fired or stones falling therefrom, and that the warning was given for no other purpose than to cause them to suspend operations and seek shelter during that time.

The petition was in two counts. The first count pleaded the principal facts as hereinabove set out, and predicated a right of recovery upon the alleged negligence of defendant in failing to provide plaintiff with a safe place to work. The second count stated the same facts, and predicated the right of recovery upon the alleged negligence of defendant in loading and exploding an extraordinary blast. On the trial, the evidence showed that the blast was not extraordinary. The verdict on the second count, therefore, was for the defendant, and on the first count the jury returned a verdict for plaintiff in the sum of \$1,800. Defendant appeals to this court, and insists that the court erred in submitting the case to the jury for the reason that the plaintiff assumed the risk, and that, having chosen his own place of refuge, his going into the smokestack, with a hole therein immediately over his head through which falling rocks might pass and inflict an injury, as was done, would preclude a recovery upon the ground of contributory negligence. After judgment, plaintiff departed this life. The case now stands revived in the name of his administrator. There are several errors in the instructions given and refused. It will be unnecessary for us to notice but one, as the view we take of this case will preclude any recovery.

McKeighan & Watts, for appellant. James Booth and J. W. Booth, for respondent.

NORTONI, J. (after stating the facts). The finding of the jury for the appellant on the second count of the petition, as above stated, eliminated from the case the charge of negligence in exploding an extraordinary blast, and the finding for the respondent upon the first count of the petition affirmed that appellant was negligent in failing to provide respondent with a reasonably safe place in which to carry on his work, so that, as the case stands before us, the recovery is predicated upon the failure to furnish a safe place to work. The question of safe place is the only question with which we are called upon to deal. The question presented for our decision is, granting all the facts to be true as stated, does the law require appellant to furnish a place at all times reasonably safe to its servants who

are conducting business for it, the very nature of which business renders the place temporarily unsafe at times? The law does not require the master to furnish an absolutely safe place in every instance for the servant to work, for the reason that the law recognizes that such requirement would be unreasonable on its part, and impossible of fulfillment on the employer's part, in view of the fact that there are many undertakings and employments which are dangerous within themselves, and about the conduct of which no absolutely safe and secure place could be furnished. Therefore the obligation which the law places upon the master is to some extent a relative obligation, and only requires him to exercise reasonable care to provide as safe a place for the performance of the services as the character of the work to be done will permit, or, in other words, the law requires the master to furnish his servant a suitable place to do his work, where by the exercise of ordinary care on his part he may perform his work with safety, or subject only to such hazards as are necessarily incident to the employment. *Bradley v. Railway Co.*, 138 Mo. 293, 39 S. W. 763; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *O'Connell v. Clark* (Sup.) 48 N. Y. Supp. 74-75; *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113; *Livengood v. Joplin, etc., L. & Z. Co.*, 179 Mo. 229, 77 S. W. 1077; 20 Am. & Eng. Ency. Law (2d Ed.) 55-57.

To follow the question still further, we find the rule of safe place is not applicable to every state of facts, nor is the principle of safe place pertinent in every case that may arise out of the multiplicity of employments and diversity of risks encountered. It has one well-defined and thoroughly established exception. It is that the master is not required to furnish his servant a safe place in which to work, where the danger is temporary only, and when it arises from the hazard and progress of the work itself, and is known to the servant. *Davis v. Mining Co.*, 117 Fed. 122-124, 54 C. C. A. 636; *Bradley v. Railway Co.*, 138 Mo. 293, 39 S. W. 763; *O'Connell v. Clark* (Sup.) 48 N. Y. Supp. 74-75; *Armour v. Hahn*, 111 U. S. 313-318, 4 Sup. Ct. 433, 28 L. Ed. 440; *Finlayson v. Utica Min., etc., Co.*, 67 Fed. 507, 14 C. C. A. 492-494; *Durst v. Carnegie Steel Co.*, 173 Pa. 162-165, 33 Atl. 1102; *Whittaker v. Bent*, 167 Mass. 588-589, 46 N. E. 121; *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 52 N. E. 518; *Browne v. King*, 100 Fed. 561, 40 C. C. A. 545; *Anderson v. Min. Co.* (Utah) 50 Pac. 815; *Railway Co. v. Jackson*, 65 Fed. 48, 12 C. C. A. 507; *Livengood v. Joplin, etc., L. & Z. Co.*, 179 Mo. 229, 77 S. W. 1077; 20 Am. & Eng. Ency. Law (2d Ed.) 57; *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344; *Kennedy v. Grace, etc., Co.* (C. C.) 92 Fed. 116; *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463, 64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505; *Belque v. Hosmer*, 169 Mass. 541, 48

N. E. 338; *Porter v. Silver Creek, etc., Coal Co.*, 84 Wis. 418, 54 N. W. 1019; *Clark v. Liston*, 54 Ill. App. 578. Indeed, 20 Am. & Eng. Ency. of Law (2d Ed.) p. 57, states a well formulated rule on this subject in the following language: "If the place is unsafe because of the nature of the work, and a servant suffers injury in consequence thereof, he cannot hold the master liable, provided reasonable precautions were taken by the master to avoid injury. The risk of injury from such cause is one of the risks assumed by the servant." It seems that this rule is conclusive of the case at bar. Here the injury which befell the respondent came upon him from a falling stone resultant of a blast, and was incident of the employment. It came about from the nature of the work being performed at the quarry, and the master, having given plaintiff and all others employed warning thereof by causing one of its employes to sound the usual alarm by whooping, prior to the exploding of the blast, which was a reasonable precaution taken by the master under the circumstances of the case to aid respondent in protecting himself from injury, the respondent is certainly precluded from recovery thereby.

What has been said above on the question of nonliability of the appellant for the injury in this instance is treated of in many cases as arising by virtue of the nonapplication of the principle of safe place, because the danger from which the injury arose was but a passing danger, temporary in its nature, and arose from the prosecution of the work itself. Upon the theory that the principle of safe place does not apply in such cases, recovery has been denied in the cases above cited. The law, therefore, did not require the master to furnish a safe place as against such temporary dangers, and the failure to provide such safe place was not negligence on its part. The same result as that predicated upon the nonapplication of the principle of safe place is usually reached in the application of the principle of assumption of the risk. That doctrine can be applied to this case with equal force as that last above discussed; for, upon entering the employment at the quarry, respondent assumed the risks which were ordinarily incident to the employment in which he engaged, and, in addition to such risks, by entering or continuing in the employment without complaint, he assumed the risks of extra hazards, the dangers of which he knew and understood, or the dangers of which were obvious. *Lee v. Railway* (Mo. App.) 87 S. W. 12; *Mathias v. K. C. Stockyards Co.* (Mo. Sup.) 84 S. W. 66; *Dean v. St. Louis Woodenware Co.* (Mo. App.) 80 S. W. 292; *Browning v. Kasten*, 107 Mo. App. 59, 80 S. W. 354; *Adolff v. Columbia Pretzel & Baking Co.*, 100 Mo. App. 199, 73 S. W. 321; *Bradley v. Railway Co.*, 138 Mo. 293, 39 S. W. 763; *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441;

Epperson v. Postal Tel. Co., 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113; *Aldridge, Adm'r, v. Midland Blast Furn. Co.*, 78 Mo. 559; *Sullivan v. India Mfg. Co.*, 113 Mass. 396. According to the testimony of the respondent, he knew full well the resultant falling of stones after these blasts, and gave testimony to the effect that such stones, as large as his fist and smaller, had fallen around his place of refuge on the bridge frequently theretofore, and that he had seen them fall from 100 to 300 yards in the river from block shots. It is a matter of common knowledge that a falling stone as large as one's fist is dangerous in the extreme and liable to produce death by striking upon the head. Respondent, then, had full knowledge of the dangers, and by continuing in the service thereafter he would be precluded from recovery by virtue of assuming such risk in continuing therewith, with full knowledge of its dangers.

But, aside from this, we are not compelled to depart from the primary rule of assumption of the risk to find the law which would preclude a recovery in this case; for the stone which inflicted the injury upon respondent came as a result of a blast exploded in the necessary discharge of the work at the quarry and without negligence on the master's part. We all know that in the operation of stone quarries blasts are discharged for the purpose of raising the stone from its stratum, and that as a result of such explosion, fragments of stone, large and small, are thrown high into the air; that gravitation will bring them to the earth with such force as is liable to inflict severe injury to one in their path. The risk attendant upon the work which is so prosecuted is not an extra hazard, but is essentially and necessarily an ordinary hazard and risk of the employment, and is therefore assumed by the servant by implication in his contract of hire. The United States Court of Appeals for the Eighth Circuit, in the case of *Browne v. King et al.*, 100 Fed. 561, 40 C. C. A. 545, said: "In entering the employment of the defendant the plaintiff assumed the ordinary risks incident to the employment engaged in. These risks were such usual hazards, dangers, and perils as belonged to the peculiar occupation of blasting rock with dynamite, including the carelessness of those engaged with him in the same work and employment. The employer was bound to furnish a reasonably safe place and appliances with which to do the work. But where the nature of the business is extremely dangerous, and conditions are necessarily continually changing by reason of placing and setting of blasts whereby dangerous conditions arise continually through the acts of the servant, without the knowledge of the master, the employer cannot be held responsible therefor without his fault, but such temporary dangerous con-

ditions arise from the nature of the employment, and are among the natural and ordinary risks and hazards attending the employment, for which the defendant is not liable." See, also, the following cases:

Livengood v. Joplin, etc., L. & Z. Co., 179 Mo. 229, 77 S. W. 1077; *Epperson v. Postal Tel. Co.*, 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; *Bradley v. Railway Co.*, 138 Mo. 293, 39 S. W. 763; *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113; *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; *Junior v. Elec. Co.*, 127 Mo. 79, 29 S. W. 988; *Aldridge v. Midland Blast Furn. Co.*, 78 Mo. 559; *Lee v. Railway (Mo. App.)* 87 S. W. 12; *Bunt v. Sierra, etc.*, Gold Min. Co., 138 U. S. 483, 11 Sup. Ct. 464, 34 L. Ed. 1031; *Davis v. Mining Co.*, 117 Fed. 122, 54 C. C. A. 636; *Finalyson v. Utica, etc., Min. Co.*, 67 Fed. 507, 14 C. C. A. 492; *Railway Co. v. Jackson*, 85 Fed. 48, 12 C. C. A. 507; *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 52 N. E. 518; *Whittaker v. Bent*, 167 Mass. 588, 46 N. E. 121; *Durst v. Carnegie Steel Co.*, 173 Pa. 162, 33 Atl. 1102; *O'Connell v. Clark (Sup.)* 48 N. Y. Supp. 74; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; 20 Am. & Eng. Ency. Law (2d Ed.) 57.

From what we have said, it is apparent that the judgment cannot stand. The injury which the poor man received was severe and permanent, and no doubt hastened his death; but, under the law as it is, there was no obligation upon the employer to compensate him or his estate therefor, and we must apply the principles of law as we find them in the adjudicated cases, regardless of the feelings of sympathy which we may entertain for the injured party. It is wholly unnecessary to discuss the question of contributory negligence so ably presented in the briefs.

The judgment must be reversed. It is so ordered.

BLAND, P. J., concurs. GOODE, J., absent.

CORUM v. METROPOLITAN ST. RY. CO.*
(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. ERRONEOUS INSTRUCTIONS — OBJECTIONS AFTER VERDICT.

Where plaintiff alleges that she boarded a car for the purpose of becoming a passenger, defendant cannot complain, after verdict, of instructions submitting to the jury to find whether she was a passenger.

2. MISLEADING INSTRUCTIONS.

In an action for injuries sustained in alighting from a street car, where plaintiff alleged that after the car came to a full stop at the usual place for cars to stop for the purpose of permitting passengers to alight, etc., and there was no evidence that the car stopped from any other cause than to discharge passengers, instructions submitting the hypothesis of the car stopping at a place where passengers were in

the habit of alighting, and of the car stopping at the place where passengers were in the habit of alighting from some other cause than that of discharging passengers, were misleading and confusing.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Sarah A. Corum against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

John H. Lucas and Ben T. Hardin, for appellant. Ellison & Turpin, for respondent.

ELLISON, J. Plaintiff was injured while in the act of alighting from one of defendant's street cars. She charges that by reason of the negligent act of defendant's servants in starting the car too quickly she was thrown to the ground while in the act of stepping off. The judgment was in her favor. It appears that plaintiff was at the corner of Twelfth and Main streets, in Kansas City, one evening when it was raining; that she desired to go to Walnut street (one block east), and there take what was known as a "Fifteenth Street car"; that she boarded a cable car at Twelfth and Main, intending to take a transfer and get off at Walnut, but before she was aware of it she had passed Walnut two or more blocks, and as the car was approaching Oak street she signaled for it to stop; that upon its stopping she attempted to get off, and on account of not being given sufficient time she was thrown to the ground while alighting as stated. She had not paid her fare, but was ready to do so if the conductor had gotten around to her. There was ample evidence tending to support the charge of negligence against defendant; but we have had the following suggestions urged upon us by defendant, as showing that it has not had such a trial as is vouchsafed by the law:

The petition, instead of charging outright that plaintiff was a passenger, alleged that she got upon the car for the purpose of becoming a passenger. The instructions she had given in her behalf submit for the jury to find whether she was a passenger. Defendant contends that such instructions made and submitted an issue not offered by the petition, and in support thereof cite the case of *Raming v. Street Ry.*, 157 Mo. 504, 57 S. W. 268, where it was held that an allegation of boarding a car with intention of becoming a passenger was not an allegation of being a passenger. But whatever error there may be in the instructions in this case in this respect is against the plaintiff, since it puts upon her the additional burden of showing that she was an actual passenger, though not alleged to be in her complaint. We think defendant's mode of attack should have been by demurrer. Having gone to trial, we think no complaint should be heard after verdict.

Again, the petition charges that "after the car arrived at the corner of Twelfth and Oak

*Rehearing denied June 26, 1905.

streets in said city, and came to a full stop at the usual place for cars to stop for the purpose of permitting passengers to alight," while the instructions only submit the hypothesis of the car "stopping at a place where passengers were in the habit of alighting."

Again, instruction No. 3 for plaintiff submits the hypothesis of the car stopping at the place where passengers were in the habit of alighting from some other cause than that of discharging passengers, that plaintiff had a right to alight from said car without making a request therefor, etc. There is no evidence whatever that the car stopped at the usual place for passengers to alight from any other cause than to discharge passengers. It is true that witnesses stated that a man came out into the street and got on the moving car before it got to the usual stopping place, and that the car slowed up seemingly for him to get on, but did not stop, though it was going very slow. So, if we should say the jury were authorized to infer that the car came to a stop at such place, and plaintiff attempted to get off, it would not show liability on defendant, since plaintiff had no right to attempt to leave the car at such place. *Railroad v. Mills*, 91 Ill. 39; *Jackson v. Ry. Co.*, 118 Mo. 221, 24 S. W. 192.

The instructions have mingled causes of liability under certain states of evidence and pleading not found in this case with causes which are in the case, and thus tend to mislead and confuse the jury. On retrial they should be drawn so as to clearly present the issues as made by the pleadings and evidence in this case, without confounding such issues with those which have heretofore arisen in other cases, the particulars of which are not found in this. An idea which might be perfectly clear as shown by pleadings and evidence in *Railroad v. Mills*, 105 Ill. 63 (approved in *Jackson v. Ry. Co.*, 118 Mo. 221, 24 S. W. 192) would be confusing and misleading in this case, which had not the same features disclosed by the evidence. *Railroad v. Mills* is first reported in 91 Ill. 39, and it will be found from that report that the case was reversed for new trial on an instruction with much less tendency to confuse than is found in the instructions here considered.

The judgment is reversed and the cause remanded. All concur.

KEENE v. SAPPINGTON.*

(Kansas City Court of Appeals. Missouri.
May 22, 1905.)

APPEAL—COSTS—TAXATION—EXCEPTION.

Where a party made no exception to a judgment against him for costs at the term at which it was rendered, such judgment will not be reviewed on appeal.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 803-810.]

*Rehearing denied June 26, 1905.

Appeal from Circuit Court, Boone County;
A. H. Waller, Judge.

Action by John W. Keene against J. L. Sappington. From a judgment on appeal from a justice's court adjudging costs against plaintiff, he appeals. Affirmed.

Webster Gordon, for appellant. Tydings & Anderson, for respondent.

BROADDUS, P. J. This cause was instituted before a justice of the peace, where plaintiff obtained a judgment, and defendant appealed. The plaintiff's statement was as follows:

J. L. Sappington, Dr.

To John W. Keene \$205 00
Interest on same from January, 1904.. 2 05

Total amount due..... \$207 05

On appeal, defendant moved to dismiss the case because plaintiff failed to file an itemized account of his cause of action, and for the reason that his complaint did not state a cause of action. The court sustained said motion, and rendered judgment against plaintiff for the costs of the suit. Afterwards, on the same day, the court, on its own motion, set aside the order dismissing the suit, and repeated the order against plaintiff for costs, whereupon plaintiff and his lawyer left the courtroom, and did not again appear in court during the term. The court, without the application of either party, continued the cause until the next term. At the term subsequent to that which the court rendered judgment against him for costs, plaintiff filed his motion to have the costs retaxed, which the court overruled. From this judgment, plaintiff appealed. The plaintiff made no exception to the judgment against him at the term during which it was rendered. We are therefore in no condition to review the action of the court in that particular. It was too late to except to the action of the court at a subsequent term. This is well-settled law.

Affirmed. All concur.

ROSS v. METROPOLITAN ST. RY. CO.*

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. STREET RAILROADS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a street railroad company for injuries to a pedestrian who was struck by a car, evidence held to show plaintiff guilty of contributory negligence.

2. SAME—DUTY TO CONTINUE TO LOOK AND LISTEN.

It is the duty of a person crossing railway tracks to devote his attention to his line of travel during the time he is within the range of passing cars, and to look and listen until he is safely across, and it is not sufficient merely to look before going on the track.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 207, 208, 215.]

*Rehearing denied June 26, 1905.

3. SAME—DISCOVERED PERIL—HUMANITARIAN DOCTRINE.

Though one cannot recover for injuries where his own negligence contributes in any degree to the immediate cause of the injury, yet, if he has negligently exposed himself to danger, which another perceives in time to avoid injury, but fails to do so, such other is liable, and the contributory negligence of the injured person is no defense.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 115.]

4. SAME—DUTY OF MOTORMAN.

It is not the duty of a motorman operating a street car to stop merely because he observes a pedestrian approaching the track, but he is only required to stop when something in the conduct of the pedestrian indicates that he is unaware of the presence of the car, and apt to be struck by it.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 197.]

5. SAME—QUESTION FOR JURY.

In an action against a street railroad company for injuries to a pedestrian who was struck by a car, evidence held to justify submission to the jury of the question whether defendant's motorman observed plaintiff's danger in time to have avoided the injury.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Myron E. Ross against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Lucas, for appellant. Frank P. Walsh and E. R. Morrison, for respondent.

JOHNSON, J. Action to recover damages for personal injuries alleged to have been caused by defendant's negligence. Judgment was for plaintiff in the sum of \$2,000.

The refusal of the trial court to direct a verdict for defendant is assigned as error.

The pertinent facts disclosed by the evidence are as follows: On the evening of July 20, 1901, plaintiff was injured at the intersection of Fifteenth and Holmes streets—two public thoroughfares in Kansas City. Two lines of cable cars operated by defendant had their junction at that place. One (the Fifteenth street line) ran east and west on Fifteenth street. The cars of the other (the Holmes street line) ran to and from their western terminus on Fifteenth street to Holmes, and thence south. The junction was effected by curved tracks, one of which (that connecting the south track on Fifteenth with the west track on Holmes) was used by cars south bound. The length of the curve, measured upon the rail nearest the southwest corner, was 70 feet. Where it began on Fifteenth street, the rail was 17 feet 9 inches from the curb; at its end on Holmes it was 12 feet; and at a point 40 feet from the beginning, 5 feet 9 inches. Plaintiff, coming from the west on the sidewalk along the south side of Fifteenth street for the purpose of boarding an east-bound car, left the sidewalk a few feet west of the corner, and proceeded in a northeasterly direction to cross the curved tracks. From the point where he

stepped from the curb to the first rail, he traveled a distance of 7 feet 3 inches. A few feet beyond this—the evidence does not disclose just how far—he was struck by a Holmes street car rounding the curve from west to south, and injured. No claim is made of an excessive verdict. Therefore it is unnecessary to describe the injuries inflicted.

It is asserted by defendant, and we think conclusively shown by the evidence, that plaintiff failed to act with proper care for his own safety. In broad daylight, with nothing to obstruct his view, and knowing of the presence of the car, he walked into the collision. He attempted to exonerate himself from blame with the following account of his misadventure: He had been standing upon the sidewalk 25 or 30 feet—the exact distance is unimportant—west of the corner, engaged in conversation. As he started on his way he saw the car standing on Fifteenth street at the entrance to the curve, about 35 feet from where he was afterwards struck. As he stepped from the curb, he looked again, noticed the car had not moved, and, dismissing it from his attention, proceeded at an ordinary walk. The bell was not rung and no warning given until the car was upon him. He was struck by the south corner of the fender which projected from the front end of the car. Owing to the sharpness of the curve in the track, this corner of the fender was at the time, as near as can be ascertained from the evidence, from 3 to 4 feet from the inside rail, so that the distance from the curb where plaintiff last observed the car to the place of contact was from 10 to 11 feet. The cable which furnished the motive power did not round the curve. The grade slightly declined to the east and south. Therefore, with the car standing as described by plaintiff, it could be moved only by force of gravity. To credit plaintiff's story requires the belief that while he was walking a distance of 11 feet—an act which did not consume more than two seconds—the car started, gained headway, and traveled 35 feet. A few figures and a moment's reflection will demonstrate the impossibility of the occurrence as described, particularly in view of the fact that no witness gave the speed of the car beyond 7 miles per hour, and the great weight of the evidence fixed it at about 5. But accepting plaintiff's statement, even in the face of the physical conditions which so plainly contradict it, his conduct must nevertheless be pronounced grossly careless. He had no right to assume when he stepped from the curb that his way was clear. A person crossing railway tracks, in the observance of ordinary care, must devote his attention to his line of travel during the time he is within the range of passing cars. He should not content himself with a last look when entering into the sphere of danger, and then blunder on, oblivious to his surroundings, but must continue to look and listen until safely across.

Plaintiff's counsel evidently recognized the indefensibility of their client's pretension that he acted with due care in walking against a moving car, for they refrained from submitting to the jury, in the instructions asked by them, any other issue of negligence than that involved in the alleged neglect of the gripman to make proper effort to stop the car after becoming aware of plaintiff's danger.

Assuming, then, that plaintiff was negligent in failing to observe the approach of the car, that defendant also was negligent in not ringing the bell or giving other warning, and that both of these acts concurred in placing plaintiff in a position of danger, no recovery can be permitted without it appears that these concurring acts of negligence were superseded as a proximate cause of injury by the sole negligence of the defendant, for the rule is elementary that if the plaintiff, by his negligent act, contributes in any degree to the immediate cause of injury, he has no cause of action, whatever the negligence of the defendant may be. The doctrine of comparative negligence has been repudiated repeatedly by the appellate courts of this state. *Boyd v. Railroad*, 105 Mo. 371, 16 S. W. 909; *Holwerson v. Ry. Co.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; *Fellenz v. Ry. Co.* (Mo. App.) 80 S. W. 49; *Moore v. Ry. Co.*, 176 Mo. 528, 75 S. W. 672. But when a plaintiff has reached a position of peril, not in wantonness nor with intent to expose himself to injury, but through inattention and carelessness, and is unconscious of his danger until too late to extricate himself, the negligence of the defendant, who, comprehending his situation in time to avoid injury, deliberately runs him down, occupies the whole field of culpability, to the exclusion of all other acts of negligence, and presents itself as the sole producing cause. In such case the contributory negligence of plaintiff but serves to afford a condition for the operation of the final act. *Bunyan v. Citizens' Ry. Co.*, 127 Mo. 12, 29 S. W. 842; *Holden v. Mo. Ry. Co.*, 177 Mo. 456, 76 S. W. 978; *Heinze v. Ry. Co.* (Mo. Sup.) 81 S. W. 848; *Segetowski v. St. Louis Transit Co.*, 102 Mo. App. 110, 76 S. W. 693; *Jett v. Ry. Co.*, 178 Mo. 664, 77 S. W. 738; *Meeker v. Ry. Co.*, 178 Mo. 173, 77 S. W. 58; *Cooney v. Ry. Co.*, 80 Mo. App. 226; *Morgan v. Ry. Co.*, 159 Mo., loc. cit. 275, 60 S. W. 195.

Under this view, the inquiry arises, is there any substantial evidence in the record from which, as a reasonable inference, it may be said defendant failed to follow the "humanitarian rule"? Some witnesses testified that, from the time plaintiff separated from his companion, they observed from his conduct that his attention was distracted, and that he was proceeding in the direction of the track without looking to see if his course was clear; and it is argued that, if this was noticeable to others, it must have been to the gripman, whose duty it then became to stop

the car even before plaintiff left the sidewalk. One answer to this contention is sufficient to dispose of it. Plaintiff is bound by his own admissions. In his anxiety to defend his conduct, he asserted with emphasis that up to the time he stepped from the sidewalk he was watching the car. If this is true, which must be conceded in the consideration of this question, for it is an admission against interest, there was nothing in plaintiff's actions prior to his step from the curb to indicate that he was proceeding to enter into danger, and the gripman was under no obligation to infer that, because he was walking in the direction of the track, he might not stop before reaching it. On the contrary, while it was the duty of the gripman, in taking his car around this busy junction corner, to proceed cautiously and to keep a sharp lookout (*Holden v. Ry. Co.*, supra; *Winters v. Ry.*, 99 Mo., loc. cit. 517, 12 S. W. 652, 6 L. R. A. 536, 17 Am. St. Rep. 591) he was not required to assume that approaching pedestrians would act carelessly in going upon the track in front of him. His duty to stop began when he saw or might have seen that plaintiff was negligently proceeding to a collision, unobserving and unaware of the presence of the car. The fact that a person leaves the sidewalk and comes near the track is not enough in itself to impose the duty to stop. People frequently do this. There must be something noticeable in the conduct of the approaching footman to apprise an observer of his contemplated movement into danger to make it incumbent upon the defendant to stop. A rule more favorable than this to pedestrians would seriously impede the operation of street cars, and unfairly interfere with the progress of their passengers, who have an equal right with others to the use of public ways. *Bunyan v. Ry. Co.*, 127 Mo. 17, 29 S. W. 842.

The gripman (a witness introduced by defendant) testified that he first became aware of plaintiff's peril when he saw him step from the curb; that his car was going at half speed (about five miles per hour) and that it was then from 14 to 18 feet from the place of collision; that he instantly applied the brakes to stop in the shortest possible distance, and brought the car to a full stop in 10 feet from where plaintiff was struck. From this testimony it must be conceded that defendant's humanitarian duty began with the act of plaintiff in stepping from the sidewalk. The gripman then knew that plaintiff was moving to a collision unaware of his situation, and fully realized the imperative necessity of stopping. If he did all that he reasonably could have done to that end, defendant cannot be held liable; but, if he failed to attempt the performance of his plain duty, it was proper to let the case go to the jury. The gripman, standing with his hands upon the brake lever, was in a position to set the brakes instantly, and this he claims to have done. Plaintiff had 10 or 11 feet to

go, and the car, traveling at half speed, could not have been closer to the place of contact than 15 feet. Some of the witnesses put the distance even greater. Plaintiff's expert evidence shows that, under the existing conditions the car could have been stopped in 10 feet; defendant's experts say in 20. According to the various estimates made by the witnesses, the car ran from 10 to 30 feet after it struck plaintiff, and many witnesses say that no effort was made to stop it until just about the instant of collision. Bearing in mind that in passing upon a demurrer to the evidence every reasonable inference must be indulged in favor of the plaintiff, we are not willing to declare that plaintiff failed to sustain his burden. To do so, we must assume that the gripman immediately applied the brakes when plaintiff left the sidewalk (a matter in dispute) and that it was impossible to stop the car in a distance of 15 feet (another controverted assertion). These issues of fact were for the jury to decide. It was, proper, as was done, to submit the case under the "last-chance rule," for it is well settled that, if the inferences to be drawn from the evidence are not certain or incontrovertible, the question of negligence cannot be passed upon by the court. *Gratio v. Ry. Co.*, 116 Mo., loc. cit. 468, 21 S. W. 1094; *Baird v. Ry. Co.*, 146 Mo., loc. cit. 281, 48 S. W. 78.

Many objections are urged to the rulings of the learned trial judge upon the admission of evidence. We have considered carefully each of them, and find none of sufficient merit to call for special notice.

Criticism is made of plaintiff's instruction No. 1, but the points made are fully covered in the views expressed. The case was fairly tried and submitted.

The judgment is affirmed. All concur.

WAECHTER v. ST. LOUIS & M. R. R. CO.
(St. Louis Court of Appeals. Missouri. June 1, 1905.)

1. PLEADING—MATTER OF INDUCEMENT—REFERENCE TO PRECEDING COUNT.

Where matter of inducement is stated in the first count of a petition, a mere reference to it in subsequent counts is sufficient.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 118.]

2. PLEADING—SEPARATE CAUSES OF ACTION—SEPARATE STATEMENT.

In an action against a street railroad for personal injuries, the first count of the petition, after setting out matter of inducement, charged negligence on the part of the conductor in failing to discover plaintiff's perilous position and stop the car to avoid injuring him. The second count recited, "For the purpose of stating a second cause of action, plaintiff hereby repeats all the facts above recited (except the specifications of negligence and of the damages thereby sustained * * *), and prays that the said facts be taken as part of this second cause of action, to avoid unnecessary prolixity in this petition"; and then followed an allegation that the motorman "intentionally, recklessly, and with wanton disregard of plaintiff's rights," ran the car upon him. *Held* to sufficiently state

two distinct causes of action—one for negligence, and the other for willfulness—within Code Civ. Proc. § 593 (Rev. St. 1899, § 593), providing that different causes of action joined in the same petition must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished.

3. SAME—ELECTION BETWEEN COUNTS.

Where both of the two counts in the petition in an action against a street railroad for personal injuries set forth the same act as causing the injury, but the first charges negligence, and the second willfulness, and the evidence is sufficient to justify a verdict on either count, plaintiff will not be compelled to elect upon which he will proceed, but is entitled to have both theories submitted to the jury.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1199.]

4. CARRIERS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In such action the question of plaintiff's contributory negligence *held*, under the evidence, to be for the jury.

5. PERSONAL INJURIES—MEASURE OF DAMAGES.

In an action for personal injuries, damages should be estimated on the basis of compensation.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 222.]

6. SAME—COMPENSATORY DAMAGES—BODILY PAIN—MENTAL ANGUISH.

Pain of body and mental anguish resulting from personal injuries are elements that enter into the estimation of compensatory damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 100–105, 233, 234, 255–259.]

7. SAME—REVIEW.

On appeal in an action for personal injuries, the verdict will not be disturbed unless the damages assessed are so excessive as to shock the moral sense, or it clearly appears that the jury was influenced by passion or prejudice.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3944–3947.]

8. SAME—EXCESSIVE DAMAGES.

Where one of plaintiff's ribs was fractured, his collar bone dislocated, and his arms and back bruised, and his injuries caused him much pain and suffering and the loss of 11 weeks' time, and it appeared that the dislocation of his collar bone interfered with his lifting power, and that he would not recover of the injury under four or five years, a verdict for \$2,500 is not excessive.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Gottlieb Henry Waechter, as next friend of Carl August Waechter, against the St. Louis & Meramec River Railroad Company for personal injuries. From a judgment for plaintiff for \$2,500, defendant appeals. Affirmed.

On the evening of January 3, 1903, the plaintiff, who was then about 20 years of age, and in the employ of the St. Louis Car Company, after finishing his day's work, boarded a Broadway car and rode to Locust street, where he was transferred to a Lee avenue car, to be carried to his home, in the northern part of the city. He left the Broadway car at the intersection of Broadway and Locust street, and boarded a Lee avenue

car, which was standing on the south track on Locust street, between Broadway and Sixth street. The car he boarded was out of order, and the passengers were advised by the conductor to take another Lee avenue car, standing about three feet ahead on the same track. About 25 or 30 of the passengers, including the plaintiff, got off the car at the front platform, passed north between the two standing cars, and made a rush to get on the forward car by way of the rear platform. Plaintiff and Fred Astroth were in the rear of the bunch of passengers, and, before they could get aboard, a St. Louis & Meramec River car, traveling west on the north track, came along and caught plaintiff and Astroth between it and the standing car, and rolled the plaintiff; turning him around and around six or eight times, and dropping him on the street. One of plaintiff's ribs was fractured, his collar bone dislocated, and his arms and back bruised. The injury caused him much pain and suffering, and the loss of 11 weeks' time. There is also evidence that the dislocation of plaintiff's collar bone interferes with the lifting power of his right arm, and that he will not recover of this injury under four or five years.

The Meramec River car runs north on Fourth street to Locust, where it turns west, and runs over Locust street on the north track. Plaintiff testified that he knew these cars ran west on the north track in Locust street, and when he got off the Lee avenue car, and passed between it and the one ahead, he looked east to see if a car was coming on the north track, but did not see one, and that, after he got on that part of the street between the two tracks, the bunch of passengers in front of him obstructed his view, and he could not see the car coming from the east on the north track, and that he did not see the car that rolled him until it was right on him (within a foot or two of him), and too late to get out of its way. In his deposition taken before the trial, and read in evidence by the defendant, plaintiff stated that he did not see the car until it struck him. The evidence is all one way—that the gong was not sounded and no warning whatever was given of the approach of the Meramec River car—and all of plaintiff's witnesses testified that the car was running at a rapid rate of speed. One of plaintiff's witnesses, who got off the disabled car at the rear platform, testified that he saw the Meramec River car stop on the west side of Broadway, saw the motorman turn on the power to start the car, and, apprehending danger, stepped over the track, out of reach of the car, and saw the bunch of passengers getting on the Lee avenue car, and saw the motorman turn on more power as his car approached, and hallooed at him three times to stop, but that he paid no attention, and went ahead at a rapid speed. The plaintiff testified that he knew he was in a place of danger when between the two tracks, but

that he could not have seen the approaching car, on account of the bunch of people immediately in front of him, without stepping back onto the north track. All the passengers except plaintiff and Astroth got on the Lee avenue car before the arrival of the Meramec River car, and Astroth testified he had hold of the hand rail, and was trying to pull himself up on the car step, when he was struck and rolled between the two cars.

A statement made by the motorman was read as his evidence by the defendant. The motorman stated that his car was running from 2 to 2½ miles per hour when it passed the Lee avenue car, and that there was no one on or so near the north track as to be struck by his car, and that he did not know any one had been hurt by it until informed by his conductor; that, as his car approached from the east, it was in plain view of any one looking east from where the Lee avenue car stood. The conductor testified that the car was running about two miles an hour, and that he did not know any one had been hurt by it until he had turned his car in that evening.

The petition is in two counts. The first charges negligence on the part of the conductor in failing to discover plaintiff's perilous position and stop the car to avoid injuring him. The second charges that the motorman "intentionally, recklessly, and with wanton disregard of plaintiff's rights," ran the car upon him. The answer was a general denial, and the affirmative defense of contributory negligence. The jury found for plaintiff on the first count, and assessed his damages at \$2,250. The verdict was for defendant on the second count. At the close of plaintiff's evidence the defendant moved the court for a compulsory nonsuit, and at the close of plaintiff's evidence, and again at the close of all the evidence, the defendant moved the court to compel the plaintiff to elect upon which count he would proceed. These motions were all denied.

Jefferson Chandler, for appellant. R. F. Ralph and Barclay & Fauntleroy, for respondent.

BLAND, P. J. (after stating the facts). 1. The matter stated as inducement in the first count of the petition covers over a page and one-half of the printed abstract (ordinary size). The second count begins as follows: "For the purposes of stating a second cause of action, plaintiff hereby repeats all the facts above recited (except the specifications of negligence and of the damages thereby sustained by said minor) and prays that the said facts be taken as part of this second cause of action, to avoid unnecessary prolixity in this petition." Then follow the allegations of intentional injury. For the reason the matter of inducement is not set out in full in the second count, the defendant contends the petition contains but one

count. Its position is that a cause of action cannot be stated by reference to or by adoption of allegations in another cause of action. Section 593 of the Code of Civil Procedure (Rev. St. 1899, § 593) provides that different causes of action joined in the same petition "must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished." In *Bricker v. Railway*, 83 Mo. 391, it is said: "When a pleader includes in his statement or petition several distinct causes of action, it is unnecessary for him to repeat allegations which are applicable to them all." The statement in the case alleged the killing of plaintiff's stock by defendant's locomotive and engine on three different dates, and contained but one allegation that the stock at the three different dates got upon defendant's road where it was required by law to fence its right of way, but had neglected to do so. The court held it was unnecessary to repeat in every count the allegation of failure to fence, as it was common to them all. In *St. Louis Gaslight Co. v. St. Louis*, 86 Mo., loc. cit. 498, it is said: "The petition consists of various counts; two for each month—one for the price of the gas, and one for the other services. The first count sets out the incorporation of the three parties to the contract, the ordinance directing the contract to be made, the contract, and the terms thereof. These matters are not stated in the second and subsequent counts, but in them reference is made to the first by the use of such terms as 'in the district aforesaid,' 'under said contract,' and 'agreed as aforesaid.'" It was held that subsequent counts might be made certain by reference to preceding ones. The rule has always been that where matter of inducement is stated in the first count, if this count be good, a mere reference to it in subsequent counts is sufficient. *Loomis v. Swick*, 3 Wend. 205. The contention that the counts are a unit, stating two repugnant causes of action, we do not think is supported by either reason or authority. The petition contains two causes of action, separately stated in such manner as to be intelligibly distinguished. It is true, the same act causing the injury is set forth in both counts of the petition. The difference in the counts is not in the act, but in its quality. In the first its quality is described as negligence, and in the second count as willfulness. Proof of negligence necessarily disproves willfulness, and vice versa, and for this reason they could not be joined in the same count. The cause of action was the injury, and the two counts stated it in different ways to meet the evidence, which might show that it occurred in the manner alleged in the first or the manner alleged in the second count. That the same cause of action may be stated in this way in different counts, as the various theories or phases of

the case may alternate, is clearly permissible, and is common practice. Rev. St. 1899, § 626; *Brownell v. Railroad*, 47 Mo. 239; *Owens v. Railroad*, 58 Mo. 386.

2. We do not think the court erred in refusing to compel the plaintiff to elect upon which count he would proceed. As before stated, there was but one cause of action, though stated in different ways. The evidence, it seems to us, would have justified a verdict on either count. It shows that the motorman in charge of defendant's car was either extremely negligent, or, worse, was reckless of human life. Where there is evidence supporting two theories, upon either of which the plaintiff might recover, and both are properly pleaded, the plaintiff is entitled to have both theories submitted to the jury, and it would be a denial of his legal rights to withdraw either from the jury's consideration.

3. It is contended that plaintiff should have been nonsuited, for the reason his own evidence shows he voluntarily put himself in a place of peril, and was thereafter negligent (down to the time of his injury) in failing to take proper precautions to protect himself. The facts do not justify the statement that plaintiff voluntarily chose to place himself near the north-bound track, where he was injured. He had to go there to take passage on the Lee avenue car, and had a right to go there for that purpose. Plaintiff testified that, as he passed between the two Lee avenue cars, he looked east, but saw no car coming on the north track. He was detained in a position of danger for two or three minutes by the bunch of passengers preceding him, and said he lingered behind for the purpose of giving the lady passengers an opportunity to get off the first car and aboard the second, and during the time he was standing on the street he did not look east for a car. Plaintiff's evidence is that his view of the north track was obstructed by the people ahead of him, and he could not have seen east, if he had looked, without stepping back onto the north track; that he was facing to get on the car, and did not pay attention to the north track; knowing all the while that he was in a position of danger, and that prudence required him to look out for a west-bound car. As applicable to this phase of the case, defendant's counsel, in his brief, quotes the following from the case of *Holwerson v. Railway*, 157 Mo. 227, 57 S. W. 770, 50 L. R. A. 850 (quoted from *Kirtley v. Railroad* [C. C.] 65 Fed. 391): "Conceding that there was a duty upon the defendant's servants to anticipate that persons would be upon the track, this is set off by the duty on the part of the deceased to anticipate that trains would run on the track, and hence keep a lookout for them. Conceding that a careful lookout on the part of the defendant's servants would have revealed the deceased on the track, this is set off by the fact that a diligent outlook by the de-

ceased would have revealed the approach of the engine at his rear. Conceding that the defendant's servants might have stopped the engine, by the exercise of ordinary care, before running onto the deceased, this concession is set off by the indisputable fact that the deceased, after he might have discovered the engine, and even at a later stage in the events which led up to the catastrophe, might have stepped aside and have avoided the engine." In the same case (at page 225, 157 Mo., page 772, 57 S. W., 50 L. R. A. 850) we find the following: "The whole law on the subject is so aptly expressed by Macfarlane, J., in *Watson v. Railroad*, 133 Mo., loc. cit. 250, 34 S. W. 573, that to attempt to improve upon it or to elucidate it would be as puerile as to try to 'paint the lily,' and we therefore simply quote and approve it. That learned jurist's formulation of the rule is this: 'In order to avoid the effect of the unquestioned negligence of deceased, plaintiff charges that defendant's employees failed to observe proper care after the peril to which he had exposed himself was known to them, or by reasonable care might have been known. The rule is thus invoked, which is well settled in this state, that, though one has negligently placed himself upon a railroad track in front of a moving train, those operating it owe him the duty of care to avoid injuring him, and his previous negligence will not bar a recovery if injury results to him from neglect of such a duty. But to carry this doctrine to the length of saying that one who knowingly crosses the track of a railway, in such close proximity to a moving train as to be struck thereby before he could cross, would not be guilty of concurring negligence, would virtually abolish the law of contributory negligence altogether, and render nugatory a long and uniform line of decisions of this court. *Boyd v. Railroad*, 105 Mo. 371, 16 S. W. 900, and cases cited.'" As held by Judge Marshall, who wrote the opinion in the *Holwerson Case*, the doctrine of negligence and contributory negligence, in its last analysis, is the effort to determine the immediate and direct cause of the injury, and to ascertain whether the plaintiff was guilty of negligence which contributed with the defendant's negligence to produce the injury, and, wherever it appears from the ultimate facts proved that plaintiff was guilty of contributory negligence, it ends the case. It clearly appears from the evidence that plaintiff's negligence, if he was negligent in placing himself where he was hurt, was prior to that of the motorman's. This prior negligence was a remote, not a direct or proximate, cause of the injury, and plaintiff was entitled to go to the jury, unless his own evidence shows that his prior negligence continued down to the time of the happening of the accident. If it did, then his negligence concurred with that of the motorman, and plaintiff cannot

recover. We do not think that plaintiff's evidence convicts him of continuing negligence, as a matter of law. It is true, he knew he was in a place of danger, and that a west-bound car might run over the north track at any moment, and before he could board the Lee avenue car; but his view of the north track was obstructed, and he was pressing forward to board the car, which, if he had succeeded in doing, would have placed him out of danger. The plaintiff's duty to look and listen for an approaching car on the north track should be measured by his opportunity to see and hear the car, and his environment should be taken into consideration; and if, after considering these, it appears he used such care as a reasonably prudent person would have used in the same or similar circumstances, he should not, as a matter of law, be convicted of contributory negligence because he failed to discover the car in time to get out of its way. The question was one of fact for the jury, and was submitted to them by the court on appropriate instructions.

4. Defendant insists that the verdict is excessive, and evinces prejudice and passion on the part of the jury. In this character of case, the damages cannot be mathematically calculated. They should be estimated on the basis of compensation. Pain of body and mental anguish resulting from an injury are elements that enter into the estimate of the damages. The uncertainty of correctly estimating what is a fair money compensation for pain of body and mental anguish is shown by the wide differences in the amounts assessed by juries in similar cases. We might go further and say that the reported cases also show a like contrast in the judgments of the appellate courts as to what are excessive damages. We think this is due more to temperament than to sound, conservative judgment. The question is one which must necessarily be deferred to the jury and the trial court, as they are in a much better position, from having seen and heard the plaintiff and all the other witnesses, to correctly estimate the damages, than is the appellate court, who neither sees nor hears any of the witnesses; and we do not think it is wise practice for appellate courts to interfere with the verdicts of juries on account of the damages assessed, and take upon themselves the task of estimating them, in this class of cases. The verdict of the jury should not be disturbed unless the damages assessed are so excessive as to shock the moral sense, or it clearly appears that the jury was influenced by passion or prejudice. There is no indication in the record before us that the jury was inflamed by passion or was prejudiced, and we are not prepared to say that the damages are grossly excessive.

Discovering no reversible error in the record, the judgment is affirmed. All concur.

SAWYER v. SANDERSON et al.*

(St. Louis Court of Appeals. Missouri. June 1, 1905.)

1. INTOXICATING LIQUORS—LICENSE—TRANSFER.

A bill of sale reciting the transfer of "all my goods, license, good will, etc., to my saloon," given at the conclusion of negotiations in which the license was considered, and in which it was agreed and understood that the saloon should be run by the buyers under the seller's name and license until the expiration of the license, and in pursuance of which it was so conducted, constitutes a transfer of the license, within the prohibition of Rev. St. 1899, § 2992.

2. SAME—EFFECT OF TRANSFER.

The inclusion of the seller's license in a sale, for a single and indivisible consideration, of a saloon, fixtures, and good will, renders the whole contract, and the note given therefor, void, under Rev. St. 1899, § 2992, prohibiting the transfer or assignment of a dramshop license, and under other provisions of the dramshop act, which contemplate the possession by a licensee of specified qualifications, and the award of a license by the county court only to an individual possessing those qualifications, and after specified proceedings, including the consent of taxpaying citizens and the giving of a bond.

Goode, J., dissenting.

Appeal from Circuit Court, Newton County; Henry C. Pepper, Judge.

Action by Thomas Sawyer against S. H. Sanderson and another. There was a judgment for plaintiff, and defendants appeal. Reversed.

The suit is to recover a balance alleged to be due on a promissory note for the principal sum of \$4,000, dated January 8, 1900, due 12 months after date, with 7 per cent. interest, payable to plaintiff, and executed by the defendants. Omitting caption, the answer is as follows: "Come the defendants, and, for answer to the petition, admit the execution of the note sued on, but deny any liability thereon. Defendants, for further answer, say: That the sole and only consideration for said note was the sale and transfer of a stock of intoxicating liquors and the business of a saloon from plaintiff to defendants, known as the Joplin Hotel Bar, in the city of Joplin, Jasper county, Missouri, and the good will and license, etc., herein-after mentioned. That said liquors, etc., were sold and delivered to defendants with the express agreement, purpose, and intention on part of plaintiff that the same should be unlawfully used, vended, and sold by the defendants at retail in said Joplin Hotel Bar, in Jasper county, Missouri, for the purposes below mentioned, without defendants having any legal authority or license to sell or vend the same. That said liquors, business, good will, and licenses were so unlawfully sold at said county and state, and said business was therewith thereafter conducted, with the approval, sanction, aid, and consent of the plaintiff, without lawful license, and in open violation of the laws of the state of Mis-

souri. That on the 8th day of January, 1900, at the date of said note and transfer of said saloon business, the stock of liquors and fixtures did not exceed two thousand (\$2,000) dollars in value, and that the agreed consideration paid plaintiff, altogether, was four thousand (\$4,000) dollars cash, and four thousand (\$4,000) dollars in and represented by the note sued on. That in order to close said deal and obtain the execution of said note, and as an inducement to defendants to execute the same, and as a part of its consideration, plaintiff (being a regular, licensed dramshop keeper in said city, holding licenses therefor from said city, county, and state) assigned and delivered his said dramshop keeper's licenses for said county, state, and city to the defendants; and likewise, as a part of said transaction, and for the same purpose and consideration, the plaintiff at the same time sold his good will, as based on said licenses, in the said liquor and saloon business, to the defendants; and likewise, and for the same purpose, plaintiff, as part of said consideration for said note, guarantied to the defendants that the room in which said Hotel Bar was run and operated should not cost the defendants to exceed one hundred and fifty (\$150) dollars per month for a period of one year from said date; and in pursuance of said sale and transfer of said saloon and business, and as part of said consideration, and as part of said transaction, and for said note, the plaintiff executed and delivered to the defendants a certain writing, of which the following is a copy: 'Carthage, Mo., January 8, 1900. For and in consideration of the sum of eight thousand (\$8,000) dollars, paid to me this day, I grant, bargain and sell to S. H. Sanderson and Geo. H. Thomas all my goods, license, good will, etc., to my saloon known as the Joplin Hotel Bar, located in the Joplin Hotel, Joplin, Mo., and do guarantee the title to the same. I also agree to pay all bills of the said house up to date, and guarantee that Sanderson and Thomas can have the room that the saloon is now in, for at least one year, at one hundred and fifty (\$150) dollars per month. Thomas Sawyer.' That pursuant to said agreement said plaintiff thereupon immediately delivered possession of said saloon and stock to defendants, who, with the knowledge, consent, aid, co-operation, and good will of plaintiff, engaged in the retail sale of said liquors at said Joplin Hotel Bar under said licenses, in said room, and under and in pursuance of said contract and the giving of said note. Defendants say that said sale and assignment of said license was in violation of section 2992, Rev. St. 1899, contrary to general law, and against public policy, and, by reason of the premises, said note is void and without consideration. Wherefore defendants ask to be discharged, and that they have judgment for costs." The reply was a general denial.

Defendants, having admitted the execution

*Rehearing denied June 19, 1906.

of the note, took the burden of proof. To sustain the issues on their part, they offered evidence showing that the note was given in part consideration for the sale and purchase of a saloon located in the city of Joplin, Mo., including liquors, cigars, etc., good will, and licenses. The question in controversy is whether or not the unexpired state, county, and city dramshop licenses held by plaintiff at the time of the sale were embraced in the sale, and furnished some part of the consideration for the purchase, and, if so, was the note void? To show that the licenses were embraced in the sale, both defendants testified that the licenses were included in the bargain, and it was understood they should go in on the trade, and that defendants might conduct the saloon business in the name of the plaintiff, and under his licenses, until the expiration of his state and county licenses. In corroboration of this testimony, defendants offered and read in evidence the following written bill of sale: "Carthage, Mo., Jan. 8, 1900. For and in consideration of the sum of eight thousand (\$8,000) dollars, paid to me this day, I grant and bargain and sell, to S. H. Sanderson and Geo. H. Thomas, all of my goods, license, good will, etc., to my saloon, known as the Joplin Hotel Bar, located in the Joplin Hotel, Joplin, Mo., and do guarantee the title to the same. I also agree to pay all bills of the said house up to date, and guarantee that Sanderson & Thomas can have the room that the saloon is now in for at least one year at \$150 per month. Thomas Sawyer." Defendants also offered and read in evidence the following admissions: "It is admitted that up to and at the time of the sale to the defendants the plaintiff had a license to keep a dramshop at the saloon known as the Joplin Hotel Bar; said license being taken out the 7th day of November, 1899, to expire on the 6th day of May, 1900. Dramshop license: Recites due petition and payment of \$466.30 license tax, and the giving of bond by Tom Sawyer, who is 'hereby authorized and permitted to keep a dramshop,' etc., 'for six months at Joplin, commencing Nov. 7, 1899, and ending May 6, 1900.' Signed by county clerk and attested by seal of county court, Jasper county. The license of Sanderson next after the expiring of that to Sawyer, as referred to, is as follows: Dramshop license: Recites due petition and payment of \$451.50 license tax and the giving of bond by S. H. Sanderson, who 'is hereby authorized and permitted to keep a dram shop,' etc., 'for six months at Joplin, commencing seventh of May and ending sixth November, 1900.' Signed by county clerk and attested by seal of county court, Jasper county." Three city licenses granted plaintiff for each of the months of February, March, and April, 1900, were also offered in evidence. The March and April licenses were taken out in the name of plaintiff, but were in fact procured and paid for by defendants.

The bill of sale was written out by defendant Thomas, and both he and his co-defendant testified that plaintiff read it before he signed it. Plaintiff testified that he did not read the bill of sale, but admitted that it was read to him by Thomas before he signed it. Plaintiff further testified that the licenses may have been spoken of in the trade, but he could not say for certain that they were mentioned, but was positive there was nothing said about how the saloon should be run; that he made no inquiry about it, and did not know under what license the business was conducted. The following is taken from plaintiff's cross-examination: "Q. You knew that when you sold this saloon to Sanderson & Thomas that they were taking your licenses along with the saloon? A. If they wanted them. Q. You didn't know that was part of the contract; that that was put in the contract? A. That was put in the contract, I suppose, but I didn't know that was in the contract. Q. You knew that when Sanderson & Thomas took possession of that saloon, and you closed the contract with them, you knew the licenses were going into the deal? A. If they wanted them. They were no good to me. I was out of business. I had no use for them. Q. You knew that, when this saloon was sold to Mr. Thomas and Mr. Sanderson, that the licenses went in as part of the consideration of this \$8,000? A. I didn't consider it so. Q. You knew that was a fact? A. No, sir; not as a part of the consideration. As I told Mr. Spencer that it might mention the license in the contract, I see it there now. I don't even know whether I read it over or not. * * * Q. You went out of that business on Monday morning, and Mr. Sanderson immediately stepped into possession? A. Yes, sir; in fact he had possession Monday. Q. The business was never closed on account of this deal? A. No, sir. Q. There was not even time for an application for a dramshop license? A. No, sir. Q. You say there was no agreement or understanding about this license. What was your idea—what was your understanding? In this contract you say you agree to grant, bargain, and sell to the defendants. What did you mean by including the word 'license,' if you didn't mean to sell it? A. I don't remember it being there. Q. It was in there? A. Yes, sir. Q. You think the bill of sale was read over to you, or you read it, before you signed it? A. I think so. I don't doubt but what it was in there."

After all the evidence was in, the defendants moved the court to instruct the jury that, under the law and the evidence, plaintiff could not recover. The court refused to so instruct, and instructed the jury to the effect that, notwithstanding they might find the license was embraced in the bill of sale as one of the things sold to defendants, it did not vitiate the contract of sale and note, and, unless they found from the evidence

that it was agreed between plaintiff and defendants that intoxicating liquors were to be sold by defendants under plaintiff's license, they should find for plaintiff. The jury found for plaintiff in the sum of \$1,160. After an unsuccessful motion for new trial, defendants appealed.

George Hubbert, for appellants. Galen & A. E. Spencer, for respondent.

BLAND, P. J. (after stating the facts). 1. It is conclusively shown by the bill of sale that the licenses were included in the things sold by plaintiff to the defendants, and defendants' evidence is that after the sale they took possession of the saloon and conducted it in the plaintiff's name and under his licenses until the expiration of the state and county license, and that no dramshop licenses were issued to them in their names during this period. Their evidence also is that at the time the trade was made it was agreed and understood by and between them and the plaintiff that the saloon should be run in his name. The plaintiff admitted that the licenses were mentioned and considered in the trade, and confessed, on cross-examination, that he knew the saloon was not closed for an hour after the sale was made; that he knew the defendants were conducting it under his licenses; but denied that there was any agreement that it should be so conducted. There may have been no express agreement that defendants should run the saloon under plaintiff's licenses, but, if such was not the understanding, why were the licenses discussed in the negotiations for the sale, and why was plaintiff willing for defendants to have the licenses, and why did he embrace them in the bill of sale as one of the things sold? Plaintiff's denial that there was such an agreement is inconsistent with the bill of sale, inconsistent with his other testimony, inconsistent with every other scrap of evidence in the record, and inconsistent with the facts and circumstances characterizing the sale, and what was done by the parties immediately after the bargain was made.

2. Section 2992, Rev. St. 1899, prohibits the transfer or assignment of a dramshop (saloon) license. "Transfer" means "the act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter." Bouvier's Law Dict. [Rawle's Rev.] 1133. One of the definitions given the term by Webster is "to make over the possession or control of; to pass; to convey as a right from one person to another." The bill of sale is conclusive evidence of a formal transfer of the license. The transfer of the license was as complete as the transfer of the liquors and other things mentioned in the bill of sale, and was as effectual as if a written assignment had been indorsed on the back thereof, transferring them to the

defendants, signed by the plaintiff; and it was no less a transfer, in fact, because it gave defendants no legal right to sell liquor under them, and was void in law because prohibited by statute. For the reason the transfer was void in law, the learned circuit judge was of the opinion that it furnished no part of the consideration for the sale, and therefore did not affect the validity of the sale, and that the note is valid, unless it was shown by the evidence that it was agreed that the liquors were to be sold by defendants under the license which had been transferred to them by the plaintiff. This view of the law finds support in the case of *Pierce v. Pierce* (Ind. App.) 48 N. E. 490, where there was a bill of sale of saloon goods and fixtures, including license; the transfer of the license being illegal. The contention of the defendant was that the contract was illegal, for the reason the license was transferred along with the saloon goods. The court, at page 483, said: "The answer avers that the 'stock mentioned in the contract consisted of intoxicating liquors then and there for sale,' but it does not aver that, without the license to sell, they were of no value. It is only the 'other property mentioned in the contract' that was without value in the absence of the right to sell under the license. It must be, presumed, nothing to the contrary appearing, that the stock of liquors had some value; and, where there is some consideration to support the contract, it will be upheld. Mere inadequacy of consideration is not sufficient to defeat a contract. *Sibbitt v. Stryker*, 62 Ind. 41. Where a person obtains all the consideration he contracts for, he cannot say there was no consideration. *Laboyteaux v. Swigart*, 103 Ind. 596, 3 N. E. 373. In the case at bar, the appellant having been bound to know that no benefit would accrue to him under the transfer of the license, and there being some consideration to support the contract, it must be presumed he obtained all the consideration for which he contracted." See, also, the case of *Strahn v. Hamilton*, 38 Ind. 57. In the latter case appellant sold appellee a saloon, stock, and fixtures, furniture, etc., and transferred to him his license to sell intoxicating liquors. The transfer of the license was valued at \$100. The court held the contract divisible, and allowed a recovery for the purchase price of the sale, etc., less the \$100, the consideration for the license. The authority of the *Pierce* Case is shaken by the case of *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165, where it is held: "There can be no recovery, as between the parties, on a contract made in violation of a statute, the violation of which is a penalty, although the statute does not pronounce the contract void or expressly prohibit the same." The *Pierce* Case is certainly out of line with about all the deci-

sions of the courts of other states where the common law prevails, and is diametrically opposed to an unbroken line of decisions in this state, which hold that a contract prohibited by statute is void, and that no action or suit can be maintained either at law or in equity upon such contracts, even where the statute does not expressly declare them void. *Live Stock Ass'n v. L. & C. Co.*, 138 Mo. 394, 40 S. W. 107; *Friend v. Porter*, 50 Mo. App. 89-92; *Mitchell v. Branham* (Mo. App.) 79 S. W. 739; *Sedalla Board of Trade v. Brady*, 78 Mo. App. 585; *Swing v. Cider & Vinegar Co.*, 77 Mo. App. 391; *Bick v. Seal*, 45 Mo. App. 475. In *Haggerty v. Ice Mfg. & Storage Co.*, 143 Mo., loc. cit. 247, 248, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647, it is said: "The law will not stultify itself by promoting on the one hand what it prohibits on the other." In *Woolfolk v. Duncan*, 80 Mo. App., loc. cit. 427, the Kansas City Court of Appeals said: "There is no distinction between a contract that is immoral in nature and tendency, and therefore void as against public policy, and one that is illegal and prohibited by law." Substantially the same rulings were made in *Parsons v. Randolph*, 21 Mo. App. 353; *Sumner v. Summers*, 54 Mo. 340; *Shanklin v. McCracken*, 140 Mo., loc. cit. 358-360, 41 S. W. 898; *Porter v. Gaines*, 151 Mo. 560, 52 S. W. 376; *Ullman v. St. Louis Fair Ass'n*, 167 Mo., loc. cit. 284, 66 S. W. 949, 56 L. R. A. 606. In *Patton v. Nicholson*, 16 U. S. 204, 4 L. Ed. 371, it was ruled by Chief Justice Marshall, speaking for the court, that where one citizen sells to another citizen of the United States, at war with Great Britain, a British sailing license, for which a note was taken, the note was void, because given for a license under which it was not lawful for an American citizen to sail. In *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759, it is said: "The general rule of law is that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." In *Penn v. Bornman*, 102 Ill. 523, the court said: "All contracts made in violation of an express statutory provision are inoperative and void, and no recovery can be had upon them." The same doctrine is announced in *Ohio*, etc., *Trust Co. v. Ins. & Trust Co.*, 53 Am. Dec. (Tenn.) 742; *Tatum v. Kelley*, 94 Am. Dec. (Ark.) 717; *Handy v. St. Paul Globe Pub. Co.* (Minn.) 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695. In the latter case it was held that a void contract was not capable of ratification. In *Gerlach v. Skinner*, 55 Am. Rep. (Kan.) 240, it was held that where the consideration for an assignment and transfer of a thing by a mere order to pay another the money due thereon was in part only contrary to a prohibitory statute against fraudulent assignments and conveyances, it vitiated the whole contract. In

Dow v. Taylor (Vt.) 45 Atl. 220, 76 Am. St. Rep. 775, it was held: "If a contract is made in part on an illegal consideration, the whole contract is void." The general rule is well stated in 9 Cyc. 566, as follows: "If any part of a single consideration for one or more provisions be illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which part or which one of the considerations induced the promise."

The written contract of sale is conclusive that the license was one of the things contracted for, and, the consideration being single and indivisible, it seems to us that, part of the single and inseparable consideration being void, the contract as a whole is void, because opposed to positive law enacted by the Legislature concerning dramshop license. But it is contended that the insertion of the word "license" in the bill of sale was without legal effect, and that the mere knowledge of the plaintiff that defendants intended to use it for an illegal purpose did not vitiate the contract. Aside from felonies and crimes, the majority of the decisions hold that the mere knowledge of the seller or the lender that the purchaser or borrower intends to use the article sold or money borrowed for an illegal purpose does not invalidate the contract. *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138; *Howell v. Stewart*, 54 Mo. 400; *Sprague v. Rooney*, 82 Mo. 493, 52 Am. Rep. 393; *Cockrell v. Thompson*, 85 Mo. 510; *Prince v. Church*, 20 Mo. App. 332; *Kerwin & Co. v. Doran*, 29 Mo. App. 397; *Mitchell v. Branham*, 79 S. W. (Mo. App.) 739; *Webber v. Donnelly*, 83 Mich. 469; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Feineman v. Sachs*, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547; *Anheuser-Busch Brewing Association v. Mason* (Minn.) 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580; *McConihe & Co. v. McMann*, 27 Vt. 95; *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617; *Wallace v. Lark*, 32 Am. Rep. 516; *Armfield v. Tate*, 29 N. C. 258; *Bishop v. Honey*, 34 Tex. 245; *Hines v. Bank* (Ga.) 48 S. E. 120. But the doctrine applies to sales of legitimate articles of commerce that may be lawfully sold at the place of sale. It has no application to sales of things prohibited, and when it does apply the courts require but slight aid by the seller, in connection with his knowledge that the purchase is for an unlawful purpose, to defeat the contract. Thus in *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154, where the seller marked packages of intoxicating liquors in order to aid the purchaser in quickly identifying and removing them on arrival at destination, where they could not be lawfully sold, before the officers had their suspicions aroused, it was held such aid for the unlawful purpose of the purchaser as to defeat a recovery. In *Aiken v. Blaisdell*, 41 Vt. 655, and *Feineman v. Sachs*, supra, similar rulings were made. Discussing the question of aid given

by a seller to a purchaser in order to carry out the latter's unlawful purpose, the court, in *Standard Furniture Co. v. Van Alstine*, 51 L. R. A., loc. cit. 891, 22 Wash. 670, 62 Pac. 145, 79 Am. St. Rep. 960, said: "If the vendor has knowledge of the immoral or illegal design of the vendee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover." *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Aiken v. Blaisdell*, 41 Vt. 665; *Schankel v. Moffatt*, 53 Ill. App. 382; *Ralston v. Boady*, 20 Ga. 449; *Webster v. Munger*, 8 Gray, 584; *Adams v. Couillard*, 102 Mass. 167; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, and note to this case in 32 Am. St. Rep. 450; *Beach*, *Modern Law of Contracts*, § 457." In *Smith v. Godfrey*, 8 Fost. 379, 61 Am. Dec. 617, it was held that if it enters at all as an ingredient of the contract between parties that the goods shall be illegally sold, or that the seller shall do some act to assist or facilitate the illegal sale, the contract will not be enforced. In *Tatum v. Kelley*, 25 Ark. 209, it was held that contracts which controvert the law are void, and courts will never lend their aid to enforce them, and, where the intention of one of the parties is to enable the other to violate the law, the contract is void.

The evidence clearly shows that the license entered as an ingredient into the sale, and the plaintiff's evidence shows that he not only knew that defendants intended to use his license in violation of the law, but that he aided them in their unlawful purpose by transferring the license to them and turning his saloon over to their possession, to be conducted by them without license. We think, on plaintiff's theory of the case, this was sufficient aid to render the entire contract void, and that plaintiff should have been nonsuited. Independent of the statute declaring a dramshop license nontransferable, it clearly appears by the dramshop act that such a transfer cannot be lawfully made. The act prohibits the sale of intoxicating liquors in less quantities than three gallons by any person other than a licensed dramshop keeper. It requires the county court to find that the applicant is a law-abiding, assessed, tax-paying, male citizen, over 21 years of age, as a prerequisite to granting the license. It requires that the applicant shall obtain the consent of the taxpaying citizens in the locality to be affected by the dramshop that he may keep the proposed dramshop, and that this consent shall be made known to the county court by a petition signed by the taxpaying citizens. It requires the applicant, as a condition precedent to receiving the license, to give a bond, to be approved by the county

court, conditioned that the applicant shall at all times keep an orderly house, and that he will not sell or give away liquors to minors, etc. It requires that he pay in advance the state and county license tax. The law also provides that protests may be filed against the granting of licenses to keep dramshops. Such protests may be against the dramshop itself, or may be against the keeping of the dramshop by the particular applicant. These provisions show that the granting of licenses is a personal privilege to be awarded by the county court only on petition of the taxpaying citizens, and only to persons possessing the statutory qualifications. For these reasons a license cannot be transferred by the licensee; to do so would be in contravention of the dramshop act; and we will not stultify ourselves by sanctioning a contract wherein the sale and transfer of a dramshop license enters and forms a part of an indivisible consideration.

The judgment is reversed.

GOODE, J. (dissenting). The plaintiff swore that he did not know the bill of sale included the licenses, though he was willing for the defendants to have the licenses if they desired them. Plaintiff testified further that there was no arrangement between him and the defendants that the latter were to conduct the saloon in his name and under his licenses, and that he knew nothing of how the business was conducted after he sold. The court left it to the jury to say whether or not there was an agreement between plaintiff and defendants in regard to what licenses the business should be run under after the sale, and that a verdict should be returned in plaintiff's favor if they found there was no agreement about the matter. In other words, the court ruled that the mere attempt to sell the licenses would not vitiate the entire contract of sale between the plaintiff and the defendants, and prevent the former from recovering on the note in suit, unless both parties intended that the licenses which plaintiff held should be utilized by the defendants in conducting the business. These two instructions will show the court's theory of the case:

"If you believe from the evidence that defendants offered and agreed to pay plaintiff \$3,000 for his saloon business, and plaintiff accepted, and defendants paid part of such price in cash and part in the note sued on, and plaintiff executed and delivered the contract introduced in evidence and marked 'Exhibit B,' and delivered possession of such business to defendants, and there was no agreement between plaintiff and defendants as to the manner in which defendants should do business or under what license it should be run, then your verdict will be for plaintiff, even though you further find and believe from the evidence that thereafter defendants sold liquors at the Joplin Hotel Bar unlawfully or without license

therefor, or sought to do business under the license issued to plaintiff, and plaintiff knew such facts."

"The court instructs the jury that this case is an action for the balance claimed to be due on a certain promissory note given by the defendants, S. H. Sanderson and George H. Thomas, to the plaintiff, Thomas Sawyer. It is claimed by the defendants that the consideration of the note sued on was the sale and transfer of a certain stock of goods with which the Joplin Hotel Bar, in the city of Joplin, Jasper county, Missouri, was stocked, consisting of all goods belonging to plaintiff and used in said saloon, together with the license of said Thomas Sawyer used in connection with the operation of said saloon, and also the good will, etc., to the said saloon; and the court further instructs that if you should find from the evidence that the consideration of the note sued on, or any part thereof, was for the sale and transfer of the saloon or dramshop keeper's license of said plaintiff to defendants, and that it was agreed that intoxicating liquors were to be sold under said license, then your finding should be for the defendants."

The attempt to transfer the licenses was, of course, a failure, but I fail to see how that necessarily vitiated the entire transaction. It is argued that the evidence conclusively shows plaintiff agreed that the defendants should conduct the business under the old licenses, and was a party to an arrangement of that kind. I think that on the evidence the question of whether he did or not was one of fact for the jury, and was properly submitted. Presumably the plaintiff was not concerned as to whether the defendants attempted to continue business under the old licenses, or procured new ones. What he wanted was to sell his property and business, and, if the vendees chose to include in the contract of sale dramshop licenses which were nonassignable, it was a matter of indifference to him. In truth, the word "licenses" may have been inserted in the bill of sale to escape paying the note. The purpose of the statute is not to prohibit the sale of a dramshop license if any one wishes to buy it, but to deny any one but the original licensee the right to keep a dramshop under it. Now, if the plaintiff simply sold the licenses, without becoming a party to a compact that defendants should violate the law by selling whisky under them, or aiding an attempt on their part to do so, he is not to be defeated in this action. As the jury found him innocent of such a compact, I favor an affirmance of the judgment. *Pierce v. Pierce* (Ind. App.) 46 N. E. 482; *Curran v. Downs*, 3 Mo. App. 468; *Mitchell v. Branham*, 104 Mo. App. 480, 79 S. W. 739.

NORTONI, J. I concur with Judge BLAND in all that is said in the very able opinion

prepared by him. It occurs to me, however, that, if there could be any question as to the intention to include and transfer the dramshop licenses, the acts and conduct of the parties at the time clearly demonstrate what that intention was. Plaintiff testifies that he knew the licenses were going into the deal "if they [defendants] wanted them"; that he went out of business on Monday morning, and defendants "immediately" stepped into possession, and the business was never closed or suspended for one moment on account of the transfer of ownership. Plaintiff admits that "in fact there was not even time for an application for a dramshop license" to be made. Plaintiff and defendants both being present, defendants went into possession under the bill of sale, and continued the business instantaneously under the old licenses; no new licenses being taken out or applied for. This action of the parties, then and there at the time, is conclusive to my mind upon the question of their intention, and it is a construction of the contract or bill of sale, clearly showing that all parties intended at the time that defendants should continue the business under the old licenses. It is always proper to look at the conduct of the parties at the time, acting under and in furtherance of the contract, when we seek to arrive at their intention. Such conduct is entitled to great, if not controlling, effect. *Am. & Eng. Ency. Law* (2d Ed.) vol. 17, p. 23; *Patterson v. Camden*, 25 Mo. 13; *Jones v. De Lassus*, 84 Mo. 541; *City of St. Louis v. Laclede Gaslight Co.*, 155 Mo. 1, 55 S. W. 1003. "I know of no better mode of ascertaining this meaning than is shown if all parties acted on a particular meaning." *Union Depot Co. v. Ry.*, 131 Mo., loc. cit. 305, 31 S. W. 808; *Whitehead v. Bank*, 2 Watts & S. 175. "In a case of doubt as to the significance of such term, the contemporaneous practice of the parties to the agreement regarding it (before any controversy arises) sheds light upon their probable meaning and use." *Ellis v. Harrison*, 104 Mo., loc. cit. 279, 18 S. W. 198.

It occurs to me that, whatever may be the testimony in a matter of this kind after a controversy arises, it will not justify a court in losing sight of the construction placed upon the bill of sale by the parties at the time of its execution, and delivery of possession thereunder. When the parties, by their acts and conduct, deliberately place a construction upon their contract, which construction is in consonance with its provisions and in furtherance of its plain terms, the courts are not at liberty to disregard such construction. *Jones v. De Lassus*, 84 Mo. 545; *St. Louis Gaslight Co. v. City of St. Louis*, 46 Mo. 128.

I agree with BLAND, P. J., in reversing the judgment.

SALLEE et al. v. McMURRY.

(St. Louis Court of Appeals. Missouri. June 1, 1905.)

1. REAL ESTATE BROKERS—RIGHT TO COMMISSIONS—BRINGING PARTIES TOGETHER.

A real estate broker earns his commission on producing a buyer able, ready, and willing to buy on the terms fixed by the owner, whether the sale is actually made or not.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 73-81, 91-97.]

2. SAME—PROCURING CAUSE OF CONTRACT.

A real estate broker is entitled to his commission on a sale of land, where he is the procuring cause of the negotiations resulting in a sale, though the agent does nothing more than to bring the parties together for the purpose of negotiating, and the negotiations are conducted and concluded by the principal in person.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 69, 74.]

3. SAME—FAILURE TO COMPLETE CONTRACT NEGOTIATED.

Where a contract for the employment of a real estate broker to procure a purchaser contained nothing as to the terms on which a sale was to be made, and the owner fixed the terms on meeting the purchaser produced by the broker, which the purchaser agreed to, the broker was entitled to his commission, though the owner failed to carry out the contract made with the purchaser.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 69, 74.]

4. SAME—REFUSAL OF PRINCIPAL TO CONVEY.

Where a real estate broker employed to procure a purchaser of land produced a person ready and able to buy, and he and the owner agreed on the terms of purchase, by which the purchaser could have the land at any time before a certain date if the owner did not sell to others, and the purchaser offered to take the land on the terms agreed on, and the sale was defeated by no other cause than the owner's refusal to convey, the broker was entitled to his commission.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 81, 94-96.]

5. SAME—TIME OF EMPLOYMENT.

A broker employed to procure a purchaser for a farm has, in the absence of any provisions in the contract of employment, a reasonable time in which to procure a purchaser, unless his authority is in the meantime revoked.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 10.]

6. SAME—REASONABLE TIME—WHAT CONSTITUTES.

In determining what constitutes a reasonable time within which a real estate broker employed to procure a purchaser for a farm must procure a purchaser, in order to be entitled to his commissions, the facts and circumstances must be considered.

7. SAME—EMPLOYMENT—CONTINUANCE—EVIDENCE.

Where a broker who was employed in the fall of a year to procure a purchaser for a farm called the owner's attention to the employment some time in June following, and the owner stated that he remembered it, and, on being told that the broker would bring a land buyer the next day, stated that he would be at home, there was evidence tending to show that the employment of the broker continued, entitling him to his commission on producing a buyer ready, willing, and able to buy.

8. SAME—EMPLOYMENT—REVOCATION.

A real estate broker employed to procure a purchaser for a farm procured a buyer, who

agreed with the owner on the terms of sale. The buyer was given to a fixed date to purchase unless the owner sold in the meantime. Before the time fixed, the buyer told the owner that he would not buy without also procuring adjacent land, which he could not do. The owner then stated to the buyer that the matter was settled between them. On the same day the buyer told the owner that he would take the farm on the terms agreed. *Held*, that the broker had earned his commission, though no sale was made; the owner's statement to the buyer not constituting a revocation of the broker's authority to procure a buyer.

9. SAME—ACTION FOR COMMISSION—INSTRUCTIONS.

In an action by a real estate broker for a commission for procuring a purchaser for a farm, who had first stated to the owner that he would not buy it, but who on the same day offered to take it on the terms agreed on, an instruction that he would have no right to return and offer to take the farm, for the mere purpose of collecting a commission from defendant, was erroneous, as suggesting a conspiracy between the broker and the purchaser.

Appeal from Circuit Court, Scotland County; E. R. McKee, Judge.

Action by Thomas J. Sallee and another against Wesley McMurry. From a judgment for defendant, plaintiffs appeal. Reversed.

From a careful reading of the record in this case, we become impressed at once that the verdict is for the wrong party. The suit is that of real estate brokers for their commissions. The principal facts are detailed in evidence substantially the same by both plaintiffs and defendant. They are as follows: The defendant owned a farm of 267.40 acres not far from Rutledge, in Scotland county. Some time in the summer or fall of 1901 he agreed verbally with plaintiff Sallee, who was a liveryman, that, if Sallee would procure for him a buyer for said farm at a price of \$40 per acre, he would pay him 5 per cent. commission on the purchase price. About the 1st of the following June, 1902, Sallee interested his coplaintiff, Ferris, in the matter, and proposed that if Ferris, who had recently moved to Scotland county from Rock Falls, Ill., would assist him in procuring a buyer from among some of his former Illinois neighbors or elsewhere for said farm, he would divide the commission on the sale. Ferris assented thereto, and a few days later brought to Sallee a Mr. Jamison, of Rock Falls, Ill., a prospective buyer. This was on Saturday. Sallee called up the defendant over the telephone, who was then at his farm, and reminded him of their verbal contract or conversation had the fall before with regard to the sale of the land, and asked him if he still desired to sell. His answer was to the effect that he guessed so. Sallee then told him that he would bring some men out to see the land the next day. Defendant answered that he would be at home. On Sunday morning, Sallee, his coplaintiff, Ferris, Mr. Jamison, the prospective buyer, and Mr. Hiens, also of Rock Falls, Ill., a former neighbor of Jamison and Ferris, drove to defendant's farm, where defendant

met them and showed them around the place. While they were out on the farm, defendant and plaintiff Sallee separated themselves for a few moments from the remainder of the party, whereupon the following conversation between plaintiff and defendant, as testified to by defendant, took place: "He asked me then, 'Don't you remember the conversation we had last fall at Rutledge?' 'What was the conversation?' I asked. 'You would give me 5 per cent. to bring you a buyer at \$40 an acre.' And I told him I remembered it. We had gotten down within probably thirty steps of the men, and he says: 'Don't mention this before these fellows. I ain't known to them only as a liveryman.' And I says, 'All right.'" Upon further examination of the farm, Mr. Jamison, the prospective buyer, was informed that defendant's brother Joseph McMurry owned the adjoining farm, of 267.40 acres, and that he might possibly be induced to sell. This interested Jamison very much, as he wanted a farm about the size of these two. He had in the neighborhood of \$25,000 in cash which he desired to invest in lands. The party then went to Joseph McMurry's house. He not being at home, they decided to return to Rutledge and communicate with him the following day. On Monday morning Sallee called Joseph McMurry over the telephone. He said he would sell his farm. Thereupon the party drove a second time to the defendant's place, and found defendant plowing corn in his field. They examined both his farm and that of his brother Joseph, and Mr. Jamison practically concluded to take the farm, but he desired to go down into Carroll county with Mr. Hiens and look a little further. He and the McMurrys agreed, however, that if he returned by the 4th day of July he could have the farm of each at \$40 per acre. A payment of \$500 cash was to be made at the time of his return, and the remainder to be paid the 1st of the following March, at which time he was to have possession. The McMurrys reserved the right, however, to sell the land to any other buyer that might come along in the meantime; but, if it was not sold, Jamison might have it upon the terms stated at any time prior to July 4th. About June 25th Joseph McMurry, with whom the plaintiffs had no contract, and who is not a party to this suit, decided not to sell his lands, and so telegraphed Jamison. On that date, in the town of Rutledge, defendant and plaintiff Sallee had a conversation, in which the defendant sought to wriggle out of his commission contract, to which conversation defendant testified as follows: "Then Sallee says, 'Don't you remember the first conversation I asked you last fall if you wouldn't give me five per cent., if I would bring you a buyer at \$40?' And I told him I did remember of the conversation. 'Well,' he says, 'Now you are backing out of the trade.' I says, 'I won't bind myself to sell it at \$40.'" And further on he explains as

follows: "I told him I would not bind myself to sell it at \$40; that the old man had insisted that the odd \$100 be knocked off, to make it an even price of \$21,000 on both places, and that, if I had to do that—if I should give them a contract of 5 per cent. commission, and make a trade with the old man, and knocked that off—would they be willing to take \$444 out of the 5 per cent., and they said they wouldn't." That Sallee advised him to stand pat at \$40—not knock off anything—and that old man Jamison would take the land at that price. On June 28th or 30th Mr. Jamison returned from Illinois to consummate the deal for the land. He and plaintiffs, Sallee and Ferris, drove to defendant's farm, where they met defendant and his brother Joseph. Mr. Jamison informed them that he had come to take the land and make payment thereon. Joseph McMurry told him he had concluded not to sell. He and Jamison had some conversation, and the matter was dropped so far as Joseph McMurry's farm was concerned. Defendant testified that he then asked Mr. Jamison if he wanted his farm without that of his brother, to which Mr. Jamison answered that he did not; that he wanted both or none at all. Whereupon defendant claims he said to Jamison: "This ends the matter between you and me, then." This conversation is alleged to have occurred at his wood pile, in the presence of plaintiffs. Both plaintiffs and Jamison say it did not occur at all. Jamison, however, asked permission to drive down on his farm and look at the drainage, which was granted, and defendant here testified that he said: "You may go and look for information, but not to buy." Both plaintiffs and Jamison say no such remark was made, and defendant's hired hand, who was present, did not hear it. Thereupon Jamison, the two plaintiffs, and Joseph McMurry drove down and looked at the bottom lands. While looking at the bottom lands, and driving back to the wood pile, where defendant was at work, Sallee and Ferris persuaded Jamison that he could take defendant's farm at the agreed price as an investment, and make some money out of it. Jamison concluded that it was the better piece of land, of the two farms, and that he would take it. They returned to the wood pile and notified defendant that Mr. Jamison had concluded to take his farm at the agreed price, and Mr. Jamison took from his pocket a bank draft for \$1,000; saying that he was to pay only \$500 on the one farm, but, as the brother had backed out, he would pay the entire amount on this farm. The defendant took the draft and looked at it, saying he supposed it was all right, but that he would not sell his farm. Thereupon Sallee, the agent, called his attention to the several conversations whereby he was to have 5 per cent. commission for producing a buyer, which conversation defendant admitted, but said, "You are not a real estate man—you

are a liveryman—and I will not pay you any commissions,” and refused to pay commissions on the sale. Defendant testified to the following conversation which occurred between himself and plaintiff Ferris just prior to Jamison driving down on the bottom to look at the drainage: “Mr. Ferris says: ‘You remember the conversation you had with Mr. Sallee last fall, and you remember you said you would not raise the price on Mr. Jamison before the 4th day of July. Now you refuse to sell.’ I told him I did not refuse to sell.” So we see up to this time there was no refusal to sell, according to defendant’s testimony. Defendant then testified that, as the party went to leave him, he opened the gate, and, as they drove off, “Tom Sallee says, ‘I have produced a buyer.’ I says: ‘You might not understand it, and made it as plain as I could when you left here before [meaning when they parted to drive on the bottom and look at the drainage] that you could not look at this place to buy,’ and says, ‘If you did not understand it then, I want you to understand it distinctly that if you ever have had authority to sell this farm to any one, or to price it to anybody, you never shall have authority to.’ He says, ‘Now you withdraw it?’ I says, ‘Yes.’ The old man says, ‘I understand it.’ I says, ‘Some people have got pretty thick heads, that you can’t beat anything into them.’” All of the evidence shows that Mr. Jamison had at the time \$18,000 in the bank, on deposit, and was ready, able, and willing to buy this farm, and was prevented from so doing by the flat refusal of the defendant to sell.

Defendant’s contentions are that, while he agreed to pay Sallee a commission in a conversation had the summer before, the contract had expired, and that it had never been renewed by him. He was therefore not obligated to pay; and, second, that he revoked the authority of the agent by his statement to Mr. Jamison in the presence of the agent, upon Jamison saying to him that he did not want one farm without the other: “That settles it, Mr. Jamison, between you and me. That is what I wanted to know”—and by saying to Jamison and the others that they might look at the farm for information, but not to buy, when Jamison drove to the bottom to look at the drainage, which statements plaintiffs and Jamison say he did not make.

The court instructed the jury on the part of the plaintiffs that if the jury believed from the evidence that defendant contracted to pay plaintiffs 5 per cent. commissions for producing a buyer for his farm at \$40 per acre, and that plaintiffs produced a buyer before said authority was revoked by defendant, McMurry, and within a reasonable time, while said contract was still in force, and such buyer was ready, able, and willing to buy, and defendant refused to sell, then the finding should be for the plaintiffs. The

court refused the following instructions asked by plaintiff, to the refusal of which exceptions were saved, and complaint thereof is made here:

“(7) Gentlemen, if you believe from the evidence in this cause that the defendant contracted and agreed with the plaintiff Sallee that, if he would sell his farm at \$40 per acre, he would give him a commission of 5 per cent. on the amount of the sale, and if you believe that said Sallee did so furnish a purchaser ready, able, and willing to take said land at said price, then it was not necessary that said Sallee should negotiate the terms of said sale; it was sufficient that he produce a man who was able and willing to comply with the terms that the defendant imposed; and, if you find that he absolutely refused to make the sale, then said Sallee was entitled to his commission, and your findings should be for the plaintiffs.

“(8) Gentlemen, if you believe from the evidence in this cause that the defendant, McMurry, contracted and agreed with the plaintiff Sallee that, if he would sell his land for the price and sum of \$40 per acre, he would pay to him the sum of 5 per cent. commission on the total amount of the sale, and if you further believe that the plaintiff Sallee produced to him a purchaser, or was the cause of one being produced, who was ready, able, and willing to take the land at said price, but the defendant, McMurry, refused to perfect said sale, and if you further believe that this coplaintiff is the one-half owner of the said commission, then you should find for the plaintiffs, as though said sale had been made the full amount of said 5 per cent. commission on said purchase price.

“(9) It was not necessary, gentlemen, that the plaintiff Sallee should have negotiated the terms of said sale with the purchaser, nor need he actually produce the purchaser in person, if he was the procuring cause of the purchaser being produced to the defendant; and, if you believe the purchaser so produced was able and willing to take the land and pay for it at the price and sum of \$40 per acre, then said Sallee was entitled to commission, provided defendant contracted with him as set forth in above instructions.”

There was some evidence on the part of the defendant to the effect that one Murray first told Jamison of defendant’s farm, and that he was thinking of going to see it when taken in charge by the plaintiffs, and negotiations commenced by them. The above instructions 8 and 9 were predicated upon this evidence, and they, as well as No. 7, should have been given.

The following instruction (No. 10, refused) should have been given:

“(10) Gentlemen, if you believe from the evidence in the cause that the defendant, McMurry, employed the plaintiff Sallee to sell his farm for him, and agreed with him

if he would sell it for \$40 per acre he would give him a commission of five per cent. on the total amount of the sale, then said Sallee would have been entitled to reasonable notice, taking into consideration the condition and situation of the parties, of the revocation of said agency, and it would be too late for the defendant, McMurry, to revoke it or terminate it after the negotiations with the purchaser had begun, which were finally consummated, if you so believe they were."

It was error to give defendant's instructions Nos. 11 and 12, as follows:

"(11) The jury are instructed that even though they may believe from the evidence in the cause that defendant, McMurry, agreed with plaintiff Sallee to pay him 5 per cent. commission for producing a purchaser for his farm, and even though you shall further believe that while said contract was existing said Sallee produced witness Jamison, who was able to purchase and pay for said farm, still if you shall further believe from the evidence that said Jamison told the defendant that he would not take his farm, without the farm of the other brother went with it, and that thereupon the defendant informed Jamison and the plaintiffs, or either of them, in the presence of the others, that the trade was off between them and that the farm was not for sale, then your verdict should be for the defendant, even though you may believe that within a short time said Jamison returned and offered to take the farm.

"(12) The jury is instructed that if you shall believe from evidence in the cause that on the 30th day of June, 1902, at the wood pile, Jamison informed the defendant that he would not purchase his farm without also getting Joe's farm, and left with that understanding between himself and the defendant, then Jamison and the plaintiffs were bound by such understanding, and he would have no right to return and offer to take defendant's farm for the mere purpose of collecting commissions off the defendant."

These two instructions treated the matter of Jamison's stating that he did not want one of the farms without the other as having terminated the agency to sell the lands, and for this reason are erroneous.

The trial resulted in a verdict for the defendant. Plaintiffs appeal here for review.

Smoot, Boyd & Smoot, for appellants. J. M. Jayne and Mudd & Pettingill, for respondent.

NORTONI, J. (after stating the facts). It is the law that a real estate broker earns his commission when he produces and introduces to his principal a buyer who is able, ready, and willing to buy upon the terms at which the broker is authorized to sell. *Brown v. Smith* (Mo. App.) 87 S. W. 556; *Goodson v. Embleton*, 106 Mo. App. 77, 80 S. W. 22; *Finch v. Trust Co.*, 92 Mo. App.

263; *Finley v. Dyer*, 79 Mo. App. 604; *Huggins v. Hearne*, 74 Mo. App. 86; *Chipley v. Leathe*, 60 Mo. App. 15; *Hayden v. Grillo's Adm'r*, 42 Mo. App. 1; *Id.*, 35 Mo. App. 647; *Id.*, 26 Mo. App. 289; *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683. And in cases where the principal refuses to sell upon the broker having produced and introduced to him a buyer who is ready, able, and willing to purchase upon the terms proposed, the law regards the sale as made, in so far as the agent and his commissions are concerned, upon the theory that the law does not require that to be done by the agent which is either unreasonable or impossible. But having produced a qualified buyer, he has fully performed on his part, as it is not within his power to force the proprietor to convey the land, and in such case the law declares the commissions earned and the sale made on the part of the broker. *Brown v. Smith* (Mo. App.) 87 S. W. 556; *Goodson v. Embleton*, 106 Mo. App. 77, 80 S. W. 22; *Real Estate Co. v. Ruhlman*, 68 Mo. App. 503; *Wright & Orison v. Brown*, *Id.* 507; *Reeves v. Vette*, 62 Mo. App. 440; *Hart v. Hopson*, 52 Mo. App. 177; *Stinde v. Blesch*, 42 Mo. App. 578; *Hayden v. Grillo's Adm'r*, *Id.* 1; *Harwood v. Diemer*, 41 Mo. App. 48; *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683.

It is also well settled that the agent is entitled to his commissions if he is the procuring cause of the negotiations which resulted in the sale, even though the agent does nothing more than bring the parties together for the purpose of negotiating, and the negotiations are afterwards conducted and concluded by the principal in person. *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683; *Timberman v. Craddock*, 70 Mo. 638; *Tyler v. Parr*, 52 Mo. 249; *Bell v. Kaiser*, 50 Mo. 150; *Wright & Orison v. Brown*, 68 Mo. App. 577; *Brennan v. Roach*, 47 Mo. App. 290.

In the case at bar the contract of employment contained nothing as to the terms upon which the sale was to be made by Sallee, and, of course, in the absence of proof, the law would presume the terms to be cash. But be this as it may, the principal can fix the terms to suit himself upon meeting the purchaser produced by the broker, and can even vary the terms, if he sees fit, that were originally provided between himself and the broker, and, upon doing so, would be obligated to pay the broker commissions upon his failure thereafter to carry out the contract in accordance with the terms agreed upon between himself and the prospective buyer. *Wright & Orison v. Brown*, 68 Mo. App. 577; *Brennan v. Roach*, 47 Mo. App. 290; *Jones v. Berry*, 37 Mo. App. 125; *Goffe v. Gibson*, 18 Mo. App. 1.

In the case at bar the brokers produced the purchaser, and he and the respondent agreed upon the terms of purchase, upon

which Jamison could have the farm at any time before the 4th day of July, provided respondent did not sell it to other parties. Jamison returned in due time and offered to take the place in accordance with the terms theretofore agreed upon, and the sale was defeated by no other cause than the flat refusal of the defendant to convey. Upon this state of facts, appellants would be entitled to recover their commissions if the jury find that they were employed as they alleged, and of which employment there seems but little or no doubt, unless the agency had been terminated before respondent's refusal to consummate the sale. If the appellants were employed as agents or brokers for the sale of the land, as it seems almost beyond controversy they were, then the employment would continue for a reasonable time, at least, or until revoked. In a contract of employment to sell real estate, the broker is universally entitled, in the absence of the revocation of his authority, or a time limit to his employment, to a reasonable time in which to find a purchaser. *Henderson v. Vincent*, 84 Ala. 99-100, 4 South. 180; *Biddison v. Johnson*, 50 Ill. App. 173; *Lane v. Albright*, 49 Ind. 275; *Stedman v. Richardson*, 100 Ky. 79, 37 S. W. 259; *Carroll v. Pettit*, 67 Hun. 418, 22 N. Y. Supp. 250; *Sibbald v. Iron Co.*, 83 N. Y. 384, 38 Am. Rep. 441; *Leslie v. Boyd*, 124 Ind. 320, 24 N. E. 887; 9 Cyc. 613; 1 Am. & Eng. Ency. Law (2d Ed.) 1220. "In deciding whether an undertaking has been performed within reasonable time, the material difficulties and hazards attending it, and the amount of diligence used and frustrated attempts at performance, should be considered, * * * and that it is a question of fact for the jury when it depends upon facts extrinsic to the contract and which are matters in dispute." 9 Cyc. 613.

In determining what would be a reasonable time for complying with a contract of this kind, it must be kept in mind that farms are slow in selling. Purchasers are not found every day, and the facts and circumstances surrounding the transaction usually are such that some little time is required in which to find a buyer and then work up a sale. In short, the facts and circumstances of each case should be considered in determining what is a reasonable time therein. *Howe v. Bristow*, 65 Mo. App. 624. At any rate, it is in evidence in this case, and it seems beyond dispute, as both parties testified substantially the same about the conversation on the evening before the broker drove the purchaser to respondent's farm, that Sallee called the attention of respondent to the conversation about the sale of the farm which he had had the fall before. Defendant said he remembered it, and, upon being told that he would bring some land buyers out the next day, said he would be at home, all of which tends to show that the contract in this case was then being acted upon by both parties; and on the following day, on de-

fendant's farm, when Sallee related the conversation of the fall before to respondent, he did not repudiate any part of it. All of the conversation tends to show that, if a contract existed at all, they were then acting upon it. If the contract of agency existed, there is no doubt but what the respondent had the right to terminate it, as, where no time for the continuance of a contract of this kind is fixed, either party is at liberty to terminate it at will, subject only to the requirements of good faith and reasonable notice. *Sibbald v. Iron Works*, 83 N. Y. 378, 38 Am. Rep. 441; *Jones v. Berry*, 37 Mo. App. 125; *Gaty v. Sack*, 19 Mo. App. 470.

The law is well settled, however, by numerous adjudicated cases, that the principal will not be permitted to terminate the agency without cause in the very midst of negotiations which the agent has brought about by the expenditure of time, labor, or money, to which he has been encouraged and moved by the principal. The principal is no more permitted to terminate the agency in the midst of negotiations, and thus defeat the agent's compensation by refusing to convey, upon the ground that he has terminated the agency, while the negotiations were pending in their last stages, than he is permitted to terminate the agency under like circumstances and defeat the agent's compensation when he takes the negotiations out of the agent's hands and completes the sale on his own account. The policy of the law is the same in either case—to protect the agent and see that he is compensated for the services he has rendered. It would be highly unjust, indeed, to permit the employment of agents, and their encouragement to work and expend money and time in the service of their principals, and then permit the principals to defeat them of their expected compensation by terminating the agency, when the purchaser was himself almost ready to close the bargain. 1 Amer. & Eng. Ency. Law (3d Ed.) 1217, says: "Of course, if the authority has been executed, it cannot then be revoked." And again, at page 1217, says: "The agent cannot be deprived of the fruits of his labors, and, when a sale is virtually effected by a duly authorized agent, if the principal takes the matter into his own hands, he is still liable for the commission to his agent, since the latter is the procuring cause." *Knox v. Parker*, 2 Wash. 34, 25 Pac. 909; *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Green v. Cole*, 103 Mo. 70, 15 S. W. 817; *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; *Blumenthal v. Goodall*, 89 Cal. 251, 28 Pac. 906; *Livezey v. Miller*, 61 Md. 836. In the case last cited the Supreme Court of Maryland said: "It is also the established law that after negotiations begun through a broker's intervention, having virtually culminated in a sale, the agent cannot be discharged, so as to deprive him of his commissions. If the agent is the procuring cause of the sale made, he will be

awarded his commissions." In *Knox v. Parker*, 2 Wash., loc. cit. 37, 25 Pac. 910, the court said: "And if at the time of the revocation the agent should have a pending treaty with a proposing purchaser, who afterwards, by a continuance of the same negotiations with the principal himself, actually buys the property, the agent would have fully earned his commission, since the principal in such a transaction cannot arbitrarily cut off the agent's authority, in the midst of what would be a successful agency, and then, although himself taking advantage of the agent's services, refuse him compensation." The Supreme Court of New York said: "Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with a view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal." *Sibbald v. Iron Co.*, 83 N. Y., loc. cit. 384, 88 Am. Rep. 441.

It seems clear to us that the mere fact that the prospective buyer, Jamison, said in the conversation at the wood pile that he did not want defendant's farm without that of his brother, and that defendant replied to him that "This ends the matter, then, between you and me," cannot operate to terminate the agency of the plaintiffs in this case, even though it was said in their presence and they heard it, as such remarks were evidently only a part of the negotiations. It is an everyday occurrence with a prospective buyer, when he fully intends to buy, to say that the article does not suit him; that he don't believe he wants it, etc.; and such statements cannot be treated, in cases of this kind, as terminating all negotiations. There was nothing said by the respondent to the appellants which tended to terminate their agency, if they had one, and the remark which the defendant says he made—that they could go down on the bottom and look at the land for information, but not to buy—certainly would not operate at that time as a termination of the agency, nor as a revocation of authority. Plaintiffs had performed their services, and were still working to consummate the deal; and the law would not permit the trade to be called off by the defendant at the last moment, and their commissions defeated thereby. Having produced a purchaser to whom respondent had given every assurance of his willingness to sell, they had the undoubted right and it was their duty to use every effort to induce him to buy, at least so long as he remained upon the premises, even though he had expressed himself as unwilling; and, upon his finally agreeing to do so, it was respondent's duty to sell.

The twelfth instruction given on behalf of the respondent was bad for a second reason.

It assumes a fact not in proof, and tells the jury that "he would have no right to return and offer to take defendant's farm for the mere purpose of collecting commissions off of defendant." It is palpable that Jamison, the purchaser, could have no commissions in the trade. The instruction is therefore suggestive of a conspiracy between the appellants and the purchaser to mulct respondent for commissions, of which there was neither evidence, nor a fact from which a reasonable inference to that effect could be drawn, in the record. It stands out in the case as an unwarranted imputation of bad faith and conspiracy on the part of appellants and the purchaser. Instructions of this character should be avoided in cases when not warranted by the evidence. *Beauchamp v. Higgins*, 20 Mo. App. 514; *Johnson v. Kahn*, 97 Mo. App. 628, 71 S. W. 725.

For the reasons given, the judgment is reversed, and the cause remanded to be proceeded with in accordance with the views herein expressed. All concur.

OYLER v. QUINCY, O. & K. C. R. CO.*

(Kansas City Court of Appeals. Missouri.
May 22, 1905.)

1. RAILROADS—INJURY TO LIVE STOCK—OWNERSHIP OF ROAD — SUFFICIENCY OF EVIDENCE.

In an action against a railroad for injury to live stock alleged to have been struck by a train on defendant's road, where plaintiff, after introducing some evidence of the ownership of the road, was permitted thereafter throughout the trial to assume as proved in the examination of witnesses the fact of defendant's ownership of the road without objection, and the defendant offered no evidence and gave no intimation of purpose to resist the action on the ground that it did not own the road, no further proof of defendant's ownership of the road was necessary.

2. SAME—KILLING BY TRAIN.

Where recovery is sought under Rev. St. 1899, § 1105, authorizing the recovery of double damages for stock killed by trains, the fact that the stock was killed by a train is not required to be proved by direct evidence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1608½.]

3. SAME—FAILURE TO FENCE—CONSTRUCTION OF STATUTE.

Under Rev. St. 1899, § 1105, authorizing the recovery of double damages for injury to live stock caused by railroad trains and the failure of railroad to maintain lawful fences, where the lands adjoining a railroad's right of way are not inclosed by a lawful fence, and the stock of a stranger reaches the railroad over them, the railroad is liable for injuries inflicted by its trains if its right of way is not inclosed by a lawful fence and the stock enters on that account.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1430.]

4. SAME.

Rev. St. 1899, § 1106, authorizing the recovery of damages against railroads for injury to live stock caused by their failure to maintain lawful fences along their right of way, where the injuries are inflicted by the animals being

*Rehearing denied June 26, 1905.

frightened and running against a fence or into a culvert, bridge, slough or mire, or other object along the line of road, is not an exclusive remedy, and, if a railroad fails to erect and maintain a lawful fence, and stock, through such breach of duty, strays on the right of way and is injured by running along over the ties and other hard substances and material of the track, the owner may recover.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1427, 1428.]

5. SAME.

Where the stock in question did not reach the defendant's right of way from the lands of an adjoining owner, but directly from the highway, a contention that recovery could be had under neither section 1105 nor section 1106, Rev. St. 1899, because they are intended for the benefit of the proprietors of adjoining lands, and not for the benefit of owners of trespassing animals, was untenable.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1429, 1431.]

Appeal from Circuit Court, Grundy County; Paris C. Stepp, Judge.

Action by F. S. Oyler against the Quincy, Omaha & Kansas City Railroad Company. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

Hall & Hall and J. G. Trimble, for appellant. Harber & Knight, for respondent.

JOHNSON, J. This suit originated before a justice of the peace in Taylor township, Grundy county. The complaint is in three counts. In the first, double damages are sought under section 1105, Rev. St. 1899, for the loss of a mule killed by one of defendant's trains. In the second, single damages are asked for injuries sustained by another mule in its efforts to escape the same train. The third count is founded upon a cause of action assigned by Dr. H. W. Oyler to plaintiff, based upon a claim for double damages for the killing of a horse by another of defendant's trains. It is alleged the two mules entered upon defendant's right of way on the night of December 1, 1903, by jumping over an insufficient cattle guard maintained in Taylor township half a mile east of the town of Brimson at a point where the defendant's railroad is crossed by a public road. The horse is stated to have entered the right of way during the night of ———, 1902, by jumping over a cattle guard maintained at another public road crossing in the same township, and also charged to have been insufficient to turn stock. At the trial in the circuit court, upon appeal, plaintiff recovered a verdict upon each count. Judgment was entered upon the first and third counts for double damages, and upon the second for the amount of the verdict. Defendant appealed.

It is claimed plaintiff failed to offer any evidence tending to show that defendant owned the railroad mentioned. The proof of this fact, the burden of which was upon plaintiff, though meager, was sufficient. After it was introduced, plaintiff's counsel throughout the trial was permitted to assume as proven, in the examination of witnesses, the

fact of defendant's ownership of the road, without objection. Defendant offered no evidence, and gave no intimation of purpose to resist the action on this ground. Under such circumstances, full proof should not be exacted. *Geiser v. Ry. Co.*, 61 Mo. App. 462; *Keltenbaugh v. Railroad*, 34 Mo. App. 148; *Lindsay v. Railroad*, 36 Mo. App. 51.

It is contended that the peremptory instruction asked by defendant should have been given. The claim is made that the evidence fails to show that any of the animals mentioned in the complaint was struck or injured upon the railroad. There was no direct proof offered, as the accidents both occurred during night, and, so far as known, were not witnessed by any one; but the facts and circumstances detailed in evidence very strongly indicated that the two animals killed were struck by defendant's trains, and that the one injured received its injuries from running upon the ties and other component parts of defendant's road in fleeing before the approaching train. Defendant says that, as section 1105 provides for the imposition of a penalty in addition to compensatory damages, it is incumbent upon the plaintiff to prove by competent evidence the liability of defendant for the injuries sustained. This is true, but the character of proof required is the same in this class of cases as in others. The existence of ultimate facts may be found from other facts and circumstances in proof. *Jones v. Ry. Co.*, 52 Mo. App. 381; *Brown v. Railroad*, 104 Mo. App. 691, 78 S. W. 273.

From the evidence adduced it appears that the three animals entered the right of way from public roads by passing over defectively constructed cattle guards. Their subsequent movements were plainly indicated by the tracks and other marks left by them. The two mules proceeded along the right of way several hundred yards from the place of entry. During the night the engine of a passing train was heard to sound the stock signal. The mules turned and ran upon the track, and in close proximity thereto, before the approaching train. One of them was found the next morning beside the track with three legs broken; the other escaped into the public road with injuries sustained from running at high speed upon the hard substances of the roadbed.

The injury to the horse was also clearly traced to a collision with one of defendant's trains, and its presence upon the track shown to have been occasioned by its passage from the public road over a defectively constructed cattle guard. The evidence was sufficient to go to the jury.

Defendant further says the demurrer to the evidence should have been sustained, for the reason that, as it was charged in the complaint, and shown in proof, the railroad, at the points of entry, ran through inclosed lands, and plaintiff was not an adjoining proprietor, no recovery could be had, because sections 1105 and 1106, Rev. St. 1899, are in-

tended for the benefit of the proprietors of the adjoining lands, and not for the benefit of owners of trespassing animals. A sufficient answer to this is that the animals did not reach the right of way from the lands of an adjoining owner, but directly from the public highway. It was defendant's duty under the statute to interpose a cattle guard between its property and the road, reasonably sufficient to turn stock, and for a breach of this duty it became liable to any one whose stock is injured thereby. Moreover, the duty to fence the right of way through inclosed fields does not inure solely to the benefit of the adjoining owner. If the lands of such owner are not inclosed by a lawful fence, and the stock of a stranger reaches the railroad over them, the company is liable for injuries inflicted by its trains if its right of way is not inclosed by a lawful fence and the stock enters on that account. *Reed v. C. & A. Ry.* (Kan., not yet officially reported) 87 S. W. 64; *Rinehart v. Ry. Co.* (Mo. App.) 80 S. W. 910.

Special objections are urged against the allowance of a recovery under the second count. It is conceded that, as the mule did not come into contact with a passing train, an action for double damages does not lie under section 1105. Counsel for defendant say that the action cannot be maintained under section 1106, for several reasons, as follows: Cattle guards are not required to be erected and maintained under this section; recovery may be had only in case the stock goes upon the right of way at a place where it is not inclosed by a lawful fence on both sides, and will not be permitted without it is shown the injuries were inflicted by the animal being frightened and run against the fence or into a culvert, bridge, slough or mire, or other object along the line of road. And on this last point defendant calls attention to the fact that the mule was not injured from any of these causes specified in the statute, but the charge is that it was frightened and pursued "over the ties and other hard substances and material of said railroad track, and caused to become sore, lame, and sick, and unable for work and use." The remedies afforded under these sections of the statute relating to the recovery of compensatory damages are not exclusive, but cumulative. Independent of them, a cause of action exists for the enforcement of common-law remedy in favor of the owner of stock negligently injured. The negligence pleaded and proven in such cases may be either actual or constructive, by which latter term is meant the failure to perform the duty imposed by statute. If the company fails to erect and maintain the kind of inclosure required by law, and through such breach of duty stock strays upon the right of way and is injured by running along the hard substances of the roadbed in escaping from approaching trains, such facts constitute neg-

ligence, and will support a recovery. *Gorman v. Railroad*, 26 Mo. 441, 72 Am. Dec. 220; *Hill v. Railroad*, 49 Mo. App. 520, and cases cited; *Hill v. Railroad*, 121 Mo. 477, 26 S. W. 576.

Finally, it is said the demurrer should have been sustained as to the third count, because it was disclosed by the evidence that the horse was struck by the train, if at all, at a place where the road ran through an incorporated town, and not required by law to be fenced. We do not so understand the evidence. The points of entry upon the right of way and of collision with the train were both outside of the town limits. The demurrer to the evidence was properly overruled.

Objections made to the instructions given are answered in the views expressed. The case was fairly submitted.

Judgment is affirmed. All concur.

PAYNE v. QUINCY, O. & K. C. R. CO.*

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. RAILROADS — KILLING OF LIVE STOCK—PLACE OF ACCIDENT—EVIDENCE.

In an action against a railroad for killing plaintiff's hogs, the statement alleged that defendant owned and operated a railroad over and across certain lands belonging to plaintiff lying in the township where suit was brought. The constable's return recited that the writ was served on defendant's station agent in that township. Plaintiff testified that he was owner of the land described. The fact of the land's location in the same township was not controverted, and the evidence showed that the killing occurred where the railroad ran through the plaintiff's land. *Held* sufficient to show that the killing occurred in the township where suit was brought.

2. SAME—OWNERSHIP OF ROAD—EVIDENCE.

Where plaintiff testified that the defendant's railroad ran through his land, and defendant gave no intimation of purpose to resist the action on the ground that it did not own or operate the road, further proof of its ownership of the road was unnecessary.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 867.]

3. SAME—MANNER OF KILLING—EVIDENCE—STATUTE.

Where the action was based on Rev. St. 1899, § 1105, authorizing the recovery of double damages for stock injured or killed by trains, the fact that the hogs were killed by a train need not be proved by direct evidence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1608½.]

4. SAME—QUESTION FOR JURY.

Where the defective condition of the fence separating plaintiff's feed lot in which he kept his hogs from defendant's right of way was shown, and it was also shown that the hogs reached the railroad track by passing through the defective fence, a case for the jury was made out.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1429, 1631-1633.]

Appeal from Circuit Court, Sullivan County; John P. Butler, Judge.

*Rehearing denied June 28, 1905.

Action by Reuben Payne against the Quincy, Omaha & Kansas City Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. G. Trimble and Wilson & Clapp, for appellant. Wattenbarger & Bingham and R. E. Ash, for respondent.

JOHNSON, J. This suit was begun before a justice of the peace in Penn township, Sullivan county, to recover double damages under section 1105, Rev. St. 1899, for the killing of four hogs. Plaintiff had judgment in the circuit court, and defendant appealed.

Complaint is made of the refusal of the trial court to instruct the jury to find for defendant. It is said the evidence failed to show that the killing occurred in the township where suit was brought. The statement alleged that defendant owned and operated a railroad "over and across the following described lands belonging to plaintiff, lying and being situated in Penn township, Sullivan county, Missouri, to wit, east half of the northwest quarter, and the north half of the northeast quarter, of the southwest quarter of section 25, township 63, range 19." The constable's return recited that the writ was served on defendant's station agent in Penn township. Plaintiff testified that he was the owner of the land described in the petition. The fact of its location in Penn township was not a subject of controversy, and, as the killing occurred where the railroad ran through this land, its location in Penn township was sufficiently proven. *Kerr v. Q., O. & K. C. R. R. Co.* (not yet officially reported) 87 S. W. 596.

Further, it is said plaintiff failed to prove defendant's ownership of the railroad. The following is the testimony of plaintiff on this point: "Q. I will get you to state if the defendant's railroad runs through your farm. A. It does." As defendant gave no intimation of purpose to resist the action upon the ground that it did not own nor operate the road, further proof was unnecessary. *Oyler v. Railroad Co.* (not yet officially reported) 88 S. W. 162; *Kerr v. Railroad*, supra; *Keltenbaugh v. Railroad*, 34 Mo. App. 148; *Geiser v. Ry. Co.*, 61 Mo. App. 459; *Lindsay v. Railroad*, 36 Mo. App. 51.

Also, it is urged that plaintiff failed to prove that the hogs were struck by a train. No direct evidence was introduced, for no one saw the killing; but the facts and circumstances disclosed very strongly pointed to a collision between the animals and one of defendant's trains as the cause of injury. The ultimate fact to be found in such cases, as in others, is not required to be proven by direct evidence, but may be inferred from other facts and circumstances. The defective condition of the fence separating plaintiff's feed lot in which he kept his hogs from defendant's right of way was shown, as was also the fact that the hogs reached the rail-

road track by passing through the defective fence. A clear case for the consideration of the jury was made out, and therefore no error was committed in overruling the demurrer to the evidence. No other is claimed.

The judgment is affirmed. All concur.

EVERETT v. BARSE LIVE STOCK COMMISSION CO.

(Kansas City Court of Appeals. Missouri. June 5, 1905. On Rehearing, June 28, 1905.)

1. AGISTER'S LIEN—LOSS—TAKING OF CATTLE BY OWNER.

One does not lose his right to an agister's lien by the owners of the cattle taking them from his pasture without his knowledge or consent.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 54-56.]

2. SAME—TAKING CATTLE TO OTHER STATE.

Where, in another state, under the rule there obtaining, one acquires an agister's lien, superior, though subsequent in point of time, to a chattel mortgage, such priority or the right to enforce it is not lost by the cattle being shipped to Missouri and thence to Illinois, and there sold, though in neither of such states does such rule as to priority of liens obtain.

3. SAME—ENFORCEMENT IN OTHER STATE.

The right acquired in another state, where the rule obtains that an agister's lien, though subsequent, is superior to a chattel mortgage, will be enforced in Missouri, though such rule does not there obtain.

4. SAME—CONVERSION.

One having an agister's lien superior to a prior mortgage may, on the owners of the cattle taking them without his knowledge and consent and turning them over to the mortgagee, recover for conversion of an innocent commission merchant who sells them for the mortgagee and turns over the proceeds to him.

On Rehearing.

5. SAME—EFFECT OF CONTRACT.

An agister's lien under the statute for a reasonable charge is not affected by a contract between the owner and the agister that the cattle are to be pastured in a manner, for a time, and at a price agreed on.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 54-56.]

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by Palmer L. Everett against the Barse Live Stock Commission Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Haff & Michaels and D. C. Ketchum, for appellant. Beardsley, Gregory & Kirshner, for respondent.

ELLISON, J. This is an action for the amount of a bill for pasturage of a lot of cattle. The judgment in the trial court was for the plaintiff. The facts necessary to state for an understanding of the points involved are these: The plaintiff had the cattle in possession from the owner, and had an unpaid claim for pasturage. Before the cattle were turned over to plaintiff to pasture by the owner, the latter had mortgaged them

to a commission company known as the McKee Company. The owner took the cattle from plaintiff's pasture without his knowledge or consent, and without paying his agister's bill, and shipped them to the mortgagee, the McKee Company. The latter company shipped the cattle to defendant company at the National Stockyards, in Illinois, who sold them and remitted the money to the McKee Company, who shortly thereafter failed in business. Plaintiff then sued the company for his unpaid bill for pasturage. The owner of the cattle and plaintiff resided in the state of Kansas. The cattle were in that state, and were pastured there, and there was where possession was taken from plaintiff. The mortgage was given upon them in that state and properly recorded there.

In this state there is no doubt that a prior chattel mortgage takes precedence of a subsequent agister's lien. *Stone v. Kelley*, 59 Mo. App. 214; *Baskin v. Wayne*, 62 Mo. App. 515; *Miller v. Crabbe*, 66 Mo. App. 660; it was so decided by the St. Louis Court of Appeals. *Lazarus v. Moran*, 64 Mo. App. 239. And so the law is in Illinois, where the cattle were sold by this defendant. *Charles v. Neigel-sen*, 15 Ill. App. 17. But in Kansas the rule is the reverse, and the agister's lien takes precedence of the prior chattel mortgage. *Case v. Allen*, 21 Kan. 217, 30 Am. Rep. 425. It therefore appears that in Kansas, which was the seat of the plaintiff's contract of agistment and of the owner's and mortgagee's mortgage contract, the agister had a lien superior to the mortgagee's lien. This was a right of which he could not be divested by surreptitiously or forcibly taking the possession from him. Possession is generally necessary to unwritten liens, but a parting with possession against one's will and consent will not affect his lien.

Nor does the fact that the cattle were shipped to Missouri, and thence to Illinois, and there sold, in neither of which states, as we have said, does the Kansas rule as to priority between liens obtain, affect plaintiff's priority or his right to enforce it. It is quite true, as stated by defendant, that the courts of one state will not enforce rights or contracts arising in another state, when it is against morality or the public policy of such state. But this is not that character of case. We enforce in this state contracts for interest, good where made, but usurious here. *Bank v. Cooper*, 85 Mo. App. 383. If that can be done, there ought not to be any scruple in enforcing a right of the character of plaintiff's. That the states do enforce rights existing under the laws of another state which would not be enforced in the state itself is a fundamental rule of comity, many examples of which will be found in plaintiff's brief.

It is finally insisted that the defendant was but an innocent commission firm, with no interest in the property, and no notice of plaintiff's claim. That feature makes this a hard case, but it cannot be allowed to overcome

well-established principles of law. This defendant, by selling the cattle, was guilty of conversion, however innocent of plaintiff's claim, and however well convinced of the right of the mortgagees to dispose of them. *Mohr v. Langan*, 162 Mo. 497-502, 63 S. W. 85; *Bank v. Morris*, 114 Mo. 255, 21 S. W. 511; *Lafayette County Bank v. Metcalf*, 40 Mo. App. 494; *Kellar v. Garth*, 45 Mo. App. 332; *Laughlin v. Barnes*, 76 Mo. App. 258.

The foregoing considerations lead to an affirmance of the judgment. All concur.

On Rehearing.

PER CURIAM. But it is said, in a motion for rehearing, that the case of *Bank v. Brecheisen*, 65 Kan. 807, 70 Pac. 895, ought to determine the case in defendant's favor. It is there held that where the lien is one which is not enforceable under the statute of Kansas, but depends for validity upon a contract between the owner and the agister, the lien of the prior mortgage is superior. To make that case have a bearing upon the present controversy, it is said that the plaintiff's lien here arose under an agreement between him and the mortgagor owner that plaintiff would pasture the cattle and be responsible for their return. Such agreement is, doubtless, no more than is made in most every case of agistment, and if agreements of that nature ousted the statute of application it would be of little practical use. A contract for feeding or pasturage does not prevent a statutory lien. There may be contracts for a lien in instances where the statute would not apply, in which cases, of course, the lien would depend wholly upon the contract. But, where the facts concerning the agistment make a demand for which the statute gives a lien, a contract between the owner and the agister that the animals are to be pastured or fed in the manner, for the time, and at the price agreed upon, will not affect the lien for the reasonable charge provided for in the statute.

HENSON v. ARMOUR PACKING CO.*

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

MASTER AND SERVANT—INJURIES TO SERVANT —ASSUMPTION OF RISK—REPAIR OF UNSAFE PLACE.

An experienced carpenter, who was sent to re-enforce the shoring of a bank of earth which was obviously unsafe unless and until the shoring should be re-enforced, assumed the risk of doing the work, and could not hold his master liable for injuries sustained in so doing, on the ground that the place in which he was working was unsafe.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 551, 610-624.]

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by George Henson against the Armour Packing Company. From a judgment for plaintiff, defendant appeals. Reversed.

*Rehearing denied June 26, 1905.

Angevine & Cubbison, J. C. Ronesberger, and J. L. Lorie, for appellant. W. A. Snook, T. J. Madden, and Bird & Pope, for respondent.

ELLISON, J. The defendant, through a number of laborers and a foreman, was engaged in digging an excavation about 45 feet square and 25 feet deep in which to lay a foundation upon which to construct a large smokestack. At a depth of near 25 feet on three sides and 18 feet on the remaining side, sloping thence from the bottom of the 18 feet to the main depth of 25 feet, it became necessary to more firmly secure the bank or wall by additional braces to the shoring which had been put in to prevent caving of the bank. Plaintiff was assigned to do the additional work, and while doing so, the bank broke or caved in and injured him. He thereupon brought this action for damages, and prevailed in the trial court.

It appears from the evidence—chiefly that given by plaintiff himself—that he was a carpenter of some 14 years' experience, and had worked for defendant in general repair work of many kinds. He had done the work of a carpenter in putting in the shoring of the wall in question about a week before the injury for which he sues. On one afternoon defendant's foreman, believing the shoring needed to be made safer or more secure, sent for plaintiff, who was then engaged at another part of defendant's packing house grounds, to come over to the excavation. When he got there the foreman directed him to go into the excavation, and proceed to put up braces so as to secure the shoring and hold the bank. He proceeded with the work, and while engaged in nailing some of the timbers the wall broke in, and he was injured. He stated that the foreman did not tell him that the wall was dangerous, but that he knew the purpose of the braces was to make the shoring secure and the wall safe, and that they were needed. We thus have this state of case: The plaintiff, a man in full mental and physical vigor, with an experience of about 14 years as a carpenter, who had assisted originally in putting in the shoring to secure the wall or bank, was called upon to put braces against the shoring so as to make it safe. He knew that was the purpose, and he believed it needed the braces. In other words, he knew that it was unsafe without the braces. He stated that the foreman did not tell him that it was unsafe. The foreman doubtless supposed a man of ordinary intelligence would know that without being told. The order itself, under the circumstances, was the same as if the foreman had said to him: "Here, Henson, that wall is in danger of breaking in. That shoring is not sufficient; it needs attention. Go down there and make it safe with braces." And so plaintiff evidently understood the situation,

and he proceeded to the work of making safe an unsafe place, a place which had become unsafe during the progress of the work. There was nothing in the conditions at the place to prevent plaintiff having a full knowledge of all the probabilities and risks. It was a plain matter of a high bank pressing against the shoring until it became necessary to brace it to keep it from falling in. As a carpenter of experience, he must have known this as well, or perhaps better, than any other person. In such state of case the master is not liable for the injury which came upon him. *Roberts v. Telephone Co.*, 186 Mo. 378-383, 66 S. W. 155; *Finalyson v. Utica Mining Co.*, 67 Fed. 507, 14 C. C. A. 492; *Moon Anchor Mine v. Hopkins*, 111 Fed. 298, 49 C. C. A. 347; *King v. Morgan*, 109 Fed. 446, 48 C. C. A. 507. When the work in hand is dangerous for the reason that it is to secure and make safe an unsafe place, the rule, as generally applied, that the master must furnish the servant a safe place in which to work, can have no application. To say that a man can have a safe place to work in an unsafe place is an absurdity.

The judgment, with the concurrence of the other judges, is reversed.

FOUTS v. SWIFT & CO.*

(Kansas City Court of Appeals. Missouri.
Feb. 6, 1905.)

1. MASTER AND SERVANT—ASSUMPTION OF RISK.

In an action for injuries, evidence that the plaintiff warned defendant's foreman of the danger of an unprotected electric fan, and received his assurance that he would attend to it as soon as he could, removes the question of assumption of risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 637, 640.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for injuries by an unprotected electric fan near where plaintiff worked, the evidence considered, and held not to charge plaintiff with contributory negligence in coming in contact with the fan.

Appeal from Circuit Court, Buchanan County; H. M. Ramey, Judge.

Action by James R. Fouts against Swift & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Mosman & Ryan, for appellant. Culver, Phillip & Spencer, for respondent.

ELLISON, J. This is an action for personal injury, which resulted in plaintiff's favor in the trial court.

We can dispose of a considerable part of defendant's objections to the judgment by correcting an impression, which must have prevailed when the brief was written, as to the nature of the cause of action which plaintiff has set out. He has not complain-

*Rehearing denied June 26, 1905.

ed of defective machinery in the sense of being compelled to use such machinery. The machine which injured him was not one with which he worked, but it was one situated near by the place where he worked, and, as he contends, made that place unsafe. Under the latter view of the petition it clearly states a cause of action, and all objections on that head which have been urged by defendant are not well taken.

The defendant is a corporation engaged in killing and packing meats at the city of St. Joseph, and in such business it conducted a cooperage department, where it made barrels, and where plaintiff was engaged as a servant. There were fires where the barrels were heated, and when heated they were passed out and along to a number of employes who performed their assigned part of the work in the process of making them a finished barrel. Plaintiff's duty was to receive the barrels when heated, "level" them on a plane surface provided for that purpose, and then pass them on to the man assigned to perform the next duty upon them. The fires and the nature of the service in this process of manufacture made it quite warm, and so defendant provided an electric fan for the comfort of those there engaged. The fan consisted of a hub or centerpiece from which several steel paddles projected. These revolved noiselessly, and with exceeding great rapidity. The fan was suspended from the ceiling of the room, and came down partially through a platform near the end. The platform itself did not rest upon the floor, but was held suspended about five feet and four inches above the floor by four or more pieces of timber of about two by four inches dimension. These timbers partially inclosed the fan above the platform and for about four inches below. Yet a person could go under the platform between the ends of these timbers and thus come in contact with that portion of the ends of the paddles of the fan which revolved below the platform. The platform was between 2 and 2½ feet square, and the fan was at the side or end furthest away from where plaintiff worked. A brick cross-wall seemed to have been so constructed that the end of it came against the platform near the center. At the time plaintiff was hurt there was a short lull in the work, and he had taken a broom and swept away some dirt or trash which would accumulate from time to time from the work. He placed the broom in the corner made by the brick wall and platform where they came together, and when he was in the act of turning around he found himself in such close contact with the platform that he instinctively dodged his head down till it cleared the platform, and in making the swing of the turn, with his head bent forward or outward from a perpendicular line with his body, it came in contact with the fan, which, as before stated, extended some

inches under the platform, and received the serious injury of which he complains. As the barrels were heated they were started on towards plaintiff by rolling under the platform and fan, and it became necessary for him to reach under for them many times a day. Plaintiff had spoken to the foreman in regard to danger from the fan, and had been told that it would be attended to when "they could get around to it." It had also been stated between them that the fan ought to be screened. Plaintiff said that he knew of the danger, but he thought he could get on safely by being careful.

In stating how plaintiff came in contact with the fan, we have not pretended to follow the language of any particular witness, but have described it according to the way the evidence shows it must necessarily have occurred. We are satisfied that a prima facie case was made for the plaintiff. There is no room for doubt that the plaintiff was hurt while engaged in the performance of his duty as an employe. The only questions in the case are whether the injury was a risk of his employment, and whether he was guilty of contributory negligence.

It appears clear that it was negligence in the defendant to leave so dangerous a device (noiseless in operation) as an electric fan to be hung so low down from the ceiling that one could walk into or against it, and not have it in some way shut off from contact with those who might be at work near it. It was not machinery with which plaintiff was required to work, but it constituted a dangerous condition to the safety of the place. As much so as would be an open and unguarded well, or an unguarded opening in a floor. We said in *Zellers v. Mo. Water & Light Co.*, 92 Mo. App. 124, in speaking of the master's duties to the servant, that: "He does not insure the safety of the place to work, but he does insure that he will not be negligent in his effort to have it safe. And, if he is negligent in that respect, he is liable absolutely to the servant, unless, of course, the servant was himself guilty of contributory negligence, or unless it be one of those instances (which it is not necessary in this case to define) where the servant assumes the risk of injury." In this case, even under that branch of authority which takes the most extreme view of assumption of risk exonerating the master (*Glenmount Lumber Co. v. Roy*, 126 Fed. 524, 61 C. O. A. 506), the warning which this plaintiff gave the foreman, and the latter's assurance that he would protect the fan so soon as he could get around to it, took the question of assuming the risk out of the case. *Hough v. Ry. Co.*, 100 U. S. 213, 225, 25 L. Ed. 612.

Practically, then, there is but one question, and that is contributory negligence. It is the theory of defendant that, as plaintiff might easily have walked around the platform and avoided the fan, he need not have

stooped under it and ran into the fan. The theory of the plaintiff is that in the act of turning around he found himself about to go against the platform, and that he stooped or "ducked" his head under it and thereby came in contact with the fan. There was evidence to support that view, and we will not say, as a matter of law, that under such circumstances he should have caught himself (as possibly he might have done) and walked around. Defendant says that he must have walked clear under the platform—that is, from one side to the other—as the fan was on the far side from him. But it must be borne in mind that the platform was a very small affair, only between 24 and 30 inches wide, and that in "ducking" under it, as expressed by witnesses, one might strike his head against an object on the opposite side while his body was just under the edge of the other side. Counsel use the expression that plaintiff, to strike the fan, would have had to pass "clear under" or "clear over to the other side," as though it was quite a distance, and that one would have to deliberately walk over to the fan. The fact is, as before intimated, that from one side to the other of the small platform was, perhaps, within the circle one's head would describe in turning round in a stooped position.

The objections to evidence were numerous. What we have already written disposes of many of them. The remaining we believe not well taken. We think that nothing was admitted or excluded which in any manner affected the substantial merits of the case.

The instructions given for plaintiff were proper, and were in keeping with the law as it is laid down in this state. *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *Wendler v. People's Furnishing Co.*, 165 Mo. 527, 65 S. W. 737; *Settle v. Ry. Co.*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Pauck v. Dressed Beef Co.*, 159 Mo. 467, 61 S. W. 806.

A careful examination of the whole record satisfies us that no error was committed which materially affected the merits of the case, and the judgment must therefore be affirmed. All concur.

MEMPHIS ST. RY. CO. v. JOHNSON.

(Supreme Court of Tennessee. June 20, 1905.)

1. APPEAL — SCOPE OF REVIEW — PROCEEDINGS IN TRIAL COURT—MOTION FOR NEW TRIAL.

A motion for a new trial must be made and overruled, to obtain a review of errors occurring in the trial of the case, which a bill of exceptions is required to bring into the record.

2. NEW TRIAL—STATEMENT OF GROUNDS.

Shannon's Code, § 6075, provides that circuit courts may make all such rules of practice as may be deemed expedient; and a rule of a circuit court required all grounds for a new trial to be stated and set out separately in a written motion, and entered on the minutes of the court, and provided that all errors not so set out should be presumed to be waived. *Hold,*

that grounds for a new trial, stated as "error in the admission and exclusion of evidence," and as "the court erred in refusing the special instructions asked," were insufficient, for failing to set out the evidence or the instructions.

Error to Circuit Court, Shelby County; J. P. Young, Judge.

Action by W. B. Johnson against the Memphis Street Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Wright, Peters & Wright, for plaintiff in error. W. V. Sullivan and W. A. Percy, for defendant in error.

SHIELDS, J. This action is brought by W. B. Johnson against the Memphis Street Railway Company to recover damages for personal injuries sustained by him, through the negligence of the defendant, while plaintiff was a passenger on one of its cars.

The case was submitted to a jury, and a verdict found for the plaintiff. The motion of the defendant for a new trial was overruled, and judgment entered. The defendant tendered a bill of exceptions to this action of the court, which was signed and filed, and the case is now before us upon appeal in the nature of a writ of error.

The errors assigned are predicated upon the refusal of the trial judge to set aside the verdict of the jury and grant the defendant a new trial because of the admission of certain evidence offered by the plaintiff over the objection of the defendant, and his refusal to give in charge to the jury certain written instructions submitted by counsel for the railway company at the conclusion of the charge in chief.

For the defendant in error it is insisted that these assignments of error cannot be considered by this court because the errors complained of were not properly set out and relied upon as grounds for a new trial in the motion made by the plaintiff in error in the trial court for that purpose, as required by a rule of that court, and passed upon by the presiding judge.

The rule of the circuit court of Shelby county in relation to motions for new trials, which is in the record, requires all grounds upon which a new trial is asked to be stated and set out separately in a written motion and entered upon the minutes of the court; and all errors not so set out are presumed to be waived, and will not be considered on the hearing of the motion.

The plaintiff in error attempted to comply with this rule, and the grounds for a new trial upon which these assignments are based are stated in its motion in these words:

"(1) For error in the admission and exclusion of evidence.

"(2) The court erred in refusing the special instructions asked by the defendant."

The jurisdiction of this court is exclusively appellate, and it can only pass upon matters which the record shows have been con-

sidered and adjudged by the trial court from which the case has been appealed. The errors reviewed and corrected by it are of two classes: Those which appear upon the face of the record proper, as erroneous rulings in sustaining or overruling motions, and demurrers challenging the sufficiency of pleadings; and errors committed in allowing or overruling motions for new trials upon grounds brought into the record by bills of exceptions, as for improperly refusing a continuance, the admission of incompetent evidence, or the rejection of competent evidence, error in instructing the jury, or refusing further instructions seasonably requested in proper form, for want of evidence to sustain the verdict, or other similar ground. It does not act directly upon errors of the latter class, which are not a part of the record without a bill of exceptions, but upon the action of the trial judge for refusing a new trial because of such errors committed by him, or otherwise occurring in the progress of the case, as they may be waived or corrected before verdict. Therefore, before the jurisdiction of this court can be invoked and relief had on account of errors of the second class, they must be considered and acted upon by the trial judge in the disposition of a motion made by the losing party to set aside the verdict of the jury and allow him a new trial. Another reason why all errors which may affect the integrity of the verdict should be brought to the attention of the trial judge in a motion for a new trial is that he may have an opportunity to correct them, if necessary, by granting a new trial, and thus save the inconvenience, delay, and expense attending appellate proceedings.

The reason why this court will consider errors which appear upon the face of the record proper, without a motion for a new trial, is that they do not directly affect the correctness of the verdict, and would not be cured by setting it aside.

That a motion for a new trial, made and overruled, is necessary, in order to give the appellant the advantage of errors occurring in the trial of the case, which a bill of exceptions is required to bring into the record, is well settled. An eminent author on Practice says: "A motion for a new trial is an application made in a trial court for a retrial of the issue or issues of fact. It is a direct, and not a collateral, motion, and ordinarily its office is to specifically direct the attention of the court to errors committed during the trial, and to get the questions into the record and have them corrected by a new trial, or to thus correct a verdict or finding which is contrary to law or the evidence. It is necessary, as a general rule, in order to present upon appeal questions as to errors of law occurring at the trial which cannot be independently assigned in an appellate court, and generally to present any matter that does not appear in the record proper." Elliott on General Practice, vol. 2, § 987.

And in another valuable work on Practice it is said: "The office of a motion for a new trial is twofold: First, to present the errors complained of to the trial court for review and correction, or to secure a new trial; second, to preserve the same errors in the record, so that the ruling of the trial court in granting or refusing a new trial may be reviewed by the appellate court. It is a general rule that all errors correctable by motion for a new trial, and not so assigned, are deemed to have been waived by the applicants for a new trial. Unless a motion for a new trial has been presented and considered by the lower court, and its ruling preserved, the errors assigned in the motion will not be reviewed by the appellate court. To secure a review in the appellate court of errors committed at the trial, the complaining party must except to the errors and irregularities at the time when the rulings of the court thereon are made, and must call the attention of the trial court to such rulings by assigning them as errors and as grounds for a new trial; otherwise such errors will be deemed waived. It is a well-known rule of appellate courts that errors of the trial court occurring during the trial will not be reviewed unless such errors have been called to the attention of the trial court, and opportunity given to correct them. It is necessary, therefore, to present such error to the trial court by a motion for a new trial, and to secure a ruling on the motion." Ency. of Plead. & Prac. vol. 14, p. 846.

Whether a motion for a new trial specifically stating the grounds upon which it is asked is necessary in cases tried by the presiding judge without the intervention of a jury is reserved in *Lancaster v. Fisher*, 94 Tenn. 228, 28 S. W. 1094, but we would be inclined to hold that the better practice would require that it be done.

The motion must be reduced to writing and spread upon the minutes of the court, where the action of the court thereon must also appear. It is not sufficient that it, or the action of the court thereon, appears in the bill of exceptions. *Railroad v. Egerton*, 98 Tenn. 541, 41 S. W. 1085.

The circuit and law courts of this state have authority, by rules of practice applicable to such courts, to control the form and time in which motions for new trials shall be made and disposed of, which are reasonable and not inconsistent with the law. Code 1858, § 4237 (Shannon's Ed. § 6075); *Mallon v. Manufacturing Co.*, 75 Tenn. 62; *Alexander v. State*, 82 Tenn. 91; *Patterson v. Patterson*, 89 Tenn. 154, 14 S. W. 485; *Railway Company v. Hendricks*, 88 Tenn. 719, 13 S. W. 696, 14 S. W. 488.

And this court, in the exercise of its power to prescribe rules of practice, may provide that errors assigned upon the action of the trial judge in refusing new trials, in cases brought to it from the circuit or law courts, shall be predicated only upon such

grounds for new trials as were set out in the motion made for that purpose in the trial court, regardless of the rules of that court. Code 1858, § 4504 (Shannon's Ed. § 6337); *Denton v. Woods*, 86 Tenn. 37, 5 S. W. 489; *Wood v. Frazier*, 86 Tenn. 500, 8 S. W. 148; *Riggs v. White*, 51 Tenn. 504; *Foster v. Burm*, 48 Tenn. 784.

Rules similar to that under consideration requiring all grounds for new trials, whether of law or fact, to be stated separately in writing, and entered upon the minutes of the court, and providing that all errors not so set out shall be considered as waived, are now in force in a majority of the circuits of this state, and are not only reasonable and valid, but the experience of these courts, and of this in the cases coming from them, has demonstrated that they contribute greatly to the speedy, final, and correct disposition of litigation; and it would be better, for these reasons, and to prevent mistakes resulting from the existence of different rules of practice in the courts of the state, that they be adopted in all of them.

This court has repeatedly held, in cases brought to it from circuits having this rule, that all errors of the trial court not assigned as grounds for new trial in the motion made for that purpose are thereby waived, and that assignments of error upon the refusal of the trial judge to grant new trials cannot be predicated upon grounds not so assigned in the lower court. *Railroad v. Blair*, 104 Tenn. 212, 55 S. W. 154; *Wise & Co. v. Morgan*, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.

We are now to determine whether or not the grounds upon which these assignments of error are predicated are sufficiently set out in the motion for a new trial. It seems to be well settled that the statement of the grounds in the motion must be sufficient to direct the attention of the court and opposing counsel to the error or irregularity relied upon to vitiate the verdict.

In the work on Pleading & Practice last quoted from, it is further said: "The general rule is that the grounds [for a new trial] must be stated so specifically as to direct the attention of the court and opposing counsel to the precise error complained of. A mere statement of the grounds, without further specifications, will therefore be insufficient. The purpose of the rule is to direct the attention of the trial judge to the alleged erroneous rulings, and present to the appellate court the precise question involved. The safest course is to assign each error with the same particularity of an assignment of error in appeal. * * * But this is not the practice in most of the states; the courts holding that it is sufficient merely to assign error in the ruling complained of, as that the court erred in giving a certain construction or admitting certain evidence, without stating why such ruling was erroneous. If the grounds for a new trial are not stated in the motion, it may be overruled by the

court, and disregarded on appeal. All errors known at the time of filing the motion must be included therein, or the errors omitted will be deemed to have been waived." *Ency. of Plead. & Prac.* vol. 14, 882, 883.

Mr. Elliott, in his work above cited (volume 2, § 991), says: "The law presumes the verdict to be correct. Hence on a motion for a new trial the party must set forth the grounds upon which he intends to rely, or the objections will be considered as waived. The motion should be in writing, and should specify with reasonable certainty all the rulings deemed erroneous. It is to be kept in mind that it is the objections specified in a motion, and those only, that are brought up for review, for all others properly arising on a motion for a new trial are deemed to be waived. It is on a motion—so it is written—that the appellate court acts, for, as to objections not properly presented, the presumption is in favor of the regularity and legality of the rulings of the trial court. It is the business of the party who takes exceptions to show that the decision is wrong. It is not sufficient that he succeeds in mystifying it by adopting language which subjects the judge to the suspicion that he did not understand the safest ground on which to place it. In order to show that rulings are wrong it must appear that they were probably injurious to the party who makes complaint, since a mere harmless error will not warrant a reversal."

The text in both of these works, which are of the highest authority, is supported by numerous decisions of other states, many of which are predicated upon the general rules of practice of courts of law.

We are of the opinion that the grounds set out in the motion should be as specific and certain as the nature of the error complained of will permit. Thus, if the error consists in the admission or rejection of evidence, the evidence admitted or rejected should be stated. If it be for affirmative error in the charge, or for failure to give an instruction properly and seasonably presented, it should set out the portion of the charge complained of, or the instruction refused, or otherwise definitely identify the instruction. If it be for misconduct of the opposite party or that of the jury, the facts constituting it should be stated. This was not done in this case. The testimony admitted and that excluded is not stated—not even the name of the witness given—and the instructions requested are not set out or sufficiently identified.

We do not think that it is necessary to state why the ruling complained of is erroneous as fully and with all the strictness required in assignments of error in this court, but a fair statement of the error complained of, sufficient to direct the attention of the court and the prevailing party to it, is all that is required.

Nor was it necessary for the successful

party in the court below to there object to the form of the motion, because rules of this character are made in the interest of the public, and for the purpose of enabling the courts to speedily and correctly dispose of the cases pending in them, and they cannot be waived by litigants.

We are of the opinion that no sufficient grounds for a new trial because of the admission of incompetent or rejection of competent testimony, or a failure to give in charge to the jury instructions submitted by the defendant, were stated in the motion made by it in the circuit court, and that there is therefore nothing upon which these assignments of error on the action of the trial judge in refusing to set aside the verdict and grant a new trial can be predicated; and, under the practice of this court, in cases coming from those courts having rules like that in this record, not to consider the assignments of error upon any grounds not appearing in the motion for a new trial, these assignments of error are insufficient, and must be overruled.

The other assignments of error filed by the plaintiff in error were disposed of in an oral opinion.

PEASE & DWYER CO. v. STATE NAT. BANK.

(Supreme Court of Tennessee. June 20, 1905.)

1. BILLS AND NOTES—CHECKS—STOPPAGE OF PAYMENT.

Under Negotiable Instrument Law, § 189 (Acts 1899, p. 172, c. 94), providing that a check is not an assignment of any part of the drawer's funds, and the bank is not liable to the holder unless and until it accepts or certifies the check, the drawer of an ordinary check may, before it is accepted, revoke it and forbid its payment, and any subsequent payment by the bank is made at its peril.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 406.]

2. SAME.

In order to place a check beyond the control of the drawer and preclude him from stopping payment thereon, it must be clearly shown that it was the intention of the parties to assign all or a part of the specific fund on deposit.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 406.]

3. SAME—DISREGARD OF BANK—WAIVER.

The bringing of suit by the drawer of a check against the payee to recover the sum for which it was drawn was not a ratification by him of the act of the bank in paying the check after he had stopped payment thereon.

Appeal from Chancery Court, Shelby County; H. F. Helskell, Chancellor.

Suit by the Pease & Dwyer Company against the State National Bank. From a decree for complainant, defendant appeals. Affirmed.

Hunston Cary, for appellant. Carroll, McKellar, Bullington & Biggs, for appellee.

SHIELDS, J. Complainant, a corporation and depositor with the defendant, the State

National Bank, having a balance to its credit of more than \$5,000, drew a check thereon July 19, 1904, payable to the order of J. W. Dickson & Co., for \$600, and delivered it to the payee. Three days later, July 21, 1904, complainant instructed the defendant to refuse payment of the check, which instruction it ignored, and paid the check July 25, 1904, charged it to the account of the complainant, deducted it from its balance, and afterwards refused to account for the money when demanded.

This bill is brought to recover the proceeds of the check, and interest thereon from the day when paid. The chancellor decreed in favor of the complainant, and defendant has appealed and assigned errors.

We are of the opinion that there is no error in the decree of the chancellor. The drawer of a check in the usual form, upon his general account with a bank, firm, or person, before it is accepted, expressly or by implication, may revoke it and forbid its payment, after which payment, if made, is at the peril of the bank. A check of this kind is not an appropriation of any part of the funds to the credit of the drawer with the bank, and does not constitute any claim or right of action against the bank until it is accepted or certified by it. The remedy of the holder, if payment is refused, is against the drawer. Negotiable Instrument Law, Acts 1899, p. 172, c. 94, § 189; Imboden v. Perrie, 81 Tenn. 505; Pickle v. Muse, 88 Tenn. 385, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900; Akin v. Jones, 93 Tenn. 356, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921.

In Imboden v. Perrie, 81 Tenn. 505, supra, the contest was between a creditor whose attachment was levied by garnishment upon the balance of a depositor in a bank, and the payee in a check drawn upon the bank before the levy of the attachment, and presented afterwards. This court quotes approvingly from Attorney General v. Continental Life Insurance Co., 71 N. Y. 325, 27 Am. Rep. 55, this statement of the law concerning the relations of banks, their depositors, and the holders of unaccepted checks: "Church, C. J., said: 'Lunt v. Bank of North America, 49 Barb. 221, declares the rule accurately, that checks drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, but containing only the usual requests, are of the same legal effect as are inland bills of exchange, and do not amount to an assignment of the funds of the drawer in the bank.

"This doctrine accords with the relations between the parties. Banks are debtors to their customers for the amount of their deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of

the payee. Until presented and accepted, it is inchoate; it vests no title or interest, legal or equitable, in the payee, to the fund. Before acceptance, the drawer may withdraw his deposit; the bank owes no duty to the holder of a check until it is presented for payment."

The facts of the case of *German National Bank v. Farmers' Dep. National Bank*, 118 Pa. 313, 12 Atl. 306, were similar to those in the case of *Imboden v. Perrie*. It is there said:

"I presume no one at this day questions the right of the drawer of a check to stop the payment thereof. This is usually done by notice to the bank on which the check is drawn. If the bank pay after such notice, it does so at its peril. The holder of a check has no remedy against the bank upon which a check is drawn for its refusal to pay it. He must look to the drawer."

In the case of *Kahn v. Walton*, 46 Ohio St. 206, 20 N. E. 203, involving this direct question, it is said:

"A check, being simply a written order of a depositor to his banker to make a certain payment out of his funds, is executory, and, of course, revocable at any time before the bank has paid it or committed itself to its payment. * * * The bank is the agent of the drawer. Its duty is to pay his money as he directs. It owes no duty to the holder except under the drawer's directions, until, by virtue of those directions, it assumes some obligation to the holder; up to that time the latest order from the drawer governs."

In the case of *Florence Mining Company v. Brown, Receiver, etc.*, 124 U. S. 391, 8 Sup. Ct. 534, 31 L. Ed. 424, Mr. Justice Field says:

"A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand to his order, not properly capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment."

Further cases in accord with these are: *St. Louis & San Francisco Ry. Co. v. Johnston*, 133 U. S. 574, 10 Sup. Ct. 390, 33 L. Ed. 683; *Fourth St. Nat. Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; *Schneider v. Bank*, 1 Daly (N. Y.) 501; *O'Connor v. Mechanics' Nat. Bank*, 124 N. Y. 332, 26 N. E. 816; *Randolph v. Allen*, 73 Fed. 42, 19 C. C. A. 353; *State v. Bank of Commerce*, 49 La. Ann. 1078, 22 South. 207; *House v. Kountze*, 17 Tex. Civ. App. 406, 43 S. W. 561; *Sunderlin v. Mecosta County Saving Bank*, 116 Mich. 284, 74 N. W. 478.

There are cases in which this general rule does not apply, but the fact must clearly show that it was the intention of the parties to assign all or a part of the specific fund on deposit. *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855.

The insistence of the defendant is that the check was countermanded by complainant, not for its own benefit, but for that of the payee; that before payment was forbidden the check had passed into the hands of a bona fide holder for value and without notice, and that the bank, having paid it, is in equity a purchaser, and has the right to set it off against the claim of complainant; and, further, that complainant ratified the payment of the check after it was done by bringing suit against the payees, *J. W. Dickson & Co.*, to recover the sum for which it was drawn, and interest.

We can see no force in the first insistence, but it is not necessary to pass upon it, as there is no proof to sustain it.

It is true that a check payable to order is a negotiable instrument, and, in the hands of an indorsee for value and without notice, it is a valid indebtedness of the drawer. But no such case is presented by this record. It does not appear that the check was indorsed or passed to any one by *J. W. Dickson & Co.*, or to whom it was paid by the bank. The only references we find to an indorsement of it are in the answer and brief of the defendant.

There is evidence, brought out upon the cross-examination of a witness for complainant, that previous to this suit complainant brought one against *J. W. Dickson & Co.* and others to recover the proceeds of the check, but the record in that case is not in the transcript in this one.

It further appears that the defendant was also sued in the same case with *J. W. Dickson & Co.*, and the bill afterwards dismissed as to it; but we do not know what relief was prayed against the defendant, and the facts stated are not sufficient to show a ratification of the payment of the revoked check.

We are therefore of the opinion that the payment of the check after it was countermanded by the complainant was unauthorized, and that the decree of the chancellor awarding a recovery in favor of the drawer should be affirmed, with costs, and it is accordingly so decreed.

SPARKS v. SPARKS.

(Supreme Court of Tennessee. June 20, 1905.)
DIVORCE—RESIDENCE—EVIDENCE.

Shannon's Code, § 4208, provides that a divorce may be granted where the petitioner has resided in the state for two years next preceding the filing of the petition. A man was born in Tennessee, and resided there until he was appointed to a position in a governmental department at Washington, D. C., to which place he moved with his family, and where he kept house for 22 years, only returning to the

state of Tennessee on three occasions, when he voted there; and during such period he paid a poll tax in Tennessee for some years. He testified that it had always been his intention to return in the event that he should lose his position. His position was under the civil service law, but the tenure of it was such that he might be discharged. *Held*, that he was not a resident of Tennessee, so as to entitle him to maintain a bill for divorce.

Appeal from Chancery Court, Carroll County; A. G. Hawkins, Chancellor.

Suit for divorce by John N. Sparks against Fanny P. Sparks. From a decree dismissing the bill, complainant appeals. Affirmed.

Geo. T. McCall, for appellant.

SHIELDS, J. This is a bill brought by the complainant, seeking a divorce from his wife, the defendant; the grounds charged being adultery and malicious desertion without reasonable cause for two whole years, committed in the District of Columbia. These charges are fully sustained by the proof, but the chancellor dismissed the bill for want of jurisdiction, being of the opinion that the complainant had not resided in this state for two years next preceding the filing of the bill, and therefore, under Code 1858, § 2450 (Shannon's Code, § 4203), was not entitled to maintain a bill for a divorce in the courts of Tennessee.

The complainant charged in his bill and testified upon the hearing that he was born in Carroll county, Tenn., and was raised in, and has been all the while and is now a citizen of, that county; that he resided there until 1882, when he was appointed to a position in the Treasury Department of the United States, at Washington, District of Columbia, when he carried his family to that city, and has lived there ever since, holding his said position; that he has within said period returned to Carroll county on three several occasions, on leave of absence of 30 days each, and has voted there in several elections, paying his poll tax in order to enable him to do so, and has had and yet has his church membership there, but he has not voted in all elections, nor paid a poll tax for every year he was liable for such tax. He further testifies that it has always been his intention to return to Carroll county to reside in the event he should lose his position in the Treasury Department, which is under the civil service law, but the tenure of it is such that he may be discharged.

Citizenship, within the meaning of the section of the Code in question, includes residence; and, if complainant is yet a citizen of Tennessee, he may maintain this bill. *Fickle v. Fickle*, 5 Yerg. 203.

The question then is, has the complainant, under the facts stated, lost citizenship and domicile in Tennessee? There is no question but what the complainant was, previous to the time he went to Washington City, a citizen of Carroll county, Tenn. There he was born and raised. There was the domicile of

his nativity. Every one is presumed to retain this domicile until another is acquired. *Layne v. Pardee*, 2 Swan, 235.

And in order to constitute a change of domicile there must be concurrence of actual change of residence, and intention to abandon the old and acquire a new domicile. *Foster v. Hall & Eaton*, 4 Humph. 348; *Allen v. Thomason*, 11 Humph. 536, 54 Am. Dec. 55; *White v. White*, 3 Head, 410; *Williams v. Saunders*, 5 Cold. 79.

Where one has his residence and carries on his business is usually his domicile, but not necessarily so. He may be there temporarily, for the purpose of the particular business in hand, with an absolute and definite intention of returning to his original and actual domicile. *Pearce v. State*, 1 Sneed, 66, 60 Am. Dec. 135.

If the absence from the domicile of nativity or an acquired domicile is temporary, and there is all the while a fixed and definite intention of returning, there is no change, and no new domicile is obtained. Residence, however long, will not work a change of domicile, unless accompanied with such intent. *Kellar v. Baird*, 5 Helsk. 46; *Layne v. Pardee*, 2 Swan, 235.

The intention, however, to return to the domicile of nativity, or one acquired, must be fixed, absolute, and unconditional. A mere floating intention to return at some future period or upon the happening of some uncertain event is not sufficient. The intent to return must not depend upon inclination or be controlled by future events. *Stratton v. Brigham*, 2 Sneed, 423; *Kellar v. Baird*, 5 Helsk. 46-49; *Story on Conflict of Laws*, § 46.

In determining whether or not a change of domicile has been made, it is proper to consider, along with the statement of the party of his intent in the matter, his conduct and declarations, and all other facts that throw light upon the subject. Complainant, when he brought this bill, had been a resident of Washington City for 22 years, had kept house and reared his family there, and had only returned to his former home and exercised the rights of a citizen there on three occasions during all that time, and does not now state that he has any fixed purpose to again take up his residence and the duties and rights of a citizen in this state. His strongest statement is that he is subject to dismissal in his employment in the Treasury Department, and in the event of such dismissal it is his intention to return. The clear inference is that if he should not be dismissed he will continue his residence in Washington during the remainder of his days. His return is conditioned upon an event that may never happen. He has no fixed purpose to return in any event. Upon these facts, we are clearly of the opinion that he has lost his citizenship and domicile in Tennessee, and is not entitled to maintain this suit. We are not to be under-

stood as holding that a citizen of Tennessee, who removes himself and family out of the state for the purpose of discharging the duties of an office to which he has been elected or appointed, or for any other purpose, either for a definite or an indefinite time, with a distinct and fixed purpose of returning to his home in this state, and who, by discharging the duties of a citizen and taxpayer of the state and exercising the privileges of a citizen, manifests his intention to retain his citizenship and domicile here, loses his citizenship. On the contrary, upon the facts stated, it is clear that he would not, upon the well-settled principle that a mere transient or temporary absence from the state, with a fixed purpose of returning, does not work a change of domicile.

There is no error in the decree of the chancellor dismissing this bill, and it will be affirmed, with costs.

CARSON v. CARSON et al.

(Supreme Court of Tennessee. June 20, 1905.)

1. WILLS—ESTATE DEVISED—LIFE ESTATE.

Where realty is devised to testatrix's husband, with direction that after his debts and funeral expenses are all paid the remainder of the tract shall go to others, the devisee takes only a life estate in the land devised, with remainder over.

2. SAME—CHARITABLE BEQUEST—VALIDITY.

A devise of the remainder after the life estate in certain land to certain persons, constituting the board of trustees of the Cumberland Presbyterian Church in the United States, and their successors, to be used to best promote the interest of Christianity in the fields occupied by that church, is a valid charitable bequest to the corporation of the General Assembly of the Cumberland Presbyterian Church, which it may hold under its charter, with due regard to the directions of the testatrix, and, beyond that, under the general trusts under which it holds its property; it appearing that the church was incorporated under that name, and it being the evident intent of testatrix that the remainder vest in the Cumberland Presbyterian Church as a charitable organization of a religious character.

Appeal from Chancery Court, Carroll County; A. G. Hawkins, Chancellor.

Bill by W. M. Carson against L. O. Carson and others. From a decree for complainant, defendants appeal. Reversed.

Bailey & Lusk and John H. De Witt, for appellants. Clarence M. Hawkins, for appellee.

WILKES, J. This is a bill to construe and contest the validity of certain clauses of the will of Sarah A. Carson.

These clauses are as follows:

"Secondly. I give, devise and bequeath to my husband, W. M. Carson, the tract of land upon which I now reside, containing one hundred and sixty-five acres, and bounded on the north by the lands of S. S. or John D. Pate and Dr. J. B. Jones; on the east by the lands in the name of Mary W. Ridley, deceased; and on the south by the lands of

William Ridley and Horace Sexton, and on the west by John Morrison and the lands of the heirs of William Ingram; and at his death I direct that after his funeral expenses and just debts are all paid, the remainder of said tract to go to J. M. Gill, W. L. Reeves, J. M. Zarecor, T. R. Foster, P. W. Morris, A. B. Miller, W. B. Reeves, B. C. Porter, T. P. Dance, S. D. Chestnut, H. E. Conover and F. M. Pepper, constituting the Board of Trustees of the Cumberland Presbyterian Church in the United States of America, and their successors in office, to be held and used by them as trustees only in such manner as to best promote the interest of Christianity in the fields occupied by the said Cumberland Presbyterian Church.

"Third. It is my wish, and I so direct, that the tract of land descended to me from my brother, G. W. Ridley, containing one hundred and forty acres, and bounded on the north by the lands of W. R. Sneed and H. P. Gaines; on the east by the lands of H. P. Gaines and J. S. Reese; on the south by the lands in the name of Mary W. Ridley, deceased, on the west by the lands of Dr. J. B. Jones, to be sold at my death by my husband, W. M. Carson, in such manner as to him may be thought best, and the proceeds appropriated to the payment of the following bequests, viz.: Five hundred dollars in trust to Rev. A. E. Cooper, T. W. Cannon, N. Bobbitt, H. O. Johnson, H. B. Thomas, B. P. Gilbert, W. E. Spear, J. M. Burns, R. B. Hamilton, J. W. Smith, W. M. Carson and Dr. Bright, composing the Board of Trustees of Bethel College, at McKenzie, in Carroll County, Tennessee, and their successors in office, to be appropriated by them for said Bethel College in such manner as they may think best; one hundred dollars I give to Henry Ridley in consideration of his kindness to my brother, G. W. Ridley, in his last illness.

"I set apart two hundred dollars out of which to pay my annual contribution of five dollars to the Rev. A. E. Cooper, at Shiloh Church, and at his death the remainder of the two hundred dollars I want used in the erection of a monument over his grave; and I further direct that a sufficient amount be used to erect a double monument over the grave of my father and mother and one for myself and to put an iron fence around the family graveyard, and the remainder of the proceeds of the one hundred and forty acres of land, if any, I give to my said husband, W. M. Carson, during his life, and at his death I direct that it go to the Board of Trustees of the Cumberland Presbyterian Church hereinbefore mentioned, and their successors in office, in trust, to be used in the promotion of Christianity in such fields as may be occupied by the said Cumberland Presbyterian Church in the United States of America."

The defendants in this case, twelve in

number, constitute the board of trustees of the Cumberland Presbyterian Church, and the bill also alleges that they are the successors in office of the trustees of said church as named in the will.

The bill further sets forth that, as to the construction of section 2 (designated "secondly") of the will above set out, a difference of opinion has arisen, and really exists; that complainant insists that under said section he is vested with an absolute fee in said lands, as set out in the section or item of said will. It alleges that, on the other hand, defendants insist that under said section the complainant is only vested with a life estate, and they with the remainder interest therein.

The bill further alleges that complainant, in accord with directions in said will as set out above, sold the land described in section 3 of said will; that he paid off the specific bequests made in said section, and that there remains in his hands about ——— dollars; that in regard to this surplus a difference of opinion has arisen, and really exists; that complainant insists that under the will he is entitled to said amount absolutely; that the defendants, on the other hand, insist that complainant takes a life estate therein, and that they, as the board of trustees of the Cumberland Presbyterian Church, are entitled to the remainder interest therein.

It further alleged that there are no outstanding debts against the estate, and that said attempted devise and bequest constitute a cloud upon complainant's title to said lands and the surplus arising from said sale. The complainant prays a construction of the aforesaid portions of said will, and asks the court to state clearly what are complainant's rights thereunder, and what, if any, are the rights of the defendants thereunder; also that the cloud upon complainant's title to said property be removed.

To this bill the defendants filed a demurrer and answer. The demurrer sets up the following propositions:

(1) That the devise to defendants the board of trustees of the Cumberland Presbyterian Church in the second item of the will of Mrs. Carson is a valid devise to complainant for life, with remainder to said board after his death, subject to payment of his funeral expenses and just debts, and that complainant's contention that his estate in the lands therein devised is not merely a life estate, but an estate in fee-simple absolute, is not well taken.

(2) That the bequest to defendants the board of trustees in the third item of the will of Mrs. Carson is a valid executory bequest, subject to a life interest in complainant, and that complainant's contention that he is the absolute owner of the land is not well taken.

The appellants then answer as follows:

First. That they constitute a corporation duly chartered by the state of Kentucky.

The charter, or rather a copy thereof, is made an exhibit to the answer, and by agreement of counsel and decree of the court is treated, without question, as the charter of the said board. It is alleged that the appellants are the lawful successors in office, as trustees under the provisions of said charter, to the trustees of said corporation designated in said will; that the trustees designated in said will were at the time of the execution of said will and at the time of the death of the testatrix regularly elected and qualified as trustees of said corporation.

Second. That the appellants, constituting said board of trustees, have full power and authority, under said charter of incorporation, to receive in trust any donation, bequest, or other charities which may be or have been given to them for the use and benefit of the religious denomination known as the Cumberland Presbyterian Church, or its general assembly, for educational, religious, or charitable purposes, under the direction of said general assembly; that the said Cumberland Presbyterian Church is a religious body existing and maintained for the advancement of Christianity; that all moneys and other estates of every description which are vested in said board of trustees by virtue of their office are to be forever held in trust for the use of the Cumberland Presbyterian Church, the interest thereof to be devoted to religious, charitable, or educational purposes under the direction of the said general assembly; that the purposes for which the devise and bequest of Mrs. Carson were made to the said trustees was one of the vital purposes, if not the chief purpose, for which the said board of trustees exists.

Third. That the defendants, as a board of trustees, are properly constituted, and capable of taking and using the property involved in the devise and bequest in such manner as to best promote the interests of Christianity in fields occupied by said Cumberland Presbyterian Church.

Fourth. That the devise and bequest constitute a valid devise and a valid bequest for charitable uses, capable of being enforced by the appellant trustees in strict accordance with the intent of the testatrix, as set forth in her will, and that the appellee's contention that he is the absolute owner in fee of the property involved in the bequest is not well taken.

Fifth. That the appellants admit all the allegations of the original bill not inconsistent with the allegations of their answer.

The chancellor decided all the issues in favor of the complainant, and from his decree the defendants have appealed, and assign the following errors:

(1) The chancellor erred in overruling the appellants' demurrer to the effect that the devise to appellee for life, with remainder to said board of trustees after his death, subject to the payment of his funeral expenses and just debts, is a valid devise;

that the bequest to the board of trustees is a valid executory bequest, subject to the life estate in appellee; and that the appellee's contention that he is the absolute owner of said land and said fund is not well taken.

(2) The chancellor erred in holding that, under the will of the testatrix, the appellee takes and is vested with an absolute estate in fee in the land mentioned and described therein.

(3) The chancellor erred in holding that, under the third clause of said will, the appellee is vested with a life, if not an absolute, estate in the surplus funds arising from the sale of the land therein mentioned.

(4) The chancellor erred in holding that that part of said clause referring to the board of trustees of the Cumberland Presbyterian Church is inoperative, of none effect, and void, and that the appellee, under said will, and as surviving husband of said testatrix, is entitled to and is vested with an absolute estate in said surplus money after paying the special bequests set out in said will.

These assignments may be resolved into three propositions, which we will discuss:

As to the first clause of the will in controversy, relating to the tract of 165 acres of land, it appears that the testator made an absolute devise of the same to her husband, W. M. Carson, in the first part of the clause; and the question presented is whether the words superadded later in the clause cut down this fee-simple or absolute estate.

These words are: "And at his death I direct that after his funeral expenses and just debts are all paid the remainder of said trust to go," etc.

The general doctrine laid down in our cases and in the text-books is that a fee-simple estate given in the first portion of a devise, with absolute power of disposition, will not be limited or cut down by subsequent clauses and provisions of the will. *Ballentine v. Spear*, 2 Baxt. 260; *Sevier v. Brown*, 2 Swan, 114; *Bradley v. Carnes*, 94 Tenn. 27, 30, 27 S. W. 1007, 45 Am. St. Rep. 696; *Meacham v. Graham*, 98 Tenn. 201, 39 S. W. 12; *Clark v. Hill*, 98 Tenn. 300, 39 S. W. 339; *Underhill on Wills*, §§ 358, 491.

In the present case a fee-simple estate is given in the usual terms, and the only question is whether the subsequent language defeats such estate.

We are of opinion it does.

Taking the entire clause as a whole, we are of opinion that the estate given is not a fee, with an absolute power of disposition in W. M. Carson, but his power of disposition, if it may be so called, is merely a power to consume it by debts, but not otherwise, or in any other way to dispose of it. It is not, therefore, an unlimited power of disposition, but one limited to a power to charge it with debts.

The power of unlimited disposition in the first taker which will defeat an executory devise must be a power given by the will it-

self, and not one attaching as a legal incident to the estate given by the will. *Booker v. Booker*, 5 Humph. 505, 511; *Brown v. Hunt*, 12 Heisk. 404.

So, in *Read v. Watkins*, 11 Lea, 158, it was held that ordinary words conveying the absolute title alone, without superadded words giving unlimited power of disposition, would not defeat an executory devise.

In that case the will contained this provision:

"After the death of my beloved wife, and after all her debts are paid, I devise, will and direct that the property, real and personal, of which she may die seized and possessed, including all moneys she may have, shall be equally divided among all my children and representatives," etc.

We are of opinion that, under this clause of the will, W. M. Carson does not take an absolute or unlimited estate, such as will defeat a valid devise over.

We are of opinion, therefore, that the chancellor was in error in holding that W. N. Carson took the land mentioned in the second item in fee simple and absolutely, but he should have held that he took only a life estate, with remainder over.

It remains to be considered whether the devise and bequest over in the second and third items of the will for charitable purposes are valid.

The provision in the second item is that the remainder shall go to J. M. Gill and others, "constituting the Board of Trustees of the Cumberland Presbyterian Church in the United States of America, and their successors in office, to be held and used by them as trustees only in such manner as to best promote the interests of Christianity in the fields occupied by the said Cumberland Presbyterian Church."

In the third item the testatrix directs the remainder of the proceeds of the 140 acres to go the board of trustees of the Cumberland Presbyterian Church, hereinbefore mentioned, and their successors in office, in trust to be used in the promotion of Christianity in such fields as may be occupied by the said Cumberland Presbyterian Church in the United States of America.

It is insisted that the devisee and grantee in each of these provisions is an incorporated body, capable of taking by gift, devise, or bequest, and that the devise and bequest is in the provision made to it in its incorporated capacity.

We find in the record a copy of a charter incorporating "a body corporate and politic by the name and style of the 'Trustees of the General Assembly of the Cumberland Presbyterian Church,'" but we find no charter of incorporation under the name and style of the "Cumberland Presbyterian Church."

It appears that it is the general assembly of the church which is incorporated, and not the church itself.

It is evident that the testatrix intended

the remainder in the land under the second item of the will and in the proceeds of land in the third term to vest beneficially in the Cumberland Presbyterian Church, as a charitable organization of a religious character. The corporate name of the church is not correctly set forth in the devise and bequest, but the intent is plain, and the party beneficiary cannot be mistaken.

The mere misnomer of the corporation will not invalidate the devise or bequest if it clearly appears who was intended thereby. *State v. Smith*, 16 Lea, 666; *Bank v. Burke*, 1 Cold. 623; *Trustees v. Reneau*, 2 Swan, 94; *Morawetz on Corporations*, 181, 182.

We think it clearly appears that the devise and bequest was made to the trustees of the corporation, as representing it, and not to them as individuals; and the provisions of the will are therefore virtually to vest the property in the corporation of the General Assembly of the Cumberland Presbyterian Church, for the use and benefit of that church or denomination.

The devise and bequest being made direct to a corporation which is charitable, the trusts need not be set out so specifically and definitely as if made to individuals, in order to make them valid.

The reason is that a corporation organized for charitable purposes has these purposes and trusts set out in its charter and articles of foundation, so that the trusts are thus made certain and will control; due deference being paid to the directions of the testator, if any are given. But no trusts in such case need be declared, as they are set out in the charter and articles of foundation.

To illustrate: If a bequest be made to the Vanderbilt University or Cumberland University by name, the trusts to which the fund is to be applied need not be further specified by the grantee, since these are well-known charitable corporations, whose objects, purposes, and trusts are fully set forth in their charters and other instruments of foundation.

But if a devise or bequest is made to individuals, as trustees, then the trusts must be declared in the instrument giving the property.

We are of opinion that the devise and bequest in this case being made, as we have before held, to the corporation of the General Assembly of the Cumberland Presbyterian Church, that corporation will hold it under its charter and articles of foundation—due regard being paid to the directions of the testatrix, as far as given—and beyond that under the general trusts under which that corporation holds all its property.

We are also of the opinion that the corporation of the General Assembly of the Cumberland Presbyterian Church is authorized, under its charter, to accept devises and conveyances of real estate, as well as bequests of personal property, under the term "charities," used in that charter.

We are of opinion, therefore, that the devise over in the second item and the bequest over in the third item are valid charitable trusts; and the chancellor was in error in not so holding, and his decree is reversed, and the cause remanded to be further proceeded with in accord with this opinion.

The executor will pay costs of appeal out of the funds of the estate; costs of the court below will be adjudged by the chancellor.

KANSAS CITY, M. & B. R. CO. et al. v. WILLIFORD.

(Supreme Court of Tennessee. June 8, 1905.)

RAILROADS—INJURIES TO TRESPASSERS—CONTRIBUTORY NEGLIGENCE.

Where intestate, without invitation or necessity, boarded the footboard at the rear of a switch engine, presumably with the knowledge of the foreman, who did not order him off, and was killed by a collision at a street crossing, which was unavoidable by the utmost energies of the engineer, he was guilty of such gross contributory negligence as precludes a recovery, though the engine was running at a speed in excess of that allowed by ordinance.

Error to Circuit Court, Shelby County; J. P. Young, Judge.

Action by A. J. Williford as administrator, etc., against the Kansas City, Memphis & Birmingham Railroad Company and others. From a judgment for plaintiff, defendants bring error. Reversed.

C. H. Trimble, for plaintiffs in error. Jere Horn, for defendant in error.

BEARD, C. J. This suit was brought by the administrator of one Owen to recover damages in the interest of certain statutory beneficiaries against several railroads, constituting what is called in the record the "Frisco System," for inflicting, as is alleged in the declaration, by actionable negligence, injuries on his intestate which soon after resulted in his death. On the trial of the case there was a verdict and judgment for \$6,500 against the defendants, and they have prosecuted an appeal, in the nature of a writ of error, to this court.

It is disclosed in the record that the deceased lived in Mississippi, and during the afternoon of the accident arrived in the city of Memphis in company with one Parker. Soon after their arrival these parties saw, at the corner of Georgia street and Kansas avenue, in the act of pulling out of the yards of the defendant railroads, a switch engine moving backwards, with several freight cars attached. Along the rear end of this engine, which was in front in this movement, there ran what is called a footboard. Without invitation from any one, Owen and Parker stepped upon this footboard, Owen taking a position on the west end thereof, and Parker mounting from it to a seat in the cab. On the same end of the engine, and above the

footboard, was the tank, on the sloping part of which sat one Middlebrook, who was the foreman of the train crew. The engineer occupied his seat on the east side of the cab, while the fireman was on the west side, dividing his time between shoveling coal and ringing the bell as the engine proceeded. On the footboard with the deceased were two negroes. With these parties occupying the different positions indicated, the engine backing, with the cars attached, proceeded a short distance south, when it turned east on Broadway to its place of destination.

Broadway, as its name indicates, is a wide avenue, devoted, however, exclusively to railroad use. On it are located six parallel tracks, the fourth from the north being the one on which the engine and cars in question were running. Davie avenue crosses Broadway from north to south, at right angles, at a point about one mile east of where Owen and Parker boarded the engine. At the point of intersection there was a flagman.

Approaching this point from the west, the view of objects on Davie avenue, moving north to the crossing, was obstructed by a brick building located at the southwest corner of these two highways, and further, upon the occasion of this accident, by a number of cars which were standing on the track immediately south of the one on which this train was moving.

As the engine approached the crossing, a team of mules hitched to a wagon and driven by a negro came suddenly from the south, out of Davie avenue, upon the track. The contradicted evidence is that this driver, as he neared the track, was looking backward, but, turning his head and seeing the engine rapidly coming, he undertook to stop his team and back off. Failing in this, he released the lines and jumped from the wagon, thus saving himself. The mules, however, proceeding across the track, the engine came in violent collision with the wagon. In this collision Owen received the injuries from which his death resulted.

It is undisputed that the flagman was at his post, and as the train advanced he raised his flag to indicate to persons on Davie avenue that it would be dangerous then to attempt to cross; and, further, that, seeing the driver of this team getting dangerously near, the flagman made an ineffectual effort to stop him.

A number of witnesses were examined with regard to the speed at which this engine was running.

As is always the case where a question of this kind depends upon opinion evidence, the rate of speed was variously estimated to be from 6 to 40 miles an hour. It may be assumed, however, that the jury credited the testimony which fixed the speed at the highest rate. The plaintiff below, also for the purpose of showing negligence on the part of the crew in charge of the train, over the objection of the defendants, offered in evidence

an ordinance of the city of Memphis, within whose limits this accident occurred, limiting the speed of all trains and engines passing over any of the highways of the city to six miles an hour. There is no dispute but that the engineer, with perfect appliances for that purpose, did all that could be done to stop the train as soon as the mules appeared, and that it was impossible to control it, at the rate at which it was going, so as to avoid the collision.

The record also shows Owen was on the engine without invitation or necessity, and without the knowledge of the engineer or fireman. It is assumed the foreman, who sat on the tank, did see him, from the fact that this position enabled him to do so, and it may be this is fairly inferable from that fact.

The foreman's knowledge, however, that the intestate occupied this position, and his failure to stop the train and order him from it, cannot lessen the responsibility of the intestate. As was said in *Railroad v. Bogle*, 101 Tenn. 40, 46 S. W. 760, the engine is at all times the most exposed and perilous portion of the train; and it was there held, even in the case of a passenger, who in a fancied emergency mounted the engine to prevent being left by the train, that he lost his right to the high degree of care the law accorded passengers riding in a coach, and could claim nothing more than protection from injury by the wilful, wanton, or intentional act of the carrier and its employes. In *R. Co. v. Wilson*, 88 Tenn. 318, 12 S. W. 720, a baggage master left his proper place on the train, and was riding with the engineer and fireman upon the engine when he was killed in a collision with another train, resulting from the negligence of an engineer in charge of an engine running from an opposite direction to that in which his train was moving. It was there held that, having abandoned his post of duty and sought a more exposed and dangerous position on the train, where he was killed, the railroad was not liable.

We do not deem it necessary to consider the various assignments of error upon the action of the lower court, as we are satisfied there is no theory upon which the verdict and judgment in this case should be maintained. The intestate was voluntarily occupying the most exposed position on the most dangerous part of the train at the time of the collision, and this, as has been seen, without invitation, and without any necessity whatever for his being there. That his presence at this place proximately contributed to his injury is beyond question. No one on the engine save himself was injured, unless it be one of the negroes riding with him on this footboard. If he had been at any other place on that train, so far as we can see, he would have avoided the danger, and, as a matter of course, if he had not been on the train at all, he would not have been affected by this collision. Under these circumstances, we think, as a matter of law.

he was guilty of such gross contributory negligence as to preclude a recovery. While contributory negligence, where the facts are fairly debatable, is a question which under proper instruction should be determined by the jury, yet, where the facts are incontrovertible, the question then becomes one for the court. *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn. 333, 70 S. W. 616, 60 L. R. A. 459, 97 Am. St. Rep. 844.

In *Warden v. Louisville & Nashville R. Co.* (Ala. 1891) 10 South. 276, 14 L. R. A. 553, the plaintiff was a front brakeman, and received the injury which he complained of while sitting on the crossbeam in front of an engine with his legs hanging over in front of the pilot while the train was in motion. The record failed to show that he had any duty to perform, or that any duty could be performed by him while so riding, or that it was in any sense necessary for him at that time to be on the crossbeam.

In that case, after a full citation of authorities, and an able discussion of the rule of law involved, the court held the plaintiff's act in being at that place when the accident occurred "was negligence in se on his part, to be so declared as a matter of law." To this point the court said: "The investigations of the court and counsel have failed to disclose a single case to the contrary, while many courts are on record as holding, either by analogy or directly, that to ride upon the pilot or crossbeam in front of an engine while proceeding along its line of track, without justifying necessity therefor, involves per se such negligence as will defeat an action counting upon injuries received while so riding, and which would not have been received but for the plaintiff's being there. Even the assumption of less dangerous, but at the same time improper, positions on moving trains, voluntarily and unnecessarily has been many times held to be contributory negligence, as a matter of law, neutralizing the negligence of the defendant, and destroying an otherwise good cause of action, as illustrated in the following cases: *Martin v. B. & O. R. Co.* (C. C.) 41 Fed. 125; *Judkins v. Maine Central R. Co.*, 80 Me. 417, 14 Atl. 735, 6 New Eng. Rep. 715; *Hickey v. Boston & L. R. Co.*, 14 Allen, 429; *Penn. R. Co. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 651; *Kentucky Central R. Co. v. Thomas' Adm'r*, 79 Ky. 160, 42 Am. Rep. 208; *Lehigh Valley R. Co. v. Greiner*, 113 Pa. 600, 6 Atl. 246; *Atlanta & C. R. Co. v. Ray*, 70 Ga. 674; *Martensen v. Chicago, R. I. & P. R. Co.*, 60 Iowa, 705, 15 N. W. 569."

In *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, the plaintiff, the employé of a railroad company, left the box car provided for his accommodation, and while returning from his work rode on the pilot or bumper of the engine, and was injured from a collision with some cars standing on the track in a tunnel. On these facts, denying

his right to recovery, the court said: "His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit." These cases involved claims arising out of injuries received when the parties so injured had voluntarily assumed positions dangerous in their nature while the trains were in motion. The parties so injured were employés of the roads upon which the injuries occurred but we can see no reason, and certainly none has been suggested, why a mere intruder upon the train, in no sense a passenger, and in no degree entitled to the care that the carrier owes a passenger, should stand on any higher plane, or be permitted to invoke any other principle for the maintenance of his action, than an employé injured or killed under like conditions. That there is no distinction was the evident opinion of the court in *Wilcox v. San Antonio & A. P. R. Co.* (Tex. Civ. App.) 33 S. W. 379, where the right of one who was not an employé to a recovery for an injury received while riding on the footboard of an engine was considered. It was there held that a party riding on the front footboard of a switch engine, even at the invitation of the engineer in charge thereof, was guilty of such contributory negligence as to prevent his recovery for injuries received as the result of the running of the engine at a reckless rate of speed by the engineer.

But it is contended by the defendant in error that, though it be granted the intestate was without any right on the engine, and was guilty of contributory negligence in choosing the footboard, yet, it appearing the collision and his injuries might have been avoided by the exercise of ordinary and reasonable care on the part of the railroad employé, his representative is entitled to recover. It is said in argument the lack of such care is shown in the unusual rate of speed at which this train was moving (in violation of the city ordinance) in its approach to the much-used, and under existing conditions an extremely dangerous, crossing, and but for this lack the accident might have been avoided notwithstanding the negligence of Owen.

Let it be conceded that the collision might have been avoided if the speed had been within the limit prescribed by the ordinance, and running at the greater rate under these conditions was negligence on the part of the crew in charge of the engine, then we have a case where both parties by their negligence contributed to the injury which would bar this action. For, though theretofore recognized as sound doctrine, yet in the year 1809, for the first time, in *Butterfield v. Forrester*, 11 East, 60, decided by the Court of King's Bench, it was distinctly announced as a rule that the want of ordinary care on

his part, proximately contributing to an injury, would prevent the injured party from maintaining an action against another whose negligence also directly resulted in the injury. This rule has never since been doubted or denied, and that case has been cited with approval in every jurisdiction where the common law prevails. It rests upon the ground, first, that it would be a violation of correct principle and sound policy to visit the consequences of the plaintiff's own recklessness upon the defendant where both are directly at fault, and, second, the impracticability in such a case of apportioning the effects of the concurrent negligence so the plaintiff will recover alone for that of the defendant.

However it may have been applied theretofore, at least in *Butterfield v. Forrester*, 11 East, 60, the doctrine was first formulated, and in a distinct form announced that the want of ordinary care on his own part proximately contributing to his injury will prevent the injured party from maintaining an action against another who also directly contributed to the injury. This doctrine announced in 1809 by the Court of King's Bench has never since been doubted or denied, and this case has been cited with approval and followed in every jurisdiction where the common law prevails. The wisdom of the rule has commended itself to both English and American courts which have had occasion to speak with regard to it.

In 1842, in the case of *Davies v. Mann*, 10 Mees. & Wel. 546, what has been called a qualification of the rule in *Butterfield v. Forrester* was announced, and it is this qualification which, at the instance of the plaintiff's counsel, the trial judge gave to the jury. The rule in *Davies v. Mann* has been often applied where that case has not been mentioned as authority, and as often where the decision was rested entirely upon its authority. In the Supreme Court of the United States it is cited with approval in *Inland & Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, and other cases as well as in the decision of many of the state Supreme Courts and of the United States Circuit Courts in different circuits. It is to be observed, however, that the *Davies Case* did not attack the rule announced in *Butterfield v. Forrester*. To the contrary, it expressly conceded its soundness, but held that it had no application to the case before the court, on the ground that the plaintiff's want of ordinary care did not constitute, because of its remoteness, a bar to the action, while that of the defendant's did proximately operate to bring about the injury. In other words, the defendant's negligence was there held the sole proximate cause of the injury sustained by the plaintiff, in

that it arose subsequently to that of the plaintiff, and, the plaintiff's negligence being so obvious that the defendant could by the exercise of ordinary care have discovered it in time to avoid inflicting the injury, his failure to discover and avoid it was actionable. This was but the application of the doctrine, well settled, that, where the negligence of the defendant is proximate and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not altogether without fault. *Trow v. Vermont R. R. Co.*, 24 Vt. 487, 53 Am. Dec. 191. A reading of the opinion in the *Davies Case* makes it entirely clear that the facts raised the question of remote negligence on the part of the plaintiff and proximate negligence on that of the defendant, so plaintiff was given a recovery.

So far as we can discover, no court which has applied the rule there announced has gone further than the authority of the original case. It is true that there is to be found occasional obscurity of statement, so as to raise a doubt as to the limits within which the rule is to be confined, and it may be, and often is, that there is practical difficulty both for courts and juries in determining what is the remote, and what the proximate, cause of an injury; but where once settled that the plaintiff's negligence directly contributed thereto, we assume no well-considered case can be found which holds that the plaintiff can avoid the effect of his negligence and maintain his action against the defendant on the ground that the matter has not exercised reasonable care.

The counsel for the defendants in error in his argument relied with much confidence upon the opinion in *B. & O. R. Co. v. Hellenthal*, 88 Fed. 116, 31 C. C. A. 414, in which there was applied the principle of *Davies v. Mann*. The case at bar, however, was evidently considered by the court as one of remote and proximate causes, and as such proper for its application. That it was not conceived by the court delivering this opinion that this rule would control where the contributory negligence of the plaintiff was a proximate cause of the injury, is apparent from the fact that the same court, speaking through Day, J., now of the Supreme Court of the United States, in the case of *Gilbert v. Erie Co.*, 97 Fed. 747, 38 C. C. A. 408, after referring to *Coasting Co. v. Tolson*, supra, *B. & O. R. Co. v. Hellenthal*, supra, and other cases, said, "We do not think the principle settled in these cases applies to the case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant."

The doctrine of the *Davies v. Mann* case has been applied in this state in a number of cases, notably in *Whirley v. Whiteman*, 1 Head. 610, though without reference to the decision itself. It is a sound and reasonable

qualification of the general rule. For no party should be excused from the liability for an injury which he inflicts on another on the ground of the earlier negligence of the latter, when, aware of the latter's exposure to peril, he omits ordinary and reasonable care to avoid the injury. When the observance of this care would have prevented the hurt, failure in that regard is actionable wrong. It is so, not only because such negligence is the proximate occasion of the injury, but for the stronger reason that it indicates wantonness, and for this the law affords no excuse. As was said by the Supreme Court of Alabama in *Ga. Pac. R. Co. v. Lee*, 9 South. 233: "Such failure with such knowledge of the situation, and the probable consequences of the omission to act upon the dictates of prudence and diligence to the end of neutralizing plaintiff's fault and averting disaster, notwithstanding his lack of care, is, strictly speaking, not negligence at all; but it is more than any degree of negligence, inattention, or inadvertence; it is that recklessness or wantonness or worse which implies willingness to inflict the impending injury, or willfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate a wrong."

This intent, however, cannot be imputed to one who is without consciousness that his conduct will probably lead to wrong or injury. Nor can it be assumed, from the general fact that in some particular prior to, but in legal sequence one of the circumstances leading up to, the injury, the party has been guilty of negligence, when it appears he was unconscious of the perilous position of him who is subsequently injured. Nothing short of actual knowledge of the situation, and an omission of preventative effort after such knowledge, and where there is a reasonable prospect that such effort will avail, "can suffice to avoid the defense of contributory negligence on the part or imputable to the injured party." *Ga. Pac. R. Co. v. Lee*, supra.

The case at bar in no sense calls for the application of the rule of *Davies v. Mann*. The facts repel all suggestion of wantonness. Though absolutely unconscious of the extremely exposed position of the deceased, yet, when the emergency appeared involving a menace to the team, wagon, and driver, as well as to the train itself and those on it, the record shows the utmost energies of the engineer, with the best appliances at hand, were unavailingly exerted to avoid the collision.

Upon the facts proven and well-settled legal principle, we are constrained to hold that there was no evidence to support this action. It was a proper case for the trial judge to instruct the jury to return a verdict in favor of the defendants.

It results that the judgment is reversed, and the case is remanded for a new trial.

UNION RY. CO. v. HUNTON et al.

(Supreme Court of Tennessee. April 24, 1905.)

1. CONDEMNATION PROCEEDINGS — PARTIES — LESSEES.

In condemnation proceedings a lessee of the land is a necessary party.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 478.]

2. APPEAL—ASSIGNMENT OF ERRORS.

On appeal in condemnation proceedings, an assignment that the court committed error in permitting a lease to one of the defendants to be used as an absolute criterion for value could not be entertained because too general.

3. CROSS-EXAMINATION OF WITNESS—DETERMINATION OF VALUE.

Where, in condemnation proceedings, a witness testified that the property in question was worth a specified sum, it was proper on cross-examination to permit him to be asked what he would consider the fair cash value of the property in view of the fact that it was leased for a certain sum per year; the witness having also previously stated that a fair rental value would be 6 per cent. of the value of the property.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 945.]

4. CONDEMNATION PROCEEDINGS—DETERMINATION OF VALUE—RENTAL VALUE.

In condemnation proceedings the rental value of the property is one consideration to be looked to in determining the value.

5. SAME—DAMAGES—DETERMINATION.

Where a judgment of condemnation was passed, the question as to whether one of defendants, who claimed an interest under a lease, was entitled to any damages, was not examinable at a subsequent term, when the court has under consideration merely the question of the amount of damages.

6. TRIAL—EXAMINATION OF WITNESSES.

Where counsel stated that he did not hope to obtain anything by certain cross-examination that he was about to enter upon, there was no error in refusing to permit him to go on with it.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 923.]

7. CONDEMNATION PROCEEDINGS — VALUE OF PROPERTY—LEASE AS CRITERION.

In condemnation proceedings it was error not to permit petitioner to show that a lease of the property held by one of the defendants was not obtained with a view to use and enjoyment of the property, but as a means of speculation in the expected condemnation proceedings, and hence that it should not be taken as a spontaneous expression of value.

8. TRIAL — REBUTTAL—REOPENING OF EVIDENCE IN CHIEF.

Where it appeared on the examination of a witness in rebuttal that, if the examination were allowed to proceed, the court would again have to go at large into testimony in chief, it was proper to refuse to permit the examination to so proceed.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 148-155.]

9. CONDEMNATION PROCEEDINGS — VALUE OF PROPERTY—ADMISSIBILITY OF EVIDENCE.

In condemnation proceedings it was error to refuse to allow petitioner to show the price for which other lots in the neighborhood of the lot in question sold within a reasonable time prior to the taking of the land involved.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 416-419.]

10. APPEAL—REVIEW—QUESTIONS CONSIDERED.

Assignments of error on the court's refusal to allow witnesses to answer cannot be considered where it does not appear what the witness would have stated.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2905.]

11. SAME—EXCLUSION OF EVIDENCE.

The rule that an assignment of error on the court's refusal to allow a witness to answer cannot be considered where it does not appear what the witness would have stated, does not apply where the trial court rules out an entire line of competent evidence, or where he holds that a witness is incompetent, and refused to hear him at all.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2905, 2906.] 9

12. CONDEMNATION PROCEEDINGS—EVIDENCE OF VALUE—COMPETENCY OF WITNESS.

Where, in condemnation proceedings, a witness testified that he had knowledge of two rental contracts of neighboring lots within a short time before the taking, and that, though he had no specific information of any other contract in the neighborhood, he was acquainted with property there, and had had many years' experience as a real estate agent, it was error not to permit him to testify concerning the rental value of the property involved.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2217, 2357.]

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Condemnation proceedings by the Union Railway Company against Mrs. E. M. Hunton and another. From a judgment of the circuit court on appeal from the determination of a jury of view, the petitioner appeals. Reversed.

McFarland & Canada, for appellant. Wilkinson & McGehee and Carroll, McKellar, Bullington & Biggs, for appellees.

NEIL, J. This was a condemnation suit brought by the Union Railway Company on the 25th of May, 1903, against the defendants, Mrs. E. M. Hunton and S. M. Wright, for the purpose of condemning a right of way 200 feet in width across the property of the defendant Mrs. Hunton, fully described in the petition.

The defendant S. M. Wright was a lessee, having a lease upon the property executed April 29, 1903, for a period of 10 years from May 1, 1903, to May 1, 1913, at a rental of \$500 per year. According to the terms of this lease the tenant was to keep down taxes, and to turn over to the landlord at the end of the term any improvements he might erect upon the land during the term. Having this claim to the premises in question, he was a necessary party to the proceeding.

The parties, therefore, who are the defendants in error, and who were the defendants named in the petition of the Union Railway Company for condemnation, are Mrs. E. M. Hunton, the owner in fee, and S. M. Wright, the alleged lessee.

In making the defendant S. M. Wright a party, and seeking the condemnation of the

leasehold interest claimed by him at the time of the condemnation of the fee of Mrs. Hunton, the petition, as to the lease and the title of S. M. Wright thereunder, alleged as follows:

"Petitioner is advised that the said Wright wrongfully obtained whatever lease he has upon this land as against this petitioner, and in bad faith to it, and had been previously advised of the necessity of petitioner occupying this land for its roadbed, and had pretended to assist petitioner in the obtention of this right of way for its purposes, but, instead of doing so, secured this lease wrongfully to himself.

"Petitioner now makes the said S. M. Wright a party defendant hereto, in order that he may appear and set up whatever interest he has, and that upon condemnation of this land and determination of what compensation shall be paid for the taking of the same this compensation may be distributed between the defendant Mrs. Hunton and the said S. M. Wright, if it appears that he has any interest in the said land."

The defendant S. M. Wright filed an answer to the petition for condemnation, in which, after denying the prior knowledge and fraud and bad faith charged against him, he continued:

"On the contrary, respondent avers that he obtained the lease in good faith, for the purpose of erecting a manufacturing plant thereon, and has already expended the sum of about \$800 in the erection of said plant; that the property is peculiarly valuable for the uses to which he desires to put it; that, being at the junction of several railroads above mentioned, it affords respondent splendid opportunities to advertise the wares to be manufactured by him, and he states that it will be a great injury to him for the said land to be taken for the uses of the petitioner."

The court, upon the petition and the answers of the defendants thereto, appointed a jury of view, who assessed the damages to both of the defendants at \$5,500, \$1,000 of which was to go to the defendant and lessee, Wright.

From this report of the jury of view all the parties, the petitioner and the defendants, appealed.

The case subsequently came on for trial before the circuit judge and a jury in the usual way, at the conclusion of which trial the jury returned a verdict in favor of Mrs. Hunton for \$7,650, with interest, and in favor of the defendant Wright for \$1,500 and interest.

Upon this verdict the court rendered judgment against the petitioner for said sums of \$7,650 and \$1,500, respectively, with interest, making a total of \$9,653.25, and all costs.

A motion for new trial was made and overruled, whereupon an appeal was prayed by the railway company to this court, and errors have been assigned.

The first, second, and sixth assignments all depend principally upon the contention of the petitioner that Wright's lease was procured under such circumstances as prevented it being properly considered as a fair expression of the rental value of the land by reason of the matter set forth in the excerpt above taken from the petition. It was contended by the petitioner that Wright, having learned from the company that it deemed the land in question essential to the further progress of its road, and that it must be acquired either by purchase or condemnation, sought out Mrs. Hunton, and procured the lease from her, not with a view of really using it, but for the purpose of, and with the expectation of, reaping a profit out of the condemnation proceedings in the valuation of the lease; that the taking of the lease by Wright was a mere speculation, based upon the certainty that the property would soon be taken from him, and that he would thereby obtain a profit from the lease without bearing its burdens, or after having borne only a small proportion of its burdens.

Having reference to this contention, the appellant assigned errors 1, 2, and 6, as follows:

"(1) The court erred in permitting the alleged lease to the defendant S. M. Wright to be used as an absolute criterion for value, and to permit Le Master and all the other witnesses to state the value of the property predicated upon this alleged lease.

"(2) The court erred in not permitting the cross-examination of the defendant S. M. Wright with reference to the bona fides of his lease, and as to his having deliberately made the lease, and erected hastily certain improvements with a full knowledge of the fact that the railway company had surveyed the land in question, and was preparing to institute condemnation proceedings."

"(6) The court erred in not permitting any testimony to be introduced upon the issue made in the pleadings as to the bona fides of the lease to S. M. Wright, and in not permitting all the facts and circumstances of the lease to be shown."

The first assignment, in so far as it makes the point as a general one, directed to the whole record, that the court allowed the lease to be used as an absolute criterion of value, cannot be entertained, because too general. In so far as it is directed to special questions and answers indicated under the assignment, it is equally untenable.

The first question specified was not answered at all. In lieu thereof, after a ruling of the court, the following questions were asked, viz.: "What would you consider the fair cash value of property that produced this \$500 net per year? Q. By Witness: Are you speaking now of this particular property? Reply of Counsel: Any property that produced a yearly return of \$500 net. Ans. By Witness: Of course; that would indicate a valuation of \$8,300." The witness had pre-

viously stated that a fair rental would be 6 per cent. on the value of the property.

This witness had already been examined touching the various elements of value proper to be considered in cases of the character before the court, and had given his opinion that the property was worth \$3,000 an acre, or \$4,000 for the one and a quarter acres. The questions above set out were asked the witness on cross-examination for the purpose of testing the correctness of his previous opinion. The substance of the matter was that counsel for the defendant, cross-examining the witness, pressed upon his attention one especial element of value, or means of arriving at value, for the purpose of demonstrating the incorrectness of the opinion previously expressed by the witness. We are of opinion that this was a fair use of the point in question, inasmuch as the court has held that the rental value is one consideration to be looked to in condemnation cases. *McKinney v. Nashville*, 102 Tenn. 137-140, 52 S. W. 781, 73 Am. St. Rep. 859.

The questions and answers quoted in the brief from the testimony of Mr. Snowden are subject to the same explanation and disposition as that given in respect of the testimony previously considered—that of Mr. Le Master.

So much of the first assignment as concerns the informity of the lease as an element of value by reason of the circumstances under which it was taken will be considered in connection with the second and sixth assignments.

It is true, as complained in the second assignment, that the court below refused to allow the petitioner to cross-examine defendant Wright for the purpose of showing that he had procured the lease under the circumstances stated in the petition; but it is also true that this refusal of the court occurred after counsel for the petitioner had stated, in the same connection, in substance, that he did not hope to obtain anything by the cross-examination, and also after he had stated that his purpose was not to weaken the effect of the lease as evidence of the value of the land, but to lay grounds for denying to Wright any compensation at all for the lease. In view of these two statements of counsel, the court acted correctly in refusing the right to cross-examine upon the subject. If the counsel expected to obtain no benefit by the cross-examination, and so stated to the court, it would have been an idle thing to take up time in going through such an examination. For the same reason he could not hope to impair the lease in any way by such examination. Moreover, the time for wholly preventing a recovery on the part of Wright came to an end when the judgment of condemnation was passed at a former term of the court. The question was not re-examinable, for such purpose, at a subsequent term, when the court had under consideration merely the question of the amount of dam-

ages. At most the question of good faith could be gone into at that stage of the case only for the purpose of weakening the effect of the lease as an element in arriving at the value of the land.

This brings us to the sixth assignment. The following evidence pertinent to this assignment appears in the record, viz.:

Mr. Snowden testified that before Mr. Wright leased the property he came into the office of Mr. Fleming, the president of the company, and in his presence had a conversation with Mr. Fleming about the property. "He said," continued the witness, "that he had an option to lease it, or a proposition to lease it, and he wanted to know whether the Union Railway was going to buy it, because, he said, if they did, he didn't see any use of his going on there, because he'd have to move away again. Then I think he said he was thinking about buying it, too, but I'm not certain on that point. Q. But he came up to be informed before making the lease, to see whether the Union Railway would buy the property? Ans. Yes, sir. Mr. Fleming told him if the Union Railway couldn't buy the property at a reasonable price, it was going to condemn the property; that he had to go through it. Q. What did Mr. Wright reply? Ans. I don't remember exactly. Q. Do you remember whether any maps or plats were exhibited? Ans. Yes, sir. I remember that the plat was on Mr. Fleming's desk, and referred to several times during the conversation. Q. And Mr. Fleming assured Mr. Wright that the road would go through there? Ans. Yes, sir."

This evidence was ruled out by the court below, notwithstanding a distinct statement upon the part of counsel for petitioner, in substance, that his purpose in offering it was to show that the lease was not obtained by Wright really with a view to its use and enjoyment, but as a means of speculation in the expected condemnation proceedings, and hence that such lease ought not to be taken as a true and spontaneous expression of value.

We think the evidence was admissible for this purpose, and its exclusion was error. In the case of *McKinney v. Nashville*, supra, while it was held that a lease might be looked to as an element in ascertaining the value of the property, yet that evidence might be heard that the amount contracted to be paid as rent was influenced by the fact that such property was procured for gambling purposes, and the apparent rental value thereby inflated. The principle is the same; that is, in the case referred to, the petitioner was permitted to show the special circumstances under which the lease was effected that impaired its evidentiary effect as a true expression or indication of the value of the property. So the special circumstances testified to by Mr. Snowden, above quoted, were proper matters for the consideration of the jury in the present case, for the purpose of ena-

bling them to rightly estimate the Wright lease as a means of arriving at the value of the property. The circuit judge should have admitted the testimony, so limiting its application. The refusal of the court below to permit this evidence to go to the jury must have had a material effect in the determination of the cause, since the existence of the lease, and the amount of the rent therein agreed to be paid, figured very prominently in the evidence as a means of enhancing the value of the property, on the theory that ordinarily the amount of the rent may be treated as 6 per cent. on the value of the property.

The third, fourth, and fifth assignments of error all rest upon a single ruling made by the circuit judge.

The substance of this matter is as follows: The railway company had introduced R. B. Snowden as a witness, who had testified that D. S. Rice, as agent of Mrs. Hunton, had employed him to assist in making a sale of the property in question a short time before the condemnation proceedings were begun, and had fixed \$4,000 as the price of the property, or the sum at which it should be sold. After the company had closed its evidence, the landowner, Mrs. Hunton, offered in rebuttal the said D. S. Rice, for the purpose of contradicting the above-mentioned statement made by Mr. Snowden. When so placed upon the stand, Mr. Rice denied that he had had any such conversation with Mr. Snowden. The attorney for the railway company, after examining the witness upon the subject of the conflict between himself and Mr. Snowden, then proceeded to interrogate him, as to the price which Mrs. Hunton had placed upon the land when she put it in his hands for sale. He testified, in substance, that she had put a tentative price of \$6,000 upon it, but reserved the right to reject this price if she should subsequently change her mind; that is to say, Mr. Rice was not authorized to make a binding offer of this kind, she reserving the right to sign the contract herself before it should be regarded as complete. Considerable discussion arose among counsel in the presence of the court, and various questions were offered and suggestions made, which indicated that, if the examination were allowed to proceed, the court would again have to go at large into testimony in chief. Thereupon his honor cut the whole matter short, ruled out the above-mentioned testimony, and stated that the evidence of the witness then on the stand must be confined wholly to matters in rebuttal.

This action of the court is assigned as error. We do not think there was any error in this matter. In the case of *Smith v. Britton*, 4 Humph. 201, the court said:

"For the purpose of facilitating and expediting business, rules of practice have, from time immemorial, been adopted in all courts of justice. These rules, though not so binding and obligatory as those establish-

ing rights, are, nevertheless, not departed from except at the discretion of the court, which discretion should not be exercised inconsiderately, and for trivial causes.

"Among other rules adopted is the one regulating the mode for the examination of witnesses. It is a very important one, and one of great antiquity. Without it the confusion in the examination of cases before a jury would be intolerable, and the prolixity of investigations interminable. It provides that the plaintiff shall, in the opening of the case, examine all his testimony which goes to establish his action. The defendant shall then introduce his proof upon his matters of defense, and his testimony rebutting the proof adduced by the plaintiff, and then the plaintiff any which may rebut that of the defendant, but nothing in chief but by the permission of the court, which permission, as we have said, ought not to be extended except for good and sufficient reason shown, lest the good which results from the rule be destroyed, and the evil intended to be obviated be visited upon the court in its full force. The relaxing of the rule, then, is a matter of discretion with the court; and so difficult is it to reverse for the exercise of a discretion that many courts have refused to do so. But in this state it has been held that the wrong exercise of a legal discretion is a matter of error; but then it must be gross and palpable, and not subject to hesitation or doubt."

See, also, *Story v. Saunders*, 8 Humph. 667; *Cash v. State*, 10 Humph. 114; *Hays v. Crawford*, 1 Heisk. 87; *Morris v. Swaney*, 7 Heisk. 595; *L. & N. R. R. Co. v. Parker*, 12 Heisk. 50; *Forsee v. Matlock*, 7 Heisk. 426; *State v. Davis*, 104 Tenn. 501, 506, 507, 509, 53 S. W. 122; *Knights of Honor v. Dickson*, 102 Tenn. 255, 258, 259, 52 S. W. 862; 2 *Elliott on Evidence*, § 819, 808-812, 946, 949.

We do not think that the present case calls for any review of the discretion of the circuit judge. We can add nothing to what was said by Mr. Justice Turley in the excerpt above quoted, concerning the impolicy of lightly interfering with the discretion of the circuit judge in such matters.

The seventh assignment makes the point that the circuit judge erred in refusing to allow the petitioners to show the prices at which other lots in the neighborhood of the lot in question had been sold, within a reasonable time prior to the taking of the land involved in the present case by the petitioner, as a means of enabling the jury to place a proper estimate or valuation upon the land so involved.

We think his honor committed error in this ruling.

In *Lewis on Eminent Domain* it is said: "The propriety of allowing proof of sales of similar property to that in question, made at or about the time of the taking, is almost uni-

versally approved by the authorities." Vol. 2, § 443, p. 963.

In *Am. & Eng. Ency. Law*, it is said: "The market value of any particular piece of land that has been taken is, of course, the general selling price in the same vicinity of similar lands. But as to whether this general selling price can be determined by considering the price that was paid in particular instances, there is a division of opinion among the courts. Many decisions—doubtless the greater weight of authority—hold that it is proper to consider the sales of similar property in the same neighborhood at about the same time." Vol. 10 (2d Ed.) p. 1155.

In *White v. Hermann*, 51 Ill. 246, 99 Am. Dec. 543, it is said: "It is urged that the court below erred in refusing to permit appellants to prove the value of other adjacent land just before the date of this instrument. As it was important that the jury should be informed of the value of the land in controversy at the time it is claimed to have been sold, we see no objection to permitting proof to be made of the worth of other property of equal quality lying near to and similarly situated to this at or near the date of the instrument, or even property of different quality in its immediate vicinity, leaving the jury to determine the difference in value."

In *St. L. K. & N. W. Ry. Co. v. Clark*, 121 Mo. 185, 25 S. W. 192, 906, 26 L. R. A. 751, it is said:

"We think the evidence of sales of similar property to that in question, made in the neighborhood, about the same time, was admissible to aid the jury in determining the damages to which the owner was entitled. The value of property is ascertained largely from such sales, and the opinions of witnesses as to values are largely predicated upon them. It is best, when it can be done, to put the jurors in possession of all the facts from which values are ascertained, and allow them to draw the conclusion therefrom. Witnesses basing their opinions upon recent sales of like property are liable to exaggerate or underestimate values. In any consideration they are no more capable of deducing fair conclusions from the known facts than the jury. The object is to ascertain the general market value, and, if particular sales are made under exceptional circumstances, the fact can be shown, and the jury can determine its probative force. Certainly no more reliable method of determining the fair market values of land can be reached than that derived from bona fide sales of similar lands in the vicinity. The objection that such evidence raises collateral issues as to the character of the land sold and the circumstances of such sales is more than compensated for by its value in aiding the jury to a correct conclusion. The weight of authority supports this view."

In *Mayor, etc., of Baltimore v. Smith et al.*, 80 Md. 473, 31 Atl. 423, it is said: "We all know, from observation, if not experience, that if inquiry is made as to the value of a lot on a certain street in a city or town, where other sales have been recently made, it is generally answered by naming the price realized at such sales. If twelve jurors are taken upon land to ascertain its value, with which they are unacquainted, the first question which is suggested to them is, 'What does land in this neighborhood sell for?' As was said in *Moale v. Mayor, etc., of Baltimore*, 5 Md. 324, 61 Am. Dec. 276, 'with a view to get at this [the value of the lot], the neighboring and contiguous lots may be looked to, but they do not furnish an unerring standard to measure the value of the lot condemned.' The property sold may, owing to peculiar circumstances, have brought more or less than the real market value; but those circumstances can be explained, and, if it is similar in character, location, etc., and the sale was of a sufficiently recent date, and was not made under unusual conditions, the price realized would help a jury to reach a just and proper conclusion."

It is insisted by counsel for the defendants in error that the above matter is not presented in such way that the court can consider it, for the reason that the record fails to show what the answer of the witness would have been. We adhere strictly to the rule referred to as declared and illustrated in *Shugart v. Shugart*, 3 Cates, 179, 185; *Stacker v. Railroad*, 106 Tenn. 450, 61 S. W. 766; *Weeks v. McNulty*, 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693; *Insurance Co. v. Scales*, 101 Tenn. 628, 49 S. W. 743; *Truslow v. State*, 95 Tenn. 199, 31 S. W. 987; *R. R. v. Stonecipher*, 95 Tenn. 315, 32 S. W. 208; *Pearce v. Suggs*, 85 Tenn. 724, 4 S. W. 526. But it does not apply where the circuit judge rules out an entire line of competent evidence, or refuses to hear any examination thereon, just as it does not apply when he holds that a witness is incompetent, and refuses to hear him at all.

The eighth assignment presents the point that the circuit judge erred in refusing to allow the witness E. B. Le Master to testify concerning the rental value of the property or lot of land in controversy in this case.

Mr. Le Master testified that he had knowledge of two rental contracts of neighboring lots within a short time before the taking in the present case, and that, although he had no specific information of any other contract in that neighborhood, yet that he was acquainted with the property there, and also had had a great many years' experience as a real estate agent in the city of Memphis, and on these grounds that he believed he could state the rental value of the property in question.

We are of opinion that under these circum-

stances Mr. Le Master should have been allowed to state his opinion. It should be observed that, while it must appear that the witness had some knowledge of the matter whereof he speaks, so that the court may see his evidence will aid the jury, yet it is not necessary that he should fill the measure of a technical expert. *Montana Ry. Co. v. Warren*, 137 U. S. 354, 11 Sup. Ct. 96, 34 L. Ed. 681; *Chicago, etc., Ry. Co. v. Blake*, 116 Ill. 166, 167, 4 N. E. 488; *Wray v. Knoxville, etc., Ry. Co.* (Tenn.) 82 S. W. 471, 474.

In 1 Elliott on Evidence, § 685, it is said:

"Witnesses who are not strictly experts, as well as expert witnesses, may testify as to the value of property, real or personal, or as to the value of services in a proper case. They must, however, have some knowledge on which to base their opinion. If they have such knowledge, the fact that it is slight will go to the weight of their testimony, rather than to its competency; but if they are not acquainted with, or have no knowledge of, the matter in question, so that their opinion can in no way aid the jury, the court should refuse to permit them to give an opinion which would necessarily be a mere guess or conjecture."

Again, it is said in the same authority:

"Although ordinary witnesses may give their opinions as to value, it is universally held that experts may be called in a proper case for the same purpose, and when experts are so called it is not a necessary qualification to their competency that their knowledge should have come from observation of the particular article or real estate. 'It is difficult to lay down any exact rule in respect of the amount of knowledge a witness must possess, and the determination of this matter rests largely in the discretion of the trial judge.' But if the witness has no actual knowledge on the subject, and is no better qualified to judge than the jury, his opinion would be worse than useless, and the court may well decline to receive it." *Id.* § 1109.

In the same authority, speaking to the subject of the admissibility of the opinions of nonexpert witnesses, it is said:

"It would be almost impossible to enumerate all the particular cases or instances in which the opinions or conclusions of ordinary witnesses are admissible. One of the most comprehensive statements upon the subject is found in an opinion of the Supreme Court of New Hampshire, where it is said: 'Courts and text-writers all agree that upon questions of science and skill opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recognized rule or principle, all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity,

handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions, and things both moral and physical, too numerous to mention." *Id.* vol. 1, § 676.

The ninth assignment of error is overruled. This involved merely a construction of the lease, and it is not contended that the construction was incorrect.

The tenth assignment is overruled. The matter copied from the charge in this assignment is not strictly correct, but the error is not sufficiently important to justify a reversal therefor. The same matter, with an additional sentence attached thereto, which made it reversible error, is fully considered in an opinion filed to-day in the case of *Union Ry. Co. v. Gilbert D. Raine* (Tex. Sup.) 86 S. W. 857, to which we refer.

The eleventh assignment of error is overruled. This same instruction also appeared, in substance, in the case last referred to, and it need not be further discussed here.

It results that for the errors committed in respect of the matters complained of in the sixth, seventh, and eighth assignments of error the judgment of the court below must be reversed, and the cause remanded for a new trial.

The costs of the appeal will be paid one-half by Mrs. Hunton and one-half by S. M. Wright.

EHRlich v. WEBER.

(Supreme Court of Tennessee. May 20, 1905.)

1. ALIENS—STATUS OF CHILDREN BORN IN THIS COUNTRY.

Children born of alien parents in this country are citizens.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Citizens, § 2.]

2. SAME—PRESUMPTION.

It is presumed that the political status of an alien continues, and the mere fact of long residence in this country is not sufficient to overcome this presumption.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Aliens, § 2; vol. 10, Cent. Dig. Citizens, § 17.]

3. TRIAL — INCOMPETENT EVIDENCE—ADMISSION WITHOUT OBJECTION.

Evidence admitted without objection must be considered, although hearsay or otherwise incompetent.

4. SAME—RIGHTS OF INHERITANCE—STATUTES—REPEAL.

Code 1858, §§ 1998-2000, regulating the rights of aliens to hold property, and providing that an alien who is a resident in the United States at the time of the death of an intestate, and has declared, or shall within 12 months thereafter declare, his intention to become a citizen, shall be capable of inheriting the estate of such intestate, are repealed by Acts 1875, p. 4, c. 2 (Shannon's Code, §§ 3659, 3660), relative

to the same subject, and providing that the heir or heirs of an alien may take lands by descent or otherwise as citizens of the United States.

5. SAME—APPLICATION OF STATUTE.

Acts 1875, p. 4, c. 2 (Shannon's Code, §§ 3659, 3660), provides that aliens may take and hold property either by purchase, descent, or devise, and that the heir or heirs of an alien may take lands by descent as citizens of the United States. Acts 1883, p. 330, c. 250, §§ 1, 2, provide that whenever any person dies a resident of this state, intestate, and the nearest of kin are aliens, the property shall be distributed in a certain manner. *Held* that, construing the two statutes together, the statute of 1883 applies only in a case in which all of the heirs are aliens.

6. PLEADING—RIGHTS UNDER TREATY.

Where complainant based his claim upon the provisions of a treaty, it was not necessary to make a formal claim of his rights under the treaty, inasmuch as treaties are a part of the law of every state.

Appeal from Chancery Court, Shelby County; F. H. Helskell, Chancellor.

Action by Rudolph C. Ehrlich against Emma Weber. From a judgment for complainant, respondent appeals. *Affirmed.*

This case involves a contest over the ownership and division of the estate of Adolph Weber, Jr., deceased.

The complainant was born in Leipzig, in the kingdom of Saxony, on the 9th day of September, 1860. Between the latter date and the year 1865 or 1866 his father, after cruelly treating his mother, Wilhelmina Ehrlich, deserted her and abandoned his family. The said Wilhelmina, after having secured a divorce from her husband, came to this country about the year 1866, bringing with her the complainant, then a child of about six years, and settled in Memphis, Tenn., with the purpose of making that city her future home.

During the year 1868 she intermarried with Adolph Weber, Sr., who was then residing in Memphis. He and his wife continued to reside there until his death, a few years later. Of this marriage were born in Memphis, Tenn., the defendant, Emma Weber, and Adolph Weber, Jr. The latter died intestate in Memphis in the month of November, 1903, leaving a valuable estate, which is the subject of the present controversy. He was never married. Wilhelmina, the mother of the said Emma, Adolph, Jr., and of complainant, also resided in Memphis until her death in the year 1896.

Adolph Weber, Sr., was born in Stuttgart, in the kingdom of Württemberg. This is proved by statements, unobjected to in the court below, which defendant, Emma Weber, testified were made to her by her mother; also by the testimony of Caroline Heinrichs, who deposed, also without objection, that Adolph Weber, Sr., told her that he came from Württemberg; also that she herself came from the same country, and that, on talking with him, she found that he knew the towns in that country with which she was familiar; also that he spoke the German language like a native, and that he

spoke English brokenly. It is not proven that he ever obtained naturalization papers, or that he ever voted, sat on a jury, or exercised any other of the political rights of citizenship in this country.

The complainant has resided in this country since he came here with his mother in 1866—part of the time in this state, part in Nebraska, part in Illinois. It is not shown that he ever obtained naturalization papers, or that he ever exercised any of the political rights of citizenship in either of the states in which he has resided.

In the bill complainant describes himself as a "resident" of the state of Illinois. In the answer defendant averred that he was an alien, and insisted that he was for that reason not entitled to share in the estate of his half-brother, Adolph Weber, Jr. This appeared in the form of an amendment to the answer. On the same day the complainant was permitted to amend his bill so as to add the following to the prayer, viz.:

"And should it appear that complainant is mistaken in his belief that he is a citizen of the state of Illinois, or should it appear that he is not a citizen of the United States, but was at the time of the death of said brother a citizen of any other foreign government, or subject of any foreign king or ruler or prince, then he prays that he have the benefit of any and all treaties or conventions with such state or government, king, ruler, or prince which may have been entered into between the United States and such foreign power touching the rights of aliens, and especially under the law of the land as proclaimed and established in the treaty with the King of Saxony of 1846, and with the King of Prussia of the year 1828, and duly ratified according to law by the United States."

The chancellor decreed that the complainant was entitled to an equal interest in the estate with his half-sister, defendant, Emma Weber. From this decree she has appealed and assigned errors.

Edgington & Edgington, for appellant. R. B. Goodwin, for appellee.

NEIL, J. (after stating the facts). Regardless of whether the said Wilhelmina and her husband Adolph Weber, Sr., were aliens, their children, Emma and Adolph, Jr., having been born in this country and under its jurisdiction, became at once, by virtue of such birth, American citizens. *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

Rudolph C. Ehrlich, complainant, having been born in a foreign country, and hence an alien, his status of alienage would be presumed to continue, in the absence of proof that he had denationalized himself or ceased to be a citizen of his native land, and the mere fact of long residence in this country would not be sufficient to overcome the pre-

sumption thus arising. *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; *Green v. Salas* (C. C.) 31 Fed. 107; *Bode v. Trimmer*, 82 Cal. 517, 23 Pac. 188; *State ex rel. Thayer v. Boyd*, 31 Neb. 730, 48 N. W. 753, 51 N. W. 602.

The same conclusion holds in respect of Adolph Weber, Sr., and of his wife, Wilhelmina. Hence, while it is true, as contended by complainant's counsel, that an alien woman, otherwise eligible to citizenship here, may become a citizen by intermarrying with a citizen of this country, and that her minor child, of a former marriage, brought by her to this country and residing with her, will, upon such marriage to a citizen of this country, ipso facto become also a citizen along with his mother (*United States v. Kellar* [C. C.] 13 Fed. 82; *Kreitz v. Behrensmeier* [Ill.] 17 N. E. 232, 8 Am. St. Rep. 349), there is nothing in this case upon which to rest such a conclusion in favor of the complainant. His mother was clearly not a citizen, aside from any consideration of her intermarriage with Adolph Weber, Sr., and that marriage did not confer citizenship upon her, for the reason that Adolph Weber, Sr., was not himself a citizen. The facts stated concerning his origin are sufficient to show that he was an alien. The testimony of Emma Weber upon this subject, set out in the statement, would, no doubt, have been excluded in the court below, as pure hearsay, if a proper objection had been interposed; but there was no objection, and the evidence must be considered. The testimony of Mrs. Heinrichs as to the statements made to her by Adolph Weber, Sr., as to the place of his birth, should probably have been held competent, even if an exception had been interposed. *Groves v. Gordon*, 3 Brev. (S. C.) 245. But see *Schuster v. State*, 80 Wis. 107, 49 N. W. 30. We are referred to *Lucas v. United States*, 163 U. S. 612, 16 Sup. Ct. 1168, 48 L. Ed. 282, as a controlling authority against the admissibility of the evidence. It is, indeed, held in that case that such evidence would not be admissible for the purpose of sustaining the jurisdiction of the court in a criminal case; but it is conceded in the opinion that in a contest over property rights the admission of the deceased person as to his status "might be competent" against those claiming under him. At all events, this evidence must be allowed, no objection having been offered in the trial court. Considering together all of the facts recited upon this subject in the statement, we are of the opinion that they are sufficient to justify the conclusion that Adolph Weber, Sr., was an alien, and that he never became a citizen of this country.

If by reason of alienage the complainant be barred of the inheritance, the whole estate must go to defendant, Emma Weber, who is a citizen of this country, and capable of taking the inheritance. *Orr v. Hodgson*, 4 Wheat. 453, 4 L. Ed. 613.

An alien has no heritable blood, under the

common law, and, if he take at all, he must do so under statutes of the state where the property is, or by the provisions of treaties. *Baker v. Shy*, 9 Helsk. 85.

The statutes of this state bearing upon the question are the following, viz.:

Sections 1998, 1999, 2000, of the Code of 1858.

"Sec. 1998. An alien may take and hold real estate in this state, by purchase, inheritance, or in any other way which may be agreed upon by treaty between the United States and the country of which he is a citizen or subject.

"Sec. 1999. Any alien resident in this state, who has legally declared his intention, under the naturalization laws, to become a citizen of the United States, may take and hold, dispose of or transmit by descent, any real estate, as a native citizen.

"Sec. 2000. An alien who is a resident in the United States at the time of the death of an intestate, and has declared, or shall within twelve months thereafter declare his intention, according to the acts of Congress, to become a citizen, shall be capable of inheriting the estate of such intestate."

Shannon's Code, §§ 3659, 3660, containing the provisions of chapter 2, p. 4, Acts 1875:

"Sec. 3659. Aliens to Hold and Dispose of Property. An alien, resident, or nonresident, may take and hold property, real or personal, in this state, either by purchase, descent, or devise, and dispose of or transmit same by sale, descent, or devise, as a native citizen; and in all cases where aliens, resident or nonresident, have heretofore acquired title to property, real or personal, in this state, in a lawful manner, said aliens, their assigns, heirs, devisees, or representatives, shall hold and dispose of the same in the same manner as native citizens.

"Sec. 3660. Heirs or Aliens may Inherit. The heir or heirs of an alien, whether resident or nonresident of the United States, may take any lands, so held by descent, or otherwise, as citizens of the United States."

The act of 1883, p. 330, c. 250, viz.:

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that hereafter when any person dies, a resident of this state, intestate and without issue, possessed of real or personal property, and when nearest of kin are aliens to the United States, the same shall be distributed as follows:

"First. By his brothers and sisters of the whole blood, born before his or her death, or afterwards, to be divided among them equally, and if any such brother or sister died in the intestate's lifetime, bearing issue, such issue shall represent their deceased parent, and be entitled to the same part of the estate of the uncle or aunt as their father or mother would have been entitled to if living. In default of brothers and sisters, or their issue, the said estate shall be inherited by the father and mother of the intestate equally; if both be dead, the equal

moieties by the heirs of the father and mother, in equal degrees, or representing them in equal degrees of relationship to the intestate; but if such heirs or those they represent do not stand in equal degree of relationship to the intestate, then the heirs nearest in blood to the intestate shall take in preference to others more remote.

"Section 2. Be it further enacted, that any alien to whom property, personal or real, shall descend under the provisions of this act, shall have the right to hold, sell, alienate, and convey the same in as full and ample a manner as if he or she were a citizen of the United States."

The treaty provisions bearing upon the controversy are articles 2 and 3 of the treaty of May 4, 1845, ratified August 12, 1846, between the United States and the King of Saxony, viz.:

"Art. 2. Where, on the death of any person holding real property within the territories of one party, such real property would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, or where such real property has been devised by last will and testament to such citizen or subject, he shall be allowed a term of two years from the death of such person—which term may be reasonably prolonged according to circumstances—to sell the same and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction on the part of the government of the respective states.

"Art. 3. The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other, by testament, donation, or otherwise; and their heirs, being citizens or subjects of the other contracting party, shall succeed to their said personal property, whether by testament or ab intestato, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

Treaties and Conventions between U. S. and Other Powers, pp. 981, 982 (9 Stat. 830, 831).

The treaty made between the United States and the German Empire soon after the formation of the latter does not appear, upon examination, to have carried any purpose of abrogating or annulling the treaties in existence at that time between the states composing the German Empire and foreign countries. *Treaties and Conventions, etc.*, pp. 363-369 (17 Stat. 921-933). See, also, comment upon this subject in *Wunderle v. Wunderle* (Ill.) 33 N. E. 195, 19 L. R. A. 84, 86; *In re Thomas*, 12 Blatchf. 370, Fed. Cas. No. 13,887. That treaty, perhaps it may be said, impliedly recognized the former

treaties referred to, so far as property rights were concerned, in the following provision appearing in the last paragraph of article 10, viz.: "In all successions to inheritances, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay, if they were citizens of the country in which the property is situated or the judicial administration of the same may be exercised." Treaties and Conventions, etc., page 366 (17 Stat. 926).

Our statute controlling the inheritance of our own citizens in cases similar to the present is the following:

"If the estate was acquired by the intestate, and he died without issue, his land shall be inherited by his brothers and sisters of the whole and half blood, born before his death or afterwards, to be divided amongst them equally." Shannon's Code, § 4163, subsec. 2.

Under our statute of distributions, the personality, in case of the death of both the father and mother of the intestate, would be divided equally between brothers and sisters. Shannon's Code, § 4172, subsec. 5.

In case of a conflict between the statutes of a state and the terms of a treaty, the latter must prevail, since the federal Constitution provides that "All treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding" (article 6). *Hauenstein v. Lynham*, supra; *Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232; *Whitney v. Robertson*, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386; *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425; *Blythe v. Hinckly*, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557. This rule has been recognized in this state (*Baker v. Shy*, supra) and in other states (*Succession of Rabasse*, 47 La. Ann. 1455, 17 South. 867, 49 Am. St. Rep. 435; *Opel v. Shoup*, 100 Iowa, 424, 69 N. W. 563, 37 L. R. A. 586; *Yeaker's Heirs v. Yeaker's Heirs*, 4 Metc. (Ky.) 33, 81 Am. Dec. 530). And see extended note to *Succession of Rixner*, 32 L. R. A. 177-189; 81 Am. Dec. 538, note.

In *Blythe v. Hinckly*, supra, it is said: "This court has held from the earliest times, in cases where there was no treaty, that the laws of the state where the real property was situated governed the title, and were conclusive in regard thereto." 180 U. S. 341, 21 Sup. Ct. 393, 45 L. Ed. 557. Again: "Questions have arisen as to the rights of aliens to hold property in a state under treaties between this government and foreign nations which directly provide for that right, and it has been said that in such case the right of aliens, was governed by the treaty, and, if that were in opposition to the law of the particular state where the

property was situated, in such case the state law was suspended during the treaty or term provided for therein." Id.

The clear meaning of article 2 of the treaty is, touching the right of inheritance, that the aliens protected thereby shall have the same right as citizens in the same situation—that is, shall inherit just as they would if they were citizens—with the qualification that this right shall be subject to the exercise of a power to sell the land and withdraw the proceeds within a time limited.

It was held in *Schultze v. Schultze* (Ill.) 83 N. E. 201, 19 L. R. A. 90, 36 Am. St. Rep. 432, construing similar language in another treaty, that the alien took "a fee, determinable by the nonexercise of the power of sale within" the time limited; approving *Kull v. Kull*, 37 Hun, 476.

On the theory that the rights of the complainant are controlled wholly by the treaty, it would result that he would take an interest in the land according to Shannon's Code, § 4163, subsec. 2, above quoted, qualified by the necessity of selling within the two years limited in the treaty, or within such reasonable time thereafter as the court might fix; also that he would have the right to file a bill for partition, preparatory to a sale, as was done in this case. *Schultze v. Schultze*, supra.

But as held in *Blythe v. Hinckly*, supra, there is no incapacity on the part of the state to give to aliens more than the treaty vouchsafes to them. This view of the matter necessitates an inquiry into the meaning of our statutory provisions purporting to regulate the rights of aliens in property situated in this state.

The act of 1875, reproduced in Shannon's Code in sections 3650 and 3650, was designed by the Legislature to completely cover the ground, and in fact did so; thereby superseding the provision of the Code of 1858, and operating as an implied repeal of those sections. This act placed aliens in all respects, as to the succession to property, in the same situation as citizens.

The act of 1883 relating to the same subject must be construed in pari materia with the act of 1875, but, operating as a limitation upon the rights granted by the former act, must be strictly construed. So construing it, we hold that it only applies to a case in which all of the heirs are aliens; and inasmuch as one of the two heirs to the estate in controversy in the present case is a citizen, and one an alien, the act does not apply to the case before us, and the act of 1875 controls, with the result that the complainant takes a full half interest in the estate.

It is perhaps needless to add that the act of 1883 could not in any event regulate the rights of the parties in any case falling within the terms of the treaty copied above, since its provisions are in clear contravention of the treaty.

If it was required of the complainant to make formal claim of his rights under the treaty, the demand was sufficiently made in the pleadings; but we are of opinion that no such demand was necessary, since "the Constitution, laws, and treaties of the United States, are as much a part of the laws of every state as its own local laws and Constitution." *Blythe v. Hinckly*, 173 U. S. 501, 508, 19 Sup. Ct. 497, 43 L. Ed. 783, 786. "This," it was said in *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628, "is a fundamental principle in our system of complex national policy."

The chancellor committed no error in the matter of costs and commissions complained of in the brief of defendant's counsel.

The costs of the court below will be paid as decreed by the chancellor.

The defendant will pay the costs of this court.

GULF, C. & S. F. RY. CO. v. MATTHEWS et al.

(Supreme Court of Texas. June 19, 1905.)

1. RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where defendant railroad company had knowingly permitted the public to use its roadbed within the corporate limits of a city as a walkway for a number of years, plaintiff's decedent, who was killed while walking on the track within such city, was not guilty of contributory negligence, as a matter of law, in walking on the track.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1289, 1377.]

2. SAME—LICENSEES.

Where defendant railroad company had knowingly permitted the public to use its track within the limits of a city as a walkway for a number of years, a person so using the track was a licensee, and not a trespasser.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1228—1234.]

3. SAME—ACTION FOR DEATH—OPINION EVIDENCE.

In an action against a railroad company for killing plaintiff's decedent while walking on the track, it was not error to permit a witness to testify that, in his opinion, deceased was one of the men he saw walking on the track shortly before deceased was killed, from the resemblance of the dead man, in form and clothes, to the second man he saw going along the track.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 2234, 2294.]

4. SAME—ADMISSIBILITY OF EVIDENCE.

Where defendant railroad company had knowingly permitted the public to use its roadbed at the place where deceased was killed for a number of years as a passway, evidence of defendant's general manager that defendant had never consented to such use by persons other than those having business with the company on its right of way, etc., was inadmissible.

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Maggie Matthews and others against the Gulf, Colorado & Santa Fé Railway Company. On certified questions from the Court of Civil Appeals.

See 73 S. W. 413; 66 S. W. 588.

Smith & Beaty, J. W. Terry, and Lee & Goree, for appellant. Wolfe, Hare & Maxey, for appellees.

BROWN, J. Certified question from the Court of Civil Appeals of the Fifth Supreme Judicial District. The statement and questions are as follows:

"We deem it advisable to present to the Supreme Court of the state of Texas for adjudication the following issues of law arising in the above-entitled cause.

"Statement.

"This suit was instituted by appellee Mrs. Maggie Matthews, on behalf of herself and her minor children, against appellant, to recover damages sustained on account of the alleged negligent killing of her husband, J. L. Matthews. It is alleged in substance that J. L. Matthews on the 8th day of May, 1899, was walking along on appellant's railroad track within the corporate limits of the city of Ft. Worth, where said track was commonly and habitually used as a pathway by pedestrians with the knowledge, consent, and acquiescence of appellant; that, while so walking along and upon said track, the said J. L. Matthews was, by the negligence of appellant's servants operating one of its freight trains, in running such train within the city limits at a greater rate of speed than allowed by an ordinance of said city, and in negligently failing to ring the bell of the engine and to keep a lookout for persons who might be expected to be on its track, knocked down, run over, and killed by said train. Appellant pleaded the general issue, contributory negligence, and specially that appellant had posted along its road in the city of Ft. Worth warning notices to the public, to the effect that all persons not having business with the company were forbidden to sit, stand, or walk upon its railroad tracks, and were prohibited from walking on or crossing the tracks of the company, except at legally established crossings; that the company did not consent to such use of its track, and that no officer or agent of the company had authority, by acquiescence or otherwise, to consent to such use of the tracks, etc.; that J. L. Matthews was not walking along its track when struck by its train, but that he was lying down upon the same; that he had either been foully dealt with, and stunned or murdered and placed upon the track, or else that he was in a state of intoxication, and had walked upon appellant's track and lain down upon the same, or for some other reason was lying asleep or in a state of insensibility on the track, and that its servants in charge of said train did not discover him in time to prevent the injury; that by an ordinance of the city of Ft. Worth it is provided, in substance, that it shall be unlawful for any person to trespass upon the property of any corporation without its consent, and any person so doing shall be deemed guilty

of a misdemeanor, and, upon conviction, be fined any sum not exceeding ten dollars. A jury trial resulted in a verdict and judgment against appellant in the sum of \$15,000, from which this appeal is prosecuted.

"J. L. Matthews owned a grading outfit, consisting of teams and tools, and had been working for the Santa Fé Railroad near Hudenheimer up to a few days before his death. He quit work near Hudenheimer, and his teams and grading outfit had been carried to Cleburne, Texas. On the afternoon of May 7, 1899, the day before he was killed, he left Cleburne for Ft. Worth, in company with T. W. Turner, expecting to get work either at a gravel pit in the city or from the Texas & Pacific Railway Company. Before leaving Cleburne, Matthews instructed one of his employes to carry the grading outfit across the country to Ft. Worth, and meet him at a certain watering trough on Main street about 3 o'clock p. m. on May 8th. About 10 o'clock p. m. on May 7th, Matthews and Turner separated at a hotel or lodging house on Main street, agreeing to meet next morning at 7 o'clock on Front street, and then go together to look for a camping place for the teams and grading outfit. Matthews told the clerk at this lodging house that he wanted to secure a bed, but did not care to go to sleep right then; that he was going away, but would be back in about one hour to occupy the bed. He was informed that he could get the bed, and about 10 o'clock p. m. he left in a state of intoxication, but did not return to occupy the bed.

"L. C. Andrews testified: 'My name is L. C. Andrews; age, 43 years. I reside in Ft. Worth. Am a cooper by occupation or trade. At the present time I am in the employ of Armour & Co., of North Ft. Worth. On May 8, 1899, I resided in Ft. Worth, Texas, and was employed as night clerk at the Tremont Hotel, on Rusk street, just east of the courthouse. I am not acquainted with the plaintiffs, or any of them. Never saw them, that I know of. I did hear of the circumstances of the finding of the body of a dead man on the track of the defendant railway company near the Old Cemetery, in the city of Ft. Worth on or about the 8th day of May, 1899. I don't remember the date, but remember that it was along about that time. I heard of the matter through hearing people talk about it at the time. I met and got slightly acquainted with a man, who, I believe, was J. L. Matthews, on the night previous to the morning J. L. Matthews, deceased, was found dead on the Santa Fé Railroad, out near the Old Cemetery. I met him about 11 p. m. in the office of the Tremont Hotel in Ft. Worth, Texas. This man Matthews came into the hotel office and applied for a bed for the night. I let him have the bed, received payment from him for the bed for the night, and showed him his room. He occupied the bed that night. I know it

was the night just preceding the morning on which the dead body of J. L. Matthews, deceased, was found on the Santa Fé track, out near the Old Cemetery. My only transaction with him was renting him a bed for that night, and receiving payment for it. He came in and asked me for a bed. We got into a short conversation after he had secured the bed. He told me that he had some teams on the road to Ft. Worth, and that he wanted to find some suitable grounds for a camp. He asked me where he could find some suitable grounds for a camp, and I told him I was not much acquainted with such as that, but I had seen people camped on the north side of the river, back of the jail, and also out along the Santa Fé track beyond the Old Cemetery. We had just a short conversation. I don't remember our exact words, but they were substantially as above. I know he wanted a place for his teams to camp, and I informed him of the two places where I had seen campers. Before going to bed on the night before, he told me to wake him up about 5 o'clock; that he wanted to get out and get a camp for his teams. I woke him up about 5:30 in the morning. I knocked at his door and awakened him. A few minutes after, he came downstairs and entered the office. It was necessary for him to come through the office, coming down from his room. I did have a short conversation with him that morning. He remained in the office a very short time. He again asked me about the camping grounds, and the directions to them. I gave him the directions to the place I had informed him about. He left, saying he was going to look out for a camping place. I never saw him after he left the office. I never noticed what direction he went after leaving the hotel office. The last time I saw him was in the office, as he was leaving, and it was about ten or fifteen minutes before 6 o'clock in the morning. It was daytime. I never saw him, dead or alive, after that. I cannot give a minute description of him. As I remember him, he was about five feet six or seven inches high, and would weigh about 135 or 140 pounds; had a light complexion; had on a brown or dark suit of clothes, and a black slouch hat. I don't remember whether or not he was clean shaven, or the color of his eyes. I only saw Matthews the two times—first at night, when I rented him the bed, and next in the morning, after he got up and came down to the office. I saw him only a short time on each of these occasions. The first time I saw him, when he came for the bed, he was drinking, but he was at himself. He could get along by himself. When he came down the next morning he was sober. The hotel at which I was working the night that Matthews was killed did keep a register. I did not enter Matthews' name on it. I saw he was drinking, and never required him to

register. He paid me cash for his bed. I afterwards inquired for his name, and got it, but neglected to place it on the register.'

"W. C. Prince was sexton of the Old Cemetery, near where the dead body of Matthews was found. On the morning Matthews was killed Prince saw one of appellant's trains pass, going north. About five or ten minutes before this train passed, he (Prince) saw two men walking on the railroad track, both going north. He was about thirty-five yards distant from them, and did not know who they were. They passed along on the track about sixty or seventy yards apart. Prince was then on his way to the cemetery, and, in a few minutes after this train passed, he saw several persons gathered at the scene of the accident, and went there, and saw the dead body.

"Clyde Baptist was a section hand in the employ of appellant, and lived at its section house. This section house was about fifty feet west of appellant's track at Peach street, which is about $\frac{1}{4}$ one-fourth of a mile south of where the dead body of Matthews was found. On the morning the body was found, he saw a man walking up appellant's railroad track, north. He did not know the man. The man he saw was about five feet and six inches high, medium build, and wore a dark suit of clothes and slouch hat, probably of a brown color. About five minutes after this man passed up the track, a stock train of appellant passed, going north, running about twenty-five or thirty miles per hour. The man Baptist saw, who had just preceded the train up the track, was walking very brisk when he passed the section house—a little over an ordinary walk, and about like a business man would go to and from his business. This witness on the same morning found one-half of a vest about one mile from the point where the dead body was found. This piece of goods or vest was of the same quality of goods, in the witness' judgment, as the clothes the man wore who passed the section house, going north, on the appellant's track. This piece of a vest had not been cut, but torn, from the other part of the garment. Baptist did not know whether the dead body found was the same man he saw pass the section house, or not. When Matthews left home, some months before the accident, he carried with him two hats—one a black, and the other a drab. He also took with him a dark-brown coat and vest, and a lighter-colored brown pair of pants. After his death the black hat was returned to his wife, but the coat, vest, pants, and drab hat were not.

"There were about three miles of appellant's railroad lying within the corporate limits of the city of Ft. Worth, its general direction being north and south. Situated within the city limits, about one mile and a half north of the depot, and on the west side of the road, is what is known as 'Old Cemetery.' Beginning near Peach street, which is about one-fourth of a mile south of the point where

the dead body was found, and extending north to the Trinity river, about a mile, the railroad is built upon an embankment varying in height, but a good portion of it is probably 15 feet high. Just north and near Old Cemetery were grounds that had been used for campers for many years, and the stockyards are about three miles north of the city.

"H. E. Bemis, for defendant, testified: 'I am a locomotive engineer. Have been for 24 years. I am in the employ of the G., C. & S. F. Ry. Co., and have been for 16 years. I know about a man having been run over about May 8, 1899, in the northern part of Ft. Worth, near the Old Cemetery; that is, what was told to me afterwards was the body. I heard there was a body run over. On that morning I was running an engine on a train. We left the Ft. Worth Station at 6 o'clock. I know where the Old Cemetery is, in the city of Ft. Worth. I remember passing it that morning. The railroad runs right close to it. Some of the embankments are walled up, to keep it from sliding into the cemetery. That morning was very foggy. As near as I can recollect, we were making about twenty-five miles an hour when we passed the Old Cemetery that morning. I did not time myself; just judging it—the speed and grade, and things like that. It is a down grade there towards the Trinity river. After leaving Peach street there are no more surface crossings before you get out of town. As we went along by the Old Cemetery, my attention was attracted to something on the track. It was a dark object, and, going at that rate of speed, it being so vague, and all considered, I could not distinctly tell what it was—whether it was a pile of rocks, or what it might be. I thought it might be a hog or a dog, or something like that. I could not tell. It was not a great distance ahead of the engine; only a short distance. I would not think it was more than thirty or fifty feet; something like that. I could not tell. You could form a pretty good idea, knowing the condition of the weather and the speed of the train. I could not say how far it might have been ahead. I should say a car length in front of the engine, which is from thirty to forty feet. About twenty-five or thirty feet is the engine's length. I have not the exact dimensions. That is my best judgment. I know the fireman noticed that object by his asking the question, "What is that?" that is how I know he did. He made the exclamation, "What is that?"—is about all I remember was said between me and the fireman about the time we went over that object. I do not remember what else was said in that conversation. It has been too long ago. Our first meeting point was the stockyards. We had orders that we had until 6:15 to get to the stockyards. The other train had the right to come out on the main line and come to Ft. Worth against us after that. They had orders to wait until 6:15 for us. We met another train that

morning at the stockyards. I did not see any man that morning walking along the track in front of the engine, and did not strike any man walking along in front of my engine. As we went along the track that morning I was watching the track closely. When it is foggy, if anything, it is more necessary to keep a constant lookout. The headlight of my engine was burning. In a fog the headlight of an engine is of no aid to the engineer. The idea is that it aids one in a fog to see the engine. Going at the rate of speed we were at the time we hit the object on the track, I could not have checked my train by the use of the appliances at hand in time to prevent running over that body.'

"A. R. Woodward, for defendant, testified: 'I reside at Cleburne. I am a locomotive engineer. I was a fireman before my promotion in 1901. I remember the circumstances of a man being run over alongside of the Old Cemetery, in the northern part of Ft. Worth, some time in May, 1899. I was on an engine running from Ft. Worth that morning. H. E. Bemis was my engineer. I am familiar with the track. I know where the Old Cemetery is. The cemetery borders on the right of way. My train passed there about 6 o'clock in the morning. It was very foggy, and, if I remember, misting rain some. About the time we passed Peach street there was a signal given for the curve—both bell and whistle. I don't know just how long the bell continued to ring as we passed the Old Cemetery, but some distance down the road. The signal was given somewhere near Peach street, both by bell and whistle. The whistle signal is two long blasts and two short blasts for every road crossing or curve. The fireman rings the bell. I was ringing the bell on that morning. As we passed along the track by the Old Cemetery that morning, I saw an object on the track. As we were going down the hill, I was sitting on the seat box and looking ahead; and this object appeared on the track, and looked very unusual and uncommon, and I looked closer at it. I don't suppose I seen the object over sixty, seventy, or eighty feet ahead of the engine. We passed over it quickly, and, as we passed over it, I glanced over at the engineer and says, "What is that?" He says, "That's what I want to know." That is about all there was to it. There was a general conversation to the stockyards. The engineer spoke up very soon, and says, "I believe it looked like a human form." I says, "That's what it looks like to me."'

"John Woods, a negro, had spent the night at his mother's, who lived near the appellant's railroad, and about 200 yards north of where the dead body was found. He was walking down the track southward on the morning Matthews was killed, going to the city of Ft. Worth. He met a freight train loaded with cattle on the railroad track, going north. He heard no signal

of the approaching train, either by ringing of the bell or sounding of the whistle, and the train was within about 30 or 40 feet of him when he discovered it. He saw and heard it about the same time. He stepped aside to let the train pass, but it was running so fast and so near to him before he discovered it that he narrowly escaped being struck by it. After the train passed, Woods got back on the track and proceeded on towards the city, and, when about 100 yards south of the point where the train passed him, he discovered the body of a dead man lying on the railroad track. This body was badly mangled and almost nude, nearly all the clothing having been torn from it, but was warm when found, and blood flowing from it freely.

"It was admitted on the trial that the body found by John Woods and viewed by the other witnesses was that of J. L. Matthews, and that the point where Matthews was killed was within the corporate limits of the city of Ft. Worth. The morning Matthews was killed there was a very dense fog.

"By an ordinance of the city of Ft. Worth, it was made a misdemeanor for any person to trespass upon the premises of another or corporation without his or its consent; and it was also made a penal offense, by an ordinance of that city, to run a train anywhere within the city limits at a greater rate of speed than six miles per hour. Appellant had also promulgated a rule as follows: 'All trains will reduce speed to six miles per hour through the corporate limits of * * * Ft. Worth.' Indorsed on the time card containing this rule was the following: 'For the information and government of employes only. The company reserves the right to vary from it at pleasure.' It was admitted that this rule was in force at the time of the accident.

"Appellant's railroad track north of Peach street and alongside of the Old Cemetery, and where J. L. Matthews was run over by appellant's train and killed, was commonly and habitually used by a great number of pedestrians at the time of the accident as a footpath, and had been so used for many years prior thereto. This track had been used so constantly as a footpath, and by such a large number of people, and for so long a time, that we conclude that appellant's agents and servants located at Ft. Worth, and those operating its trains over said track, had full knowledge of such use.

"M. R. Pendell, for defendant, testified: 'I was superintendent of the Northern Division of the Santa Fé in May, 1899. My duties as superintendent took me all over the line. I had full charge of the track north of Ft. Worth between the station and the Ft. Worth Stockyards. We were making some improvements along there at that time. I used to go there sometimes two, three, and four times a week; sometimes over it several times. Was division superintendent

three years and a half, and was trainmaster three years and a half before that time. There was no footpath along that track. Like any other track, occasionally saw people on it. We had workmen along there. There were few people along there. I had full control of the track along there by the cemetery. There was no one—not even myself—had any authority to give permission to citizens and outsiders to use the tracks as a highway. The general manager or general superintendent at Galveston did have this authority. Colonel Polk was then general manager, and B. F. Yoakum was general manager prior to Colonel Polk. If any authority had been given to any person for footway or use of the track, it would have gone through my hands—through my office. It would have come under my jurisdiction.

"L. J. Polk testified: 'I am 46 years of age; residence, Galveston, Texas. My occupation is that of general manager of the Gulf, Colorado & Santa Fé Railway Company, and my residence and occupation were the same in May, 1899. The company caused notice to be printed and posted at all depots, warehouses, and other numerous places on the company's property, and, as far as practicable, the notice has been kept posted ever since that time. I did not know that the portion of the defendant's track in question has been, and was for a long time prior to May 8, 1899, used by the public as a footway. I have not been so informed. I have no personal knowledge as to what extent the track of the company has been used at Ft. Worth.'

"Appellant had posted on the north and south ends and on the sides of its depot at Ft. Worth, in conspicuous places, notices warning the public and positively forbidding them 'to enter, sit, stand or walk upon its railroad side tracks, right of way,' etc. This depot was situated one mile and a half south of the point where J. L. Matthews was run over and killed. There is slight evidence tending to show that there may have been a notice at Peach street, which is about one-fourth of a mile south of where the accident occurred, but we think the verdict of the jury embraces a finding that there was none there; and we find there was no such warning notice nearer than one mile and a half of the point where Matthews was run over by the train. There was no express consent on the part of appellant or its agents for pedestrians to use that portion of its railroad track in question as a footpath. We also think the verdict of the jury embraces a finding that, at the time J. L. Matthews was struck by appellant's train, he was walking along on appellant's railroad track, and was not lying down upon the track; and, in deference to the verdict, we so find.

"Appellant offered, by L. J. Polk, its general manager, to prove that appellant had never consented to the use by the public or

any person or persons, except on business of the company, of the appellant's right of way, depot grounds, or reservation as a pathway. Appellees' counsel objected to the introduction of this testimony on the ground 'that it stated an opinion and conclusion of the witness, and involved not only a question of fact, but a question of law as well, and that it invaded the province of the jury; being a statement of the very question which the jury was to decide.' The objection was sustained, and the testimony excluded.

"When the dead body of Matthews was discovered, it was almost nude; nearly all the clothing having been torn from it. The witness Prince, in testifying, did not describe the size, form, or clothing of either of the men he saw going north on appellant's railroad track just a few minutes before the train passed and Matthews' dead body was found. Nor did he or any other witness describe what there was of clothing on Matthews' body. The trial court permitted the witness Prince to testify, over appellant's objection, that such testimony was 'an opinion and conclusion of the witness on a matter that was for the jury, and that it was incompetent, irrelevant, and immaterial, as follows: 'I have not undertaken to say that I believed that one of the men walking on the track was the man that was killed. It is my opinion that such is a fact from the resemblance of the dead man, in form and clothes, to the second man I saw going along the track.'

"Upon the issue of contributory negligence the court charged the jury as follows: 'You are further instructed that if you find and believe from the evidence that J. L. Matthews was walking along the defendant's track, and was struck and killed by said train; but if you further believe from the evidence that in going upon said track to walk along same at the time and under the circumstances he did, if you find he was so walking, said Matthews was guilty of negligence, as this term has been defined to you; or if you believe that said Matthews was at the time in a state of intoxication, and that such state of intoxication placed him in such a condition that he was unable and failed to exercise ordinary care for his own safety, as ordinary care has been heretofore defined to you, and that by reason of such condition he was struck and killed by said train, if you find he was so struck and killed; or if you believe from the evidence that said Matthews could, by the exercise of ordinary care, have seen or heard said train in time to have gotten out of the way of it and avoided injury; and if you further believe from the evidence that he failed to look and listen, or to do either, for an approaching train, and that in such failure, if you find he did so fail, you find and believe said Matthews was guilty of negligence, as this term has heretofore been defined and explained to you; and

you further believe that said negligence, if any, proximately contributed to his death; or if you believe from the evidence that there was sufficient space for said Matthews to have walked along the embankment of defendant's roadbed, outside of the railway tracks, without danger of being struck by a passing train; and if you further believe from the evidence that when he was struck by said train, if you find he was struck by said train, he was walking between the rails on defendant's roadbed; and if you further find and believe that in walking between said rails, if you find he was so walking, said Matthews was guilty of negligence, as this term has been defined to you—then, in either of the events mentioned in this paragraph, you will find for the defendant, although you may believe that the defendant was negligent in any or all of the particulars submitted to you by the court.'

"Question 1. Did the trial court err in submitting to the jury the question whether or not the deceased, J. L. Matthews, was guilty of contributory negligence in being upon appellant's railroad track at the time and place of the injury? In other words, under the facts stated, was the said Matthews guilty of contributory negligence, as a matter of law, in being upon appellant's railroad track at the time and place when run over and killed and should the jury have been instructed to return a verdict in favor of defendant?"

"Question 2. Under the facts and evidence stated, was the said J. L. Matthews, at the time he was run over, a licensee upon appellant's railroad track?"

"Question 3. Did the court err in permitting the witness Prince, over appellant's objections, to testify: 'I have not undertaken to say that I believed that one of the men I saw walking on the track was the man that was killed. It is my opinion that such is a fact from the resemblance of the dead man, in form and clothes, to the second man I saw going along the track?'"

"Question 4. Did the trial court err in excluding the testimony of appellant's general manager, L. J. Polk, that appellant had never consented to the use by the public or any person or persons, except on business of the company, of appellant's right of way, track, depot grounds, or reservation as a pathway?"

We answer the first question, that the facts do not show that, as a matter of law, Matthews was guilty of contributory negligence in walking upon the defendant's roadbed. Therefore the trial court did not err in submitting that issue to the jury.

To the second question, we reply, under the facts found by the Court of Civil Appeals, the jury might have concluded that Matthews was a licensee, as defined by the decisions of this court. *Washington v. Railroad Co.*, 90 Tex. 314, 38 S. W. 764; *Lee v. I. & G. N. Ry. Co.*, 89 Tex. 583, 36 S. W. 63; *Railroad Co. v. Watkins*, 88 Tex. 20, 29 S.

W. 232; *Railroad Co. v. Crosnoe*, 72 Tex. 79, 10 S. W. 342. It is well settled by the decisions of this court and by the decisions of courts of other states that if a portion of the roadbed of a railroad company has been commonly and habitually used for a long time by the public as a footpath, with the knowledge and acquiescence or by the permission of the company, it is considered as having licensed the public to use such portion of its roadbed for that purpose. The evidence in this case would justify a jury in finding that the railroad company had knowingly permitted the public to use its roadbed at the place of the accident for a number of years, and, under such facts, Matthews would be considered as a licensee; that is, he would not be held to be a trespasser in the sense that his act of walking upon the roadbed would per se constitute negligence that would defeat a recovery for his death by his wife and children.

We answer the third and fourth questions in the negative.

HOUSTON ICE & BREWING CO. v. KEENAN.

(Supreme Court of Texas. May 25, 1905.)

LEASES—PROVISIONS—SALE OF LIQUOR—LOCAL OPTION—EFFECT.

Though a lease provided that the premises should be used for the saloon business, the contract was not rendered illegal, nor the lessee absolved, by the adoption of local option in the county.

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by R. A. Keenan against the Houston Ice & Brewing Company. From a judgment in favor of plaintiff, defendant appealed to the Court of Civil Appeals, which affirmed the judgment, and on motion for rehearing certifies questions.

The following is the opinion of the Court of Civil Appeals (Talbot, J.):

"On the 9th day of June, 1902, appellee, by written contract, leased to appellant a certain building in Waxahachie, Ellis county, Tex., for the term of three years, to begin June 1, 1903. Appellant agreed to pay as rent, for the use of said building, the sum of \$2,100, in quarterly installments of \$175 each. It was stipulated in the lease 'that said premises shall be used for the saloon business.' After the execution and delivery of the lease, and before the term thereof began, an election was ordered by the commissioner's court of Ellis county, under what is known as our 'Local Option Statute,' and held throughout the county, to determine whether or not the sale of intoxicating liquors should be prohibited in that county. The election resulted in favor of prohibition, and local option became effective in said county on October 11, 1902. Appellant claimed that the stipulation in the lease, that

the demised premises should be used for the saloon business, constituted an express covenant that said premises should be used for no other purpose, and that, inasmuch as such use became illegal by the adoption of local option in Ellis county, it was absolved from liability for the agreed rent. Taking this view of the matter, appellant notified appellee that it could not carry out the agreement, refused to occupy the leased building, or to pay the rent. Appellee insisted on the validity of the lease contract, tendered the building, and demanded payment of the rent in accordance with the terms of the contract, which being refused, this suit was brought to recover the first installment thereof. Judgment having been rendered for appellee, appellant appeals.

"We think it must be conceded that the stipulation in the lease, that the premises should be used for the saloon business, amounted to a covenant on the part of appellant to use them for no other purpose. The particular use to which the building was to be put having been specified, a restriction against other uses will be implied, and the lease need not contain an express covenant imposing such restriction. In such case the lessor may invoke the preventive powers of a court of equity to restrain the lessee from making any use of the premises inconsistent with the terms of the contract. *DeForest v. Byrne*, 1 Hilt. (N. Y.) 43; *Am. & Eng. Ency. Law*, vol. 18, p. 635, title 'Leases,' subtit. 'Express Restriction upon the Use'; *Taylor on Landlord and Tenant*, vol. 1, p. 494; *Spalding Hotel Co. v. Emerson* (Minn.) 72 N. W. 119.

"Having restricted the use of the building to the 'saloon business' or sale of intoxicating liquors, the question is presented: Was the lease contract terminated, and appellant absolved from liability for the rents therein agreed to be paid, by reason of the adoption of local option in Ellis county? In so far as we are advised, this question has not been passed upon by any of the courts of this state. The general rule has been broadly stated to be that, where the performance becomes impossible subsequent to the making of the contract, the promisor is not thereby discharged. But to this general rule there is a well-established exception, viz., that, where the performance becomes impossible by a change in the law, the promisor is discharged. The facts, however, in our opinion, do not bring the case at bar within the exception. Nor does it become necessary to apply the general rule stated in all its rigor to justify the conclusion we have reached. For the purposes of this case it may be asserted that, when a party voluntarily undertakes, and by contract binds himself, to do an act or thing, without qualification, and performance thereof becomes impossible by some contingency which should have been anticipated and provided against in the contract, the nonperformance will not

be excused. In such case the party's failure to exempt himself from responsibility in the event of the happening of the contingency will be attributable to his own folly, and he will be held to make good his contract. Applying these latter principles, we think that the prohibition of the sale of intoxicating liquors in Ellis county under our local option statute furnishes appellant no legal excuse for its failure to pay the rent sought to be recovered in this action. The stipulated use to which the demised premises were to be put was entirely legal when the lease contract was executed. That such use might become illegal was a probability well known to appellant at that time. The statute authorizing, and under which the sale of intoxicating liquors was prohibited in Ellis county, had been enacted and was an existing law at the time the lease was made. It was only necessary for the people to pursue the course pointed out by its provisions in order to put the law in operation in that county and avail themselves of its benefits. This event appellant must have known was likely to occur, and that, if it did, the performance of the stipulation in the lease under discussion would be prohibited.

"Appellee had no interest in the business to be conducted in the leased building, and appellant knew that, by a vote of the people under the existing statute referred to, the 'saloon business,' which included the sale of intoxicating liquors, might be prohibited before the beginning of the lease term. This was a probable contingency which an ordinarily prudent man should have foreseen and provided for in his contract, and, having failed to so do, he took the risk upon himself, and must abide the consequences. In the English case of *Newby v. Sharpe*, 8 Ch. Div. 39, the defendant let the basement of a store to the plaintiff, 'with full and undisturbed right and liberty to store cartridges therein, and covenanted to keep the premises in proper repair and condition so as to be available for storing cartridges, and also covenanted for quiet enjoyment.' Plaintiff took possession of the demised premises, and stored cartridges in them. Other parts of the store were at that time let to other persons for storing gunpowder. Soon afterwards the explosive act, 1875, passed, making it illegal to store cartridges and gunpowder in the same building, and prescribing heavy penalties for a violation thereof. Upon the passage of this act the defendant, lessor, removed the cartridges which had been placed in the store to another building, and notified plaintiff that in order to protect himself from liability he would be compelled to notify the authorities if he, plaintiff, stored other cartridges in the leased premises. This course was pursued by defendant solely to avoid subjecting himself to the penalties of said act, and all times stated to plaintiff that the rented premises

were at his disposal. Plaintiff, the lessee, however, claimed an eviction, and sued to restrain defendant from obstructing the storing of his cartridges, and for damages. It was held that plaintiff could not recover, and that judgment must be entered for defendant, the court, among other things, making the following observation: 'At the time when the lease was granted, both parties were aware that there was pending in Parliament a bill to make further regulations as to the storing of explosive substances, and, if plaintiff intended to be guaranteed by defendant against any effect which such regulations might have on his use of the demised property, he ought to have insisted upon having stipulations for that purpose inserted in the lease. He did not do so, but chose to take the risk.' We think it is manifest from the opinion in the above case that the pendency of the bill in Parliament, and the knowledge of that fact by the 'plaintiff' when he procured a lease of the premises, exercised controlling influence with the court in the conclusion reached. The facts in the case at bar present stronger reasons for the enforcement of the contract sued on than those in the case from which the above quotation is made. Here the law by which the intended use of the rented property was prohibited had been actually passed by the Legislature, was a valid and subsisting statute, and such statute and the action taken under it, resulting in the prohibition of appellant's business in Ellis county, were presumably in contemplation of the parties when the lease in question was made.

"In addition to the case of Newby v. Sharpe, supra, the following cases may be cited as instructive, if not directly in point. *Rosenbaum v. U. S. Credit System Co.*, 64 N. J. Law, 34, 44 Atl. 966; *Dewey v. Alpena School Dist.*, 43 Mich. 490, 5 N. W. 646, 38 Am. Rep. 206; *Tweedie Trading Co. v. Jas. P. McDonald Co.* (D. C.) 114 Fed. 985; *Moseley v. Baker*, 2 Sneed (Tenn.) 362; *Bryan v. Spurgin*, 5 Sneed (Tenn.) 681.

"Appellant's proposition that the performance of a contract is excused by a supervening impossibility caused by the operation of a change in the law is correct, but it is believed there has been no such change in the law since the lease in question was executed as would authorize the application of that principle in this case. We see no valid reason for not applying in this case the fundamental maxim that, 'As a party binds himself, so shall he be bound.'

"Believing that the proper judgment was rendered in the court below, the same is affirmed."

Baker, Botts, Parker & Garwood and J. L. Gammon, for appellant. G. C. Groce, for appellee.

BROWN, J. This is a certified question from the Court of Civil Appeals of the Fifth

Supreme Judicial District. The statement and questions are as follows:

"The judgment of the court below in the above-entitled cause was affirmed on a former day of the present term of this court, but, upon further consideration of the case on appellant's motion for a rehearing, we deem it advisable to present to the Supreme Court of the state of Texas, for adjudication, the following issues of law arising upon the appeal:

"Statement.

"On the 9th day of June, 1902, appellee, by written contract, leased to appellant, who was engaged in the manufacture of ice, and sale of ice and beer and intoxicating liquors, a certain building in Waxahachie, Ellis county, Tex., for the term of three years, to begin June 1, 1903. Appellant agreed to pay as rent for the use of said building the sum of \$2,100, in quarterly installments of \$175 each. Said contract is as follows:

"The State of Texas, County of Ellis.

"This lease, made this the ——— day of ———, 189—, between R. A. Keenan, of the first part, and H. Hamilton, Prest. Houston Ice & Brewing Co., of the second part, witnesseth: That said party of the first part, in consideration of the rents and covenants hereinafter contained, and by said party of the second part and their assigns to be paid and performed, do hereby grant, demise and lease to the said party of the second part, their executors, administrators and assigns, the following described premises: Brick building in the rear of Waxahachie National Bank on the East side of Franklin Street, Waxahachie, Texas.

"The present lease to Jake Cohen in building is assigned to Houston Ice & Brewing Company, unexpired term of which is 14 months from April 1st, 1902.

"To have and to hold the same, with the appurtenances, unto the said party of the second part, their executors, administrators and assigns from June 1st, 1903, for and during the full term of three years next ensuing, and fully to be completed and ended by June 1st, 1906, they, the said lessees holding and paying therefor during said term the sum of Twenty One Hundred Dollars, to be paid in the following manner, to wit: One Hundred and Seventy Five Dollars quarterly.

"Provided, however, that if said rent, or any part thereof, shall remain unpaid for 10 days after it shall become due, and without demand made therefor; or if said lessees shall assign this lease or under let said leased premises or any part thereof, or if the said lessees' interest shall be sold under execution or other legal process without the written consent of said lessor, his heirs or assigns, first had, then and in that event and at the option of the owner of the premises described above, the whole amount remaining unpaid under this lease shall at once become

due and payable, and it shall be lawful for said lessor, or his agents, heirs or assigns without notice or demand, to re-enter said premises and have the same again, repossess and enjoy, as in his first and former estate, and thereupon this lease and everything therein contained on the said lessor's behalf to be done and performed, shall cease, determine and be utterly void.

"And said lessees for their executors, administrators and assigns covenant and agree with the said lessor, his heirs and assigns as follows: That is to say—that said lessees will pay said rents in the manner aforesaid, that they will not do or suffer any waste therein, that they will not assign this lease or under let said premises or any part thereof, without the written consent of said lessor, or his agents, and at the end of said term, they will deliver up said premises in as good order and condition as they are now, or may be put by said lessor, reasonable use and ordinary wear and tear thereof excepted, and they will not use any gasoline or coal oil stoves in said leased premises, and further for the said rents to be paid by said lessees and assigns, a lien is hereby reserved upon the property hereby leased, the interest of said lessee and assigns in the same, and the property of said lessee upon said premises, in favor of said lessor, his heirs and assigns, prior and preferable to any and all other liens thereupon whatsoever. It is agreed and understood that this contract provides for ten per cent of amount involved as attorney's fees in case the same is collected by suit and lessee agrees that same shall be entered as part of judgment.

"The said lessees herein waive all notices which by law are required to be served upon . . . in the event any suit of ejectment or forcible detainer be brought. All repairs upon said property herein leased during the time that the same may be leased, shall be at the expense of said lessees, for damages done by said lessees, to any part of said leased premises, and no alteration shall be made to said premises without the consent of said lessor or his agents, and said lessor for his heirs, executors, administrators and assigns covenant and agree with said lessees, their executors and administrators, that said lessees paying the rents, and observing and keeping the covenants of this lease on their part to be kept, shall lawfully, peaceably and quietly hold, occupy and enjoy said premises during said term, without any let, hindrance, ejection or molestation by said lessor or his heirs, agents or any person or persons lawfully claiming under this contract.

"And it is agreed that said premises shall be used for the saloon business.

"In witness whereof, said parties have hereto set their hands on the day and year first above written.

"Witness: R. A. Keenan.

"Houston Ice & Brewing Co."

"At the time of the making of the foregoing lease, appellant took an assignment from appellee of his rights as landlord of an unexpired lease which had been granted to one Jake Cohen, the unexpired term of which was at that time 14 months from April 1, 1902. After the execution and delivery of the lease, and before the term thereof began, an election was ordered by the commissioner's court of Ellis county, under what is known as our 'Local Option Statute,' and held throughout the county, to determine whether or not the sale of intoxicating liquors should be prohibited in that county. The election resulted in favor of prohibition, and local option became effective in said county on October 11, 1902, and has continuously remained in force since that date. Appellant claimed that the stipulation in the lease that the demised premises should be used for the saloon business constituted an express covenant that said premises should be used for no other purpose; that such use became illegal by the adoption of local option in Ellis county, and by reason thereof it was absolved from liability for the agreed rent. Taking this view of the matter, appellant notified appellee that it could not carry out the agreement, and refused to occupy the leased building. Appellee insisted on the validity of the lease contract, at all times recognized defendant's rights thereunder, and tendered the building to appellant at the beginning of the lease term, and demanded payment of the rent in accordance with the terms of the contract. Appellant refused to receive the building or to pay the rent, and this suit was brought to recover the first installment thereof. A jury being waived, the trial court filed conclusions of fact, and found, among other things, in effect, that the lease to Jake Cohen of the building in question was in writing, was dated June 1, 1900, and was for a term of three years, beginning on that date; that said Cohen's lease provided 'that said premises shall be used for mercantile and no other purpose'; that it further provided as follows: 'It is also agreed in the event of prohibition being carried in this town Jake Cohen is permitted to cancel this lease.' These conclusions of fact found by the court are not attacked. Judgment having been rendered for appellee, appellant appeals.

"Question 1. Did the stipulation in the lease contract, 'that said premises shall be used for the saloon business,' constitute a covenant on the part of appellant that it would use the land and premises for that particular purpose, and operate as an implied restriction against other uses?

"Question 2. Was the lease contract rendered illegal, and appellant absolved from liability for the rents therein agreed to be paid, by reason of the adoption of local option in Ellis county, subsequent to the execution of said contract, prohibiting the sale of intoxicating liquors in said county?"

To both questions we answer: Assuming that the stipulation referred to in the first question "constitutes a covenant," nevertheless the contract of lease was not "rendered illegal," nor was appellant absolved from liability for rents, "by the adoption of local option in Ellis county."

The opinion of the Court of Civil Appeals clearly states reasons which are satisfactory to this court, and that opinion is adopted and directed to be published with these answers.

TEXAS & N. O. RY. CO. v. McDONALD.

(Supreme Court of Texas. June 25, 1905.)

1. RAILROADS—NEGLIGENCE — PERSONAL INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

The act of sitting on a railroad track over which cars are expected to pass is a negligent one, which precludes one guilty of it, when hurt, from complaining of mere negligence on the part of those operating the cars in failing to discover his presence and avoid injuring him.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 895, 1286, 1287.]

2. SAME—EVIDENCE.

Where defendant railroad was delivering cars, to be unloaded by the consignee's men, and was permitting all uses of the cars and of the track and right of way proper in carrying on the work, it was under no obligation to plaintiff, one of the men, while not so engaged, which it did not owe to the public generally, who might be about the track and cars.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by Ed. McDonald against the Texas & New Orleans Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

For former opinion, see 85 S. W. 493.

Baker, Botts, Parker & Garwood, Andrews, Ball & Streetman, and C. L. Carter, for plaintiff in error. Jno. W. Parker and R. R. Hazlewood, for defendant in error.

WILLIAMS, J. The defendant in error, the plaintiff below, recovered judgment in the district court and Court of Civil Appeals against plaintiff in error, as defendant, for damages for personal injuries sustained under the following circumstances:

Plaintiff was in the service of one Shea, a contractor with the city of Houston, to whom the defendant was delivering gravel upon flat cars on a spur track which was located on Burnett street, in that city, running east and west. West of the place of accident was McKee street, and east of it was Hardy street, both running north and south and intersecting Burnett street. For several days before plaintiff was hurt, the defendant had been delivering upon this spur track the cars loaded with gravel, which was taken off and put in wagons by men employed by Shea. From time to time the unloaded cars were removed, and other loaded ones set in to be unloaded. The evi-

dence conflicts as to the time of the day when this handling of the cars had been done, the plaintiff introducing the evidence of a witness from which it might be inferred that it had been done, at least during the time of plaintiff's employment, and for a day or two before, in the intervals between the times of the hands quitting and resuming work in the evenings and mornings, and when they were not about the track. The defendant's evidence, on the other hand, tended to show that the practice had been to take out empty and put in loaded cars in the daytime, and that, in order to avoid interruption of the work of unloading, it had been arranged between Shea's representative and the employees of the defendant that this was to be done during the noon hour, from 12 to 1 o'clock, when Shea's men were not at work but were getting their dinners. On the day in question there were upon the spur, and west of McKee street, a long string of unloaded cars. East of that street, and between it and Hardy street, were other cars, some of which had been unloaded and others not, an opening between the two strings having been left at McKee street as a passageway. The number of cars in the last-named string is variously estimated, but there were certainly more than two, and all but two had been unloaded. Of the two nearest Hardy street, one had been nearly unloaded, and the other was full of gravel. On that day, just before 12 o'clock, Shea's representative arranged with defendant's foreman to take out the unloaded cars and put in other loaded ones during the noon hour, in order that there might be work for the hands to do in the afternoon. An announcement of this arrangement was made to the men at or just before noon, but plaintiff and some of the others did not hear it. Plaintiff had been at work about that place for two or three days, but, as well as can be gathered from his confused statement, had been unloading cars only a day and a half. According to his testimony, he had known of no engine coming in upon this spur during the daytime, and did not expect that the standing cars, which he says were there all the while he worked there, would be disturbed during the hour allowed for dinner. When the signal for dinner was given, the hands left their work of unloading the cars, and those who had their dinners with them sat down to eat at various places near the cars. As the weather was hot, some of them sought the shade of trees and weeds near by. Plaintiff and two others took their positions under one of the unloaded flat cars, plaintiff sitting on the end of a cross-tie outside of but near to the rail, and in front of the brake beam, facing east, with the edge of the car extending over him. While he was thus seated, employees of defendant came upon the spur track with an engine to take out the empty cars, coupled with the cars west of McKee street, pushed them

across the open space, and struck those east of that street, causing them to move eastward, so that the brake beam or shoe of the one by which plaintiff was sitting struck him, knocking him under the wheels and causing the loss of both legs. The evidence, though conflicting, is sufficient to authorize a conclusion that this was done without any signal of bell or whistle or other warning of the intended movement, except the announcement before stated, not heard by plaintiff.

The part of Burnett street south of the track, on which side plaintiff was seated, was unused as a street, and was covered with tall weeds. There is evidence to the effect that, before the movement of the cars, a switchman walked down on the north side a part of the distance from McKee to Burnett street, but did not look under the cars to see if persons were there. There is much testimony in the case directed to the question whether or not the parties under the cars could have been seen by him or others attending the engine, much of which, as stated, is very obscure. It does not show that any of the defendant's servants did see them or know their situation, and the judgment is not based on that theory. Nothing is shown to have been brought to their knowledge during the time they had been engaged in handling the gravel cars to indicate a probability that any of Shea's hands would be under the cars. It was shown, indeed, that this spur, prior to this period, had not been much used, and that engines had rarely gone upon it; that it had been a storage or repair track for cars in bad order; and that it had been a practice for employees of defendant to eat their dinners, and for children to play, about and under such cars. But all cars of this character had been removed to make room for the movement of the gravel cars, as stated, and during the time of plaintiff's service there, and longer, this had been the use made of the track. There is nothing to indicate that plaintiff knew of or was influenced by the practice of the employees and children to be under the cars.

One of the positions of the defense is that, from these facts, no reasonable conclusion can be drawn but that plaintiff was himself guilty of such negligence, contributing to his injury, as precludes him from recovering, and we are of the opinion that it must be sustained.

That the act of sitting upon a railroad track over which cars are expected to pass is a negligent one, which precludes a person guilty of it, when hurt, from complaining of mere negligence on the part of those operating the cars in failing to discover his presence and avoid injuring him, is well settled. 2 Thompson, Com. Neg. § 1789, and cases cited. Of that character was plaintiff's act in not only sitting on the track, but in sitting immediately under a car where

his view of the movements of the defendant's servants, and their view of him, were greatly, if not wholly, obstructed, unless it is excused by his claim that he did not know or expect that the cars would be moved. What assurance had he of this? He had none, according to any view that can be taken of the evidence. That for defendant is to the effect that the switching of the cars was done in strict accordance with the understanding and the previous practice. This, however, may be treated as disproved by the evidence for plaintiff. The facts stated by the witness for plaintiff from which the inference is drawn that the taking out and putting in of cars had for a few days prior to the accident been done between the times when Shea's hands quit work in the evenings and resumed in the mornings do not go to the extent of showing that there had been any understanding that the business should be managed in this way or that this practice should continue and be uniform. They gave no assurance that the defendant would not take out empty cars at any other time, when it could do so consistently with the work being done for Shea.

When we come to plaintiff's own testimony, we find that the only facts stated by him as a basis for his belief that the cars would not be disturbed are that these cars had been on this track and had not been moved during the time of his service there, and that no engine had come upon the spur. He claims, not that any particular time had been fixed for putting in and taking out cars, but that he judged they were not to be disturbed before they were unloaded. He says: "I do not know whether it was the intention to move these cars until they had been unloaded or not; they were there to be unloaded, and I knew that after we got them unloaded I supposed they would move them somewhere; I did not suppose they would do that until they were unloaded." His inference that loaded cars would not be taken out was a just one; but the two that had not been unloaded were so connected with others that were empty that any attempt that might be made to take away the latter was likely to move the former, and that is what happened.

We have asked what assurance he had that the cars would not be moved, because in our opinion nothing short of that would justify him in taking a position, merely from choice and for his own pleasure, where any movement of the car was almost sure to hurt him. In taking this position, he was not performing any duty or work, and had not even the excuse that it was the only convenient place where he would be in the shade. Without some definite assurance or understanding of the kind referred to, the only restriction upon the right of the defendant to move its cars was that to be implied from the fact that it was delivering them to be unloaded by Shea's men, and was

permitting all uses of them and of the track and right of way which was proper in carrying on such business. This imposed upon it the duty of conducting its business with due regard to the safety of the men while engaged in carrying on this work, and, had plaintiff been hurt while so engaged, his case would have been different. He would then have been where he had the right to be, and where defendant must have anticipated he would be; and it may be that defendant would have had no right to disturb the cars without knowing his situation, and he could have relied on the observance of its duty. But, as he was not thus employed, no such restriction existed upon the right of the defendant to control its own business, and in doing so it was under no obligation to the plaintiff that it did not owe to the people generally, who might be about the track and cars. Hence he had no right to assume that it would know that he might be situated as he was and would find him out.

There being nothing to prevent the defendant moving the cars at that time, the very fact that they were cars on a track, the business in which they were employed, constituted a warning that the empty ones were at some time to be moved, and that they might as well be moved at this time as at another. But for the fact that plaintiff was under one of them, no better time could have been chosen, and of that fact defendant's servants had no notice. If it be conceded that they were guilty of negligent omissions in moving the engine without signals, we think it unquestionably true that his own contributing negligence was the chief cause of his misfortune. His contention amounts to this: that having thus, without reason and for his own pleasure, placed himself in one of the most dangerous positions he could have chosen, he yet had the right to exact of defendant and its servants the foresight and the clocklike precision of action necessary to discover and save him from the consequences of his own imprudence—a foresight and caution for his protection utterly wanting in his own conduct. Having thus thoughtlessly exposed himself to a danger from which he suffered, and which he could easily have foreseen and avoided, he is not in a position to say that he relied on the defendant's employees to discover his danger and protect him from it. *Central Ry. Co. v. Smith*, 78 Ga. 694, 3 S. E. 397. His case is not better than that of persons who negligently walk, sit, or lie upon railway tracks. These often do not know, or have especial reason to expect, that trains will be passing while they are on the track; but of this they take the risk, the very nature of the place warning them of the dangers they incur. The fact that the cars were being used as they were for the purpose of hauling gravel to this place notified plaintiff of the probability of the empty ones being moved so as to cause a movement of the

one under which he sat. In this respect his attitude is the same in principle as those instanced, and, in so far as he so placed himself as to limit the opportunities of himself and of defendant's servants to see his peril, it is worse.

Giving due consideration to the verdict and the judgments of the courts below, we yet cannot escape the conviction that the evidence conclusively establishes a case of contributory negligence which requires us, reluctant as we are to interfere on such a ground, and regretting, as we do, the necessity, to reverse the judgment.

Reversed and remanded.

LONG v. STATE.*

(Court of Criminal Appeals of Texas. April 26, 1905.)

1. MURDER—EVIDENCE—DYING DECLARATION.

In a prosecution for murder, a statement by deceased to his physician the morning after the shooting that his injuries were "mighty bad" was admissible as a part of the predicate for the introduction of a dying declaration previously made.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 457.]

2. SAME—ADMISSIBILITY OF EVIDENCE.

In a prosecution for murder, evidence that immediately after the shooting the wife of deceased asked defendant why he shot deceased, and that defendant replied: "Don't come down here with your gun. I have got as much lead as anybody"—was admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 810, 816.]

3. SAME.

In a prosecution for murder, in which it appeared that one cause of the difficulty resulting in the killing was that animals belonging to deceased had gotten into defendant's inclosure, a note written by defendant to deceased three days before the killing, warning him to keep his stock out of defendant's pasture, was admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 288, 290, 291-294.]

4. SAME—DEMONSTRATIVE EVIDENCE—HARMLESS ERROR.

In a prosecution for murder, admission in evidence of the bloody clothing of deceased was not cause for reversal, where such evidence was of such slight consequence as not to have assisted in bringing about a conviction or the enhancement of the punishment.

5. SAME—DYING DECLARATION—ORAL STATEMENTS.

In a prosecution for murder, it was not error to admit oral evidence of a dying declaration of deceased objected to on the ground that a dying declaration had been taken in writing; the bill of exceptions not showing whether the written declaration was admitted in evidence, or what it contained.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 461, 462.]

6. SAME—MOTIVE—ADMISSIBILITY OF EVIDENCE.

In a prosecution for murder, evidence that defendant did not indorse the religious views of deceased was competent on the question of motive.

*Rehearing denied June 14, 1905.

7. SAME—ADMISSIBILITY OF WEAPON.

In a prosecution for murder, the rifle with which defendant killed deceased is admissible in evidence.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 374.]

8. SAME—WITNESS—CROSS-EXAMINATION.

In a prosecution for murder, in which defendant testified as a witness in his own behalf that he had been shot at the night before the homicide under circumstances indicating that it was deceased who fired the shot, cross-examination as to why defendant did not report this alleged fact to the authorities was proper.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 979-982.]

9. SAME—ADMISSIBILITY OF EVIDENCE—IMPEACHMENT OF WITNESS.

In a prosecution for murder, in which defendant had testified that he and deceased had been friendly up to a few days before the homicide, evidence that a year before defendant had told witness that he had been having trouble with some of his neighbors, including deceased, and was afraid he would have to hurt some of them, was admissible as original as well as impeaching testimony.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 288, 290, 291-294.]

10. SAME—DECLARATIONS OF ACCUSED.

In a prosecution for murder, in which it appeared that the difficulty arose in part from the fact that deceased's stock had broken into defendant's pasture, and that defendant had written a note to deceased, telling him to keep the stock out, evidence that, on the same day the note was written, defendant said to witness that deceased's stock had been getting into his pasture, and, if he didn't keep it out, lead was going to fly, was admissible.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 288, 290, 291-294.]

11. CRIMINAL LAW—BILL OF EXCEPTIONS—SIGNATURE.

An unsigned bill of exceptions cannot be considered.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2336.]

12. SAME—NEW TRIAL—MISCONDUCT OF JURY.

On a motion for a new trial after conviction for murder, two members of the jury testified that some reference was made in the jury room to the fact that a former jury, which had disagreed, stood eight to four, or ten to two. It was not shown that any one stated whether a majority of the former jury were for conviction or acquittal. The other jurors, though present at the hearing of the motion for a new trial, were not called as witnesses. *Held*, that it did not appear that defendant was prejudiced by the reference to how the former jury stood.

13. SAME—AFFIDAVIT OF JURORS—INSTRUCTIONS—HARMLESS ERROR.

In a prosecution for murder, the court instructed the jury that the case had been tried before, and that they should not discuss the result of the previous trial, but that, if they were guilty of such misconduct, they should not make *ex parte* affidavits relative to it, but should tell about it on the witness stand, where the court could protect them. Code Cr. Proc. art. 817, provides that where, through misconduct of the jury, the court is of the opinion that the defendant has not received a fair trial, it shall be competent to prove such misconduct by the voluntary affidavit of the jurors. Article 821 provides that the state may take issue with the defendant upon the truth of the causes set forth on the motion for a new trial, and in such case the judge shall hear evidence by affidavit or otherwise, and determine the issue. The jury did discuss the result of the former

trial, and on motion for a new trial the court granted defendant process, summoning all the jurors for examination, but only two were examined. *Held*, that the action of the court in directing the jurors not to make affidavits did not prejudice defendant, and was not cause for reversal.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

J. C. Long was convicted of murder, and appeals. Affirmed.

Nugent & Carter, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction is for murder in the second degree, five years' confinement in the penitentiary being fixed as the penalty.

Dr. Allen, testifying in behalf of the state, over the objections of appellant, was permitted to state that he waited upon deceased at the time of his death; that the gunshot wound produced his death; that he had a conversation, while attending deceased, about his condition, and deceased used the following language, "This is mighty bad, isn't it?" or words to that effect. This occurred the morning after the difficulty. The grounds of objections were that the dying declarations of deceased were put in writing by Justice of the Peace Herring "on the night of the homicide," and this was only the opinion of the witness, was not *res gestae*, and inadmissible for any purpose, and hearsay. The court signs this, with the explanation that it was admitted as a part of the predicate for the introduction of the dying declarations. This testimony was admissible for the purpose stated by the court. While it was not sufficient to show, within and of itself, that deceased was then conscious of approaching death, it was admissible as tending to show his mental condition; and, when taken in connection with the other facts in regard to this predicate, we think, was admissible.

The bullet taken from the body of deceased was offered in evidence. Several objections were urged to its introduction, which we think untenable. The widow of deceased was permitted to testify that, upon hearing the shot fired which killed her husband, she ran immediately to the place where the difficulty occurred; that defendant was in his wagon, and she asked him: "Oh, Mr. Long! what did you shoot him for?" Defendant replied, "Don't you come down here with your gun. I have got as much lead as anybody." The objections urged were that the statement was not directed to deceased, could throw no light on the case, and was directed to another and different person than deceased, and, further, was irrelevant. This testimony was clearly admissible. It was made immediately after the shooting, and was brought within the rule of *res gestae*.

The state introduced the following note in evidence: "Mr. J. T. Anderson: I have not got a free pasture. Keep your stock out, J.

C. Long." Various objections were urged to the introduction of this document. It was clearly admissible. One of the reasons for the trouble and killing was that deceased's (Anderson's) mules were getting inside the inclosure of appellant. The note was written on Thursday before the killing on Saturday. This was the first meeting after the note had been written by appellant to deceased.

A pair of pants and coat were exhibited before the jury, and identified as those worn by deceased on the night of the homicide. Objections are (1) that it tended to prejudice appellant before the jury; (2) immaterial; (3) could serve no purpose except to influence the minds of the jurors adversely to appellant; and (4) was not admissible for any purpose. We have held that under some circumstances the bloody clothes of deceased could not go before the jury. However, wherever they serve any legitimate purpose, or tend to illustrate any question or explain any thing or circumstance connected with the homicide, the clothing is admissible. It may be further stated in this connection that the admission of this character of testimony is like the admission of any other fact or circumstance in the case. If admissible, the fact that it may prejudice or injure appellant would not be cause for its rejection. If it even remotely tends to elucidate or illustrate any theory or issue, it is admissible, though it may not be of a cogent character. Its admission is like the admission of any other fact or circumstance, and, before reversal would be required, some injury must be shown. It is not the introduction of all irrelevant or immaterial evidence that will cause reversal. Where it is of such slight consequence as not to have assisted in bringing about a conviction or the enhancement of the punishment, we do not believe an appellate court would be called on to reverse. We believe this matter comes within the above rule, and, inasmuch as the jury gave appellant the minimum punishment for murder in the second degree, no injury is shown, even if erroneously admitted.

The daughter of deceased testified that she asked her father: "What did Mr. Long say to you, and how did he come to shoot you?" Deceased replied, "I stopped Mr. Long and asked him what of my stock had been getting in, and he said, 'Two mules,' and I asked, 'How?' And he said, 'Wherever they wanted to, or took a notion to.' And I says, 'There must be a weak place in your fence.' He says, 'No; they get over whenever they take a notion.' He says, 'You must be the man that wired up my gate last night.' And I says, 'I did.'" The bill then recites as follows: "And then he became so weak that he could not talk any more. And it was in evidence that Harper Herring, the justice of the peace, had taken his dying declarations in writing." Objection was urged that the declarations of deceased were taken properly and in writing, and were the best evidence

of what occurred, and are not accounted for, and are in possession of the state, and that the statement of deceased was in response to the questions propounded by the witness; that such conversation is not a part of the *res gestæ*; and that the statement is not a complete narration of what occurred at the time of the homicide. The court qualifies this bill with this explanation "that at this time Herring had not testified, and no written declaration had been offered, and it was not shown that deceased had put in writing everything that showed how deceased received his injury." Where the dying declarations have been reduced to writing and signed by the declarant, it is the best evidence, and usually excludes verbal evidence of dying declarations, unless the absence of the written declaration is properly accounted for as a predicate for the introduction of the verbal statement. This bill is not clear or satisfactory. It does not exclude the idea that the written dying declaration was admitted. If the written declaration was admitted, and this statement was in accord with that, we do not see any objection to its being used by the state, or, if contradictory of the written declaration, it might be used by appellant. Mr. Wharton, in his work on Homicide, thus states the rule: "If the declaration of the deceased, at the time of his making it, be reduced to writing, the written document must be given in evidence, and no parol testimony respecting its contents can be admitted. It has been held in England that if a declaration in articulo mortis be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of a declaration which is not itself produced when its production is possible. But where the dying person repeats his declaration three several times in the course of the same day, the fact of its having been committed to writing in the presence of the magistrate on the second occasion will not, it seems, exclude parol evidence of the others, where it is not in the power of the prosecutor to give that which has been committed to writing in evidence." Wharton on Homicide, § 766; Greenleaf on Ev. 161; Krebs v. State, 8 Tex. App. 1. The state was not seeking to introduce the statements or contents of the written declaration. It was another statement made by him to a witness other than the justice of the peace. If, as a matter of fact, the state was seeking to introduce the contents of the written declaration, its loss not being accounted for, the objection would be well taken. But this is not the question. It was an independent statement. In regard to one of the rules above stated—that is, that the dying declaration may be impeached or contradicted by showing that deceased made statements contradictory of that introduced—see Felder v. State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777. The bill does not exclude the idea

that the written statement was introduced, or that this statement of the deceased shown by witness, here complained of, was contradictory of anything contained in the written declaration, or that it was made at the same time; and under the rule laid down by Mr. Wharton, above quoted, we are of opinion the evidence was properly admitted.

Appellant, testifying in his own behalf, stated on cross-examination that he did not indorse the religious views of deceased prior to the time of the killing. It was objected to the introduction of this that every person, under our Constitution, has a right to worship God according to the dictates of his own conscience, and whether he liked the religious views of deceased, or not, is irrelevant, and the introduction of this statement was prejudicial, and further that it did not tend to show malice. These are but grounds of objection and conclusions, as stated in the bill. Whether these religious views entered into the motive of appellant would be a question of fact. There is nothing in the bill to show the contrary. It may be stated, as a matter perhaps of common notoriety, that differences in religious views have been productive of many serious personal and national troubles. It seems the tendency of the human mind to become very much excited at times over religious and moral questions. However this may be, we believe this was admissible to go to the jury for what it was worth. How far it may have entered into the ill feeling of appellant towards deceased was a matter to be weighed by the jury, and the bill does not attempt to show that this matter did not enter into the questions of malice and motive.

The rifle with which appellant killed deceased was handed to him while testifying, and identified by him, and admitted in evidence. There was no error in this, under the decisions in this state.

Appellant was further asked, on cross-examination, why he did not go to the town of Duffau and report that he was shot at on the night previous to the homicide. He answered that he had work to do the next day, picking cotton, and saw no officer to whom he could report the shooting which occurred Friday night. Under the facts, this testimony is clearly admissible. Appellant contended that he was shot at the night before as he approached his gate, which had been fastened by wire by deceased, as he admitted. The state contended he was not shot at, but that one of the boys of deceased, at deceased's residence, shot off his gun, which was some distance from where appellant was at the time of the firing of the gun. We think this testimony was clearly admissible, as affecting appellant's credibility and his belief in the fact that he was shot at.

McCarty was permitted to testify that he had a conversation with appellant about a year before the killing, which conversation

occurred in the town of Duffau. Appellant stated to him that he had been having trouble with some of his neighbors, mentioning the name of deceased; said they had been bothering him, and, if they did not stop it, he was afraid he would have to hurt some of them. It is urged that this is too remote and too general, and was not evidence of malevolence towards the deceased, and not a threat directed at deceased. This testimony was clearly admissible. While testifying that he had no ill will towards deceased, appellant stated that he and deceased had been friendly up to a few days before the homicide; and the effect of his testimony was to limit their trouble to the fact that deceased's mules had been getting in his pasture or field a short time prior to the homicide, and which brought about the writing of the note to deceased. He denied having made this statement to witness McCarty. It tended to show that he had ill feeling towards appellant long prior to the occurrence of the matters mentioned in, and which caused the writing of, the note, and that his ill feeling towards deceased was not of recent origin. In our judgment, it was admissible as original as well as impeaching testimony.

Mrs. Jameson testified, "I saw Mr. Long on Thursday before the killing, about 8 o'clock in the morning. He passed my house and stopped. We had a conversation. He told me in the conversation that some one's mules had been bothering him, and a little later on he said it was Mr. Anderson's mules that had been bothering him, and that if he did not keep them out, or from breaking in, or did not stop them, lead was going to fly, and that it was going to fly quicker than anybody was expecting it." It is urged that this statement is too general, and is not directed towards deceased, and is not a threat against deceased, and that the facts and circumstances attending the homicide show it was not the moving cause of the killing, and it was immaterial and irrelevant. We cannot agree to these contentions. The note previously mentioned was written Thursday morning. This conversation occurred the same day, but subsequent to the delivery of the note at the house of deceased. The statement to Mrs. Jameson by appellant directly includes deceased by name. The occurrences at the homicide show that it was the stock getting in the pasture about which the difficulty occurred. At least, there were remarks made at the time between them with reference to this stock. The statement was not too general, and directly and personally mentioned deceased.

There is an unsigned bill of exceptions in the record in regard to some remarks of one of the attorneys for the prosecution. We cannot consider it in the absence of its approval by the judge. If approved, we would

not deem it of sufficient importance to reverse. No special charge was asked, and perhaps it was a legitimate argument.

On cross-examination, appellant testified that the reason he did not report the shooting at him on Friday night before the homicide on Saturday evening was because he was afraid and excited, and he did not know when he would be shot. Objection was urged that a party who has been shot at is not required by the law to report that fact to officers; that it is irrelevant and immaterial, and calculated to prejudice him in the minds of the jury. How far it may be the duty of a party who has been assaulted, waylaid, and shot at to report to the officers is a matter that we do not propose to discuss here, and it is not necessary to discuss it. But the question was a proper one. It tended to affect the credibility of the witness, and his honest belief that he was actually shot at the night before. It was a fact for the jury to take into consideration in passing on those questions.

In the motion for new trial, appellant sets up the misconduct of the jury. One of the jurors (Spurlock) testified that after the jury had retired there was something said about the former trial of appellant. One of the jurors asked how the other jury stood. Juror Zimmerman answered, "Eight to four," or "Ten to two," but that this had nothing to do with the case, and the jury could not consider it. This witness was not positive whether Zimmerman used the words "ten to two" or not, but he said some one did use the words "ten to two," and he understood that the ten to two jury hung on the question of either penalty or degree; that he understood further that these were all for conviction, but differed as to penalty. Up to this time this juror further says that they had disagreed as to the degree of the offense; that one of the jurors was for manslaughter. Zimmerman was sworn, and testified that he was a juror in this case, and that, after the jury had retired and taken a vote, some one asked "how the other jury stood, and [he] replied, 'Eight to four,' but that we could not consider that, as it had nothing to do with this case. There were three or four, or maybe five or six, jurors present when this happened." This was all that the witness said. He did not know how the jury stood as to conviction or acquittal. That he said nothing in regard to the former trial, except as to how they were divided. He himself said nothing about the jury standing ten to two. No such an expression was used. It was not used in his presence or at that particular time and place. It was held in Morrison's case, 39 Tex. Cr. R. 519, 47 S. W. 369, that the mere announcement in the jury room that defendant had been previously convicted, and his punishment assessed at 20 years in the penitentiary, would not constitute reversible error, unless some prejudice was shown to appellant. Moore's

Case, 36 Tex. Cr. R. 88, 35 S. W. 668, is to the effect that, where the accused was on trial for robbery, where it was made a ground of the motion for new trial that the jury had received other testimony after their retirement, and it appeared that the newspaper containing an announcement that defendant was on trial for the robbery, giving a statement of the transaction, and that one of the defendants had already been tried and convicted, and the accused was under indictment for murder in one county, and other minor offenses, and the juror made an affidavit that he did not read the article until they had agreed upon defendant's guilt, and none of the other jurors had read it, so far as he knew, and that after reading it he agreed to a verdict of five years less than he had before fixed upon, and that the article did not influence his verdict, it was held that there was no prejudice, and the conviction was not disturbed. To the same effect is Williams v. State, 33 Tex. Cr. R. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21, and Munos v. State, 34 Tex. Cr. R. 472, 31 S. W. 380; McDonald v. State, 15 Tex. App. 493. The statute only prohibits the allusion in the argument to a previous conviction of the appellant in the same case after new trial awarded. So it would seem that in cases like this, where there had not been a previous conviction for the same offense, it is a matter to be judged from all the environments of the action of the jury, and its probable effect upon their minds. There are only two jurors who testify in regard to the matter occurring in the jury room, and we do not believe it is shown that any injury resulted to him from their statements. The other jurors were present, but were not placed on the stand by either side. As presented, we are of opinion there is not such a showing as will require this court to reverse the judgment.

The motion for new trial further shows that the district judge instructed each jury for the week during the term, inasmuch as some of the cases to be tried before them had been tried more than once, not to discuss the result of any previous trial; that this would be misconduct; that, if they were guilty of misconduct, not to make affidavits for lawyers in the case; that such affidavits were ex parte, and not to make them, but to tell it, if any such misconduct happened, and talk to the lawyers on both sides of the case about it freely, and then appear on the witness stand, where the court could protect them, and they would not get into any tangle about the matter, but not to make any affidavits. This was the statement of the judge under oath. The court qualifies this bill of exceptions by stating that the court gave defendant process for each of the 12 jurors, and set the motion for new trial for a certain day, that he might have all of them present, and that appellant did not see proper to put them on the stand. The court

enjoined on the jurors not to make *ex parte* affidavits simply for their own protection, and not to deprive defendant of any right, as they were told, first, not to do wrong; and, second, if they did, not to conceal that fact, but tell it to counsel upon either side, and to swear truthfully about it before him (the judge) on the motion for new trial. Such is the bill as qualified. Subdivision 8 of article 817, Code Cr. Proc., is as follows: "Where through the misconduct of the jury, the court is of the opinion that the defendant has not received a fair and impartial trial, it shall be competent to prove such misconduct by the voluntary affidavit of the jurors, and the verdict may in like manner in such cases be sustained by such affidavit." Article 821, Code Cr. Proc., provides: "The state may take issue with the defendant upon the truth of the causes set forth on the motion for new trial, and in such case the judge shall hear evidence by affidavit or otherwise and determine the issue." It seems to be largely a question of practice as to how the matter of the misconduct of the jury shall be brought to the attention of the court, and how the misconduct shall be shown. The statute (article 817, subd. 8, *supra*) provides it may be by affidavit *pro and con*; article 821, that the state may meet the issues of the causes by affidavit or otherwise, and the case on this issue thus determined. While it is safest always to follow the language of the statute or its commands in regard to this question of misconduct, still the mere fact that affidavits were not made in obedience to the prior instructions of the court would not necessarily require reversal of the judgment, if the facts were otherwise produced, or if the opportunity was afforded, and the accused declined to produce the evidence. The ultimate effect and intent of these statutes are to inform the court with the sworn statements, either written or verbal, of the facts attending and manifesting the misconduct. This court would not feel called upon to reverse a judgment where the facts have been adduced or tendered for introduction, if declined simply because they were verbal, and not set out in affidavits. The essential matter is the information for the benefit of the trial court, and, in case of its rejection by that court or the overruling of the motion, then for the inspection of this court on appeal. We do not see, under the facts, how appellant has been injured. The jurors were all brought in and tendered accused, and two of them placed upon the witness stand, and their testimony elicited. He declined to introduce the remaining ten. We do not believe the testimony of these jurors would have been any more cogent or truthful in affidavit than when detailed verbally under oath. There is no such error in this matter as requires a reversal of the judgment.

The charge of the court is criticised in regard to self-defense because it is an ad-

mixed charge of real and apparent danger. The case made by appellant was one of apparent danger. We do not agree with the contention that apparent danger was not sufficiently given. The charge submits the entire trouble from the standpoint of appellant; that is, as to how he viewed the facts and the actions of deceased at the time he fired the fatal shot. In fact, we think the charge rather favorably presents the law than otherwise.

Finding no reversible error in the record, the judgment is affirmed.

CRAIGER v. STATE.

(Court of Criminal Appeals of Texas, Oct. 19, 1904. On Rehearing, June 24, 1905.)

1. HOMICIDE—INSTRUCTION—SELF-DEFENSE.

Where the evidence on a prosecution for homicide more cogently showed that the difficulty was brought on by deceased than by defendant, and the court in its charge limited the right of self-defense with provoking the difficulty, defendant was entitled to a charge the converse thereof.

2. SAME.

On a prosecution for homicide, where the facts that deceased had followed defendant and had whistled at his horse were but two of the facts which led up to the main facts of the trouble, a charge on self-defense that specially mentioned those facts as not justifying defendant in taking the life of deceased was erroneous, under the statute expressly prohibiting the court from giving a charge on the weight of testimony.

3. DEADLY WEAPONS.

The bare fact that a wound inflicted by a weapon produced death is not conclusive that it was a deadly weapon.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 5, 10, 83, 119.]

4. SAME.

Pocketknives are not *per se* deadly weapons.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 5, 16, 83, 119.]

5. HOMICIDE—INSTRUCTION—CODE.

On a prosecution for homicide, where the killing was done with an old broken-handled pocketknife which was used by defendant on a sudden trouble coming up between him and deceased in regard to insulting conduct of deceased towards defendant, and defendant only used the knife after being struck by deceased, and inflicted but one wound, defendant was entitled to have given in the charge Pen. Code, art. 717, providing that the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending, and that, if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 595.]

Brooks, J., dissenting.

Appeal from District Court, Angelina County; Tom C. Davis, Judge.

Artie Craiger was convicted of murder in the second degree, and he appeals. Reversed.

E. J. Mantooth, W. J. Townsend, I. D. Fairchild, and John F. Weeks, for appellant. O'Quinn & Robb and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This conviction is for murder in the second degree; the punishment assessed at five years' confinement in the penitentiary.

The evidence for the state, in substance, shows that deceased, Henry Falvey, in company with Tom Dubose and others, was standing on the gallery of deceased's father, who was running a store at the town of Burke, when defendant passed, riding a horse; that Tom Dubose gave a derisive whistle, directed at defendant and his horse. This enraged defendant, and he stopped, and asked the parties on the gallery if they had anything against his horse or himself. Receiving no reply, defendant went a short distance, and after a little while turned and hitched his horse near the store of Meeks, went into the store, and was looking at a drummer display his goods. Deceased and several of his companions who were on the gallery of his father's store came across to the store where defendant was. After remaining there a few moments, defendant called deceased out on the gallery, with the statement that he wanted to see deceased. When deceased reached the gallery, defendant asked deceased what he was whistling at his horse for. Deceased denied that he had done so, but stated that Tom Dubose (who was then in the Meeks store) did the whistling. Thereupon Dubose ran behind the counter in the store. Defendant first asked where Dubose was, and, when informed of the fact, turned upon deceased and applied various vile epithets, such as "liar" and "son of a bitch," stating deceased did the whistling at his horse. Deceased picked up a piece of white pine plank and proposed to resent these indignities, and at that juncture his brother, J. C. Falvey, interfered and stopped the difficulty. A moment thereafter, deceased having secured another piece of plank, told defendant that he would not repeat the insults he had offered him, which being done, deceased struck defendant; defendant grabbed deceased by the arm and stabbed him with a pocketknife, which wound penetrated deceased's heart, and he died in a few moments. This is in substance the state's case. Defendant testified, in substance, to a complete case of self-defense, which is to some extent supported by his witnesses. Defendant further testified that the knife which inflicted the injury "was an old knife, with one handle nearly off; and you could just throw it open and shut. It would stand open if you would hold it straight, but if you held it the least bit slanting, it would fall shut. The back spring was broken." This is all the description we find in the record of the knife

The charge of the court in the main is an admirable presentation of the law of murder in the first and second degrees, manslaughter, and self-defense. The court also properly applied the law applicable to the imperfect right of self-defense, telling the jury, in substance, that, if defendant provoked the difficulty with intent to kill, he would be guilty of murder; or if he provoked the difficulty without the intent to kill, he would be guilty of no higher offense than manslaughter. The charge of the court, as suggested by the Assistant Attorney General, seems to announce the law as laid down by this court in *Franklin v. State*, 30 Tex. App. 628, 18 S. W. 468, and *Id.*, 34 Tex. Cr. R. 286, 30 S. W. 231. There are various criticisms of the charge of the court, but a careful reading of the same demonstrates they are not well taken, and do not present reversible error. However, we deem it necessary to pass on one objection urged as an erroneous omission in the charge. Appellant insists that the court should have charged articles 717 and 719, Pen. Code 1895. Under article 51, Pen. Code 1895, the intent is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act. Under article 717, if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears. As stated in *Shaw v. State*, 34 Tex. Cr. R. 435, 31 S. W. 361, we have the following principles announced under the provisions of this article: First, that the weapon or means used must possess the quality of a deadly weapon without regard to the manner in which it is used; second, though not deadly, the manner of its use must show an evident intention to kill. In other words, the character of the weapon cannot be fixed or determined by the manner of its use. It must ordinarily be a deadly weapon per se to warrant a presumption arising from its use; or, if not such a weapon, the intent to kill must evidently appear from the manner of its use. Now, applying the principles of this article to the facts of this case, we hold that the weapon may be conceded not to be per se a deadly weapon, since the length and character of the same is not disclosed; but we hold that the intent to kill evidently appears from the manner of its use, and hence the provisions of article 717 are not required to be given in charge to the jury, as the issue thereby required to be charged is not raised by the evidence, to wit, a lack of evident intent to kill. The facts, as collated above, show that appellant provoked the difficulty, for, as he testifies, he had had previous difficulties with deceased; that deceased had provoked him on many occasions; and here upon the scene of the killing he had a knife drawn, and, as soon as his outrages and indignities to deceased had provoked deceased to resent it, he grabbed

deceased by the arm and plunged the knife into his heart, from which he died instantly. As laid down by this court in *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17, defendant had a right to approach deceased and ask him why he offered him an indignity, but this was not evidently the intent and purpose of defendant in calling deceased out on the gallery, since, the moment deceased denied offering appellant any indignity, he cursed and abused him, and would take no character of explanation, although deceased stated that the party who did offer the indignity was then in the house. This being true, the intent to kill, the means and manner used to accomplish it, and the whole surroundings indicate clearly that appellant did have the evident intent to kill at the time he made the felonious assault upon deceased. Article 719, Pen. Code 1895, embodies the law of a case in which there was no intent to kill, and when the homicidal act is divested of an evil or cruel disposition. The facts of this case do not present any phase of this statute, and hence the court did not err in charging either article 717 or article 719, as insisted by appellant. For a discussion of this question, see *Honeywell v. State*, 40 Tex. Cr. R. 199, 49 S. W. 586; *Perrin v. State*, 78 S. W. 930, 9 Tex. Ct. Rep. 533; *Baker v. State* (Tex. Cr. App.) 81 S. W. 1215. The latter case in most, if not all, of its facts, is like the case at bar. The only difference we discover is that in the *Baker Case* the length of the knife blade is shown to have been 2½ inches, while the length of the blade is not shown in this record. However, the whole tone and trend of the evidence shows that appellant used a deadly weapon, and had the evident intention to kill at the time he inflicted the deadly blow.

The last insistence of appellant is that the court erred in not granting him a new trial on account of the misconduct of the juror George Manley. The misconduct consists, as appellant alleges, in the juror on his voir dire suppressing a preconceived ill will against appellant. To sustain this contention, appellant attaches the affidavits of several parties tending to sustain him. These affidavits were controverted by the state, and issue thereby joined, which issue the court decided against appellant. Under the authorities of this court, we are not called upon to review the decision of the court below in the matter. *Belcher v. State*, 37 S. W. 428; *Cockerell v. State*, 32 Tex. Cr. R. 585, 25 S. W. 421.

No error appearing in the record, the judgment is affirmed.

DAVIDSON, P. J., absent.

On Rehearing.

DAVIDSON, P. J. We have carefully reviewed this record in the light of the motion for rehearing, and are of the opinion that there was error in affirming the judg-

ment, and now conclude that it should be reversed. The substance of the evidence is that deceased, Henry Falvey, in company with Tom Dubose, Leonard Dunn, Wright Dunn, and Grover Dunn, were on the gallery of the store belonging to the father of deceased. J. C. Falvey, a brother of deceased, was interested in the store in some way, perhaps as clerk. Appellant had been in Falvey's store for the purpose of purchasing some nails. Failing to find what he wanted, he left, went to his horse, hitched about the street of the little town, mounted him, and rode by the store, going in the direction of another store, for the purpose of purchasing the nails. Grover Dunn testified that, as appellant passed, Tom Dubose gave a derisive whistle. Under his testimony, he was the only party whistling at defendant and his horse. Tom Dubose, Leonard Dunn, and Wright Dunn testified that Tom Dubose and deceased whistled. There had been previous trouble between deceased and appellant. Two personal troubles are mentioned by the witnesses. The testimony makes it certain that appellant was the subject of derision and practical jokes of one or more of these young men; that he was not very bright intellectually; that they made him the subject of their derision on several occasions, until it had become irritating and annoying to him; that shortly after appellant passed Falvey's store, going in the direction of the store of Weeks & Powell, these young men left Falvey's store, and went to where appellant was. En route they were heard to say, "Let's go over there; we aren't afraid of him." Coyle saw these boys en route, and requested them not to go over there and raise any trouble or have any trouble. However, they went; and appellant says that they came over there, singing and laughing at him. Just after they entered the store of Weeks & Powell, appellant called deceased out on the gallery, and asked why he was whistling and laughing, and making fun of him and his horse. Deceased denied that he was the party who had whistled at defendant and his horse as he passed Falvey's store. From this point forward the testimony varies as to the immediate subsequent acts and words. The state proved that, when deceased denied he whistled at appellant and his horse, appellant called him a damn liar. Deceased reiterated in similar language. Appellant jerked or got out his knife, and deceased grabbed the board, variously described, but it was of sufficient size and dimensions to inflict a serious blow. At this point J. C. Falvey (brother of deceased) took the board away from deceased, and he then got another board to use in the difficulty, when appellant inflicted one blow with a pocketknife, which terminated fatally. Appellant's theory of the trouble, as shown by the testimony, is that appellant called deceased out for the purpose of settling the matter amicably, and that, when he asked him why he had used his in-

sulting whistle and other conduct towards him, deceased said he had not done so. Appellant insisted that he had. He then called appellant a liar, or a damn liar, and grabbed a board and struck him with it on the hip. That J. C. Falvey then interfered, and deceased kicked a board from a box setting on the gallery, grabbed that, and, as appellant was turning to go away, deceased ran in front of him with it, and was about to strike him again, when he jerked his knife from his pocket, and struck one blow; that J. C. Falvey then expostulated with them, whereupon he ceased and went away. The only description of the knife given is: "It was an old knife, with one handle nearly off; you could just throw it open and shut. It would stand open if you would hold it straight, but, if you held it the least bit slanting, it would fall shut. The back spring was broken." This is the only description given in this record of the knife which was used by appellant, and with this he inflicted one stab.

Various and sundry exceptions are reserved to the charge of the court. The charge limits the right of self-defense with provoking the difficulty. Under this state of facts it is seriously questionable whether or not this issue was in the case. Perhaps it may have been brought within this rule by the state's testimony under the decision of Polk v. State, 30 Tex. App. 657, 18 S. W. 466, concede that it was, then it was clearly incumbent upon the court to charge the converse of it, because the evidence more cogently states that the difficulty was brought on by deceased, and not by appellant. This question was admirably elucidated in Shannon v. State, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17. Appellant unquestionably had the right in a peaceable manner to arm himself and to seek a meeting with the party who had insulted him, on a peaceful mission to endeavor to settle the troubles between them, and, if deceased made an attack upon him or provoked a difficulty, the further right to defend himself; but in this case appellant did not arm himself. It was a casual meeting, so far as the record shows, and, from the standpoint of appellant, and perhaps from the record, an unnecessary insult on the part of the young men, one of whom was deceased. They evidently followed him from the store of Falvey to the store of Weeks & Powell. It was shown that deceased was of a quarrelsome nature. Special charges were asked covering appellant's side of this question, which were erroneously refused. The court charged the jury: "In passing on the question as to whether or not defendant is justifiable, the facts and circumstances must be viewed from the standpoint of the defendant. Defendant would not be justified in killing deceased because deceased had followed him, or because deceased had whistled at defendant's horse. The only act that would justify defendant in killing deceased

would be such acts upon the part of the deceased, or words coupled with his acts, as were reasonably calculated to produce in the mind of the defendant a reasonable expectation or fear of death or serious bodily injury." Exception was reserved to this charge as being argumentative and on the weight of the testimony. This was singling out the fact that deceased followed accused and had whistled at him and his horse, and charged upon the weight and effect of those two facts. This the court should not have done. While these facts may not have justified appellant in taking the life of his adversary, however, they were but two of the facts mentioned in connection with it which led up to the main facts of the trouble which occurred on the gallery. By this line of reasoning, the charge may have and doubtless did impress the jury with the idea that the court believed these were the only facts in the case relied upon by appellant, and, in fact, practically limited the consideration of the right of self-defense to those two facts. It is not the province of the court to charge on the weight of the testimony. The jury are the exclusive judges of the credibility of the witnesses, and the weight to be given their testimony. The statute expressly prohibits the court from giving a charge on the weight of testimony.

As before stated, appellant requested the court to submit the issue that if deceased provoked the difficulty at Weeks' store, and that appellant believed from the acts and declarations of deceased that it was his purpose to provoke a difficulty and do him serious bodily harm, and that, while deceased was in the act of inflicting serious bodily injury or was about to inflict serious bodily injury upon appellant, he (appellant) had the right to resist, and if, under those circumstances, he killed, defendant would not be guilty. Again, special instruction was requested to the effect that, if the jury should find from the evidence that deceased followed appellant from Falvey's store to Weeks' store for the purpose of provoking a difficulty with him, and, in pursuance of such design, deceased, not in the act of defending himself, procured a piece of plank and struck defendant, and that defendant then cut and killed Falvey, believing at the time he was in danger of serious bodily injury from Falvey, he would be entitled to an acquittal. These charges were refused. They should have been given.

Exception is reserved to the charge because articles 717 and 719 of the Penal Code of 1895 were not given in the charge to the jury. Article 717 reads as follows: "The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently

appears." Article 719 provides: "Where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide, unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery." There is no evidence showing that the knife was a deadly weapon. The only fact from which that inference can be gathered is the "bare" fact that the wound inflicted by the knife did produce death. It has never been held, so far as we are aware, that, because death resulted, therefore the weapon is necessarily a deadly weapon. The weapon is not necessarily a deadly weapon. The weapon is described as an old knife, with one handle nearly off; "you could just throw it open and shut. It would stand open if you held it straight, but if you held it the least bit slanting it would fall shut. The back spring was broken." There is enough evidence to indicate it was a pocket-knife, for defendant got it out of his pocket. Pocketknives are not per se deadly weapons. They may or may not be deadly weapons. Where a weapon is not necessarily a deadly weapon, then we may look to the manner of its use, along with all the facts, in order to ascertain the intent with which it is used. If it is not ordinarily a deadly weapon, then, in order to find homicide, the intent to kill must evidently appear from the manner of its use. *Shaw v. State*, 34 Tex. Cr. R. 435, 31 S. W. 361. Here sudden trouble came up between the boys in regard to the insulting conduct of deceased towards appellant. It seems to be rather clear and certain that a deadly conflict was not contemplated. Appellant's intention, as he expresses it, was simply to ask for an amicable settlement of the trouble and a cessation of the insults. He had not armed himself for any deadly conflict; simply had an old broken-handled pocketknife, and resisted from his standpoint the attack made upon him with the plank. He only used the knife after being struck, and only inflicted one wound, which proved to be fatal. We do not believe the evidence warrants the court in taking the facts from the jury. It should have been submitted to the jury as a question to be decided. As bearing out this view of the law, see *Nichols v. State*, 24 Tex. App. 137, 5 S. W. 661; *Martinez v. State*, 35 Tex. Cr. R. 386, 33 S. W. 970. Under the very terms of the statute before the court would be authorized to refuse an instruction under article 717, supra, the testimony must make it evident that the party intended to kill. The facts here do not warrant the trial court in solving this question adversely to appellant. The charge should have been given under this statute.

It is not necessary to discuss the conduct of the jury, as it will not arise upon another trial.

For the errors discussed, the motion for rehearing is granted, and the judgment is reversed and the cause remanded.

BROOKS, J., dissents.

UPTON v. STATE.

(Court of Criminal Appeals of Texas, May 24, 1905. On Rehearing, June 14, 1905.)

1. HOMICIDE — CRIMINAL LAW — RECALLING WITNESS.

In a prosecution for murder, the court did not abuse its discretion in recalling a state's witness after he had testified, and asking him if he was armed on the occasion of the shooting, and whether he remained to see the conclusion of the difficulty.

2. APPEAL—REVIEW—BILL OF EXCEPTIONS—PURPOSE OF TESTIMONY.

In a prosecution for murder, the refusal to permit accused to state that, in a conversation with deceased before the shooting, he told him not to send any notes to his (defendant's) wife by his children, will not be received where the object and purpose of the testimony is not stated in the bill of exceptions.

3. HOMICIDE — EVIDENCE — CIRCUMSTANCES OF SURRENDER.

In a prosecution for murder, refusal to permit accused to state the circumstances of his surrender was proper, where there was no controversy in regard thereto, and no evidence tending to show flight.

4. CRIMINAL LAW — TRIAL — EXCLUSION OF JURY.

The court did not abuse its discretion in sending the jury out while accused's counsel was arguing the questions of law to the court, where the object was to enable the court to determine what issues should be presented to the jury.

5. SAME—REVERSAL—DEFECTIVE VERDICT.

A conviction of murder in the second degree will not be reversed because the verdict finds the accused guilty, and assesses his "punish" at confinement in the State Penitentiary for ten years.

On Rehearing.

6. HOMICIDE—EVIDENCE—RELATION OF DECEASED TO ACCUSED'S CHILDREN.

In a prosecution for murder, where it appeared that immediately prior to the killing one of accused's children brought a note to his wife, which the evidence tended to show came from deceased, it was error to exclude testimony by accused that deceased's relations with his children were friendly, for the purpose of showing that deceased would be likely to procure the children to carry the note; it appearing that the genuineness of the note was contested.

7. SAME—EVIDENCE—RES GESTÆ.

In a prosecution for murder, it was error to refuse to permit accused to show by his wife what his child stated when delivering a note, as res gestæ of the act of delivering the note, which the evidence tended to show came from deceased.

Appeal from District Court, Brewster County; B. C. Thomas, Judge.

Dave Upton was convicted of murder in the second degree, and he appeals. Reversed.

Morris & Van Sickle and Geo. Powell, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his

punishment assessed at confinement in the penitentiary for a term of 10 years; hence this appeal.

The facts show that appellant and deceased were both employed at a mining camp in Brewster county. Appellant had a wife and two children, under nine years of age, who lived at the camp with him. Up to a short time previous to the homicide, appellant and deceased were friends. Two or three days before the killing, appellant discovered some acts of undue familiarity between deceased and his wife. Appellant's work was in superintending the engine of the mining company at night; and on Saturday night before the homicide, which occurred on the following Tuesday, he had occasion to go to his camp, and there discovered deceased with his arms around his wife—as he states, “in the act of hugging his wife.” On the next day he remonstrated with deceased about his conduct, and they had some altercation. Later on, during Sunday, he started with his wife in a hack to Mariposa, where they could secure a stage, for the purpose of sending her to the train, and thence to El Paso, evidently for the purpose of a temporary separation, or getting her out of the way of deceased. He found the stage crowded, and returned to the mining camp with his wife and children on Monday. On Tuesday he was lying in bed in his tent, his wife being in the tent sewing, and the children brought her a note, which the evidence for the defense tends to show was from deceased, Reed. This note stated, in substance, for Mrs. Upton not to leave camp; that he would either run her husband off or kill him; and was signed, “George Reed.” Evidently appellant was not asleep at the time this note was handed to his wife, as he raised up directly and demanded that she should hand it to him. She pulled the note out of the machine drawer, where she was sewing, threw it down, and ran out of the tent. Appellant read it, and immediately took his Winchester gun, went to where deceased was, found him with two Mexicans (also employes of the mining camp), and immediately shot him down. At the first shot deceased fell, and defendant then shot him again. Appellant says that, when he got to where deceased was, deceased made a demonstration as if to attack him, and he shot him. This is a sufficient statement of the evidence to present and discuss the assignments.

Appellant questions the action of the court in refusing to permit him to prove by the defendant, while a witness, that George Reed's (deceased's) relations with his children were friendly; that he played with the children frequently; placed them on burros, etc., assisting them to ride, etc. This testimony was excluded. Appellant in the bill fails to assign any purpose that would be subserved on his behalf in the admission of said testimony. The bill should have stated the object and purpose of said evidence. In the court's explanation to this bill it is stat-

ed that the evidence does not show that, at the time this conversation occurred between Upton and Reed, Reed had ever sent a note by the children, or that Upton had ever heard that Reed had sent a note by the children, or that he had any intention of sending a note by them. This explanation of the court evidently suggests that the purpose of appellant in proposing to adduce the proof offered was to show that deceased would likely use appellant's children in sending notes to his (appellant's) wife. It does not appear from this bill, however, that the sending of the notes by the children was a controverted matter. In the absence of some showing in the bill itself as to the object and purpose of this testimony, and how its rejection injuriously affected appellant, we are not authorized to supply it. The bill should be complete within itself, so as to point out the error of the court, and show that the court's action in rejecting the evidence operated to the injury of appellant.

The next bill is with reference to the action of the court in recalling the state's witness Pablo Viegas, after he had testified, and asking him if he was armed on the occasion of the shooting, and whether he remained to see the conclusion of the difficulty, in answer to which he stated that he was not armed, and that he did not run away, but remained to see the conclusion of the difficulty. It is permissible to recall a witness, even after the defendant has closed his case, either in rebuttal, or where there is some controversy as to what the witness may have stated, and he can be required to restate his testimony on the point. This is a matter within the discretion of the court. As presented, we see no error.

While appellant was on the stand, testifying as a witness in his own behalf, and was testifying as to a conversation had with deceased on Sunday morning, he started to testify that in the same conversation he told deceased not to send any notes to his (defendant's) wife by his children. Counsel for the state objected on the ground that such statement would be self-serving, irrelevant, and immaterial to any issue. The court sustained the objection. It will be seen that the object and purpose of said testimony are not stated in the bill. Unless the object and purpose of testimony are obvious, the bill should always state such object and purpose, in order that the court below may intelligently pass on the objection to the evidence. *Rodgers v. State*, 34 Tex. Cr. R. 612, 31 S. W. 650; *Cline v. State*, 34 Tex. Cr. R. 847, 30 S. W. 801; *Martin v. State*, 32 Tex. Cr. R. 441, 24 S. W. 512; *Graham v. State*, 28 Tex. Cr. App. 582, 13 S. W. 1010. It has further been held that the statement that the testimony is irrelevant and immaterial is not a ground of objection, unless it is obviously so. *Hamblin v. State*, 41 Tex. Cr. R. 135, 50 S. W. 1019, 51 S. W. 1111. In addition to this, the court further explains that the evidence does not show that,

at the time the conversation occurred between Upton and Reed, Reed had ever sent a note to his wife or other person by the children, or that Upton had ever heard that Reed had sent or intended to send any note by the children. Of course, if we were permitted to look to the evidence, we might understand the object and purpose of the attempted introduction of this testimony, but we are not allowed to help out bills of exception in this manner.

We do not believe there is anything in the refusal of the court to permit appellant to state the circumstances attending his surrender. There was no controversy on this point—as to a voluntary surrender by appellant—and no evidence introduced by the state remotely tending to show flight.

Bill No. 5 shows that when Sadie Upton, wife of defendant, was testifying in his behalf, and had testified to the delivery to her of a note from the deceased, George Reed, immediately preceding the killing (being the second note witness testified to having received from George Reed, as shown by the statement of facts; said note having been delivered by one of the children of defendant to his wife, Sadie Upton, in company with the other child), defendant proposed to prove in this connection what the child said when in the act of delivering the note to said witness, as to who sent the said note, to wit, that the child said at the time that it was sent to witness (wife of defendant) by George Reed. On objection, this testimony was excluded. This was objected to on the ground that it was hearsay and immaterial. The bill does not show what object and purpose appellant had in offering this testimony. The court, in the explanation, shows that he excluded it because appellant was not present at the time. Appellant, in his brief, insists that the testimony was admissible as a part of the *res gestæ* of the act of delivering the note. This contention, the writer believes, is correct. Wharton Law of Ev. (2d Ed.) vol. 1, § 262. However, if it be conceded that this statement of the child at the time of delivering the note was *res gestæ* (that is, a part of the transaction of its delivery), as stated before, appellant does not show what object and purpose he had in introducing this *res gestæ* testimony. Without such statement, we cannot undertake to say that it would have served any legitimate purpose. See authorities heretofore cited. Appellant argues at length in his brief that it was a controverted question as to the genuineness of said note; that is, as to whether it was written and sent by George Reed, deceased, to the wife of appellant. If this object and purpose had been stated in the bill, we believe there can be no question as to its admissibility. But it is not so stated, and we are not permitted to help out the bill by a reference to the statement of facts.

Appellant objected to the court sending the jury out while counsel for defendant were

arguing the questions of law to the court. As explained by the court, it occurred in this wise: Counsel for defendant was proceeding to address the court as to the legal propositions controlling the case, and over his objections the court sent the jury out. After this discussion before the court, the jury returned, and the court explains that appellant had full opportunity to discuss before the jury the law applicable to the facts of the case, and to apply such law to the facts; that his only object in sending the jury out was to enable the court to determine what issues should be presented to the jury. In this exercise of judicial discretion we do not believe there was error. See *Vernon v. State* (Tex. Cr. App.) 33 S. W. 364.

Appellant insists that the case should be reversed on account of the verdict of the jury, which is as follows: "We the jury find defendant guilty of murder in the second degree and assess his punish at confinement in the State Penitentiary for ten years." His insistence being that the word "punish" is unintelligible in this connection. We do not agree to this contention. *Bain v. State*, 79 S. W. 814, 9 Tex. Ct. Rep. 950.

Appellant also urges that the testimony is not sufficient to sustain the verdict. We confess that, looking to the evidence, it appears to us very much like a case of manslaughter; but we are not prepared to say that the jury was not authorized to find appellant was not excited by passion at the time, and so they may have been justified in finding murder in the second degree.

The judgment is affirmed.

On Rehearing.

This case was affirmed at a former day of this term, and now comes before us on motion for rehearing. Appellant urgently insists that the court was in error in holding that he failed to state the purpose he had in view in showing the friendly relations existing between George Reed, deceased, and appellant's children, and, further, that the court was mistaken in holding that it was not a controverted matter about Reed sending notes by the children of appellant. A more critical examination of this bill suggests that appellant does state that his purpose in introducing this testimony was to show that deceased would likely procure appellant's children in carrying notes between himself and appellant's wife. True, the court states in qualification to said bill that the evidence does not show that, at the time this conversation occurred between Upton and Reed, Reed had ever sent a note by the children. On reflection, it does not occur to us that this explanation disposes of appellant's bill of exceptions in this particular. In our view, it would not matter whether appellant knew at that time anything in regard to the notes, or that deceased was sending the notes by his children to his wife. Now, if, as stated in the original opinion, there was no controversy in regard

to deceased sending notes by appellant's children to his (appellant's) wife, then the refusal of the court to permit the testimony, perhaps, would not be injurious to appellant. However, we do find in the testimony that the genuineness of these notes was contested by the state. It was proven by the mother of deceased that the note produced in evidence did not have the genuine signature of her son George Reed. So that, in a sense, there was a controversy as to the genuineness of these notes, which evidently embraced the fact as to whether or not they were sent by deceased to appellant's wife. Taking this view of the question, we were evidently in error in holding that the court was correct in excluding the testimony as is shown by the bill.

We also believe that we were mistaken in holding that appellant's bill No. 5 failed to show error. If the delivery of the note from deceased to appellant's wife by appellant's little child was admissible in evidence—and unquestionably it was—what occurred at that time, as stated in the original opinion, was a part of the *res gestæ* of that act, and was admissible as a part of the act; and although the object and purpose are not further stated, than that it was *res gestæ*, we believe that was a sufficient statement to render it admissible, in connection with the delivery of the note. If that was a material circumstance, it was obviously material to show what was said by the messenger at that time as to who sent it.

The motion for rehearing is accordingly granted, and the judgment is reversed and the cause remanded.

ARMSWORTHY v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

1. HOMICIDE—CAUSE OF DEATH—INSTRUCTION.

Where deceased lived till within a few days of six months after being shot by defendant, and within two months after the shooting deceased was able to be up and visit his neighbors, defendant was entitled, on a prosecution, for killing deceased, to have Pen. Code 1895, arts. 651, 652, charged, requiring not only that the destruction of life must be brought about by the act of another, but that the destruction of life must be complete by the act.

2. SAME—SELF-DEFENSE.

On a prosecution for homicide, evidence examined, and *held* to raise the issue of and entitle the defendant to a charge on self-defense.

3. SAME—MANSLAUGHTER.

The evidence was also sufficient to entitle defendant to a charge on manslaughter.

4. SAME—AGGRAVATED ASSAULT.

The evidence was also sufficient to entitle the defendant to a charge on aggravated assault.

5. SAME—PREVIOUS THREATS—CODE.

Proof of previous threats by deceased to injure defendant entitled the defendant to a charge as to such threats, under Pen. Code 1895, art. 713, providing that, where a defendant accused of murder seeks to justify on the

ground of threats against his own life, he may be permitted to introduce evidence of the threats made.

Appeal from District Court, Bowie County; P. A. Turner, Judge.

A. M. Armsworthy was convicted of murder in the second degree, and he appeals. Reversed.

Mahaffey & Thomas and J. B. Manning, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment fixed at confinement in the penitentiary for a term of five years.

The evidence shows, in substance, that appellant and deceased met in the public road; deceased being in a wagon, and appellant walking. Words ensued between them, and appellant attempted to shoot deceased with a pistol. The pistol snapped, and appellant left, and in a few minutes returned with a gun and shot deceased in the face, putting out his eyes, and slightly wounding him in other portions of the head and face. Dr. Talbot testified that he was a physician; could not tell how many shot hit deceased; could not count them; he was shot all over the face. His eyes were shot out, and he was shot in the mouth. He was shot in the hair, neck, throat, and chest, and perhaps one or two of his teeth were shot out. "I extracted some of the shot. Waited on deceased 8 or 10 days. In my opinion, this was a very serious wound, but I did not consider it fatal unless complications arose. I ceased attending him because I did not think my services were needed any longer, and thought his condition very good. I did not consider the wounds dangerous. It was a serious wound, but not necessarily dangerous. By complications I mean erysipelas, blood poisoning, or pneumonia. I consider it, as far as the wound went, unless these complications set up, he was out of danger when I quit." The testimony does not show that any complications such as the physician testified about ensued. Within two months after deceased was shot he was up and able to visit his neighbors. It was within a few days of six months after the wounds were inflicted by appellant before deceased died. Appellant insists that the court should have charged articles 651 and 652, Pen. Code 1895. The charge of the court in reference to the matter thus suggested is as follows: "I further charge you, upon an indictment for murder, defendant may be convicted of assault with intent to murder. If the evidence in this case fails to establish to your satisfaction, beyond a reasonable doubt, that the wounds inflicted by the defendant, if any, on the deceased, E. G. James, caused his death, then you will consider whether the defendant is guilty of an assault with intent to murder." The articles cited above

are more specific, as insisted by appellant, than the common law, and state not only that the destruction of life must be brought about by the act, agency, procurement, or omission of another, but that the destruction of life must be complete by such act or agency. In other words, if the wounds inflicted by appellant upon deceased did not cause his death, and appellant was not the guilty agent that brought about the complete destruction of his life, then he is not guilty of murder. It is true that the witnesses testified deceased did not recover; that his health gradually failed under the wounds inflicted by appellant. We take it that appellant, being entitled to the reasonable doubt in the matter, should have had a charge presenting the question more accurately.

Appellant insists that the court should have charged on self-defense. Appellant testified in his own behalf, substantially, as follows: That the difficulty between himself and deceased occurred on June 28, about 5 o'clock; that he had been to Texarkana with his father, and came back with him; that he (defendant), in company with Gardner, left Dr. Bentley's home and started to his (defendant's) home. Deceased lived about 300 yards south of Bentley's house, on the west side of the road, opposite Gardner's. When defendant and Gardner were about halfway between Bentley's place and Gardner's, defendant heard a wagon coming behind him, and, glancing back, saw it was deceased in company with Walraven and Hickson. When defendant saw the wagon he said to Gardner that he wanted to speak to James (deceased). Defendant accosted James as follows: "I said, 'Hold on a minute, Mr. James.' He pulled up the lines and said, 'Well?' I said, 'Mr. James, what is the matter? What have we done to you as a neighbor to cause you to take such a stand as you have?' He said, 'I have done nothing, except what the law requires me,' or words to that effect. I said, 'I care nothing for that; but you made a remark this afternoon, and I want to know whether it was with reference to my sister or not.' He said, 'You God-damn little son of a bitch, do you presume to ask me what I say or do?' or words to that effect; and he said, 'I will wear you out.' He had a whip in his hand, or reached for one; he had it anyway when I looked up, and he was threshing at my face and eyes from a standing position in the wagon. He was sitting down when I spoke to him, and after I spoke he arose and commenced threshing at me when I asked those questions. When he threatened to whip me he reached out that way for me, and I drew a revolver. I said to him, 'It is enough to scandalize my people, let alone horsewhipping me, and I will not stand for it. I will certainly hurt you if you hit me in the face with that whip.' Hickson said to me, 'Don't shoot, Arthur.' I said, 'I am not going to shoot, and I am not going to be

horsewhipped either.' Walraven and Hickson were trying to get hold of James to hold him back in the seat, and the mules either started up or somebody started them, and they went a few paces, three or four, south, and Mr. James jumped out of the wagon and said, 'I will wear the road out with that little son of a bitch if I can get hold of him,' and I looked back and he was coming on me, and I drew the revolver again. He threw the whip at me, and I picked it up and threw it back in the wagon, and said: 'I will have no more to do with you. You have got no sense. I see that.' I went away from there then—went north. I did not snap my gun at him. I went in the direction of Dr. Bentley's. After I had turned the corner of the lane going east, I heard James say: 'Oh, Charles, bring me that; bring me that! I will kill the damned son of a bitch, if he is the last man I ever see.' I heard James say that. I was then on my road home. * * * Some one halloed in the house, 'Come in, Arthur, they are going to intercept you across the field.' I said, 'I guess not;' and my aunt or somebody in the rear of the house came to the side gate in the south yard fence, and got hold of me, and said, 'Come in, Arthur, and eat supper, and then go home,' and I could not well get away. She was kind of excited, and had hold of me, and I advanced into the gate, through the woodhouse, then through the dining room into the middle room. I remained in the house a very short time. I just stepped into the middle room, and there was a south window. I expected somebody in that middle room. My aunt left me there in the dining room, or went around to the rear. * * * I heard exceedingly loud talking, looked out the window, and saw two or more persons coming in a northerly direction. I saw one of them was Mr. James. They were probably 10 or 12 paces apart. I heard some loud cursing, but could not distinguish the words. I was inside the house, and could hear one oath after another—a regular torrent of oaths. I thought they were undoubtedly coming after me, and to do me some harm. There was a double-barrel shot gun setting in the closet just to my right, and I picked it up by the barrel * * * and went out of the house, but did not see any one, but could hear somebody. * * * I stood there a half minute, possibly, before I saw any one. I then saw Charley James, and saw his father afterwards; I could not say positively how close Charley was to his father, but the best I can remember would be, about half the distance between his father and myself. When I saw him he was possibly 15 steps from me, and I says, 'Hold on, Charley,' and he stopped, and almost simultaneously, or immediately afterwards, his father halloed and said, 'Stand aside, Charles, I will fix the son of a bitch,' and then I looked beyond him. He stepped out of

the way a couple of paces or more, and I saw his father coming on me with his hand back here, and the shot was fired. He was coming on me with his hand behind him. I could not see what he had in his hand. * * * At the time I saw James and heard him tell his son to stand aside, I thought he was going to shoot me. From the attitude he was in, the position he was in, it left no room for doubt at all." This evidence, as we understand it, raises the issue of self-defense, and the court should have charged on it.

We think the court erred in failing to charge the jury upon the issues of manslaughter and aggravated assault.

In presenting the law of self-defense on another trial, we suggest that the court charge on previous threats made by deceased to injure appellant. *Swain v. State*, 86 S. W. 335, 12 Tex. Ct. Rep. 812; article 713, Pen. Code 1895.

For the errors discussed, the judgment is reversed, and the cause remanded.

TONES v. STATE.*

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. ROBBERY—CONSENT OF PARTY ROBBED—PLAN TO ENTRAP ROBBER.

Where prosecutor, in anticipation of being robbed, carried marked money, in order to detect the robber, this was not such consent as absolved defendant from criminality.

2. SAME—ELEMENTS OF OFFENSE.

On proof of either of the allegations in an indictment charging that defendant committed a robbery by an assault and by violence, and by putting the prosecutor in fear of life and bodily injury, etc., the offense is complete.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, § 5.]

3. SAME—PROOF OF ACTUAL FEAR.

In a prosecution for robbery, it is not necessary that actual fear of life and bodily injury on the victim's part should be strictly and precisely proved, as the law presumes fear where there appears to be just ground for it.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, §§ 7, 28.]

4. SAME—ARREST BY OFFICERS—SUBSEQUENT VIOLENCE AND ROBBERY—EXONERATION.

Officers who make a rightful arrest, and subsequently use violence and rob the party arrested, are not exonerated on account of the legality of the alleged arrest.

5. SAME — RIGHT OF OFFICERS TO SEARCH PRISONER—INTENT TO ROB.

Conceding that officers making an arrest may search the prisoner and take valuables from him for the purpose of keeping them safely until he is enlarged, yet if they had the intent, at the time of finding valuables or money on him, to take the same, and used force to make the search, their right of search is not available to defeat a prosecution for robbery.

6. SAME—DEGREE OF FORCE—EVIDENCE.

Where, after making an arrest and taking the prisoner to jail, the officers, without asking his consent to be searched, rudely backed him against the wall and held his hands up,

while one of them extracted money from his pocket, sufficient force was used to constitute an element of robbery.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, § 6.]

7. SAME—INTENT TO APPROPRIATE — SUFFICIENCY OF EVIDENCE.

Evidence that almost immediately the officers deposited with the jailer whisky and 55 cents taken from the prisoner, but kept \$38 in currency, also taken from him, was sufficient to show a present intent, in taking the money, to appropriate it to their own use.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, §§ 3, 33.]

8. SAME—EVIDENCE — ADMISSIBILITY — ERROR.

Where, in anticipation of being robbed and in order to detect the robber, prosecutor carried marked currency, the admission in evidence of a written memorandum preserved by a witness, at the time he gave prosecutor the bills, of the numbers and denominations thereof, and used by the witness, who stated that it was correct and made at the time, was not error.

9. SAME—REVERSIBLE ERROR.

The bills having by other evidence been abundantly identified as those taken from prosecutor, the admission of the memorandum, if erroneous, was not reversible error.

10. CRIMINAL LAW—SPECIAL CHARGE — INSTRUCTIONS ALREADY GIVEN.

Where, in a criminal case, the court charged correctly, special charges, in so far as they announced the same principles, were not called for.

Appeal from District Court, Grayson County; B. L. Jones, Judge.

John Tones was convicted of robbery, and appeals. Affirmed.

E. J. Smith, F. N. Roberts, and R. H. Thompson, for appellant. Galloway & Vowell and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of robbery, and his punishment fixed at confinement in the penitentiary for a term of nine years; hence this appeal.

The state's case, briefly stated, is as follows: H. S. Rich was constable of precinct No. 1, at Sherman, and Marion Nicholas was also a resident of Grayson county. Nicholas suspected that some robberies and violations of the local option law were being committed in the city of Denison. He conferred with Rich about the matter, and, as a result of their conference, Rich agreed to get a man to see if he could not catch up with the parties committing said offenses. He selected prosecutor Joe Richards, a painter and a resident of Sherman. On the day preceding the night of the alleged offense, these three parties met in Sherman and gave Richards \$40, \$38 of which was furnished by Nicholas, and consisted of one \$10 bill, and five \$5, and three \$1 bills of United States currency. The numbers of all these bills were taken on a slip of paper by the parties at the time. Besides, they were marked, and from some of the bills small portions were torn off. The remaining \$2 in silver was furnished by Rich, constable.

*Rehearing denied June 23, 1905.

It was understood that Richards was to go to Denison that night, buy all the whisky he could with the silver money, but was not to spend the currency. These bills were placed with him to be used to detect any parties who might rob prosecutor, Richards, should he be robbed. In pursuance of this agreement, Richard and Nicholas went that evening or night to Denison. After getting there, Nicholas separated from prosecutor Richards. Richards immediately proceeded to the execution of the plan, went to several joints, drank some beer and a drink of whisky, and bought two pint bottles of whisky at two different joints. Subsequently he was seen on the street by appellant, who was a policeman of Denison, and by Finley, also a policeman. He was at the time either drunk, or acting in a manner to suggest he was drunk. They accosted him and charged him with being intoxicated. He seems to have denied it, stating he could take care of himself and had money to pay his way, and that he was from the territory. They arrested him, however, and marched him to the jail, one on either side of him. When they got there, they took him inside, stood him against the wall, held his arms up, and searched him. They took from him the roll of currency bills before mentioned, 55 cents in silver, a pocketbook, and the two pint bottles of whisky. They deposited with the jailer the two pints of whisky, the purse, and 55 cents. The balance of the money they did not deposit. The next morning, on complaint of Richards, appellant and his co-defendant, Finley, were arrested and searched. On appellant's person was found four \$5 bills and one \$1 bill, and on Finley was found a \$10 bill and a \$5 bill and one \$1 bill. All of these bills were thoroughly identified by witness Rich as the same currency bills that he and Nicholas had given to prosecutor Richards on the evening before. All of said currency that had been given said Richards was found, except two one-dollar bills not accounted for. Appellant denied that he got any money off of Richards on the night before, except the 55 cents, and claimed the money found on his person as his own property, which he had borrowed on the day before from one Carver. Finley also denied that they had taken any money from Richards, except the 55 cents, and accounted for and claimed the money on his person as his own. It was also shown on the part of appellant that when they arrested prosecutor he claimed to have been robbed of his watch and some money in a house of prostitution in Denison. This is a sufficient statement of the case to discuss the legal questions presented.

We understand appellant's defense to embrace two propositions: First, that prosecutor was willing to be robbed, prepared himself for that purpose, made no resistance; and, conceding that the money was taken from him under the circumstances by

the officers, that it was with his consent, and so there could be no robbery. Second, that appellant and his companion, Finley, were police officers of the town of Denison; that they were authorized by ordinance to arrest persons found drunk in any public place in said city; that appellant was found in such condition by them, and they took him into custody and carried him to jail; that they had a right to search him; that they used no violence in said search; and that in the absence of any violence used in procuring the money, conceding that they did procure it, this would not constitute robbery. Furthermore, if it be admitted that sufficient violence was shown in taking the money, still no intent was shown to appropriate it, and, if subsequently they formed the intent and did appropriate said money, it would not constitute robbery.

On the first proposition, appellant has cited a number of authorities, from which he deduces a principle of law as follows: Where money is placed upon a person with the purpose of being taken from him, in order to detect a criminal, the owner of the money and the person from whom the money is taken consenting thereto, robbery is not committed. The authorities cited in support of this proposition are *Spelden v. State*, 3 Tex. App. 162, 30 Am. Rep. 126; *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295; *State v. Hayes*, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360; *MaGee v. State* (Tex. Cr. App.) 66 S. W. 564; notes to *Allen v. State*, 91 Am. Dec. 477; note to *State v. Hull* (Or.) 54 Pac. 159, 72 Am. St. Rep. 705. Of course, if it be conceded that the evidence shows that the prosecutor was consenting to the robbery, then the application of the authorities cited may be granted. However, we gather from the authorities cited by appellant, and others, that as to the offense of burglary, larceny, robbery, and other crimes of like character, if the owner of the burglarized premises or property invites a crime or induces parties to commit an offense in order that they might be apprehended, he cannot afterwards be heard to say that he did not consent to what was done. It was so held in *Allen's Case*. The principle is further extended by some of the cases that where the owner of the premises sought to be burglarized authorizes his servant to act with the accused, and under the owner's direction unlocked the door of the premises said to be burglarized, and entered the premises with the accused, this was held not to be burglary, because of his consent. In *Speiden's Case*, which was the alleged burglary of a bank in Dallas, it appears that the owners set on foot the design to have the bank burglarized, and had detectives go in with the burglars. In that case it was held there was consent. But we do not believe it is held by any well-considered authority that where a person has learned of plans

to burglarize his premises, and does not at all enter into the designs of the burglar, but does not try to prevent the burglary, on the contrary, lays plans to entrap the burglar, and does apprehend him in the act, there is no consent to the burglary, and the burglar is amendable to punishment. *Robinson v. State*, 34 Tex. Cr. R. 71, 29 S. W. 40, 53 Am. St. Rep. 701; *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364; *State v. Sneff*, 22 Neb. 481, 35 N. W. 219. And we understand the same principle is announced in *Alexander v. State*, 12 Tex. 540; *Pigg v. State*, 43 Tex. 108; *Johnson v. State*, 3 Tex. App. 590; *Bishop*, Cr. Law, vol. 1, § 262. In *Alexander's Case*, Judge Wheeler cites with approval the principle laid down in 3 Chitty's Cr. Law, p. 952, as follows: "If the owner, in order to detect a number of men in the act of stealing, directs a servant to appear and to encourage the design, and leads them on until the offense is completed, so long as he did not induce the original intent, but only provided for its discovery after it was formed, the criminality of the thieves will not be destroyed." In *Russell on Crimes*, vol. 2, p. 113, citing 1 *Foster*, p. 129, he refers to a case very much in point, and illustrative of the principle of law here involved. We quote as follows: "One Norden, having been informed that one of the early stage coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavors to apprehend the robber. For this purpose he put a little money and a pistol into his pocket, and attended the coach in a post chaise, until the highwayman came up to the company in the coach, and to him and to them presented a weapon, demanding their money. Norden gave him the little money he had about him, and then jumped out of the chaise with a pistol in his hand, and, with the assistance of some others, took the highwayman. This was holden to be a robbery of Norden." It occurs to us that the facts of this case come within the principle of the above case. Here there was no agreement between prosecutor Richards and appellant that he would submit to a robbery, as was the case in *Rex v. McDaniel*, 1 *Foster's Rep.* 121, 128. Nor was there any invitation on his part, much less was there any device to lead appellant to the commission of the offense. While he anticipated, like Norden, that he might be robbed, he made no agreement with the robbers in that regard. Apprehending that he might be robbed, he had a perfect right to prepare himself beforehand, in order that he might detect the persons guilty of the robbery, and this we understand to be all that he did. Under the authorities, this is not consent to the robbery in such measure as to absolve appellant from criminality.

The next question is, was the violence used such as to constitute the offense? The indictment charges that appellant committed

the robbery by an assault and by violence, and by putting the said Richards in fear of life and bodily injury, etc. If either of these allegations is proven, the offense is complete. It may be conceded here that appellant was not in fact put in actual fear of life or serious bodily injury; but the authorities hold it is not necessary that actual fear should be strictly and precisely proved, as the law in odium spoliatoris will presume fear where there appears to be a just ground for it. *Long v. State*, 12 Ga. 293; *Williams v. State*, 51 Neb. 711, 71 N. W. 729. We take it that the state's case depends on violence. If there be not a sufficient degree of violence proven, then the state has no case. We understand it is contended that whatever violence was used was authorized by law in making the arrest. This may be conceded, so far as the arrest is concerned. But we do not understand it to be the law that officers can make a rightful arrest, and if they subsequently use violence and commit a robbery they will be exonerated on account of the legality of the alleged arrest. The books do not cite many cases of robbery where the offense was committed by officers after the arrest of the prisoner, yet there are some which recognize the principle as above stated. *Russell on Crimes*, vol. 2, p. 11, cites *Gascoigne's Case*, 1 *Leach*, 280, which is illustrative of this question. There a woman was arrested upon the charge of having committed an assault upon another woman who lodged in her house. She appears to have been committed to the custody of an officer, who took her in charge, threatened to put her in jail, handcuffed her, and succeeded, by alarming her, in getting from her several shillings. Justice Nares, who tried the prisoner, said: "That in order to commit the crime of robbery it was not necessary that the violence used to obtain the property should be by the common and usual modes of putting the pistol to the head or a dagger to the breast, and that the violence, though used under the color and specious pretense of law or of doing justice, was sufficient, if the real intention was to rob. And he left the case to the jury with the direction that, if they thought the prisoner had originally, when he forced prosecutrix into the coach, a felonious intent to take her money, and that he made use of the violence or the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty. The jury found that the prisoner had a felonious intention of getting whatever money the prosecutrix had in her pocket, and that the putting her into the state described in the evidence was only a colorable means of putting his felonious intention into execution. And, upon the case being referred to the 12 judges, they were unanimously of the opinion that, as it was found by the jury that the prisoner had an original intention

to take the money, and had made use of the violence, under the sanction and pretense of the law, for the purpose of obtaining it, the offense was clearly a robbery." *Long v. State*, 12 Ga. 293, is another case somewhat in point. There the court laid down the criterion which distinguishes robbery from larceny, as the violence, actual or constructive, which precedes the taking. There can be no robbery without violence, and no larceny with it. It is further held: "If one, against whom a crime has been committed, with or without warrant arrests the offender, and receives money or property without violence, actual or constructive, under an agreement not to prosecute, that is not robbery. Actual force in robbery implies personal violence. If there is any injury done to the person, or if there is a struggle to retain possession of the property before it is taken, this is a sufficient criterion of force." It is further held: "If threats or accusations are accompanied with force, actual or constructive, and property or money is given up in consequence of this force, the case is robbery. Nor is the guilt of the party accused any defense to an act of robbery. If property is extorted by violence, upon a charge of larceny or any other crime, the offense is neither justified nor mitigated by his guilt, nor aggravated by his innocence. The law will not permit the property or money to be violently taken from a citizen because he happens to be a guilty man. He is liable to the law if guilty, and under the protection of the law whether innocent or guilty." It is further held: "That there must be some degree of force used, and the taking must be against the will of the person robbed; yet it may seem to be with his consent when it is really delivered from fear. If it is apparently voluntary, yet from the facts and circumstances it is from fear, it is still robbery." The facts and circumstances, however, in that case as to the violence used, were stronger than in the case at bar; still the principles of law there laid down are applicable.

In *Com. v. Snelling*, 4 Bin. (Pa.) 379, there, as here, it was contended that the offense does not amount to robbery, because the watch was taken without his being in any fear of being robbed. The court lays down this rule: "To constitute a robbery, there must be a felonious taking of property from another by force. This force may be either actual or constructive. Actual force is applied to the body; constructive is by threatening words or gestures, and operates on the mind. It is impossible in advance to comprehend all cases which may arise. As the different cases are presented, the question will be whether they fall substantially within the principles of the definition. The verdict of the jury did not expressly find whether the watch was taken against Harrod's consent or not, but it did find that he did not know of its being taken. It was

therefore held that it was without his consent. It was also found that he was in fear, not of being robbed, but of being beaten. The court held on this point that fear is not an essential ingredient of robbery, force being sufficient. It was expressly found that the prisoner made use of force to obtain the watch; that is, he seized Harrod by the cravat with his left hand, and pressing him against the wall at the same time, taking his watch from his fob." The court further say: "It is clear that the personal violence was the cause of Harrod's losing his watch. The fear of being beaten diverted his attention from his property, and this fear was produced by force, so that, in truth, the property was taken by force. The law is not to be evaded by fraudulent contrivances. * * * If it was the prisoner's intent to obtain the watch under cover of this violence, without the knowledge of the owner, it is to be construed the taking was by violence." And, for other authorities on this subject, see note to *State v. McCune*, 70 Am. Dec. 182, 183. In *Bussey v. State*, 71 Ga. 100, 51 Am. Rep. 256, defendant pretended to be town marshal, and seized prosecutor, to whom another was showing a trick at cards, shoved him against the wall, and threatened to take him to jail unless he paid him money. Whereupon prosecutor paid him money, as he said, to keep him from going to jail and being bothered. (In Georgia, threats to accuse prosecutor of a crime do not afford the basis of a prosecution for robbery, except in one instance; that is, a charge of the crime against nature.) In that case the quotation above given from *Long's Case* is cited with approval. The court further say: "These principles will be found in 2 East, Pleas to the Crown, 714 to 736, and in 2 Russell on Crimes, p. 117 et seq. The presumption is that the court below gave them to the jury, and that the jury found that the money was extorted from the prosecutor by violence on a charge of gambling, and not by the mere fear of a criminal prosecution for that offense. If the jury so found, and there is evidence of violence sufficient to support the finding, then, under the decision in *Long v. State*, the verdict is not contrary to the law and evidence. What violence is proved? The prosecutor was seized, shoved and held against the wall, and threatened to be taken to jail, and this money was extorted from him. True, he did say he paid it to keep from going to jail, and he did not want to be bothered. But the jury might well have concluded that, whilst the fear of the jail did not enter into the reason of his delivery of the money, the violence of the defendant, the seizure by the collar, and pressing him against the wall contributed largely to it, and made a considerable part of that bother in which the poor country dorky was involved when in the clutches of these town sharks.

While the mere arrest of him with the threat to take him to jail would not suffice alone to make a case of robbery, yet, accompanied by this ill usage and violence of seizure, pushing, and holding, it does, according to *Long v. State*, make such a case." And see *Williams v. State*, 51 Neb. 711, 71 N. W. 729.

Now, what are the facts of this case as bearing on the question of violence? It will be taken for granted that the appellant and Finley had a right to arrest prosecutor for drunkenness on the streets of Denison, and they had a right to take him to jail. And it may be conceded they had a right to search him for weapons or instruments he might use in accomplishing an escape. It may be doubtful, however, if the prisoner objects, or without consent, an officer has any right to take from a prisoner valuables which are not weapons or may not be used in accomplishing an escape. Still, conceding that they had this right to take from the prosecutor his money for the purpose of keeping it in safe custody against the time when he might be enlarged, if they had the intent at the time they found any money or valuables on him to take it, and they used force to make the search, then we understand they cannot avail themselves of the right to search in order to defeat the prosecution. They took the prisoner in hand after they got him in jail. They did not ask him to consent to be searched. According to the testimony, they rudely backed him up against the wall and held his hands up, while one of them thrust his hand into his pocket and extracted his money. Was this sufficient force? We hold, under the authorities above cited, that it was. No consent was given to the search. In order to make the search effective, they forced him against the wall, used violence in holding his hands above his head against the wall, and then took his money. Did they have the present intent to appropriate it to their own use when they took it? The evidence shows that almost immediately they deposited the whisky and 55 cents in coin which they got from the prosecutor with the jailer, but they kept the \$38 in currency. If there was violence in a case of this character, the law will not closely scrutinize the degree. Here two guardians of the public welfare, peace officers, take a prisoner in charge. He is powerless, and he knows it. The least effort to foil them, he is aware, will call for the use of greater force and violence, and undoubtedly his apparent acquiescence under the circumstances was superinduced by his surroundings. As was said in *Bussey's Case*, supra, "Whilst this court will rule the law as it understands it, it will not strain it one jot or tittle to shield the perpetrator of such an outrage."

Appellant assigns as error the action of the court in its charge to the jury, and in refusing to give a number of special re-

quested instructions. We have examined the charge of the court, and it is in accordance with the principles hereinbefore discussed; and, in so far as the special charges asked announce the same principles, they were not called for. Special charges which contravened the principles contained in the charge, and which have been heretofore discussed in this opinion, were not the law, and the court did not err in refusing to give them.

Appellant excepted to the court receiving in evidence a written memorandum preserved by Rich, at the time he gave the currency bills to prosecutor, of the numbers and denominations of said bills. The witness used this memorandum. He stated he took it at the time, and that it was correct. We do not believe there was any error in the admission of this memorandum, under the circumstances in which it was done. However, aside from this, the bills were abundantly identified as those taken from the prosecutor. The admission of the paper, if erroneous, would not constitute reversible error.

There being no errors in the record, the judgment is affirmed.

ROBERTS v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

1. HOMICIDE—DYING DECLARATIONS — PREDICATE.

Sufficient predicate was laid for the admission of dying declarations of deceased, where he stated the physicians said he could not live, and, sending for the lady to whom he was engaged, he told her he could not live, and released her from the engagement, though his mind at times was delirious, and he was under the influence of opiates.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 431-434.]

2. SAME—INSTRUCTIONS.

Where dying declarations of deceased were admitted, and it appeared that he was under the influence of opiates, and his mind at times was delirious, the court should have guarded the matter by an appropriate instruction.

3. SAME—SELF-DEFENSE—COMBINED ATTACK.

In a prosecution for murder, where it appeared that prior to the difficulty it had been discussed by accused and others, and preparation made for it, and that one of such persons was present, at least, aiding and encouraging deceased in the assault, the court should have charged with reference to self-defense as against a combined attack.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 623.]

4. SAME—INSTRUCTIONS—ISSUES.

In a prosecution for murder, the evidence considered, and held not to suggest the issue of provoking the difficulty on the part of accused, so as to warrant the court in limiting the right of self-defense by a charge on provoking the difficulty.

5. SAME—EVIDENCE — REPORTS IMPUTED TO ACCUSED—CONTRADICTION.

In a prosecution for murder, where it appeared that the difficulty arose from a report imputed to accused, it was error to exclude evi-

dence by accused showing that he did not start the report.

6. SAME — SELF-DEFENSE — FACTS UNKNOWN TO ACCUSED.

In a prosecution for murder, evidence is inadmissible that a pistol used by deceased in the conflict was unloaded, which was not known to accused, as his right of self-defense could not be impaired by such proof.

Appeal from District Court, Nacogdoches County; Jas. I. Perkins, Judge.

Charles Roberts was convicted of murder in the second degree, and he appeals. Reversed.

C. A. Hodges, Geo. F. Fuller, and A. Chesnutt, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction is for murder in the second degree.

When the dying declarations were offered, appellant reserved several exceptions involving their admissibility. Drs. Fuller and Blackshear testified that they informed deceased he could not survive. They further stated they could only keep him alive by the use of opiates. Deceased stated, they said, he could not live, sent for Miss Fuller, to whom, it seems, he was engaged, and told her he could not live, and released her from the engagement, and requested that she should marry some man, and make him a good wife. This is the predicate of his belief in approaching death. In regard to the question of his mental condition, the facts show beyond controversy that he was under the influence of opiates, used as a means of prolonging his life as long as possible, and, when not aroused, was delirious, but, when awakened and aroused, talked connectedly and intelligently. However, some of the testimony does not go so far, and shows that while awake and talking his mind at times was delirious. Under the authority of *Taylor v. State*, 38 Tex. Cr. R. 552, 43 S. W. 1019, this testimony was admissible; sufficient predicate being laid, under that authority. But the court should have instructed the jury appropriately in regard to these issues. While it is perhaps fairly clear that deceased was conscious of approaching death, it is not so clear in regard to his mental status. Having admitted the testimony under the circumstances, the court should have guarded this matter by an appropriate charge, as was stated in *Sims v. State*, 36 Tex. Cr. R. 154, 36 S. W. 256. Upon another trial an appropriate charge should be given in this connection.

It is contended that the court should have charged the jury with reference to the law of self-defense as against the combined attack of more than one assailant. The evidence bearing upon this question shows that there was ill feeling between deceased and appellant, growing out of the report that had been circulated in the neighborhood to the effect that deceased and Eugene Baker had made an arrangement by which they were to clandestinely get the daughters of Mr. Fuller

away from their home, meet them at a certain point, and convey them to a neighboring village, to some festivity. This was attributed by deceased and Baker to appellant, and caused considerable talk in the neighborhood, and finally led up to this difficulty. On the evening of the difficulty it seems that Dr. Fuller and deceased, Blackshear, instead of following their usual route home from the little town of Attoyac, took the path that led from the business houses towards the residence of appellant, and stopped en route, taking their seat upon the log, where appellant found them as he was en route home late in the evening. The difficulty came up at once. The testimony in regard to how it did arise is widely variant. We are treating it from the standpoint of the defense. Under that theory, the deceased brought on the difficulty, and used his pistol as a bludgeon; striking appellant over the head several severe blows, causing the blood to flow very freely, and calling for the attention of a surgeon for some days. Dr. Fuller, under defendant's theory, participated in this attack—at least, was aiding and encouraging the deceased in the assault—and, when appellant undertook to draw his pistol to defend himself, Dr. Fuller forbid his pulling it, accompanied by threats to take his life. The court charged self-defense alone from the standpoint of the attack by deceased. This theory of the law should have been given from the standpoint of a combined attack by deceased and Dr. Fuller. There is testimony back of this difficulty, tending to show that this matter had been discussed and preparation made for this difficulty that evening on the part of deceased, Dr. Fuller, and Eugene Baker. These matters were issues in the case, and should have been fully submitted on the behalf of the defendant. It is not necessary to cite authorities.

The court limited the right of self-defense by a charge on provoking the difficulty. We do not believe the issue of provoking the difficulty is suggested. It is not necessary to go into a detailed statement of this record in regard to these matters, as it is very voluminous. Taking the testimony of Dr. Fuller, the first witness for the state: After locating the parties, and the approach of appellant where he and deceased were, he says: "The first words I heard pass were that I heard defendant say to Eddie, 'Maybe you will call me a "damn liar" again,' and caught Eddie [deceased] in the collar, or about the collar—I am not certain; and then I heard Eddie say, 'Turn me a-loose, or I will hurt you.' I think Eddie said this to him three times. Eddie told him, if he did not turn him loose, he would hurt him. Charley appeared to me to be choking him. Then Eddie pulled his pistol and began hitting defendant on the head with it, and struck defendant several times on the head. Could not say how many times. But about this time John Hargis ran up, and I tried to keep John back from inter-

fering; and, in doing so, I tripped John Hargis up, and he fell to the ground, and then Eddie stepped off from Charley about 10 or 12 feet," still having his pistol in his hand. Defendant then pulled his pistol, and the witnesses differ as to the position deceased held his pistol at the time of the fatal shot. Some of them state that he was pointing the pistol at appellant, or in the act of bringing it to a level. This is the state's view of this difficulty. This does not suggest the issue of provoking a difficulty on the part of appellant. It is not necessary to quote the testimony relied upon by appellant, but it makes a clear case of self-defense, unaccompanied by provocation.

Appellant contends that he should have been permitted to prove that he did not tell Fuller that Eugene Baker and deceased were to carry his girls to the little village of Chireno. In this, appellant is correct. The testimony was clearly admissible. The whole difficulty grew out of the report imputed to appellant in regard to Eugene Baker and deceased seeking to clandestinely get Fuller's daughters away from home at night, and accompany them to the little town of Chireno. Evidence was introduced to show that appellant was the author of the statement. The dying declarations made that prominent. Appellant offered the testimony of Fuller and Cauthern to show that he did not start the report. We understand that, wherever material facts are introduced in evidence that tend to affect the issue, the opposite side has the right to deny or contradict that testimony; showing its falsity or breaking its force and effect in any legitimate way. This testimony, under the circumstances detailed by this record, should have been admitted.

Witness Dr. Fuller was permitted to testify that the pistol used by deceased was unloaded. Objection was urged to this because this was not known to appellant, and that his right of self-defense could not be impaired by proving facts of this character that were unknown to him. We believe this contention is correct. *Everett v. State* (Tex. App.) 18 S. W. 674; *Adams v. State*, 68 S. W. 270, 5 Tex. Ct. Rep. 32.

There is an urgent insistence for reversal in regard to the empanelment of a certain juror. This will not occur upon another trial, and we premit a discussion of the subject.

For the errors indicated, the judgment is reversed and the cause remanded.

MAHANAY v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1905.)

CRIMINAL LAW—ACCOMPLICE.

A person offering to contribute toward the payment of a contemplated fine of another on his committing an assault is not an accomplice, and punishable for an assault committed by the latter, who had no knowledge of the offer.

Appeal from Comanche County Court; W. C. Jackson, Judge.

Newt Mahaney was convicted of aggravated assault, and he appeals. Reversed.

Oscar Callaway, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an aggravated assault, and his punishment fixed at a fine of \$25. The indictment charges that appellant and others "did then and there unlawfully commit an aggravated assault in and upon C. R. Houghton, with premeditated design, and by the use of means calculated to inflict great bodily injury upon the said C. R. Houghton, to wit, by the use of their fists, and they did then and there, by the means aforesaid, strike, wound, and bruise the said O. R. Houghton," etc. The evidence before us shows that one Bolivar Brown sought out the prosecuting witness, Houghton, and viciously assaulted him, and violently beat him. There is some evidence in the record to show that appellant contributed something towards paying the contemplated fine of the codefendant Brown, provided he would whip said Houghton. But the evidence does not show that said Brown ever acquiesced or had cognizance of any agreement to pay the said fine, or effort on the part of appellant to pay or get up money to pay it. There must be some complicity of the accomplice, or some guilty acting together with the principal, before appellant can be found guilty. The mere fact that he paid or offered to pay money provided Brown would whip prosecuting witness would not per se authorize his conviction of an aggravated assault. The evidence is not of that conclusive character authorizing this court to affirm the verdict. If the defendant offered Brown money to assault prosecuting witness, or induced him by any other means to do so, he could be properly prosecuted; but bare desire or inclination to pay the fine, or a bare offer, disassociated from the principal, and unknown to him, would not authorize the conviction of the defendant in this case. The evidence being insufficient to support the conviction, the judgment is reversed, and the cause remanded.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

1. CRIMINAL LAW—CONFESSIONS — ADMISSIBILITY—INSTRUCTIONS.

Where the evidence of the state tended to show that accused made a voluntary confession, and the evidence for defendant tended to show that the confession was procured by threats, the court must charge that if the confession was not voluntary it must be disregarded.

[Ed. Note.—For cases in point, see vol. 14 Cent. Dig. Criminal Law, §§ 1219, 1220, 1867.]

2. SAME—CONFESSION INDUCED BY THREATS.

A confession made by an accused while laboring under the influence of threats which induced a prior confession to another person is inadmissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1163-1171, 1189.]

3. HOMICIDE — EVIDENCE — SUBMISSION OF MURDER IN SECOND DEGREE.

Evidence on a prosecution for murder held to require the submission to the jury of the issue of murder in the second degree.

4. SAME—EVIDENCE—ADMISSIBILITY.

Where, on a prosecution for murder, the theory of the state was that decedent was killed for his money, amounting to \$150, defendant was entitled to show that a woman without means of obtaining money, except such sums as a third person, earning \$1.35 per day, gave her from time to time, had a large amount of money in her possession shortly after the homicide, as tending to show that the third person had committed the crime.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Rob Johnson was convicted of murder, and he appeals. Reversed.

Ben Palmar, D. F. McAdams, and B. E. Cook, for appellant. Fred H. Chandler, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for murder, with the death penalty assessed. A brief history of the case will show that, leaving Stamford, Jones county, appellant and deceased arrived at Dublin, Erath county, some time during the night. They came on a freight train, and had some trouble in producing money and other effects sufficient to pay their way; deceased supplementing his money with a pocketknife. They went from the train at Dublin to an oilmill, where, after warming themselves, they were permitted to sleep in the seedhouse. During the night appellant left, and a few days afterwards the body of deceased was found covered up by the cotton seed. This was about the 25th of November, and some time about the middle of December appellant was arrested in McLennan county, charged with the murder of deceased. The head of deceased appeared to have been struck by some blunt instrument two or three very severe blows, and near the body was found a stick which is described as being the handle of a shovel, about two feet long, with iron plating on one end of it, and adjusted as handles of this kind usually are at the other end, with a contrivance or place to be held by the hand. Appellant, when arrested, was carried by the sheriff to Hamilton county, to Hico, thence overland to Hamilton, thence to Stephenville, in Erath county. While in jail at Hamilton a confession was made to the sheriff and witness Main. Subsequently confessions were made to the sheriff of Erath county, and to the district attorney of that district. Considerable testimony was introduced as to whether these confessions were voluntary, or produced by persuasion,

threats, and fear. The confession made to the district attorney was sought to be eliminated from the operation of any threat or reasons why objections should be urged to its introduction. There was also testimony introduced through the witness Hawkins of statements made by appellant on the train en route from Waco to Hico. In regard to this statement, it is conceded there was no warning; but the introduction of this testimony is sought to be justified through the explanation of the court to the bill of exceptions, on the ground that appellant had taken the stand and testified to some matters in connection with the transaction for which he was under arrest, and this justified the state in having him detail all the conversation that occurred on the train. Without going into a detailed statement of the matters surrounding the confessions made to the two sheriffs and witness Main, it is somewhat doubtful as to whether they were brought within the rule of confessions voluntarily and freely made after being warned. Perhaps they were sufficiently within the provision of the statute, from the state's standpoint, to have permitted them to go to the jury. From the defendant's standpoint they were clearly inadmissible. Conceding that the confessions were admissible from the predicate laid by the state, yet they were not from the standpoint of defendant's testimony; and this required a charge from the court submitting the issue to the jury as to which view they would take under the testimony bearing upon the predicate—if they should find that the confession was not voluntarily made, to disregard it. The court, in a qualified way, gave a charge along this line. Appellant, however, requested a charge submitting more fully and pertinently the law, which upon another trial should be given.

Appellant further requested the court, in regard to the confessions made to the district attorney, that if he was still laboring under the influence of the threats, promises, duress, and force made by any or all of the officers, or any other person in whose custody he may have been since his arrest, and there had not been a cessation of such influence at the time he made such confession, then such confession could not be regarded. While the charge itself does not mention the district attorney in connection with it, the charge was asked so as to cover that condition of the case, and, in our judgment, it should have been given. The case as to confession is somewhat similar to that of *Gallagher v. State*, 40 Tex. Cr. R. 296, 50 S. W. 388.

Exception was reserved because the law applicable to murder in the second degree was not given. We think this contention is well taken. Bearing upon this, the witness Thurman was placed upon the stand by the state, and testified that he was the father-in-law of defendant, and saw him after he reached Waco, subsequent to his leaving

Dublin, where the tragedy is said to have occurred. A conversation occurred between witness and defendant, in which, among other things, he asked witness if he had heard anything as he came through Dublin. "I went on talking with him for a little while, and, in talking with him, I noticed he had his hand tied up in a handkerchief, and I asked him what was the matter with his hand. He said, 'I got into a game in Dublin with two fellows, and one of them cut me in the hand, and the other kicked me in the side.' I asked him what he did. He says, 'I grabbed a stick and hit one of them over the head, and I think I killed the son of a bitch.' We dropped the conversation then, and I went on about my work." Witness Hawkins testified that he was a conductor on the train when appellant was carried from Waco to Hico by the sheriff of Hamilton county. Omitting all previous portions of his testimony, he says: "I went and worked through the train, and some time later I came in and sat down there, and I remember the officer told me that the negro was ready to tell something—that was the sheriff told me that—and the negro commenced. He said, 'There was five of us went in the seedhouse at Dublin to gamble,' and he started to mention some name, and I stopped him. I says: 'I don't want to be a witness in this case. I don't want to hear any name.' And he said that while the game was in progress Berry and a big man that was in the crowd got into a difficulty, and that Berry grabbed a seed-fork handle and started to hit the big man with it. He called him the big man of the crowd. And the big man took it away from him and beat him over the head with it, and then finished him up with his 45, and then the big man told him (defendant) to get Berry's grip, and he (defendant) picked it up, and he (the big man) 'marched me with his 45 to my head through the engine room, and down the railroad to the crossing of the two roads,' and he said, 'You go that way' (and pointed down the Texas Central, east), 'and don't you ever look back or say nothing, or I'll kill you,' and that he went out about three or four miles down the track, and that he there opened the grip and took the clothes out of it." Defendant testified in connection with this phase of the case as follows: "Medford carried us to the door, where, just before going into the seedroom, we met Eugene Tyson, and he says, 'How is tricks, kid?' and shook his hand and went on. He just says, 'How is tricks, kid?' and then Medford shook his hand as he went by him. We were right at the door—three or four feet outside, I suppose. And Medford took us on inside of the seedhouse, and showed us where to dig a hole in behind the bank of seed, so the wind would not strike us. Medford helped Berry to dig a hole right in behind a big column in there, and by that time I had mine dug, and was in it. I don't know how long I was

in there (I had been asleep) when I woke up, and Tyson and Medford were standing by Berry, right over him, and tapping him on the foot with a seed-fork handle. Just as Berry raised up, I did, too. And Tyson says: 'What about that game?' And he says: 'I don't want to have any game. I want to sleep.' One of Berry's feet was sticking up a little. I got up and went outside, and I think I stayed out there about ten minutes—maybe not so long; and I came back, and they were gone; and I went on back to the boiler room; and after that awhile Tyson came into the boiler room, and he says, 'I skint him, but I had to knock hell out of him, and he has gone to have the whole push run in, and you had better hull out.' And I says, 'I haven't done anything to him that he would want to have me arrested for,' and he says, 'He will have you arrested for vag.' He says, 'They are hell on having fellows pulled for vag down here.' I understood that he meant by 'vag' that it meant laying around, loafing, and not having anything to do. He asked me there if I had any money, and I told him that I didn't have but a nickel; and I told him it was 'awful cold to have to hot-foot it out of this place to-night.' He said for me to go. He says, 'Go in there and get the damn son of a bitch's grip.' He said, 'Go get it and hike out.' And he told me to go to Waco at once, and I told him that I didn't want to go that way. He says, 'If you go by Stephenville, you couldn't more than make it there by daylight, and they would telephone there and have you arrested.' He went with me to show me the way out." Under the testimony of Thurman and Hawkins, the issue of murder in the second degree was unquestionably suggested. This evidence was placed before the jury by the state. The court, recognizing the force of this testimony, charged the jury in regard to accomplice's testimony. The theory that Medford and Tyson were accomplices is suggested very largely by the testimony of these witnesses. While there may have been other testimony bearing upon this question, still these statements in part call for a charge on accomplice's testimony. This testimony may further suggest the theory of manslaughter. However, the questions of manslaughter and self-defense were not urged in the court below, as we understand this record. We have so often decided that the court should submit a charge to the jury upon every phase of the case that we hardly deem it necessary to refer to that phase of the law again. Whenever testimony suggests a theory favorable to the accused, the court should submit the law applicable to that condition.

It is also urged that the testimony of Felix Price should have been admitted to impeach Allie Crawford. Allie Crawford, a negro woman, was the mistress of Eugene Tyson, and she and Tyson had been charged with and convicted of adultery. She was

placed upon the stand by appellant, and testified that Eugene Tyson was in the habit of giving her money occasionally—perhaps two or three dollars every week. She denied having a large roll of money on the night subsequent to the homicide, but admitted he had given her \$5. The theory of the state was that deceased was killed for the purpose of taking his money, and the further theory that he had \$150 on his person. Appellant, supporting his theory that he did not kill deceased, but that Tyson and Medford did, offered to put this witness on the stand to prove, if he could, that she had a considerable amount of currency, and had exhibited it to Felix Price. She denied having the money. For the purpose of contradicting her, Price was offered as a witness, and his testimony rejected. It is insisted that he should have been permitted to impeach his own witness, Crawford, through the witness Price, showing that she did exhibit the money to him, and the circumstances under which she did. Upon another trial this testimony may become material as original testimony. If the woman had the money, and had no means of obtaining it in an honest and legitimate way, as she testified she had not, it would be a circumstance, in connection with all the other facts and circumstances to be proved by appellant by Price, as original testimony. Where a party is charged with crime, he can show, as one of the means of meeting the state's case, that another party committed the offense, and not himself. This has been the settled rule in Texas since the case of *Dubose v. State*, 10 Tex. App. 230. The facts and circumstances were sufficiently cogent on the trial of this case to cause the court to give a charge on accomplice testimony in regard to Medford and Tyson, and, under all the evidence introduced along this line, it was shown that the witness Allie Crawford was not in a condition to have had more than a few dollars, as she herself testified she was a negro washwoman, and the deceased was a day laborer, employed in the oil mill at \$1.35 per day. If Crawford had anything like a large amount of currency, it would be evident, under that state of affairs, that she came by it in some illegitimate way; and, as the facts appear, it would seem that Tyson would be placed in the attitude of coming into possession of it the same way. The intimate relations existing between them—the fact that he had been in the habit of giving her money every week—perhaps these and other matters connected with the testimony might be a sufficient predicate to admit the testimony of Price to the effect that he saw her with this amount of money. Her statements in connection with her possession of the money would indicate that she got the money from Tyson. While the circumstances do not as closely connect themselves up as might be entirely satisfactory, yet these are circumstances which, in our judgment, might call for the admission of Price's tes-

timony to the effect that she was seen in possession of the roll of currency.

The question of race discrimination is suggested as a reason why the judgment should be reversed and the indictment quashed, as well as the error of the court in refusing to quash the venire of petit jurors. Without reviewing this phase of the case, we are of opinion that there was no error on the part of the court in refusing to quash the indictment. It is true, there is an antipathy to the negro race in that county, especially in some portions of it. There are very few negro voters in the county, in comparison with the great number of voters—86 out of perhaps 4,700 or more. The jury commissioners testified that they did not discriminate against these negroes in the selection of jurors; that they selected in every instance competent jurymen, as they understood their duty, without discrimination against the few negroes sufficiently qualified to sit on the jury.

For the errors indicated, the judgment is reversed and the cause is remanded.

PATTERSON v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. CRIMINAL LAW — STATEMENT OF FACTS—TIME TO FILE.

Statement of facts in a criminal case filed after the adjournment of the term, without an order allowing the filing, cannot be considered on appeal.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 2554-2559.]

2. SAME—APPEAL—REVIEW.

In the absence of the facts, the court on appeal in a criminal case cannot review the requested charges and bills of exceptions.

Appeal from Cooke County Court; G. W. Perryman, Judge.

M. B. Patterson was convicted of obstructing a public road, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of obstructing a public road, and appeals. He filed a motion to quash the complaint and information. The court did not err in overruling this motion, as the complaint and information are in proper form.

The record is rather voluminous, but the statement of facts cannot be considered, as it was filed after the adjournment of the term, and there is no order allowing such filing. The term adjourned on August 11, 1904, and the statement of facts was filed on August 20, 1904. In the absence of the facts, this court cannot review the various requested charges and bills of exceptions, and determine whether or not any injury was done to appellant.

No reversible error appearing, the judgment is affirmed.

HILSCHER v. STATE.*

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. CRIMINAL LAW—THEFT FROM THE PERSON—EXPLANATION OF POSSESSION BY DEFENDANT OF STOLEN PROPERTY—INSTRUCTIONS.

In a prosecution for theft from the person, an instruction that if the explanation by defendant as to his possession of the property, i. e., that he found the same, was reasonable and probably true, it would be taken as true and go to defendant's acquittal, was in defendant's favor, and not erroneous.

[Ed. Note.—For cases in point, see vol. 82, Cent. Dig. Larceny, § 200.]

2. SAME—MISLEADING INSTRUCTIONS.

In a prosecution for theft from the person, an instruction as follows: "If you find * * * that any of the property mentioned * * * was privately stolen from the person of J. at the time and place charged, * * * and that subsequently any of the property so stolen was found in the possession of the defendant, then if the defendant, when such possession was called in question, stated that he had found the property in S., then, if you find that such explanation * * * is reasonable and probably true, it devolves upon the state to prove its falsity, and if you so find, and the state has not proven the falsity of such explanation, then the possession of such property by the defendant (if he had such possession) must not be considered by you as tending to establish the guilt of the defendant"—was not vague, confusing, or misleading.

3. SAME—BURDEN OF PROOF—FALSITY OF ACCOUNT OF POSSESSION.

The instruction was not open to the objection that "it imposed on defendant a greater burden than the law does; that the law requires the state to show the falsity of any account given by defendant, if the account is in itself reasonable and probable"; the effect of the instruction being that if the jury believed the explanation was reasonable and probably true, and the state had not proved its falsity, the fact of such possession must not be considered as in any manner tending to establish defendant's guilt.

4. SAME—NEW TRIAL — NEWLY DISCOVERED IMPEACHING EVIDENCE.

New trials are not ordinarily granted for newly discovered evidence of an impeaching character.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2331, 2332.]

5. SAME—MATURITY OF NEWLY DISCOVERED EVIDENCE.

In a prosecution for theft from the person, defendant's witness stated that he saw defendant on a certain day with a silver dollar and some greenbacks, but on cross-examination admitted that he saw only the dollar. Newly discovered evidence claimed by defendant as ground for a new trial was to impeach the witness by showing that he had stated to other parties that he saw defendant with a ten-dollar currency bill at the time, or, rather, with some currency. Defendant only claimed by the testimony adduced by him to have had a ten-dollar bill and a silver dollar. By other than the state's witnesses it was shown that on the night after the alleged robbery he had more currency than \$10. *Held*, that the impeaching testimony was not material, or on an issue likely to have influenced the jury, and the overruling of the motion for a new trial was not error.

Davidson, P. J., dissenting.

Appeal from District Court, Lavaca County; M. Kennon, Judge.

R. Hilscher was convicted of theft from the person, and appeals. Affirmed.

Arthur P. Bagby, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft from the person, and his punishment assessed at two years' confinement in the penitentiary.

Appellant objected to the seventh paragraph of the court's charge, which is as follows: "If you find from the evidence that any of the property mentioned in the indictment was privately stolen from the person of the said John Shulark at the time and place charged in the indictment, and that subsequently any of the property so stolen was found in the possession of the defendant, then if the defendant, when such possession was called in question, stated that he had found the property in Shiner, then, if you find that such explanation of possession by the defendant is reasonable and probably true, it devolves upon the state to prove its falsity, and if you so find, and the state has not proven the falsity of such explanation, then the possession of such property by the defendant (if he had such possession) must not be considered by you as tending to establish the guilt of the defendant." The grounds of objection stated in the bill of exceptions are as follows: That the same in the beginning erroneously stated the law as to the effect of an explanation reasonable and probable by appellant on being found in possession of property alleged to have been stolen; and because said paragraph, taken as a whole, was vague, confusing, unintelligible, misleading, and calculated not to instruct, but to mislead, the jury as to the law. We do not consider the objections urged in this bill as tenable. The charge is an instruction in favor of the defendant, and tells the jury in effect that, if the explanation given was reasonable and probably true, it will be taken as true, and will go to the acquittal of appellant. Nor do the subsequent portions of the objection raise any question as to the charge. We do not believe that it is vague or confusing, or calculated to mislead the jury.

In the motion for new trial appellant again excepts to this charge. The ground of objection stated is that it imposes upon defendant a greater burden than the law does; that the law requires the state to show the falsity of any account given by the defendant, if the account is in itself reasonable and probable. We understand this to be exactly what the charge does; that is, requires the state to prove the falsity of said explanation of appellant, if the same was reasonable and probable. The charge further instructs the jury that, if the state failed to prove the falsity of said explana-

*Rehearing denied June 23, 1905.

tion, then the possession of said property by defendant, if he had such possession, must not be considered by the jury as tending to establish the guilt of the defendant. We understand this to be correct. The effect was to inform the jury, if they believed the explanation given by defendant was reasonable and probably true, and the state had failed to prove its falsity, that the fact of such possession must not be considered by the jury as in any manner tending to establish the guilt of the defendant. These are the only exceptions urged against said charge, and in our opinion they do not point out any question showing that said charge was improper or illegal.

In motion for new trial, appellant insisted the same should be granted on the ground of newly discovered evidence. This newly discovered evidence was of an impeaching character. New trials are not ordinarily granted for this character of evidence. Witness Frank Sadalacek was introduced by defendant. On his examination in chief he stated that he saw appellant on the day he went to town, and before he started, have a silver dollar and some greenbacks. On cross-examination he admitted that he saw no money in defendant's hand except a silver dollar; that it was Mrs. Hilscher, defendant, and old man Hilscher who told him to swear as he did. The testimony developed from this witness on cross-examination was denied by Mrs. Hilscher. Why the defendant's father was not placed on the stand to deny this is not stated. But it seems the testimony desired, as judged from the affidavits, was to impeach appellant's own witness, by showing that he had stated to other parties that he saw appellant with a ten-dollar currency bill before he went to town, or, rather, with some currency. Appellant only claimed by the testimony adduced by him to have had a ten-dollar currency bill and a silver dollar. By other than the state's witnesses it was shown that on the night after the alleged robbery he had more currency than \$10. We do not think the impeaching testimony was material, or upon an issue that would have likely exerted any influence with the jury. The court did not err in overruling the motion on the ground of newly discovered evidence.

The judgment is affirmed.

DAVIDSON, P. J. (dissenting). The charge quoted in regard to possession of property recently after being taken, and the reasonable account of such possession, is not correct, and has been uniformly condemned since Wheeler's Case, 34 Tex. Cr. R. 350, 30 S. W. 913. The charge here is practically a reproduction of the condemned charge in Wheeler's Case. The charge given does not instruct the jury as to what the law is, but what it is not. It certainly is fully "misleading" if it tells the jury the law is the opposite of what it is. The court gave, or

was supposed to give, the law, and the jury must so regard the charge. Here the charge gave what this court has more than frequently said is not the law, and the jury is bound to take the charge as the law of the case, and we must suppose they did.

I therefore dissent from the opinion of my Brethren, and believe the judgment should be reversed.

MOORE v. STATE.

(Court of Criminal Appeals of Texas, June 14, 1905. On Rehearing, June 23, 1905.)

1. CRIMINAL LAW — TRIAL — ARGUMENT OF COUNSEL — REFERENCE TO DEFENDANT'S CHARACTER.

A statement of the district attorney, in closing, that defendant's attorney did not dare put defendant's character in issue, was proper, when made in reply to one of the attorneys for defendant, who said that defendant was a good woman, and did not use bad language, like the prosecutrix.

On Rehearing.

2. SAME — DATE OF OFFENSE — COMMISSION SUBSEQUENT TO INDICTMENT.

Under Code Cr. Proc. 1895, art. 420, making it the duty of the grand jury to inquire into indictable offenses of which any of the members have knowledge or of which they may be informed, it must be proved that the offense was committed prior to the presentment of the indictment, and a conviction cannot be sustained by evidence of the commission of an offense after the indictment was returned.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 548.]

Appeal from District Court, Ft. Bend County; Wells Thompson, Judge.

Maggie Moore was convicted of assault with intent to murder, and appeals. Reversed.

Russell & Pearson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault with intent to murder, and her punishment assessed at confinement in the penitentiary for a term of two years.

There is but one bill of exceptions, which relates to the following: The district attorney, in his closing argument, said: "Gentlemen of the Jury: Defendant's attorney did not dare put defendant's character in issue." To which language defendant then and there objected, and asked the court to instruct the jury not to consider the same; and the court refused to so instruct the jury, and defendant excepted. The court explains this by bill saying: "The above language of the district attorney was made in reply to one of the attorneys for defendant, who said that defendant was a good woman, and did not use bad language like the prosecutrix." The explanation of the court disposes of any supposed error in the statement of which appellant could complain.

The evidence is sufficient to support the verdict of the jury, and the judgment is affirmed.

On Rehearing.

The judgment was affirmed, and is now before us on rehearing. Appellant, in his motion, calls our attention to the fact that the indictment alleges the assault occurred on the 13th day of September, 1904, and that it was presented by the grand jury and filed on November 3, 1904. Prosecutrix, Frances Jones, in her testimony, states, "She [defendant] shot me with a pistol on the 13th day of November, 1904." And she also states, "This occurred in Ft. Bend county, Texas, some time in November, 1904." This is the only witness in the statement of facts showing when the assault occurred. So it appears from the evidence that the assault occurred some 10 days after the indictment was returned by the grand jury. It must be proved that the offense was committed prior to the presentment of the indictment. *Clement v. State* (Tex. App.) 2 S. W. 379, citing *Code Cr. Proc.* 1895, art. 420.

The motion for rehearing is accordingly granted, and the judgment is reversed and the cause remanded.

CASSENS v. STATE.

(Court of Criminal Appeals of Texas, May 3, 1905. On Rehearing, June 7, 1905.)

1. CRIMINAL LAW—RECOGNIZANCE — SUFFICIENCY.

A recognizance on appeal in a criminal case, conditioned that defendant, "who has been convicted in this court of a misdemeanor, * * * as more fully appears by the judgment of conviction entered in this cause, shall appear * * * in order to abide the judgment of the Court of Criminal Appeals," is not defective for using the words "in this court," instead of the words "in this cause," as required by the statute.

2. INTOXICATING LIQUORS—SALE—EVIDENCE.

Proof of selling beer to a minor, without proof that it was intoxicating, does not warrant a conviction for selling intoxicating liquors to a minor.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 143, 271, 316.]

Appeal from Williamson County Court; Chas. A. Wilcox, Judge.

Enno Cassens was convicted of selling intoxicating liquors to a minor, and he appeals. Reversed.

Dan S. Chessher and D. W. Wilcox, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Conviction of a misdemeanor. The Assistant Attorney General has filed a motion to dismiss the appeal because of a defective recognizance. We have examined the recognizance, and it does not appear to comply with article 887, Code Cr. Proc. 1895, and the decisions thereunder. The recognizance is conditioned that the said "Enno Cassens, who has been convicted in this court of a misdemeanor, and his punish-

ment," etc. The statute provides the recognizance must show that the conviction was "in this cause of a misdemeanor." The substitution of "in this court" for the language "in this cause" vitiates the recognizance. *Meeks v. State*, 74 S. W. 910, 7 Tex. Ct. Rep. 824; *Heinen v. State*, 74 S. W. 776, 7 Tex. Ct. Rep. 921; *Armstrong v. State*, 77 S. W. 446, 8 Tex. Ct. Rep. 847.

The appeal is accordingly dismissed.

On Rehearing.

This case was dismissed because of an alleged defect in the recognizance, and is now before us on rehearing. We copy that portion of the recognizance involved, as follows: " * * * conditioned that the said Enno Cassens, who has been convicted in this court of a misdemeanor, and his punishment assessed at a fine of twenty-five (\$25.00) Dollars, as more fully appears by the judgment of conviction entered in this cause, shall appear before this court from day to day and from term to term of the same, and not depart therefrom without leave of the court, in order to abide the judgment of the Court of Criminal Appeals of the State of Texas, in this case." In the original opinion we held that because the recognizance contained the words "who has been convicted in this court of a misdemeanor," when it should have stated "in this cause of a misdemeanor," the same was defective; citing *Meeks v. State*, 74 S. W. 910, 7 Tex. Ct. Rep. 824; *Heinen v. State*, 74 S. W. 776, 7 Tex. Ct. Rep. 921; and *Armstrong v. State*, 77 S. W. 446, 8 Tex. Ct. Rep. 847. In *Meeks' Case*, supra, besides the particular defect in this recognizance, it contained another defect, in that, in connection with the clause requiring his presence before the trial court from day to day and from term to term of the same, it omitted the words "of the same." *Heinen's case*, supra, omitted the concluding part of the statutory recognizance, to wit, "in this case." *Armstrong's Case*, supra, followed *Heinen's Case*, containing the same defect. *Perkins v. State*, 78 S. W. 346, 9 Tex. Ct. Rep. 152, contains the defect in the recognizance relied on in this case. In the Texas Court Reporter, to which reference is here made, the full recognizance is not shown. If the recognizance was as full on the point in question as this here, we were evidently in error in holding the same defective. We take it that the particular allegations are no part of the obligation assumed by appellant, except in so far as the same are referred to in order to identify the particular case in which the appellant was recognized. Here it occurs to us that, notwithstanding in that portion of the recognizance in which the language "in this court" occurs does not follow the statute, yet subsequent portions of the recognizance show definitely that said recognizance was taken in the particular cause, as a reference to the same as above copied

shows, inasmuch as it is recited "as more fully appears by the judgment of conviction entered in this cause." This language shows distinctly that the recognizance was taken in the particular cause, and whatever defect may have existed in the former portion of the recognizance, by stating "in this court," instead of "in this cause," is remedied and made certain by this subsequent statement above referred to. We accordingly hold that the recognizance here set out is sufficient to give this court jurisdiction. In so far as either of said cases above cited may contravene this opinion, they are hereby overruled.

There is but one question to be considered on the merits of the case; that is, it is agreed in the statement of facts that the defendant sold and gave beer to Austin Moore in August, 1903, in Williamson county, knowing at the time of such sale and gift said Moore was under the age of 21 years. The question is, was the court below authorized and are we authorized to take judicial cognizance of the fact that beer is an intoxicating liquor? It may be conceded that there are decisions of other states holding to the effect that beer is an intoxicating liquor, and that courts will take judicial cognizance thereof. A number of decisions, however, are the other way. The decisions in this state hold that there must be proof that the beer sold or given away was an intoxicating liquor. *Harris v. State*, 86 S. W. 763, 12 Tex. Ct. Rep. 1018; *Sullivan v. State* (decided at present term) 87 S. W. 150; *Blatz v. Rohrbach* (N. Y.) 22 N. E. 1049, 6 L. R. A. 669; *State v. Brewing Co.* (S. D.) 58 N. W. 1, 26 L. R. A. 138; *Hansberg v. People*, 120 Ill. 21, 8 N. E. 857, 60 Am. Rep. 549; *Netso v. State* (Fla.) 1 Law Rep. Ann. 825.

Because there was no proof offered that the beer was intoxicating, the judgment is reversed, and the cause remanded.

MOORE v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

1. BURGLARY—INSTRUCTIONS.

Where an indictment for burglary charged an entry without the consent of the occupant of the house, and the jury were instructed that to convict they must find an entry without the free consent of the occupant, a further instruction that if accused by force in the night entered the house, as charged in the indictment, with intent to commit theft, to find him guilty, was not erroneous, as authorizing his conviction regardless of whether he had prosecutor's consent to enter the house.

2. SAME—OCCUPATION OF PREMISES.

Where an indictment for burglary charges the entry without consent of the occupant of a house, occupancy is equivalent to possession, and embraced a chicken house on the premises of the prosecutor.

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

Green Moore was convicted of burglary, and he appeals. Affirmed.

J. W. Preston and J. M. Eckford, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

Appellant complains that the court by its charge instructed the jury to send him to the penitentiary regardless of whether he had prosecutor's consent to enter the house. The charge applied the law to the facts, thus leaving out this feature so far as the direct averment is concerned. However, it states, if the jury believe that appellant by force in the nighttime did enter the house occupied by Adolph Sueltenfuss, as charged in the indictment, with the intent to commit the crime of theft, to find him guilty. Now, here is a direct reference to the indictment, and the indictment in this respect charges the entry without the consent of the owner and occupant of the house. Besides, in defining the offense, the court directly told the jury, before they would be warranted in convicting defendant, they must find that the entry was made without the free consent of the occupant or one authorized to give such consent. We do not understand that the proof raised any issue as to this matter of consent.

It is also contended that, the house in question being a chicken house, it could not be said to be occupied by prosecutor. In fact, the proof showed that he occupied the dwelling house, and the chickens occupied the chicken house. This, it occurs to us, is a play upon words. "Occupancy" here is equivalent to "possession." Prosecutor in that sense is shown to have been in occupation of the entire premises, consisting of 30 acres, and including the house in question.

There being no error in the record, the judgment is affirmed.

Ex parte PARKER.

(Court of Criminal Appeals of Texas. June 23, 1905.)

HABEAS CORPUS—BAIL—REJECTION OF TESTIMONY—REVIEW.

On habeas corpus, where bail is the only question, errors of the trial judge in rejecting or admitting certain facts will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 114.]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

R. R. Parker was remanded, under habeas corpus proceeding, to custody without bail, and appeals. Judgment reversed, and relator granted bail.

Crawford, Lamar & Crawford and Muse & Allen, for appellant. Robt. B. Sedy, A. B. Flanary, and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Under habeas corpus proceeding relator was remanded to custody, without bail, for the killing of F. J. Bell. Several questions are presented for revision by bills of exception in regard to the rejection of testimony. We premit any discussion of these questions, and express no opinion in regard to the matters presented by these bills. This is a matter purely of bail on the record, and we will not undertake to discuss errors or supposed errors of the judge in rejecting or admitting certain facts. This might become more or less important before a jury, but not on habeas corpus, where bail is the only question.

We have reviewed the case as presented, and are of opinion that it is bailable. We are further of opinion that the bail should be fixed at the sum of \$10,000, which is accordingly done. The officer having relator in custody will take his bail in the terms of the law for that amount, unless the court should be in session. Of course, then, relator will be required to enter into recognizance in open court.

The judgment is therefore reversed, and the relator granted bail in the sum of \$10,000.

PARRISH v. STATE.*

(Court of Criminal Appeals of Texas. June 7, 1905.)

CRIMINAL LAW—MISCONDUCT OF JURY.

The mere inquiry by a juror during their deliberations, "Why did defendant not testify?" is not such misconduct as authorizes the setting aside of the verdict of conviction.

Appeal from Bell County Court; Jno. M. Furman, Judge.

Will Parrish was convicted of aggravated assault, and he appeals. Affirmed.

Winbourn Pearce, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$250, and six months' confinement in the county jail.

In the motion for new trial, appellant complains of the misconduct of the jury. Attached to the motion is the ex parte affidavit of appellant's counsel setting up said misconduct, which was an allusion by one of the jurors, after they retired to consider of their verdict, to the failure of the defendant to testify. Prior to passing upon this motion, the trial court had all of the jurors brought in, and they testified. Some of them stated that they heard somebody say, "Why did the defendant not testify?" The substance of the testimony of the jurors is that there was nothing further said about it, some stating that they did not even hear the remark. In *Mason v. State*, 81 S. W. 718,

10 Tex. Ct. Rep. 900, we held that the mere mention in the jury room of the failure of the defendant to testify, when this is immediately suppressed, is not ground for reversal. In that case one of the jurors remarked, "Why did not the defendant take the stand?" and another replied, "Out that out." Others testified they did not hear the remark. We accordingly hold that the mere allusion by one of the jurors during their deliberation to the failure of the defendant to testify is not, per se, cause for reversal. The record before us shows that it could not, nor did it, influence the action of the jury in any respect.

Appellant insists that the evidence is not sufficient to support the verdict of the jury. We think it is amply sufficient.

The judgment is affirmed.

GARZA v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

1. ASSAULT WITH INTENT TO MURDER—SELF-DEFENSE—INSTRUCTION.

On a prosecution for assault with intent to murder, where the defendant was shown to have entered the difficulty merely to protect a friend, and at no time acted in self-defense, he was not entitled to a charge on self-defense, but was entitled to a charge confined to an affirmation of his right to interfere in behalf of his friend.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 624-626.]

2. SAME—PROVOKING DIFFICULTY—INSTRUCTION—EVIDENCE.

Evidence examined, and held sufficient to justify a charge on provoking the difficulty.

3. SAME—DEFENSE OF ANOTHER.

The evidence was also sufficient to require a charge that, if defendant's friend, in whose behalf defendant interfered, had no intention of provoking the difficulty, and did no act to bring it on, but went into the store with his companions expecting a settlement, and that they were then assaulted by prosecutor, his friend's right of self-defense was complete.

4. SAME—PROVOKING DIFFICULTY.

To render one guilty of provoking a difficulty, he must be shown to have used some language or done some act with that intent.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 149.]

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Saturina Garza was convicted of assault with intent to murder, and he appeals. Reversed.

W. L. Grogan and B. A. Cox, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

There is no bill of exceptions to the introduction or rejection of evidence. The only

*Rehearing denied June 23, 1905.

questions raised are as to the charge of the court and the sufficiency of the evidence to sustain the conviction. Appellant questions the action of the court in agglomerating appellant's right to interfere with the difficulty between his friend Pedro Barstado and prosecutor, Gallamore, and his right to enter the difficulty to protect Pedro, and his own right of self-defense. The court does conjoin these two features of defense in the same charge. As we read the evidence, appellant at no time acted in his own self-defense, but, if he was authorized to interfere at all, it was on behalf of his friend Pedro. The court should have confined his charge to this feature alone, as a conjunction of the two in the same charge was liable to confuse and mislead the jury. Besides, as stated, the court was not authorized to give a charge on self-defense, so far as appellant was concerned at all.

It is further complained that, in connection with the charge on self-defense and defense by appellant of his friend Pedro, the court improperly qualified the same with a charge on provoking the difficulty by Pedro with the said Gallamore. The record shows substantially that prosecutor had brought Pedro, with some four other Mexicans, from Ballinger, to pick cotton for him in Taylor county. They picked for him a day and a half, and then quit. On the day of the difficulty all of the parties were in the town of Tuscola, Taylor county. Pedro, who seemed to have charge of the other Mexicans (he being the only one who could speak English well), was insisting on prosecutor, Gallamore, paying him for picking the cotton. Gallamore contended that they were to pay him for bringing them from Ballinger to Taylor county; that the understanding was, if they stayed with him and picked cotton for him he would not charge them, but, as they had quit him, that they should pay him for bringing them. It seems there was a crowd of Mexicans in front of Young's store at the time this altercation was going on. Gallamore declined to pay anything, and told Pedro to let him alone about it, whereupon Pedro told him he was "the damndest sorriest white man in Taylor county." Prosecutor asked him what he said, and Pedro repeated this, whereupon prosecutor turned and walked into Young's store, Pedro following immediately after him, and two of the other Mexicans also moving towards the store. It is shown that as soon as Gallamore (prosecutor) got into the store he walked behind the counter, got a gun, and came around the counter with it. Pedro advanced towards him, having in his hand a paper sack, which one of the witnesses says contained a knife. As Pedro approached, Gallamore shot him with the gun. Pedro fell on his back, and the other four Mexicans immediately appeared in the store and began an attack on Gallamore. Appellant wrenched the gun from Gallamore, and proceeded to

strike him with it. During the subsequent progress of the struggle, the Mexicans cut Gallamore a number of times on the head, in the back, and about the face. Appellant is not shown to have had any weapon except the gun which he snatched from Gallamore, and which he used to strike with. From this general statement, we take it, two theories are suggested—one for the state that Pedro and the other Mexicans followed Gallamore into the store, Pedro having insulted him by the use of the language before referred to, for the purpose of seeking a quarrel and difficulty; and one on the part of appellant and the other Mexicans, that they went into the store, following Gallamore there, whom they had no right to believe was going after the gun, expecting to get a settlement from him. This is substantially all of the testimony with regard to provoking a difficulty. On it the court was justified in charging on provocation. It occurs to us that the court should, in this connection, have presented a counter theory; that is, if Pedro had no intention of provoking the difficulty, and did no act to bring the same on, but went into the store with the other Mexicans, expecting a settlement, and that they were then assaulted by prosecutor, the right of self-defense of Pedro would be complete.

The charge on provoking the difficulty is further criticised by appellant on the ground that it failed to inform the jury that it was required that Pedro must have used some language or done some act with intent to provoke a difficulty before he and those with him would be deprived of the right of self-defense. The charge of the court seems merely to cut off the right of self-defense if Pedro and those with him sought the occasion regardless of the doing of some act calculated to bring the difficulty about. This character of charge has been frequently condemned. *Airhart v. State*, 40 Tex. Cr. R. 470, 51 S. W. 214, 76 Am. St. Rep. 736; *Winters v. State*, 37 Tex. Cr. R. 582, 40 S. W. 303; *McCandless v. State*, 42 Tex. Cr. R. 58, 57 S. W. 672.

There is some testimony in the record, though it is meager, tending to show a conspiracy on the part of the Mexicans to force prosecutor to settle for picking the cotton by the use of violence. In view of another trial, if the proof sufficiently tends to show this, then the court should instruct the jury on the doctrine of conspiracy. *Chapman v. State*, 76 S. W. 477, 8 Tex. Ct. Rep. 392.

The evidence here presents a theory in favor of this appellant, and it may do so in another trial, to the effect that all he did after hearing the gunshot in Young's store was to go into the store, and there he saw his companion Pedro shot down, and the prosecutor in the act of doing him further violence; that he then seized prosecutor's gun, wrested it from him, and struck him with it. If he was engaged in no conspiracy, in connec-

tion with Pedro, to bring on the difficulty with prosecutor, and he only entered into the conflict to protect his friend Pedro, he was guilty of no offense. The court should distinctly present this matter in a charge to the jury. As stated before, there is nothing in this record suggesting self-defense, so far as appellant was concerned, but only the defense of Pedro. The charge should not embrace an issue not raised by the testimony.

For the errors discussed and pointed out, the judgment is reversed, and the cause remanded.

PEDRO v. STATE.

(Court of Criminal Appeals of Texas, June 14, 1905.)

1. ASSAULT—PROVOKING DIFFICULTY.

To render one guilty of provoking a difficulty it must be shown that he did some act at the time calculated to have that effect.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 149.]

2. SAME—INSTRUCTION.

On a prosecution for aggravated assault, where it appeared that the defendant made the assault while interfering in behalf of another, and evidence of declarations made in the absence of defendant was introduced to show the intent of the person in whose behalf he interfered, the defendant was entitled to a charge that he was not bound by any intent of such person unless the jury believed beyond a reasonable doubt that the evidence showed he adopted the intent, and was co-operating in bringing on the difficulty.

Appeal from District Court, Taylor County: J. H. Calhoun, Judge.

Blazdo Pedro was convicted of aggravated assault, and he appeals. Reversed.

W. L. Grogan and B. A. Cox, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an aggravated assault, and his punishment assessed at two years' confinement in the county jail and a fine of \$1,000. This is a companion case to that of Pedro Barstado v. State, 87 S. W. 344, and Saturina Garza v. State, 88 S. W. 231. The charge on provoking the difficulty contains the vice discussed in the cases cited, and, as stated, is erroneous. In order to constitute one guilty of provoking a difficulty, he must do some act at the time calculated to provoke the same. If appellant was acting with Pedro, and Pedro, with intent to provoke a difficulty, used language to Gallamore, the injured party, calculated to effect this object, then the defendant would be guilty of the intent actuating Pedro in provoking the difficulty, whatever that intent may be. If he provoked the difficulty with intent to kill, and a killing occurs, it would be murder in the first or second degree. If he provoked the difficulty without such apparent intention, he would be guilty of manslaughter. This is a question that should have been properly submit-

ted to the jury, stating in each instance, of course, that appellant must co-operate with Pedro in whatever intent Pedro had, and the jury must believe beyond a reasonable doubt that he did so join or co-operate.

During the progress of this trial the evidence showed that one Pedro had a difficulty with Tom Gallamore, and certain acts and conversations leading up to said difficulty between Pedro and Gallamore were introduced in evidence against this defendant, which acts and conversations were not in the presence of the defendant. The learned trial court attempted to limit this testimony by the following charge, to wit: "The court permitted some evidence to be introduced before you tending to show certain conversations between the said Tom Gallamore and one Pedro in a drug store and at other places before the time of the alleged assault that were not in the presence of the defendant. Some testimony was also introduced as to the action of one Mexican called 'Bob,' and as to transactions between said Bob and said Pedro, not in the presence of the defendant now on trial. Said evidence as to said acts and conversation was allowed to be introduced for the purpose only of better enabling you to understand (if it does) how the difficulty (if any) between said Tom Gallamore and said Pedro arose or came up, and to explain the actions of said Tom Gallamore, if it does, and the actions of said Pedro, if it does; and the same must not be considered by you for any other purpose. Said acts and declarations, if any, that were not shown to be within the knowledge of this defendant, must not be considered as evidence against him on this trial, or as tending to establish his guilt in any way. And no act or word of any person that the evidence fails to show you or to satisfy you was within the knowledge of the defendant should be considered by you as evidence tending to establish the defendant's guilt." This charge is erroneous. The court should have charged the jury, if they believed certain acts and conversations of third parties were introduced, then the same were introduced for the purpose of illustrating the intent and purpose of appellant's codefendant Pedro, and to throw light upon his animus and purpose, and the jury should not regard said acts and conversations at all in making up their verdict against defendant, unless they were satisfied beyond a reasonable doubt that the defendant was actuated and moved by the same purpose and intent of Pedro at the time the difficulty took place. In other words, that the defendant is not bound by any intent of Pedro, unless the jury believe beyond a reasonable doubt that the evidence shows he adopted said intent and was co-operating with him in bringing on the difficulty.

Appellant insists that the evidence is not sufficient to support the verdict of the jury. The record before us is replete with evidence

that appellant was co-operating with Pedro at the time of the difficulty and was assisting in said difficulty.

For the errors discussed, the judgment is reversed, and the cause remanded.

MARTINEZ v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

ASSAULT WITH INTENT TO MURDER—SELF-DEFENSE.

The law of self-defense, as applied to one accused of assault with intent to commit murder, who at the time of the assault was acting in defense of another, does not apply to accused personally, and accused's right of self-defense would be the same as that of the person in whose defense he was acting.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 177-181.]

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Placido Martinez was convicted of assault with intent to murder, and he appeals. Reversed.

W. L. Grogan and B. A. Cox, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction of assault with intent to murder, four years in the penitentiary being fixed as the punishment. This is a companion case to that of *Saturina Garza v. State* (this day reversed) 88 S. W. 231. It is a part and parcel of the same transaction, and the questions in this case are practically the same as those raised and decided in *Garza's Case*. However, in this case appellant requested an instruction to the effect that, if he acted in the defense of Pedro Barstado, and the right of self-defense was in Pedro, then his right of self-defense would be the same as that of Pedro; in other words, that the law of self-defense as applied to him did not apply to him personally, but in the defense of another. The charge was refused, and this was error. However, it is not necessary to discuss this and the other questions raised, because they are fully passed upon in *Garza's Case*. The judgment is accordingly reversed, and the cause remanded.

PEARCE v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. LOCAL OPTION—VIOLATION—PATENT MEDICINES.

In a prosecution for violating the local option law, where it appeared that the liquor sold by defendant as a drug clerk was a bottle of Kidney Specific, prescribed as a medicine, and which did not smell, taste, or look like an intoxicant, it was error to refuse an instruction that defendant was not guilty if the liquor sold was a medical preparation, and was not an intoxicating liquor when drunk in such quantities as could be practically drunk.

2. SAME.

Defendant was not guilty if the liquor sold contained various drugs as ingredients, and a person taking it in such quantities as could be practically drunk would be influenced by it or made drunk, but such effect was the result of the drugs contained in the preparation, and not of any intoxicating liquor therein.

Appeal from Comanche County Court; J. H. McMillan, Judge.

Tom Pearce was convicted of violating the local option law, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a local option conviction. The state's case disclosed that the alleged purchaser secured from appellant, a clerk in the drug store of Dr. Daniel, a bottle of a preparation called "Kidney Specific"; that later on he bought two other bottles—one for Walter Johnson and the other for Charley Johnson; that he drank about 1½ bottles of this specific. "It made me drunk, but it did not affect me exactly like whisky. It did not look, taste, or smell like whisky. It did not make my tongue thick, like whisky does. I have been drunk on intoxicating liquor, and know its effects. I do not remember drinking any whisky that day." Odell was also introduced for the state. He says he was in the photograph gallery, where he saw the purchaser, Fant, and that Fant was drunk. Saw him drink something from a bottle which he took to be whisky. It looked like whisky. "I have seen the Kidney Specific, and the liquor he drank from the bottle did not look to me like Kidney Specific. I do not know where the whisky came from, or how much of it Fant had drank, as Fant and the whisky were both up there when I went. He appeared to be out of fix before he drank the whisky." Defendant's evidence discloses that witness Johnson furnished Fant 50 cents for the purpose of purchasing a bottle of Kidney Specific, which was afterwards used by them. At the time he gave Fant the 50 cents, Fant appeared to be drunk. "Later in the morning I was upstairs at Mr. Parks' photograph gallery, and saw Walter Fant drink some whisky. The Kidney Specific does not taste nor smell like whisky. I drank about one-half bottle. This did not have any effect on me." Parks testified: That he was familiar with the preparation called "Kidney Specific." That he had used it as a beverage. "Kidney Specific does not look, taste, or smell like any intoxicant. It does not affect me at all, or like any intoxicant. I have drank as much as one bottle, or a pint, at a time, and did not experience any effect from it." Nelson testified that he was a drummer, and has been following that business for 12 years, 10 of which he had sold drugs in Comanche county; that he sold a large number of proprietary and patent medicines—among those, the Kidney Specific; that he sold this medicine to Dr. Daniel; that he had been

selling it for 10 years in Comanche county, and long prior to the time local option law became operative in that county. He says that he had sold as much or more of it before local option was operative than since; that he was familiar with the preparation; that it was not at all like an intoxicant; that it did not look, taste, or smell like an intoxicant; that he had used it as a medicine, and never experienced any intoxicating effect. Dr. Daniel testified that he carried this Kidney Specific in his stock, and had been treating Fant for a relapse of mumps; that on Friday, before this sale occurred, he had told Fant to send to the drug store and get a bottle of medicine which he would prepare; that he prescribed a bottle of this medicine, and, in addition, added a little niter to the Specific, and had it set aside for him. It is shown by this witness, as well as defendant, on his examination, that when Fant came to the drug store this particular bottle was given him. Dr. Daniel further testified that he used this Specific in his general practice as a kidney tonic, for both men and women, and has always found it to be an excellent tonic; that he was familiar with the nature of the preparation and its ingredients; that it contains turpentine, juniper berries, spirits of niter, and other drugs, with equal parts of gin and water, having only a sufficient amount of gin to preserve the drugs, and not enough to intoxicate; that a man could not ordinarily drink enough of it to be intoxicated by the gin it contained; that, before the gin would affect a man, he would be nauseated, and, in a sense, made crazy and drunk on the other ingredients it contained. Defendant testified in his own behalf that he let Fant have the bottle in question under the direction of his principal, Dr. Daniel; and he also testified that the preparation did not smell, taste, or look like an intoxicant. This is, in brief, the substance of the testimony.

The court charged the jury on the defensive theories that any liquor capable of being used as a beverage, containing sufficient alcohol to produce intoxication when drunk in practical quantities, is an intoxicating liquor, and the jury should not convict unless they should find from the testimony that the liquor sold was an intoxicating liquor, as defined. He further charged: Another defense relied on by defendant was that if it was an intoxicating liquor, and he (defendant) did not know it, and if the jury should believe it was an intoxicating liquor, but that defendant, at the time he sold it, believed in good faith that it was not intoxicating liquor, and, without reason to believe it was intoxicating liquor, sold it, they would acquit. Exception was reserved to the charges. Special instructions were requested, submitting not only a definition as to what intoxicating liquor is, in accordance with the previous decisions of this court; but appellant contends that the charge here given did not meet the issues made by the testimony. Among other

special charges refused is the following: "You are further charged; as a part of the law of this case, if you find the liquor sold was a medical preparation, and was not an intoxicating liquor when drunk in such quantities as could be practically drunk, you will find the defendant not guilty." And again: "You are further charged, as a part of the law of this case, that if the liquor sold contained various drugs, as ingredients, and that a person taking same in such quantities as could be practically drunk would be influenced by the same or made drunk, but that such effect or drunk produced by the preparation was the result of the drugs so contained in same, and was not the result of any intoxicating liquor contained in said preparation, you will find the defendant not guilty." We believe that, under the facts, these charges should have been given. The rule in regard to matters of this sort is well stated in *Amer. & Eng. Ency. of Law*, vol. 17, p. 204. "It has been held that whatever is generally and popularly known as medicine or an article for the toilet, recognized and the formula of its preparation prescribed in the United States Dispensatory, or like standard authority, and not among the liquors ordinarily used as intoxicating beverages, such as tincture of gentian, paregoric, bay rum, cologne, etc., is not an intoxicating liquor, within the meaning of the statutes regulating and prohibiting the traffic in intoxicating liquors, and the courts may so declare as a matter of law, notwithstanding such articles contain alcohol and may produce intoxication. * * * If the compound or preparation be such that the distinctive character and effects of intoxicating liquors are gone, and its use as a beverage is rendered undesirable or practically impossible by reason of the other ingredients, and the liquor is used merely as a vehicle for or preservation of the other ingredients, or to extract their virtues and hold them in solution, the article will not be within the prohibition of the statute, although its use may produce intoxication. On the other hand, if the liquor is the predominant ingredient, and sufficiently retains its intoxicating qualities to render the mixture reasonably susceptible of use as a beverage, it is within the prohibition of the statute. The laws cannot be evaded by disguising intoxicating liquors sold as a beverage with some tincture or preparation which will give to the liquor, to some extent, the flavor or appearance of medicine, or by mixing with the liquor drugs, barks, or seeds which have medicinal qualities." In regard to the question of evidence, the same text says: "The composition and character of the article, and the amount of alcohol in it; whether it does readily or with difficulty produce intoxication; whether it is agreeable or nauseous to the taste; whether it is used or not used as a medicine to cure disease; whether it is generally kept and sold by druggists as a medicine; whether it is frequently resorted

to and used as a beverage—are competent matters to be given in evidence to determine whether the article sold is or is not within the prohibition of the statutes.”

Under the facts of this case, it is a very serious question, and the preponderance of the evidence would seem to indicate that Fant was intoxicated, not from the Kidney Specific bought of appellant, but from the use of whisky. The state's main point of proving the intoxicating properties of this compound is found in the fact that Fant was intoxicated. If he became so from the whisky used, either before or after drinking the Specific, or in connection with it, it might be a serious question as to whether or not the intoxicating properties of the Specific was shown by this condition of affairs. Under the testimony for the defendant, it is made definitely accurate that the intoxication did not follow the use of the Specific, and, if it did, it was not that character of intoxication that comes from the use of gin or whisky. Even the state's case shows that it was not the intoxication produced by the use of whisky or gin. If this compound was used as a medicine, usually sold as such, and not as a beverage, to evade the local option law, under the quotation above, the sale of it would not be violative of the law. The quotation from the American & English Encyclopedia of Law, is sustained in the note by ample and numerous authorities. If this was a medical compound, with only sufficient amount of gin included to preserve it or to extract the properties from the ingredients, and was not usually sold as a beverage, but as a medicine, it would not be violative of the statute to sell it; and the jury should have been given some criterion by which this question, which is the crucial point in the case, could be decided by them.

We believe the special charges requested by appellant should have been given, and, because they were not, the judgment is reversed and the cause remanded.

CURTIS v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1905.)

SWINDLING—OFFENSE—INDICTMENT — SUFFICIENCY OF.

An indictment for swindling, charging that defendant obtained money by the sale of wheat falsely represented by him to be dry-weather wheat, which would stand the drought better than any other, and which was superior to wheat raised in a certain county, held not to charge any offense against the laws of the state.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Pretenses, §§ 7-10.]

Appeal from Collin County Court; F. E. Wilcox, Judge.

G. W. Curtis was convicted of swindling, and appeals. Reversed, and prosecution ordered dismissed.

Abernathy & Abernathy, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of swindling, and his punishment fixed at a fine of \$100, and 30 days' confinement in the county jail.

The charging part of the indictment is as follows: “* * * That G. W. Curtis, on October 20, 1903, * * * with force and arms in the county of Collin and state of Texas, devising and intending to secure the unlawful acquisition of fifteen dollars in money of the value of fifteen dollars, then and there the corporeal personal property of and belonging to S. M. Francis, and with the further intent on the part of him, the said G. W. Curtis, to appropriate said money when so acquired to his own use, did then and there unlawfully and fraudulently acquire possession of said money from the said S. M. Francis by means of false and deceitful pretenses, devices, and fraudulent representations then and there unlawfully, knowingly, and fraudulently made by him to the said S. M. Francis, in this, to wit: The said G. W. Curtis did then and there falsely pretend and fraudulently represent to the said S. M. Francis that he, the said G. W. Curtis, was the owner of certain dry-weather wheat; that the same was raised in Fannin county, Texas, and was grown from seed that originally came from Arizona; and that said wheat would stand the dry weather better than wheat raised from seed grown in Collin county, Texas, and that said wheat was superior to the wheat grown in Collin county, Texas. And he did then and there by means of said false pretense and fraudulent representations fraudulently induce the said S. M. Francis to exchange his said money for ten bushels of said alleged dry-weather wheat, and by reason of said false pretenses, devices, and fraudulent representations so made by the said G. W. Curtis, to the said S. M. Francis, he, the said S. M. Francis, was then and there induced to part with and did part with the title and possession of said money, and did deliver the title and possession of the same to the said G. W. Curtis, in exchange for, and did receive therefor from the said G. W. Curtis, the said ten bushels of said alleged dry-weather wheat, whereas, in truth and in fact, the said G. W. Curtis did not then and there own any dry-weather wheat, and did not then and there own any wheat raised in Fannin county, Texas, and did not then and there own any wheat grown from seed that originally came from Arizona. And whereas, in truth and in fact, said alleged dry-weather wheat would not stand the dry weather better than the wheat raised in Collin county, Texas. And whereas, in truth and in fact, the wheat then and there owned by the said G. W. Curtis, and so exchanged as aforesaid, would not stand the dry weather

er better than what was raised in Collin county, Texas. And whereas, in truth and in fact, the wheat so owned by the said G. W. Curtis was not superior to the wheat raised in Collin county, Texas. The said wheat so owned and exchanged by the said G. W. Curtis was wheat raised in Collin county, Texas, as he the said G. W. Curtis then and there well knew. And the said pretenses and representations so made and the devices so used by the said G. W. Curtis to the said S. M. Francis in order to acquire the title and possession of said money from the said S. M. Francis as aforesaid were false and fraudulent when so made, and he, the said G. W. Curtis, then and there well knew the said pretenses, devices, and representations to be false and fraudulent when he made and used them as aforesaid," etc. We do not think the indictment charges any offense against the laws of this state. As to whether the wheat sold was dry-weather wheat is more a question of opinion than a statement of fact. As to whether it would stand the drought better than the other wheat is also a question of opinion. Furthermore, as to whether said wheat was superior to wheat raised in Collin county, is a question of opinion. While, as the state insists, it was reprehensible for appellant to sell wheat that was not raised as he stated, yet under no state of facts do we think the allegations of the indictment authorize a prosecution under the swindling statute.

The judgment is accordingly reversed, and the prosecution ordered dismissed.

McBRIDE v. STATE.*

(Court of Criminal Appeals of Texas. May 3, 1905.)

FORGERY—INDICTMENT—SUFFICIENCY.

An indictment for the forgery of a check of the tenor, "Pay to * * * or breer \$10.80 Jev rale $\frac{30}{100}$ dollars," is bad for failing to contain innuendo averments explaining the terms "breer" to be intended for "bearer," and "Jev rale" to be "ten and" dollars.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, § 79.]

Appeal from District Court, Williamson County; V. L. Brooks, Judge.

Frank McBride was convicted of forgery, and he appeals. Reversed.

H. N. Graves, for appellant. Warren Moore, Dist. Att'y., and Howard Martin, Asst. Att'y. Gen., for the State.

BROOKS, J. Appellant's punishment was fixed at two years' confinement in the penitentiary upon conviction under an indictment charging substantially as follows:

* * * That Frank McBride, in said county and state, on or about the 8th day of March, in the year of our Lord, Nineteen

hundred and four, and before the presentment of this indictment, did then and there unlawfully and without lawful authority and with intent to injure and defraud did wilfully, and fraudulently make a certain false and forged instrument in writing, purporting to be the act of another, to-wit: purporting to be the act of Pat McCarty, which said false and forged instrument in writing is substantially to the tenor as follows:

P A T M C C A R T Y
C O N F E S S I O N

THE MERCHANTS & FARMERS BANK
Responsibility \$150,000.

No. 124

Pay to

Charles B. McCarty *George town, Texas* *377* *1904*
Jev rale *30* *100* *dollars*

Pat McCarty

Appellant contends there should have been innuendo averments in the indictment explaining the term "breer" to be intended for "bearer," and "Jev rale" to be "ten and" $\frac{30}{100}$ dollars. In our opinion, the contention of appellant is well taken, for it is not manifest from the face of the instrument that this was the intention, unless innuendo averments are placed in the indictment to that effect.

*Rehearing denied June 21, 1905.

Because of this defect in the indictment, the judgment is reversed, and the prosecution ordered dismissed.

COLEMAN v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. CRIMINAL LAW—HOMICIDE—EVIDENCE.

In a prosecution for murder, evidence of attempts by deceased to solicit or obtain carnal intercourse with his daughter, who at the time of the homicide was living with her father and under his protection, and was not related to defendant, though she married the latter some months after the homicide, did not raise the issue of manslaughter, and was inadmissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 383-384.]

2. SAME—THREATS—INSTRUCTIONS.

In a prosecution for murder, an instruction that threats could be considered in explaining the conduct and arriving at the intention of defendant was not erroneous on the ground that the jury is required to also consider threats of the deceased in explaining the attitude and conduct of deceased at and about the time of the killing.

3. SAME—SELF-DEFENSE.

In a prosecution for murder, where the evidence showed that deceased had no weapon, but defendant testified that he thought he had, and that he shot at deceased because he thought that when the latter threw his hand to his hip he was going to shoot, a charge that if the jury believed deceased had threatened defendant, etc., and caused defendant to believe that deceased was about to assault him with a weapon, etc., was not erroneous as limiting defendant's right of self-defense to an attack made on him by deceased with a weapon.

4. SAME—CESSATION OF DANGER—RIGHT TO KILL.

An instruction that, when danger of death or serious bodily injury ceases, the right to kill ceases with it, was correct, and not erroneous as limiting defendant's right to act on apparent danger.

5. SAME—APPLICABILITY.

The instruction was applicable where, if defendant was ever in real or apparent danger from an attack by deceased, it was when the first shot was fired, and he was shown to have afterwards pursued deceased and fired several shots at him, two of which took effect.

6. SAME.

A charge that, if the jury believed the first shot was fired under circumstances which caused defendant to believe that his life was in danger or that he was in danger of serious bodily injury, he had a right to shoot to protect himself, left to the jury to determine whether or not defendant believed he was in danger, and was not erroneous as eliminating the appearances of danger.

7. SAME—CHARGE ON WEIGHT OF EVIDENCE.

The charge in further submitting that if the jury believed that, after defendant justifiably fired the first shot, deceased ran, and defendant pursued and killed him, though not believing himself then in danger, defendant was guilty, was not on the weight of evidence in assuming that deceased fled.

8. SAME—SPECIFIC OBJECTIONS TO CHARGE—PRESUMPTION.

When an appellant assumes to point out specifically grounds of objection to a charge, it will be presumed that he has no others to urge.

9. SAME—SPECIAL VENIRE—SUFFICIENCY OF RETURN—DILIGENCE.

A sheriff's return to a special venire reciting that one of the venire was not then, nor when the writ was issued, in the county; that he then was, and for the past two years had resided, in another county; that another of the venire, when the writ was issued, was, and ever since had been, absent from the county—recites facts as to the jurors, rendering unnecessary any amount of diligence on the sheriff's part to secure their attendance.

Appeal from District Court, Kerr County; Ed Haltom, Special Judge.

Ned Coleman was convicted of murder, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment fixed at seven years' confinement in the penitentiary; hence this appeal.

By bill of exceptions No. 1, appellant questions the action of the court refusing to permit him to show acts of familiarity between deceased, Jim Askey, and his daughter, Polle Scruggs; that is, some attempts on the part of deceased to solicit or obtain carnal intercourse with his daughter, Polle Scruggs. At the time of the homicide Polle Scruggs is not shown to have occupied any relationship to appellant. Some months after the homicide she married him, but this fact would not authorize the introduction of that character of evidence, as Polle Scruggs was then living with her father and under his protection, and was not related to appellant. We fail to see how this fact, if permitted to be proven, would raise the issue of manslaughter. This is not like the case of Jones v. State, 38 Tex. Cr. R. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719, where the insults were offered to Mrs. Bullington prior to her marriage to Jones, and there was evidence of the renewal of the insults after she became the wife of Jones; the homicide occurring after her marriage with Jones.

As explained by the court, there is nothing in appellant's contention that his counsel was not afforded the privilege of discussing murder in the second degree. The court's explanation shows that he informed appellant of his intention to submit murder in the second degree, and that the court would allow counsel for defendant such time as they desired to address the jury on that question. Defendant's counsel declined to further address the jury.

In motion for new trial, appellant excepted to a number of the charges of the court. It may be conceded that some of these charges, if properly excepted to, would be erroneous; but as excepted to, it does not occur to us that they are. For instance, the charge on threats is objected to, because the court instructed the jury that they could be considered in explaining the conduct of and

arriving at the intention of defendant, whereas the law requires the jury to also consider threats of the deceased in explaining the attitude and conduct of deceased at and about the time of the killing. We understand that threats are introduced for the benefit of a defendant, and that the jury is authorized to look to them in connection, with all the facts and circumstances of the case, in judging of the acts and conduct of the defendant at the time of the homicide.

Appellant excepts to the charge, also, because it limited the defendant's right of self-defense to an attack made on him by deceased with a weapon. The charge on this point is, in substance, if the jury believe deceased had threatened defendant, etc., and caused defendant to believe that deceased was about to assault him with a weapon. While it is true that the evidence showed deceased did not have any weapon, appellant testified that he thought he had. He says he shot at him because he thought when deceased threw his hand to his hip that he was going to shoot him. We do not regard this as suggesting to the jury that deceased must have had a weapon, but refers the matter to them in connection with the belief of appellant.

Appellant also objected to the court's charge instructing the jury that, when danger of death or serious bodily injury ceases, the right to kill ceased with it. He says this charge is erroneous because it eliminates the right of defendant to act upon apparent danger. It states a correct proposition of law, and was applicable to this case, because, if appellant was ever in any danger or apparent danger from an attack by deceased, it was at the time the first shot was fired. He is shown to have afterwards pursued deceased and fired two or three other shots at him, two of which took effect. We hardly think, judging from the evidence, that there could be any self-defense as to these latter shots, even from the appellant's own statement.

Appellant objected to the charge of the court in which the jury were told, if they found appellant was justifiable in firing the first shot, and that thereafter deceased ran, and defendant did not believe himself in further danger, but followed after deceased, shooting at him, and then killed him, he would be guilty of murder. Appellant's objection to this charge is not on the ground that under the circumstances he might be guilty of a less grade of felonious homicide than murder, but he states specifically his grounds of objection to be that said charge was upon the weight of the evidence, in assuming that deceased fled, and erroneous in that it eliminated the defendant's right to act upon apparent danger, and it assumes that defendant's right to shoot ceased with the flight of deceased. An examination of the charge does not show that it is subject to the criticisms leveled at it by appellant.

We are only discussing those exceptions taken to the charge. The charge submits to the jury, if they believed the first shot was fired under circumstances which caused defendant to believe that his life was in danger or he was in danger of serious bodily injury, that in such event he had a right to shoot to protect himself. This does not eliminate the appearance of danger, but leaves to the jury to determine whether or not appellant believed he was in danger. It further submits to the jury that if they believed deceased, after the first shot, ran, and defendant pursued him, and did not believe himself then in danger, etc. This is not an assumption on the part of the court that deceased fled. The charge is not subject to the objection urged against it. We are by no means commending this charge as a model; nor do we say that it is not subject to objections, if they had been properly taken. We are only discussing those exceptions taken and urged against it. When appellant assumes to point out specifically the grounds of his objection to a charge, we will presume that he has no others to urge, or he would have stated them.

There is a motion to quash the special venire. The ground of objection stated is that the return does not show what diligence was used by the officer to serve and secure the attendance of R. S. Ridgway and W. C. Wharton, 2 of the special venire of 36 who were selected. The return shows, as we read it, that "R. S. Ridgway is not now nor was he in Kerr county when the writ was issued. He is now and has resided in Edwards county, Texas, for the past two years." That W. C. Wharton, when this writ was issued, was absent from Kerr county, and has ever since been so absent. We are at a loss to understand how appellant can contend that sufficient excuse is not presented for failure to serve these two jurymen. The excuse, it is true, is not set out opposite the names of the jurors, nor are the acts of diligence by the sheriff stated; but he recites facts as to said jurors which render any amount of diligence on his part unnecessary.

There being no error in the record, and no reversible errors in the charges of the court as excepted to by appellant, the judgment is affirmed.

JACKSON v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. CRIMINAL LAW — INDICTMENT — INSTRUCTIONS—DUTY TO INSTRUCT ON LESSER OFFENSE.

Where, on a prosecution for assault with intent to murder, there was evidence tending to show a lesser degree than such crime, and defendant entered a plea of guilty, it was the duty of the court to instruct on the lesser degree.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 658.]

2. SAME—EVIDENCE—LESSER OFFENSE.

Where, on a prosecution for assault with intent to murder, it appeared that prosecutor, who was a train conductor, put accused off the train because his pistol slipped from his pocket and was accidentally discharged, whereby accused became excited and fired at the prosecutor, the court should have instructed on aggravated assault.

3. TRIAL—ABSENCE OF ATTORNEY AND WITNESSES—SURPRISE.

Where, on the calling of a criminal case for trial, accused was informed by the court that the attorney who had previously represented him had informed the court that he would not represent accused, and accused had supposed that the attorney would represent him, and had given him the names of his witnesses, and the witnesses were absent, the court should have afforded accused an opportunity of employing other counsel, or, at any rate, have given him an opportunity to have his witnesses present.

4. NEW TRIAL—SURPRISE.

On a motion for a new trial on such ground, it appearing from the affidavits filed by defendant that he had a good defense, and they not being controverted by the state, the motion should have been granted.

Appeal from District Court, Bowie County; P. A. Turner, Judge.

William Jackson was convicted of assault with intent to murder, and he appeals. Reversed.

Hart, Mahaffey & Thomas, for appellant.
Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of 10 years; hence this appeal.

Appellant's contention is that, although he entered a plea of guilty to the indictment, and the evidence thereon was heard by the court, yet on account of the circumstances attending said plea, and because the court failed to charge on aggravated assault, he should have been granted a new trial. He reinforces this idea by showing, in connection with his motion for new trial, by affidavits appended thereto, that there is a strong probability that he is not guilty of an assault with intent to murder, and on another trial the jury would not be authorized to find him guilty of said charge. By appellant's own affidavit, which in the motion does not appear to be controverted, it is shown that, after the alleged commission of the offense, and when he was arrested and brought before an examining court, he secured the services of W. P. Mahaffey, Esq., an attorney, to represent him; that said Mahaffey did represent him before the magistrate, waived an examination, and appellant was remanded to jail, with his bail fixed at \$1,000, which he was unable to give; that he understood and believed that said attorney would continue to represent him. After he was indicted, and at the succeeding term of the district court, he gave said attorney the names of his witnesses whom he desired summoned; that, being in jail, he relied on

his attorney to represent him, and did not know when his case would be called. The criminal docket was set down for trial on March 20, 1905, and on the first day after taking up said docket he was brought into court, and was asked by the judge whether he was ready for trial. He informed the judge that his attorney was not present, and the judge then informed him that the attorney, W. P. Mahaffey, Esq., had informed the court he was not going to represent him on the trial of the case in the district court; that he was only employed to represent defendant on the trial in the justice court. Appellant alleges that this was the first information he had that said attorney was not going to represent him; that, if he had known said attorney was not going to represent him, he would and could have made arrangements with some other attorney to have represented him. After this he was called on to announce, and he stated his witnesses were not present, and the court asked him if his witnesses had been summoned, and he stated to the court he did not know; that he supposed they had, as his attorney, Mr. Mahaffey, was looking after the matter. The court then asked the clerk or sheriff if said witnesses had been summoned, and was informed that they had not. The court then told him that said witnesses had not been summoned, and that he would have to go to trial, as he ought to have had his witnesses summoned. Thereupon defendant, being ignorant of his rights in the premises, and being excited, told the court, as he had no attorney and no witnesses, that he would just plead guilty, and put himself on the mercy of the court; that said trial then proceeded; that the indictment was read, and two witnesses were put upon the stand by the state. They testified against him, but, not knowing his rights, he did not ask them any questions. It was further shown in the motion that the case was not fully developed by the state; but it is insisted that sufficient facts were developed to have required of the court a charge on aggravated assault. In order to present this matter clearly, we will state substantially the testimony adduced on the trial and contained in the affidavits appended to appellant's motion. Witness D. D. Cannon stated that, on Christmas Day, 1904, he was conductor on the road between Texarkana and Waco, and was running a passenger train on the Cotton Belt Railroad; that he left Texarkana on that day, and some four or five miles out he was informed by some of the trainmen that a darky had shot his pistol on the train. He was in the chair car at the time, and went ahead through the next car, and out on the vestibule or platform in rear of the baggage coach and saw some darkies. He asked who was doing that shooting, and none of them replied. He asked the darky standing by appellant, and he motioned to him, and, just as he did, he reached around and got hold of

appellant's gun and took it from him. Appellant undertook to jump off, but he held to him, and he and the brakeman and newsboy kept him from jumping off; that some one pulled the bell cord, and the train stopped. At that time they were standing on the steps, and appellant was trying to jump off. He did jump off, and told witness to "give me my gun back, and I will walk to Redwater," which was the station where appellant was destined. At this time appellant was standing some 10 feet from the steps. Witness gave the engineer a signal to go ahead, and, just as he started the train, witness dropped the gun in front of the darky, some 10 or 15 feet ahead of him. Appellant picked up the gun, and pulled down on witness. When he saw him leveling his gun down, witness jumped into the door and heard the shooting. It appeared to witness that appellant shot about three times. After the shooting, the newsboy gave him a bullet. He saw evidence or signs of where it struck in the vestibule. The bullet struck on the opposite side of where he was standing. The bullet struck a little iron casting, and glanced and hit two or three other places, and then dropped down on the platform. With reference to where witness was standing, the bullet could not have hardly passed there without hitting him, if he had been standing on the steps where he was when appellant leveled the gun; that he jumped back into the door to keep from being shot. J. S. Jones, another witness for the state, testified, substantially, that he knew appellant; that he lived at Redwater, and witness also lived there; that, some two hours after the train passed on, appellant came up, and he had a conversation with him. Appellant said: "I shot at that conductor, but I do not know whether I hit him or not." (Witness had previously heard of the shooting from the trainmen before appellant got there.) He then asked appellant: "Are you the negro that did the shooting?" And he said: "Yes; but don't know whether I hit him or not. God damn him, I tried to hit him." He further stated: "Me and another negro were standing on the car taking a drink, between the cars." He stated that the pistol slipped out of his pocket, and the conductor came back there, and asked him who shot the gun; and he said he told him it was none of his business, and the conductor grabbed him to put him off, and shoved him off the train, and when the train started he shot at him, and he shot at the engineer too. This was all the testimony adduced.

Appellant, in connection with his motion for new trial, appended a number of affidavits. Two white men who were on the train, and knew him, stated, substantially, that they were on the rear car from where the shooting occurred, and that the negro did not fire the pistol until after they had passed the place where the negro was standing, and that the negro must have been 150 or 200

feet in rear of the baggage car when he fired the first shot; that he fired it parallel with the train. It is also shown that from the position where this shot was fired it would have been impossible to have hit the conductor on the vestibule of the baggage car. The affidavits of one or two of the negroes who were on the vestibule in rear of the baggage coach with appellant at the time of the occurrence show the accidental firing of the pistol when it slipped out of appellant's pocket, and that the ball struck on the south side of the coach, which was the bullet that the conductor testified about; that no bullet fired by appellant after he was off the train struck at that point.

It is contended by appellant that it was the duty of the court, on appellant's plea of guilty, and after the evidence had been adduced, to charge fully on every phase of the case presented by the evidence; that the court was not circumscribed or limited to appellant's plea of guilty to the indictment; that the indictment contained, besides an assault with intent to murder, subordinate degrees of the offense, and, if there was any evidence tending to show any lesser degree than assault with intent to murder, the court should have charged it. We believe this contention is correct. The court in every felony case is required to give a written charge, and that charge must embrace every phase of the case as presented by the testimony. Here, unquestionably, if appellant shot after he jumped off the train, or, as is testified by one witness, after he was shoved or put off the train by the conductor, and he had killed the conductor, he would have been entitled to a charge on manslaughter. The conductor had no right to put him off the train because his pistol had slipped from his pocket and accidentally fired (appellant having paid his fare to Redwater, the point of his destination), and, in doing so, was guilty of an assault. If appellant on account of this became excited and was rendered incapable of cool reflection, and under such circumstances shot and killed the prosecutor, he might be guilty of no higher offense than manslaughter, and consequently, where he did not kill the conductor, he was entitled to a charge on aggravated assault. But more than this, it occurs to us that appellant, ignorant as he was of his rights, had a right to believe that the attorney employed by him would represent him in the district court. He swears that after the court begun, and after this indictment, he gave this attorney the names of his witnesses to have summoned; and this is not controverted by the attorney or any other witness. The attorney, it seems, had done him no service in the justice court, and under the circumstances, when he was informed by the court for the first time that said attorney had informed the court he would not represent him, and appellant's witnesses were not there, the court should have afforded appellant an opportunity either to

employ other counsel, or, at any rate, have given appellant an opportunity to have his witnesses present. Of course, if appellant had no defense to the action or refusal of the court to grant a new trial, he could not complain of injury. But here, as we understand it, the affidavits show a good defense to the state's case, and these are not controverted by the state. Nor do we understand that the testimony of the state's witness Cannon, who was an eyewitness to the transaction, when his evidence is analyzed, antagonizes that shown by the affidavits accompanying appellant's motion. These affidavits show that it was impossible, from where appellant stood when he fired the shots, for him to have shot or hit the prosecutor. Prosecutor says he jumped in the door as soon as appellant leveled the pistol, and that the train was moving on, and he heard the shots, but did not even see them. The affidavits of the witnesses accompanying the motion for new trial show that these shots were fired, not directly at the train, but parallel with the train, and after the car where prosecutor was had passed on from 150 to 200 feet. If it was impossible for appellant to have reached the prosecutor, or to have made an assault on him, by the means used, then he could not be convicted of an assault with intent to murder. Taking all the circumstances of this case together, we believe that the court erred in refusing to grant appellant a new trial.

The judgment is accordingly reversed, and the cause remanded.

NOLEN v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

1. SEDUCTION—CRIMINAL PROSECUTION — EVIDENCE—IMPEACHMENT — CONTRADICTION — ERROR.

In a prosecution for seduction, evidence that prior to the trial prosecutrix, who married subsequent to the alleged seduction, stated, in substance, to defendant's attorneys, that defendant had raped her, was admissible for impeachment, and an attempted limitation of it by the court to contradiction alone was error.

2. SAME—PREVIOUS CONDUCT OF PROSECUTRIX—LETTERS.

In a prosecution for seduction, letters written to a third person by prosecutrix, showing a vulgar and lascivious mind on her part, were admissible for the purpose of discrediting her, and also to shed light on her chastity at the time of her alleged seduction by defendant.

3. SAME—SUBSEQUENT CONDUCT.

In a prosecution for seduction, evidence of acts of prosecutrix subsequent to the alleged commission of the offense, going to show illicit relations and lascivious conduct with others than defendant, is admissible to show that prosecutrix was unchaste prior to the alleged illicit intercourse with defendant.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 74.]

4. SAME—SUBSEQUENT PROSTITUTION.

While the mere fact that prosecutrix subsequently becomes a prostitute is no justification or defense for defendant, yet, if her conduct

be such as to indicate general prostitution on her part, this should be considered as a circumstance by the jury in passing on whether she was probably chaste at the time of her alleged seduction.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 75.]

5. SAME—INSTRUCTIONS.

The court should instruct that the evidence is to be considered for no other purpose.

6. SAME.

If prosecutrix did not rely solely on the absolute promise of marriage, but was moved to favor defendant partly through fear, or partly through lust, or through both, defendant should be acquitted, though a promise of marriage was then made, and was part, though not the sole, inducement.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, §§ 57, 58.]

7. SAME—SUBSEQUENT OFFER OF MARRIAGE—WHEN ADMISSIBLE.

As under the amendment to the seduction law the offer of marriage must be made to the prosecutrix herself, it was not error in a prosecution for seduction of a minor female to exclude evidence that shortly after his arrest defendant sent to her father, requesting permission to marry her, witness also testifying that the day following defendant stated that he did not intend to marry prosecutrix.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 77.]

Appeal from District Court, Bosque County; O. L. Lockett, Judge.

Tom Nolen was convicted of seduction, and appeals. Reversed.

Dillard & Word and Cureton & Cureton, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of seduction, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant complains of the following portion of the court's charge: "The evidence of the witness Mrs. Willie Bell Stanley, made in the office of the attorneys for defendant, in which statement she says that the offense committed by defendant was rape, is admitted for the purpose only of showing that she had made a different statement to what she testified to on the trial, if said statement does show that; and as to whether it does or not you are the exclusive and only judges." The evidence shows that prosecutrix was a single woman, of course, at the time of the alleged seduction, but subsequently married a man by the name of Stanley; and that prior to the trial she appeared in the office of the attorneys for defendant, and made a statement, in substance, that appellant had raped her. The above-quoted charge is an effort on the part of the court to limit the effect of said testimony, which statement was proved on the trial. The court committed error in attempting to limit said testimony to contradiction alone; same was admissible for impeachment. *Crockett v. State* (Tex. Cr. App.) 49 S. W. 393.

The eighth bill of exceptions shows that appellant, after identification, offered in evi-

dence certain letters written by prosecutrix to a third party, in which prosecutrix shows a vulgar and lascivious mind. We do not deem it necessary to copy said letters. Previous acts and conduct of prosecutrix are admissible for the purpose of discrediting prosecutrix, and also for the purpose of shedding light upon her chastity at the time of her alleged seduction by defendant. The court committed error in excluding these letters. *Davis v. State*, 36 Tex. Cr. R. 550, 38 S. W. 174; *Creighton v. State* (Tex. Cr. App.) 51 S. W. 910; *McClain's Cr. Law*, vol. 1, p. 277, § 1117.

The record contains various bills with reference to the refusal of the court to permit appellant to prove acts of the prosecutrix, subsequent to the alleged commission of the offense, going to show illicit relations or lascivious conduct with other parties than defendant. This evidence should have been admitted. It was admissible for the purpose of showing that prosecutrix was unchaste prior to the alleged illicit intercourse with appellant. *Davis v. State*, 36 Tex. Cr. R. 550, 38 S. W. 174. *Creighton v. State* (Tex. Cr. App.) 51 S. W. 910. The mere fact that prosecutrix becomes a prostitute, if such be the case, after being seduced, would not be any justification or defense to appellant for seducing prosecutrix. But if her conduct be such as to indicate general prostitution on her part, this is and should be considered as a circumstance by the jury in passing upon whether or not she was probably chaste at the time of her alleged seduction. While the court should admit this testimony, still it should be limited to the purpose for which it was introduced as indicated. We are not attempting to lay down any form of charge, but to indicate that the court should instruct the jury that such evidence should only be considered by them for the purpose of passing upon whether or not prosecutrix was chaste at the time of the alleged seduction, and for no other purpose.

Appellant requested the following instruction: "The court instructs you, if you believe from the evidence beyond a reasonable doubt that the prosecuting witness, Willie Bell Stanley (then Willie Bell Doyal), did not rely solely upon the absolute promise of marriage, but that she was moved to let defendant have the alleged sexual intercourse with her partly through fear, or partly through lust, or through both fear and lust, then it is your duty to acquit the defendant, although you should believe that a promise of marriage was then made, and was part, though not the sole and only, reason of inducement." This charge should have been given. *Barnes v. State*, 37 Tex. Cr. R. 329, 39 S. W. 684; *Spenrath v. State* (Tex. Cr. App.) 48 S. W. 182; *Fine v. State* (Tex. Cr. App.) 77 S. W. 807.

Bill No. 15 shows that while witness Dany Mitchell was on the stand in behalf of

the state upon cross-examination appellant's counsel asked the following questions: "Is it not a fact that defendant, shortly after his arrest in this case, requested you to go see W. L. Doyal, father of prosecutrix, and with whom she lived, and ask said W. L. Doyal's permission to marry prosecutrix? And is it not a fact that you did go to the said W. L. Doyal, for defendant, and asked his permission for defendant to marry prosecutrix? And is it not a fact that you did go to see said Doyal for defendant, and ask his permission for defendant to marry prosecutrix? And is it not a fact that said Doyal promised to let you know whether or not he would grant said permission? And is it not a fact that he never did let you know, and that you reported all these facts to defendant? And is it not a fact that prosecutrix at said time was a minor, a little over sixteen years of age, and that she then resided with her father at Iredell, Texas?" The state objected to said questions and the answers because it did not show an offer in good faith to prosecutrix to marry her. Witness would have testified to these facts if permitted. The court appends this explanation: "When this witness was on the witness stand, the jury were sent out, and witness testified before the court, and, in addition to what is stated in the bill, stated that defendant told witness on next day after he gave him the message for Doyal, that defendant told him he did not intend to marry Willie Bell Doyal, and the court thought it was not made in good faith. Under the amendment of the seduction law it provides that the offer must be made to the woman, and this offer was never made to her, and, she being the one who must decide or accept or reject it, was immaterial and irrelevant what message was sent to her father." We do not think there was any error in the ruling of the court. *Harvey v. State* (Tex. Cr. App.) 53 S. W. 102.

For the errors discussed, the judgment is reversed, and the cause remanded.

SLIGER v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. INTOXICATING LIQUORS—LOCAL OPTION—C. O. D. PACKAGES — DISPOSAL BY CON-SIGNEE.

Defendant had a package of liquor in the express office, which had been sent to him C. O. D., and let different parties, who furnished the money to take the package out of the express office, have shares of the liquor. *Held*, that defendant was guilty of violating the local option law.

2. CRIMINAL LAW—APPEAL—PRESUMPTIONS.

In the absence of a showing to the contrary, it will be presumed on a criminal appeal that an application for a continuance, the overruling of which is complained of, was a second application.

Appeal from Comanche County Court; J. H. McMillan, Judge.

George Sliger was convicted of violating the local option law, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Conviction of violating the local option law; punishment assessed being a fine of \$25, and 20 days' confinement in the county jail.

The facts show that appellant had a package containing intoxicants in the express office, which had been sent to him O. O. D.; that he let Condrum have one quart of it, and other parties the remainder. Condrum and other friends furnished the money to pay the package out of the express office, as consideration for the whisky they received. The facts of this case come strictly within the rule laid down by this court in *Dunn v. State*, 86 S. W. 326, 12 Tex. Ct. Rep. 803; *Treadway v. State*, 62 S. W. 574, 2 Tex. Ct. Rep. 415.

Appellant also complains of the overruling of his motion for continuance. In the absence of a statement to the contrary, we will presume it is the second application. There is no diligence shown. Furthermore, the testimony was cumulative, as will be seen from a casual inspection of the statement.

There is no error in the record, and the judgment is affirmed.

HALL v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. STATEMENT OF FACTS—TIME OF FILING.

Where the court adjourned on April 30th, and the statement of facts was not filed until August 30th, it cannot be considered, in the absence of any reason assigned for the delay.

2. SAME—CONTINUANCE—REVIEW.

The refusal of a continuance will not be reviewed in the absence of a statement of facts.

3. BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions reciting that, when a certain witness was on the stand, defendant, anticipating that he would testify that defendant was whipping his wife when deceased interfered, asked that the jury be retired before hearing the testimony, and stated that certain witnesses would testify to defendant whipping his wife, "to which, before the jury heard the same, defendant objected because the same was irrelevant and immaterial," is too indefinite to be considered; it being difficult to determine whether defendant objected to the refusal to retire the jury, or to the admission of the evidence.

4. EVIDENCE—DECLARATIONS OF DEFENDANT.

In a prosecution for murder, permitting a witness to testify to a statement of defendant that: "I have just called a woman a liar. * * * I used to hunt ducks down here on the bayou, and I could get them on the wing, and I think I can get those standing"—was not error, where it appeared from the court's explanation of the bill of exceptions that the proof showed that defendant had just called a certain woman a liar, and in a difficulty just previous, when deceased interposed, defendant left the house, uttering a threat against deceased's life.

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Archie S. Hall was convicted of murder in the second degree, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree.

The court adjourned on April 30, 1904. What purports to be a statement of the facts was filed on August 30, 1904. No reason is assigned for the delay. The refusal of the continuance will not be reviewed in the absence of the statement of facts. We have no criterion by which to know or ascertain the relevancy or materiality of the absent testimony.

The second bill of exceptions recites as follows: "When the state's witness Amelia Clark was on the stand, defendant, anticipating that witness would testify that defendant was whipping his wife when deceased rushed in and interfered, asked that the jury be retired before they heard the testimony, and stated to the court that the state's witness, Amelia Clark, John Moy, and Mrs. Minerva Moy would testify to defendant whipping his wife and his cruel treatment of her (which testimony is fully set out in the statement of facts). To which, before the jury heard the same, defendant objected, because the same was irrelevant and immaterial, and calculated to prejudice the minds of the jury against defendant," etc. This bill is too indefinite to be considered. The statement of facts is not before us. It is somewhat difficult to ascertain whether he objected to the court refusing to retire the jury, or the admission of certain evidence to be found in the statement of facts in regard to the defendant's cruel treatment of his wife. What the facts were, or what connection they may have had with the case, if that is the point in the bill, is not shown. They may have been relevant. They may have been a part of the res gestæ. They may have been the very cause that led to the killing. In any event, the bill does not show any reason why the action of the court complained of is erroneous.

Another exception was taken to the introduction of some statements of appellant, testified by the witness Sharpley, as follows: "I called a woman a liar. Reilly Small and I used to hunt ducks down here on the bayou, and I could get them on the wing, and I think I can get those standing." Objection was urged to this, because irrelevant, immaterial, and too remote to connect deceased with the remark. This explanation is appended by the court to the bill: "That witness testified that defendant said: 'I have just called a woman a liar. Reilly Small and I used to hunt ducks down here on the bayou, and I could get them on the wing, and I think I can get 'em standing.' And the proof before this showed that defendant had just called Miss Moy a liar, and in the difficulty just before this, in the

Moy house, when Holland (deceased) interposed, defendant left the house, uttering a threat against deceased's life." We do not believe, as shown on the face of the bill, with the explanation, any error is made to appear. We judge from this bill that the difficulty happened "just before" the uttering of the language about which the exception was reserved, in the Moy house, where deceased interfered in a wordy altercation occurring between appellant and Miss Moy, and that, on account of this interference by deceased, defendant left the house, uttering threats against the life of deceased. Under the facts, deceased may have been sufficiently designated or pointed out as to give point to the language used by witness Sharpley. The bill is not sufficiently specific to show that error was committed. The presumption is that the rulings of the trial court are correct, and this presumption must be overcome before a reversal would be authorized. The judgment is affirmed.

Ex parte SMITH.

(Court of Criminal Appeals of Texas. June 7, 1905.)

**LOCAL OPTION ELECTION—TIME OF HOLDING
—PUBLICATION OF RESULT OF PREVIOUS
ELECTION.**

Under Sayles' Ann. Civ. St. 1897, art. 3393, relative to local option, and providing that no election shall be held within less than two years after an election has been held in the same territory, an election held more than two years after the last preceding election is not rendered invalid by the fact that the result of the preceding election was published within two years.

Application by Joseph Smith for a writ of habeas corpus to secure applicant's discharge from custody. Applicant remanded.

Mason Cleveland, Co. Atty., and Howard Martin, Asst. Atty. Gen., for respondent.

BROOKS, J. This is an original application for the writ of habeas corpus. The facts upon which the same is predicated are as follows: The record shows that local option was adopted in Johnson county on September 13, 1901, and the order declaring the result and prohibiting the sale of intoxicating liquors was published, respectively, on October 4, 11, and 18, 1901, and on March 11 and 18, 1904, in the Cleburne Chronicle. This court held in the Stephens (87 S. W. 157) and Tump Griffin (87 S. W. 155) Cases, decided at the present term, that this election did not go into effect, because the order of the commissioners' court declaring the result, and prohibiting the sale of intoxicants in Johnson county, was not published four successive weeks, as required by the statute. A second election for local option was held in Johnson county on April 7, 1904, resulting in favor of prohibition, and appears to be regular in every way, and properly put into operation. However, the insistence is

made that the second election is invalid on account of having been held within two years from the date the result of first election was declared. Article 3393, Sayles' Ann. Civ. St. 1897, provides: "No election under the preceding articles shall be held within the same prescribed limits in less than two years after an election under this title has been held therein; but at the expiration of that time the commissioners' court of each county in the state, whenever they decree it expedient, may order another election to be held by the qualified voters of said county, or of any justice's precinct, or such subdivision," etc. We hold that the second election is valid, because the same was held after the expiration of two years from the first election. It makes no difference when the result of the election is published and put into operation. The subsequent election can be held within two years from the date the previous election is held. It follows that the second election is valid. Applicant was convicted under a complaint and information based and predicated upon the second election, held in 1904. The judgment is in proper form.

Relator is accordingly remanded to the custody of the officer.

REYES v. STATE.

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. WITNESSES—IMPEACHMENT.

The state cannot impeach its own witness unless the witness has testified to something injurious to the state.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1094, 1096.]

2. APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions showing that the court permitted the state to impeach its own witness, without showing that the witness testified to something injurious to the state, raises no question for review.

3. ASSAULT WITH INTENT TO MURDER—SPECIFIC INTENT.

Without a specific intent to kill, there can be no assault with intent to murder.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 112.]

4. SAME—EVIDENCE—SUFFICIENCY.

Where it was shown that prosecutor ran, and that accused fired his pistol, but without showing even circumstantially that he shot at prosecutor, there was nothing to show that accused committed an assault with intent to murder.

5. SAME—INSTRUCTIONS—SIMPLE ASSAULT—AGGRAVATED ASSAULT.

Where, on a trial for assault with intent to murder, it was not shown that accused shot at prosecutor, but only that prosecutor ran, and that accused fired his pistol, a charge on simple, but not on aggravated, assault should be given.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 658.]

Appeal from District Court, Aransas County; E. A. Stevens, Judge.

Pancho Reyes was convicted of assault with intent to murder, and he appeals. Reversed.

W. H. Baldwin, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Conviction of assault to murder, with two years in the penitentiary fixed as the penalty. Bills of exceptions Nos. 1 and 2 show that the court permitted the district attorney to impeach the state witness. This cannot be done unless the witness has testified to something injurious to the state. The bills do not show that the witness had so testified—in fact, do not show what he testified. The bills are defective in this regard. Be this as it may, this character of testimony is inadmissible; and we say this in view of the fact that the case must be reversed, and the question may arise upon another trial.

Appellant insists that the evidence is not sufficient to support the verdict of the jury. We think this contention is well made. There is nothing to show that appellant ever shot at the prosecutor; and without specific intent to kill there can be no assault with intent to murder. The mere fact that prosecutor ran, and appellant shot his pistol, would not show, even circumstantially, that he shot at prosecutor. Therefore, we believe the evidence is not sufficient. Appellant also insists that the court should have submitted the issue of aggravated assault to the jury. There is no evidence showing that prosecutor was shot at. On another trial, should the evidence show that prosecutor was shot at, the court should charge on aggravated assault. If the evidence is the same as here presented, there should be a charge on simple assault, on account of the shot being fired to frighten.

The judgment is reversed, and the cause remanded.

COMER v. FLOORE.

(Court of Civil Appeals of Texas. May 24, 1905.)

1. ASSIGNMENTS—ORDERS—ACCEPTANCE.

An order to defendant to pay plaintiff the amount due the drawer to the date of the order, and that the order should be defendant's receipt for the same, constituted an assignment of the drawer's account to plaintiff; and an acceptance thereof by defendant was an agreement to pay what was due after deducting credits arising in the same transaction, or independent items mutually agreed on between defendant and the drawer.

2. JUSTICE COURT APPEAL—PLEADING.

Under Sayles' Ann. Civ. St. 1897, art. 858, providing that no set-off or counterclaim shall be set up by a defendant which was not pleaded in the court below, where a set-off was not pleaded in an action on an accepted order before a justice of the peace until after judgment by default had been entered, defendant was not entitled to plead such set-off on appeal to the county court.

Appeal from Johnson County Court; J. D. Goldsmith, Judge.

Action by John W. Floore against W. H. Comer. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

O. T. Plummer, for appellant. Ramsey & Odell, for appellee.

JAMES, C. J. The action was begun in justice's court by Floore against Comer on the following papers, filed on March 19, 1903:

"Cleburne, Texas. January 27, 1903. W. H. Comer, Esq.: Please pay to John W. Floore the amount you are due me for work and material to this date and this shall be your receipt for same. Respectfully, H. I. Malsbury.

"I accept the above and will pay on the above order any amount I find I am due Malsbury. W. H. Comer. 1—31—1903."

"John W. Floore, Esq.: Upon settlement recently with W. H. Comer, I find he owes me for painting, canvassing and papering houses, in Cleburne and Rio Vista the sum of One Hundred and Ninety and $40/100$ Dollars and I owe him to be deducted from the above the sum of Thirty-nine and $65/100$ Dollars, leaving balance due me by W. H. Comer at this time and subject to the order that I gave you, and which Comer has accepted the sum of One Hundred and Fifty and $75/100$ Dollars which amount is to pay you. H. I. Malsbury.

"Subscribed and sworn to before me this 9th day of March, 1903. W. R. Walker, N. P. Johnson Co., Texas."

On March 31st defendant filed an answer and a motion for new trial, and on April 6th an amended motion for new trial, which was overruled on April 7th. On appeal to the county court, plaintiff filed an itemized, verified account in favor of Malsbury against W. H. Comer; and defendant Comer contested items in the account, and also filed an amended account showing Malsbury was owing him \$181.94 at the time plaintiff claims Malsbury did the work for defendant and furnished the material to defendant mentioned in plaintiff's amended account, in addition to an item placed to his credit in plaintiff's amended account.

In his charge to the jury, the judge allowed the jury to consider in Comer's favor all items of the verified account which he (Comer) had contested, but he instructed the jury not to consider any evidence which tended to show that Malsbury was indebted to Comer. They returned a verdict for plaintiff for the full amount. By the charge, and also by a bill of exceptions, it is made clear that the court ruled that defendant, not having pleaded the set-off in the justice's court, could not do so in the county court. The order given by Malsbury was in effect an assignment of the particular account to Floore. The acceptance of it by Comer was an agreement to pay what was due on that account, which meant that account, less credits properly ap-

plicable to it, such as payments or credits arising in the same transaction, or even independent items, if it had been mutually agreed between Comer and Malsbury that such items should be credited. The record shows conclusively, as to the set-off pleaded in the county court, that there never had been any such agreement. The set-off was not pleaded in the justice's court until after the judgment had been allowed to be taken by default, and consequently was not before the court when the judgment was rendered. There was no error in refusing to give effect to it in the county court. Sayles' Ann. Civ. St. 1897, art. 358.

The judgment is affirmed.

BROWN v. ORANGE COUNTY et al.*

(Court of Civil Appeals of Texas. May 20, 1905.)

1. POWERS—SCOPE OF AUTHORITY.

A power of attorney authorizing the attorneys to sell by quitclaim deeds, for such price, upon such terms of credit, and to such persons as they jointly shall think fit, the whole or any part of certain premises, did not authorize them to convey a part of the land in consideration of money expended by the grantee in defense of a certain suit to recover a part of such land.

2. ANCIENT DEEDS—VALIDITY—EVIDENCE.

Where an ancient deed executed by the owner's agents and attorneys conveyed the land for a consideration of money expended by the grantee in defending a certain suit, and thereafter the former owners since 1877 had no possession, paid no taxes, and claimed no interest in the land until 1904, when one of them conveyed his interest in the land to one of the defendants by a quitclaim deed, and in an action to recover the land such defendant took no steps to procure such owner's evidence, which was available, the mere fact that the owners' agents and attorneys were not authorized by a power of attorney duly recorded prior to the execution of their deed to sell the land for the consideration specified therein, did not establish that the deed was executed and delivered under such power, or that it was invalid.

Appeal from District Court, Orange County; W. P. Nicka, Judge.

Action by E. W. Brown against Orange county and others. From a judgment in favor of defendant county, plaintiff appeals. Reversed.

Holland & Holland, for appellant. Hart & Sholars, for appellee.

PLEASANTS, J. This is an action of trespass to try title, brought by appellant against Orange county, A. M. Stark, and W. R. Bolin. The property in controversy consists of city lots in the city of Orange, which are fully described in the petition. The appellee answered by plea of not guilty and plea of limitation of 10 years, and by cross-action asserted title to the property and prayed for judgment therefor against plaintiff and its codefendants. The defendants Stark and Bo-

lin accepted service on plaintiff's petition and the cross-action of appellee, but filed no answer. The trial in the court below was without a jury, and resulted in a judgment in favor of Orange county against all the other parties to the suit for the land in controversy. From this judgment, plaintiff alone has appealed.

W. H. Cordrey, Annie S. Cordrey, and Drusilla Cordrey are the common source of the title under which both parties claim. On March 22, 1892, R. B. Russell and D. Call, claiming to act as "the legally constituted agents" of the Cordreys, conveyed to Wm. Smith, along with other lands, the land in controversy. Plaintiff is the holder of whatever title Smith acquired by this conveyance. This deed, which was duly recorded in Orange county May 10, 1872, is an ancient instrument, and was admitted in evidence as such. The recited consideration for the conveyance is as follows: "One thousand dollars expended by Wm. Smith in defense of a certain suit brought in the District Court of the United States by A. T. Brumley vs. Aaron Ashworth and others, for the league of land on which the town of Orange is situated." It conveys all of the right, title, and interest of the Cordreys in the property, and warrants the title only as against persons claiming through or under them. The property has never been in the possession of any one, and no taxes have been paid thereon since 1877 by either of the parties to this suit or those under whom they claim, and it is not shown what taxes, if any, or by whom same were paid prior to 1877. On November 19, 1870, the Cordreys executed a power of attorney to Russell and Call, authorizing them to sell all or any part of the lands therein described and situated in Orange county. The lands conveyed to Smith by the deed above mentioned is a portion of the lands described in this power of attorney. The powers conferred by this instrument are as follows: "To bargain, sell, and convey in fee simple by quitclaim deeds, for such price, upon such terms of credit, and to such person or persons as they jointly shall think fit, the whole or any part of the following premises," etc. "Hereby ratifying all bargains, receipt for purchase money, agreements, and deeds of quitclaims as shall be made, executed, or acknowledged in the premises by our said attorneys, the same as if we were personally present and did the same," etc. This power of attorney was recorded in Orange county December 28, 1870. The Cordreys lived in Ohio, and Russell and Call exercised exclusive control and management of their lands in Orange county until it was all sold. The remainder of this land was sold by said attorneys in 1877, and they delivered to the purchaser the original power of attorney above mentioned. W. H. Cordrey conveyed his interest in the land in controversy to appellee by quitclaim deed dated June 9, 1904. He was living at the time of

*Rehearing denied.

the trial in the court below, and is the sole heir of Drusilla and Annie S. Cordrey, both of whom are dead. His testimony was not attempted to be procured by either party. Smith died in 1874, and Russell in 1890. The estate of Smith was administered in Orange county, and the inventory of the estate did not include the land in controversy. Call is also dead, but the date of his death is not shown. All of these men lived in Orange, after the conveyance to Smith, until their death. They were all men of affairs, and prominent in their county. There is no evidence that Smith, or those claiming under him, ever asserted any claim to the land in controversy, or the Cordreys, or any one for them, ever asserted any claim after its conveyance to Smith.

We do not think these facts authorize the trial court to render judgment for the appellee. The deed from Russell and Call being over 30 years old, and coming from the proper custody, free from suspicion, the power to execute it therein recited will be presumed to have existed. *Watrous' Heirs v. McGrew*, 16 Tex. 518; *Veramendi v. Hutchins*, 48 Tex. 552; *Dalley v. Starr*, 26 Tex. 566; *Garner v. Lasker*, 71 Tex. 434, 9 S. W. 332. This is a presumption of fact, not a conclusion of law, and can be rebutted by proof that such authority did not exist. *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963. Appellee attempted to show by circumstantial evidence that Russell and Call did not have the power to convey the land in controversy for the consideration expressed in the deed, but we do not think the evidence adduced is sufficient to rebut the presumption of the existence of such power which arises from the recitals in the ancient deed. The power of attorney offered in evidence did not authorize the attorneys to convey the land for the consideration expressed in their deed, but there is no evidence to sustain the finding that the deed was executed under this power. Evidence of the existence of a power of attorney from the owners of the land to the person executing the deed, which did not authorize its execution, is not in itself sufficient to sustain a finding that the deed was executed without authority. The deed does not refer to this power of attorney, and there is nothing in the evidence to sustain the conclusion that it was executed thereunder. Under no construction of the language used in the power of attorney would the donees be authorized to convey the land for the consideration expressed in their deed, and we cannot presume, in the absence of any evidence, that they acted under an instrument which did not authorize the conveyance. *Bean v. Bennett*, 80 S. W. 662, 9 Tex. Ct. Rep. 879. If the power to execute the deed did not exist, that fact must be known to W. H. Cordrey, who was shown to be living at the time of the trial, and whose whereabouts were known to appellee. The fact that no effort was made to obtain his testimony, taken in connection

with the facts that he never asserted any claim to the land after its conveyance by Russell and Call, and that his deed to appellee is only a quitclaim, are circumstances tending to sustain the presumption that the execution of deed was authorized. The record is silent as to whether Smith or his successors in title ever exercised acts of ownership over the other land conveyed to him by the deed in question. It is apparent from the record that the facts have not been fully developed, and for that reason we will not render judgment, but will remand the case for another trial. It is accordingly ordered that the judgment of the court below be reversed, and the cause remanded.

Reversed and remanded.

HENRY v. STUART et al.

(Court of Civil Appeals of Texas. June 3, 1905.)

1. NEGLIGENCE—JOINT TORT FEASORS—EVIDENCE—RELEVANCE.

An owner of realty contracted for the construction of a building thereon, arranging with a building and loan association to furnish the money. When the contractor was entitled to pay for the work done he went to the architect, who furnished him an estimate addressed to the owners of the land, and which was taken by the contractor to the building and loan association, which gave its check payable to the owners of the land, who indorsed it to the contractor. In excavating for the building the contractor removed earth supporting the foundation of an adjacent building so that it fell. *Held*, that the building and loan association was not liable.

2. SAME.

Evidence that the building and loan association had before taken liens on homesteads, and that the lien on the building in question was the largest one it had ever taken, had no tendency to show that the building and loan association was in fact the real contractor, and hence was irrelevant.

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action by F. M. Henry against J. W. Stuart and others. From a judgment for plaintiff as against the defendant named, but in favor of the Gate City Building & Loan Association, defendant, plaintiff appeals. *Affirmed*.

S. J. Henry, for appellant. W. H. Arnold and Glass, Estes & King, for appellees.

BOOKHOUT, J. On the 14th day of August, 1902, appellant, F. M. Henry, filed this suit in the district court of Bowie county, Tex., against Blanche D. Stuart, J. W. Stuart, and appellee Gate City Building & Loan Association, to recover damages on account of the collapse and destruction of his said building, situated on said lot numbered 2, and in undertaking to fix liability against appellee Gate City Building & Loan Association alleged that said Stuart entered into an agreement with it to build a brick house on said lot numbered 1, and that in pursuance

of said agreement they began by excavating and removing the dirt from said lot for the purpose of making a basement story to the building to be erected, and that said Stuarts and Gate City Building & Loan Association, acting together in the common design, were guilty of willful and gross negligence and want of skill, care, and proper regard for the vested rights of plaintiff in undertaking to dig out and remove all the dirt and clay constituting the support of said east wall of plaintiff's said brick house for the entire length of said house, and to a depth of from 5 to 7 feet below the footing and foundation of said wall, etc.; that by reason of said willful and gross negligence of said parties, all acting together, said east wall of plaintiff's building, and his entire house, standing on said lot numbered 2, was destroyed, and reduced to a mass of ruin without any value; that the Gate City Building & Loan Association answered by general denial, and by a special denial of any contract with the Stuarts to build their said house, and of any connection with the excavation complained of, and by a supplemental answer denied that Ed Rutter was employed or empowered by it to construct the house for the Stuarts, mentioned in plaintiff's petition, and of any control or right to direct the said Ed Rutter in the building of said house; and it further set up that said Ed Rutter was an independent contractor of the defendants Stuart, and that said Gate City Building & Loan Association had nothing whatever to do with said building or work, or the manner of doing the same, and was in no way liable for the acts of said Rutter, or any other person, in connection therewith. Stuart also filed an answer, and on the 20th day of September, 1904, a trial was had before a jury, and at the conclusion of the testimony and argument of counsel the court instructed the jury to return a verdict for the defendant Gate City Building & Loan Association, but submitted the case as between plaintiff, F. M. Henry, and the Stuarts, to the jury, which resulted in a verdict and judgment in favor of said Henry against the Stuarts for the sum of \$4,500. Appellant, F. M. Henry, has perfected an appeal from the judgment in favor of appellee Gate City Building & Loan Association.

Error is assigned to the action of the court in instructing a verdict in favor of the Gate City Building & Loan Association. It is contended that the Gate City Building & Loan Association is jointly liable with J. W. Stuart and Blanche D. Stuart for the damages sustained by appellant, for the reason that the same were caused by the joint trespass of the said loan association and said Stuarts. If the appellant's building was caused to fall by reason of a joint trespass of the loan association and said Stuarts, then this contention is sound, and should be sustained. The evidence shows that in March, 1902, appellant, F. M. Henry, was the owner of lot numbered

2 in block numbered 26 in the city of Texarkana, Tex., and Mrs. Blanche D. Stuart was the owner of lot numbered 1 in said block, adjoining said lot numbered 2. Lot numbered 1 was vacant, but on lot numbered 2 there was a two-story brick building, owned by appellant. Prior to this ownership by Mrs. Blanche D. Stuart, lot numbered 1 was owned by A. L. Ghio, and when the building was erected on lot numbered 2, by appellant, F. M. Henry, by an agreement made between Ghio and Henry they became joint owners of the wall in said building erected on the line between said lots numbered 1 and numbered 2. Mrs. Blanche D. Stuart, desiring to erect a building on said lot numbered 1, on February 5, 1902, joined by her husband, J. W. Stuart, made a contract with appellee Gate City Building & Loan Association to borrow \$7,500, to be used, with other money, in paying for the erection and completion of said building, and executed their promissory note for said sum, and also a deed of trust on said lot to secure the payment of said note. After the execution of said note and deed of trust, Mrs. Blanche D. Stuart, joined by her husband, J. W. Stuart, made a contract with Ed Rutter, for the erection and completion of said building, said Rutter to furnish all material and labor, and turn the building over to the said Stuarts in a completed condition. That thereafter said Rutter employed laborers, and had them excavating on said lot numbered 1 for a basement and foundation for the building which he had agreed to erect for the Stuarts; and on the 8th day of March, while so excavating, and by reason of such excavation, the wall of the building on said lot numbered 2, which stood on the line of said lot and of said lot numbered 1, gave way, and said building collapsed.

A careful examination of the statement of facts fails to show any joint trespass on the part of the loan association and the Stuarts, or that it had any connection with the excavation that caused appellant's building to fall, other than to loan the Stuarts the money to carry on the improvement. It is insisted that the loan association furnished material and labor to the amount of \$7,500 in the erection of the house for the Stuarts; that payments were made by said association on the estimates of the architect from time to time to the contractor for labor and material. It was shown that when the contractor was entitled to pay for work done he went to the architect, who furnished him an estimate for the work performed and material furnished, less 30 per cent. thereof, which the contract stipulated the owner should reserve. This estimate was addressed to Mrs. Blanche D. Stuart, and was taken by the contractor to the loan association and said association gave its check on its treasurer for the amount, payable to Blanche D. Stuart or order. This check the contractor delivered to Mrs. Stuart who indorsed it to the contractor, who pre-

sented it to said treasurer, and procured it to be cashed. It was for convenience the contractor presented the estimate to the loan association and got its check, instead of taking the estimate to Mrs. Stuart for her to procure the check. The act of the loan association in so issuing its check and thereafter, upon Mrs. Stuart indorsing it, paying the same, did not constitute a furnishing of labor and material; nor is there any evidence in the record to justify the inference that said association did in fact furnish labor and material to construct a house for the Stuarts. It seems to be contended that because the evidence discloses that the Stuarts could not have made the improvement unless the association furnished the money, that by making the loan and furnishing the money it participated in the trespass, and thus became liable for the same. We are of the opinion that making the loan of money to the Stuarts to construct a house was not such a participation in a trespass committed in excavating for the foundation of such house as made the association liable therefor. As we view the evidence, it does not show that the loan association participated in the trespass which caused appellant's house to fall. The evidence does not disclose that the Gate City Building & Loan Association had any right of control as to the manner in which the work was to be done, or of the means by which it was to be done, or of the persons engaged in the work. In our opinion, there was no evidence requiring the case to be submitted to the jury as between the Gate City Building & Loan Association and the plaintiff. *Wallace v. Southern Cotton Oil Co.*, 91 Tex. 18, 40 S. W. 399.

There was no error in sustaining appellee's exception to the testimony of the witness J. W. Stuart "that the officers of the loan association knew, when they advanced the money, it was for the purpose of improving the homestead of the Stuarts, to be occupied by them as a homestead." This evidence was irrelevant and immaterial, and the trial court did not err in so holding.

Error is assigned to the action of the court in sustaining appellee's exception and excluding the testimony of the witness F. W. Offenhauser, secretary and treasurer of the loan association, to the effect that "said association had heretofore taken a great many liens on homesteads in Texas; that in every instance the association contracted with the builder and paid for the material and labor in making improvements on homesteads in Texas; that this was the largest lien ever taken by it on a homestead in Texas." The trial court excluded this testimony as being irrelevant and immaterial. It was shown that the Gate City Building & Loan Association loaned the Stuarts \$7,500 to improve a lot, taking their note for the same and a deed of trust on the property to be improved to secure the payment of the note, with the understanding that the money should be ad-

vanced as the building progressed. The money was advanced to the Stuarts as the building progressed, and it was so advanced after the collapse of the plaintiff's building. Evidence as to what had been the course of business between the appellee Gate City Building & Loan Association and other persons was immaterial. This testimony was evidently offered to prove that the true contract between the loan association and the Stuarts was not a loan of money, but a contract whereby the loan company agreed to construct a house for the Stuarts, and that said association was the real contractor, and that the giving of the note and deed of trust was but a scheme and device to conceal the real contract between the parties. If it be conceded that the pleadings are sufficient to raise this issue, the evidence contained in the record fails to prove it. The evidence is all one way to the effect that the Stuarts contracted with Ed Rutter to erect the building, and that Ed Rutter had no contract with the loan association, and that the association had no control over the work. The evidence does not show that the contract between the Stuarts and the loan association is other than a loan of money as evidenced by the note and deed of trust. The evidence excluded did not show otherwise, and its exclusion could not have prejudiced the appellant.

Finding no error in the record, the judgment is affirmed.

MEDLIN v. SEIDEMAN.*

(Court of Civil Appeals of Texas. May 24, 1905.)

1. SHERIFFS AND CONSTABLES—POWERS OF CONSTABLE—CIVIL PROCESS.

Under the express provisions of *Sayles' Ann. Civ. St.* 1897, arts. 1214, 1447, 2338, 3147, 3152, 4706, the several kinds of writs, processes, and notices in civil actions are to be directed to the "sheriff or any constable" of the county where the same are to be executed.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 23.]

2. SAME—EXECUTION—DELIVERY TO CONSTABLE.

Sayles' Ann. Civ. St. 1897, art. 4901, provides that it shall be the duty of the sheriff to "execute all process and precepts directed to him by legal authority," and article 4915 requires the constable to execute and return according to law all processes, warrants, and precepts to him directed and delivered "by any lawful officer." *Held*, that where the clerk of the county or district court issues process and delivers it to the party who has obtained it or to his attorney, and it is then delivered to a constable for execution, such delivery constitutes a delivery by the clerk to the constable, in full compliance with article 4915, which does not require that the process should be delivered directly by some officer to the constable in order to authorize him to execute it.

3. SAME—AUTHORITY OF CONSTABLE.

The power of a constable is coextensive with the limits of the county to which his precinct belongs, and within such limits he has the

*Rehearing denied June 21, 1905.

same duties and powers, in connection with the execution and return of civil process, as the sheriff.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, §§ 100, 101.]

Appeal from District Court, Guadalupe County; M. Kennon, Judge.

Suit by Adam Seideman against P. P. Medlin. From a decree in favor of plaintiff, defendant appeals. Reversed.

See 79 S. W. 590.

Dibrell & Mosheim, for appellant. W. R. Neal and Adolph Seideman, for appellee.

FLY, J. This is a suit instituted by appellee, the sheriff of Guadalupe county, to obtain an injunction restraining appellant, the constable of Precinct No. 1, Guadalupe county, from executing and returning process in civil actions issued from the district and county courts of Guadalupe county, unless such process be directed and delivered to him by some lawful officer, and to recover of appellant fees collected by him. A temporary writ of injunction was granted, and on the final hearing the injunction was perpetuated, and judgment was rendered against appellant for \$262.20 for fees collected by him on process issued out of the county and district courts of Guadalupe county. It was proved that appellee was the duly elected and qualified sheriff of Guadalupe county, and that appellant was the duly elected and qualified constable of Precinct No. 1 of the same county. Process in civil cases, issued by the proper officers out of the county and district courts of Guadalupe county, was placed in the hands of the constable, for execution, by the attorneys of the respective parties in such suits, and he properly executed and returned the same and collected the fees due therefor. The sheriff was in no manner disqualified from executing the process executed by the constable. Under the terms of the different statutes of Texas on the subject, the several kinds of process, writs, and notices in civil actions are to be directed to the "sheriff or any constable" of the county where the process is to be executed. *Sayles' Ann. Civ. St. 1897*, arts. 1214, 1447, 2338, 3147, 3152, 4706. In article 4901, *Sayles' Ann. Civ. St. 1897*, it is provided that it shall be the duty of the sheriff to "execute all process and precepts directed to him by legal authority," and in article 4915 the constable is required to "execute and return according to law all process, warrants and precepts to him directed and delivered by any lawful officer"; and the district court must have arrived at its conclusion in regard to the case by construing the latter statute to mean that the clerk must direct the process to the sheriff or constable, and then that it must be delivered to the latter by the clerk or by some other lawful officer, in person, in order to empower him to execute it, or create a duty in connection therewith. That, possibly, is

what a literal construction of the statute would lead to, and it would be necessary to hold that a writ or other process placed in the hands of the constable, to whom it is directed, by the attorneys of the party at whose instance it was issued, could not be legally executed; but if the same process be delivered to the constable by a county commissioner, a notary public, a justice of the peace, a policeman, or an alderman, then he would be empowered to execute and return it. The very statement of the effect of a literal construction of the statutes shows to what absurdities it would lead, and we think that a broader and more liberal construction is demanded. Considerations of what is reasonable always has a potent influence in the construction of statutes, and they will be construed in such a manner as to prevent absurdity, hardship, or injustice and to favor public convenience. *Sutherland, Stat. Con. §§ 322, 323.*

Courts are not authorized to legislate or read into statutes constructions that will do violence to the language thereof, but in all cases where a reasonable construction can be placed upon a statute when a literal construction would lead to absurd and unreasonable results, that construction should be favored. In the case of *Russell v. Farquhar*, 55 Tex. 355, the court said: "If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted that appellants' objection to the evidence was well taken. But such is not the case. To be thus controlled, as has often been held, would be for the courts in a blind effort to refrain from an interference with legislative authority by their failure to apply well-established rules of construction, to in fact abrogate their own power and usurp that of the Legislature, and cause the law to be held directly the contrary of that which the Legislature had in fact intended to enact. While it is for the Legislature to make the law, it is the duty of the courts to 'try out the right intendment' of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent. For it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertence by the Legislature to express its intent, and to follow which would pervert the intent." Applying that method of construction to the language of article 4915, and would it not be inconsistent to hold that the Legislature intended to provide that a constable should have the authority to execute any legal process handed to him in person by a notary public, hide inspector, or public weigher, but could not execute the same process if handed to him by the attorney who procured its issuance? It does no violence to the law, but gives it a reasonable construction, to hold that when a clerk

of the county or district court issues process, and delivers it to the party who has obtained it, or his attorney, and it is delivered by him to a constable, it is in the eyes of law, reason, and common sense a delivery by the clerk to the constable, and a full compliance with the provisions of article 4915, Sayles' Ann. Civ. St. 1897. To hold otherwise is to place the absolute power in the hands of the clerk of a court to determine what officer shall execute process and enable him to deprive a sheriff of his county of the fees arising from the execution of all process issuing from his court, which would be much more disastrous to him financially than would the selection of a constable by a single attorney to execute the process issued in his cases. We cannot conceive that the Legislature intended to place any such power in the hands of the clerk, but rather that it intended to permit the attorneys of a litigant to obtain any process desired, and to place the same in the hands of the sheriff or constable, as he may desire, or retain it, and not have it executed at all.

The power and authority of the constable is coextensive with the limits of the county to which his precinct belongs, and within those limits he has the same duties and powers in connection with the execution and return of civil process as the sheriff has. *Cundiff v. Teague*, 46 Tex. 475; *Land Co. v. Masterson* (Tex. Civ. App.) 33 S. W. 376. After citing the statutes applying to the issuance and service of process, the Court of Civil Appeals of the First District in the *Masterson* Case said: "These are some of the provisions prescribing various duties of sheriffs and constables, and from them it appears that process from all the courts is addressed to both constable and sheriff, and that when one is required to execute process the same power is given to, and duly imposed upon, the other." This quotation no doubt expresses the legislative intent in the enactment of article 4915. In order to show to what inconsistencies a literal construction of statutes might lead, it is only necessary to refer to article 4901, where the sheriff is required to execute all process and precepts directed to him by legal authority. Literally construed, his duty to execute such process would arise whether it was delivered to him or not, because delivery to him is not mentioned in that article. Such a construction would be so absurd and unreasonable that it could not be entertained for a moment. Instances could be multiplied of the absurd results that would arise from a literal interpretation of statutes. A construction of a statute in accordance with its reason and spirit will be preferred to one based on its strict letter, if not altogether inconsistent with its terms.

If the judgment in this case were held to be in accord with the spirit of the law, it would have the effect of opening to attack every writ executed and returned by con-

stable, on the ground that process issued in strict compliance with law had not been handed to him directly by another officer, although he may have received it from the hands of the person as much or more interested in it than any one else. Such a rule would disturb titles, and produce confusion and uncertainty. In the return of a constable on a citation, for instance, it is not required by law that it shall state by whom it was delivered to him, but merely that it was served, and the manner of service, and be signed by the officer. If it be essential to the validity of the service that it should be delivered to the constable by a lawful officer, a return failing to show that fact would be illegal, and import no verity to the act. The Legislature did not deem it of sufficient importance, however, to require it to be embodied in the return. Article 1225, Sayles' Ann. Civ. St. 1897.

The evidence appearing in the statement of facts does not establish the amount of damages that may have accrued to appellant by reason of the issuance of the writ of injunction, and this court is therefore unable to pass upon the question of damages that might have arisen in the case.

The judgment of the district court is reversed, and judgment here rendered dissolving the injunction, and in favor of appellant for all costs in this behalf expended in this court as well as in the trial court; the rendition of this judgment being without prejudice to any action that might be instituted for damages by appellant against appellee and the sureties on his injunction bond.

PLOWMAN v. DALLAS COUNTY et al.*
(Court of Civil Appeals of Texas. May 27, 1905.)

1. HIGHWAYS—CONDEMNATION OF LAND.

The provision of Acts 24th Leg. Sess. Laws 1895, p. 213, c. 132, constituting a special road law for certain counties, that the commissioners' court may condemn land in the same manner that a railroad company can condemn land for a right of way, is mandatory, and does not merely confer on the commissioners' court a discretionary power to proceed under the railroad law.

2. SAME—PROCEDURE.

Acts 24th Leg. Sess. Laws 1895, p. 213, c. 132, constituting a special road law for certain counties, providing that in case of conflict it shall control the general law as to the counties specified, and authorizing the condemnation of land under the railroad law, which, as amended by Acts 26th Leg. Gen. Laws 1890, p. 105, c. 70, authorizes a railroad to take possession of property sought to be condemned pending litigation by depositing a sufficient sum of money to secure all damages which may be awarded against it, is so far inconsistent with and so far repeals the general road law which authorizes the county to enter on and appropriate land condemned by merely depositing the damages allowed by the commissioners' court, without giving any security for the amount of damages which may ultimately be recovered.

*Rehearing denied June 17, 1905, and writ of error pending in Supreme Court.

3. SAME—INJUNCTION.

A property owner is entitled to an injunction to restrain the opening of a contemplated road over his land where there has been no valid condemnation of such land for the road.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 29; vol. 27, Cent. Dig. Injunction, § 102.]

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Action by George H. Plowman against Dallas county and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Geo. H. Plowman, for appellant. S. J. Hogsett and Cockrell & Gray, for appellees.

TALBOT, J. Appellant instituted this suit on the 4th day of July, 1903, to restrain appellees from opening up a public road over the tract of land described in his petition, and for damages, actual and exemplary, alleged to have been sustained by him on account of trespasses already committed on said land and for the recovery of said land. The writ of injunction as prayed for was granted, bond made, and the writ issued in accordance with law and the fiat of the judge granting the same. Defendants pleaded to the jurisdiction of the court, general and special exceptions, and specially by way of cross-action and for affirmative relief, in substance, among other things, that certain citizens residing in Dallas county, Tex., being desirous of opening up and constructing the road in question, filed with the commissioners' court of said county, on May 14, 1902, a petition requesting said court to open up said road as described to be of the first class; that appellant, George H. Plowman, and his children, Marcus Plowman, Daisy Plowman, and Hardin Plowman, refused to permit the opening up of said roadway across the property belonging to them, which was situated partly within the corporate limits of the city of Oak Cliff; that thereafter, and again on August 11, 1902, certain citizens residing in the vicinity through which said roadway was desired to be opened and constructed, being about 50 in number, petitioned the commissioners' court of Dallas county to open up said roadway across the said property of appellant and his said children; that in pursuance of said petition and of the laws of the state of Texas as set forth in the Revised Statutes of 1895, D. A. Eldridge, special county judge, granted the petition and the prayer therein, and appointed a jury of view of freeholders residing in Dallas county, Tex., who were sworn as prescribed by law to proceed to lay out and mark said road to the greatest advantage to the public and as little prejudice to inclosures, and report their proceedings in writing to the next regular term of the commissioners' court of Dallas county, Tex.; that thereafter, to wit, on October 12, 1902, George H. Plowman, appellant, and

his said children, were duly notified according to the laws of this state that the jury of view appointed would, on the 14th day of November, 1902, at 9 o'clock a. m., proceed upon the ground over which the road was desired to run to lay out and mark said roadway and assess the damage incidental thereto; that said jury of view, in accordance with said notice, did on the 14th day of November, 1902, proceed under the commission and direction of the court and under their oaths to lay out and mark said roadway and assess the damage incident to the opening of the same according to the orders as directed to them and the oath administered, to the best of their skill and knowledge; that said jury of view further reported that they did lay out said roadway of the first class to be 60 feet wide, and to be known as "Zang Boulevard"; that said jury of view did also on the 14th day of November, 1902, assess the damages incidental to the opening of said roadway in favor of George H. Plowman, appellant, and Marcus Plowman, Daisy Plowman, and Hardin Plowman, in the sum of \$225 for land actually taken for the road and in the sum of \$150 for damages to adjoining land, making the sum total \$375. It was further alleged that said report was on the 15th day of November, 1902, adopted by the commissioners' court, and said road ordered opened by said court; that the report of said jury of view assessing the damages in favor of said parties at \$225 for land actually taken for the road and \$150 for damages to adjoining land was on the 15th day of November, 1902, adopted and allowed by the commissioners' court; that on said last above named date the commissioners' court of Dallas county, Tex., entered its order adopting all reports made by the said jury of view, and ordered the county treasurer of said county to set aside the sum of \$375, the same to be subject to the order of said appellant and his said children, and that immediately thereafter said treasurer did set aside said sum, and deposited the same especially to the benefit of said parties; that the said George H. Plowman did, after the adoption of the report and assessment of damages made by the jury of view, except to the action of the commissioners' court, and give notice of appeal to the county court of Dallas county, Tex.; and did on the 22d day of November, 1902, make up or have made up a transcript of the proceedings had before the commissioners' court, and said jury of view, and filed the same with the clerk of said county court, and caused the same to be docketed on the civil dockets of said county court as cause No. 12,432, styled "Dallas County v. Geo. H. Plowman et al"; that said suit is still pending upon the docket of said court, undisposed of. It was further alleged that after the road was established and the writ of injunction mentioned had been issued appellant unlawfully obstructed

said roadway by placing across the same a three barb-wire fence, and stationed a man there to watch and prevent travel over the same. Appellees prayed that the writ of injunction be dissolved, that a mandatory writ of injunction be granted commanding the appellant to remove said wire fence and other obstructions placed by him in said roadway, and that appellant be enjoined from obstructing or interfering with the grading and macadamizing of said road. To the answer and cross-bill of appellees, appellant by second supplemental petition interposed general and special exceptions, all of which were overruled except special exceptions Nos. 2, 8, and 9. The case was tried before a jury, and resulted in a verdict for appellees on the issues submitted, and a judgment against appellant that the injunction theretofore issued should be dissolved, and for costs of suit; that Dallas county have and recover of appellant the strip of land in controversy for roadway; and that a mandatory injunction issue commanding appellant to forthwith remove from said land all fences, obstructions, etc. From this judgment appellant, George H. Plowman, has appealed to this court. The evidence shows that the condemnation proceedings under the general road law, as pursued by the commissioners' court, were substantially as stated in appellees' pleadings; and that appellant had perfected his appeal to the county court, as alleged.

Appellant's first, third, fourth, and thirty-fourth assignments of error complain of the action of the court in overruling his general demurrer, special exceptions numbered 11 and 12, and in overruling his motion for a new trial. The contention under these assignments is that the condemnation proceedings set up in appellees' answer, and as shown by the proof, and upon which appellees relied in this suit to secure a dissolution of the injunction issued restraining them from entering upon appellant's land and opening up the road in question, were illegal and void, for that, as shown by the averments of appellees' answer, such proceedings were had under the general road law as adopted by the Legislature and found in the Revised Statutes of 1895; that this general road law was not in force in Dallas county, Tex., when the condemnation proceedings relied on were begun and prosecuted, but that the special road law applicable to Dallas, Lamar, and Medina counties passed by the Twenty-Fourth Legislature (Sess. Acts 1895, p. 213, c. 132) was in force at that time; that a strict compliance with the provisions of said special road law was essential to a legal condemnation and appropriation of appellant's land for road purposes; and, not having complied with such law, judgment should have been entered for appellant perpetuating the injunction, removing cloud from his title and for possession.

The question arises, was the general road law, in so far as Dallas county is concerned, repealed by the special road law referred to, or is the latter merely cumulative of the former? The decision of the question involves an examination and comparison of the several provisions of the different acts and the law governing the mode of procedure thereunder for the condemnation of land for road purposes, with a view of ascertaining and determining whether or not there is such a conflict or repugnance between them as would prevent the application of the general rule that in such cases both acts should be upheld and enforced. Looking to the provision of the general road law pertinent to the question, we find that the commissioners' court is authorized, upon the application of a certain number of freeholders of the county and 20 days' notice thereof, to direct the laying out and establishment of a new road. If the application is granted, a jury of view consisting of five freeholders is appointed by the commissioners' court, and after taking the required oath a majority of them may lay out the road. The oath prescribed and required to be taken before proceeding to act is: "I ——— do solemnly swear that I will lay out the road now directed to be laid out by the order to us directed from the commissioners' court according to law, without favor or affection, malice or hatred to the best of my skill and knowledge, so help me God." After having thus qualified, it is the duty of such jurors to lay out and mark the road, and report their proceedings in writing to the next regular term of the commissioners' court. The jury of view is required to issue and cause to be served upon the landowner through whose land the proposed road may run, his agent or attorney, at least five days' notice of the time when they will proceed to lay out such road, or when they will assess the damages incidental to the opening of the same. The owner may, at the time stated, present to the jury a statement in writing of the damages claimed by him incidental to the opening of the road, and the jury thereupon proceeds to assess the damages, returning their assessment and the claimant's statement with their report to the commissioners' court. If the commissioners' court approves the report, and orders such road to be opened, they shall consider the assessment and damages by the jury and the claimant's statement thereof, and allow to such owner just damages and adequate compensation for the land taken; and when paid or secured by deposit with county treasurer to the credit of such owner they may proceed to have such road opened. If the owner of the land is not satisfied with the assessment by the commissioners' court, he may appeal therefrom as in cases of appeal from judgments of justices' courts, but such appeal does not prevent the county from entering upon and appropriating the land to road purposes. The only matter that

can be considered on such an appeal is the amount of the property owner's damages. It seems manifest from the provisions of this law that the assessment of the damages sustained by the property owner on account of the appropriation of his land for a public road is an entirely secondary consideration, and that the oath required of the commissioners relates primarily, if not exclusively, to the motives which shall actuate them in the performance of their duty in laying out such road, and not to the assessment of such damages. Besides, the property owner has no voice in the selection of these commissioners, and is required to take the initiatory steps after notice of the county's intention, to secure any damages at all. Turning to the special road law passed by the Twenty-Fourth Legislature (page 213, c. 132), we find that it is entitled "An act to create a more efficient road system for Dallas, Lamar and Medina counties," etc. It provides in section 1 "that each member of the commissioners' courts of Dallas * * * county shall be ex officio road commissioners of his respective district, * * * and it shall be his duty under such rules and regulations as the commissioners' court may prescribe, to superintend the laying out of new roads, the making or changing of roads, and the building of bridges." To the care and custody of these commissioners are committed all the teams, tools, and implements belonging to the county, and they are required to enter into bond conditioned that they will perform the duties required of them, and, acting as the commissioners' court of the county, have full power and it is made their duty to "adopt such system for working, laying out * * * and repairing the public roads as they may deem best," and "shall direct the manner of grading * * * same, which directions shall be observed and obeyed by all overseers of their districts." Section 11, p. 215, of this act, provides: "Whenever it shall be necessary to occupy any land for the opening, widening, straightening, or draining any road or part thereof, if the owner of said land cannot agree with court as to damages to be paid, the court may proceed to condemn the same in the same manner that a railroad company can condemn land for right of way, and the same proceedings may be had, and the same rights shall exist to each party that would exist if the proceedings were by a railroad company, except that the county shall in no case be required to give bond." And by section 15 it is provided: "This act shall be taken notice of by all courts in the same manner as the general laws of the state on the subject of roads and bridges when not in conflict therewith; but in case of conflict this act shall control as to Dallas, Lamar and Medina counties." It will be observed that section 11 of the act, quoted above, provides that the commissioners' court may, when necessary to occupy any land for public road purposes, proceed to condemn the same in the

same manner that a railroad company can condemn land for its right of way, and that the same proceedings may be had and the same rights shall exist to each party that would exist if the proceedings were by a railroad company, except that the county shall in no case be required to give bond. The provisions of the law applicable to condemnation proceedings by a railroad company which are made a part of the special road law under consideration provide that, in the event the company and the owner of the land cannot agree upon the damages, it devolves upon the company to state in writing the real estate sought to be condemned, the name of the owner thereof, and his residence, if known, and file the same with the county judge of the county in which such property or a part thereof is situated. Upon the filing of such statement the county judge shall forthwith appoint three disinterested freeholders of the county as special commissioners to assess said damages, and he is required to give preference to those that may be agreed on between the railway company and the owner. These commissioners, unlike the jury of view appointed under the general road law, must be sworn to "assess said damages fairly and impartially and in accordance with law." They are required to appoint, without delay, a day and place for hearing the parties, and the place selected for such hearing shall be as near as practicable to the property sought to be condemned, or at the county seat, and notice shall be issued in writing, notifying the parties of the time and place selected for the hearing, and such notice shall be served upon the parties at least five days before the day of hearing. The power under this special law, unlike the general law, is conferred upon the commissioners to compel the attendance of witnesses and the production of testimony and to administer oaths and punish for contempt as fully as is provided by law for the district and county courts. They shall hear evidence as to the value of the property sought to be condemned, as to the damages which will be sustained by the owner thereof by reason of such condemnation, etc. They become a special tribunal, invested with like powers conferred upon the courts of this state, to administer fair and equal justice between the landowner and the county in the condemnation of such owner's property to public use. "When they shall have assessed the damages, they are required to reduce their decision to writing, * * * and shall file their assessment, together with all other papers connected with the case, with the county judge. If either party be dissatisfied with the decision of such commissioners he may within ten days after the same has been filed with the county judge file his opposition thereto in writing, setting forth the particular cause or causes of his objection and thereupon the adverse party shall be cited and said cause shall be tried and de-

terminated as in other civil causes in said court."

At the time the special road law under consideration was passed it was provided that in no case should the railroad company be entitled to enter upon and take the property condemned without having paid whatever amount of damages and costs may have been awarded or adjudged against it. And, while this provision of the law was amended by an act of the Twenty-Sixth Legislature (Gen. Laws 1899, p. 105, c. 70), for the purpose, as stated in its caption, "to permit railroad and other corporations having the right of eminent domain to enter upon and take possession of the property sought to be condemned pending litigation," still this right is made to depend (1) upon the payment by such corporation, as a condition precedent, of whatever amount of damages which had been adjudged against it by the commissioners, or a deposit of the same in money in court, subject to the order of the defendant, and also the payment of the costs awarded against it; (2) a deposit in said court, in addition to the above, of a further sum of money equal to the amount of damages awarded by the commissioners to be held, together with the award itself, to secure all damages which may be awarded against the plaintiff; and the giving of a bond, with two or more solvent sureties, conditioned for the payment of costs either in the court below or upon appeal. By the special road law passed for Dallas county these statutes are made applicable to proceedings for the condemnation of land by that county for road purposes. No such provision to secure the payment of the damages sustained by the property owner can be found in the law governing the proceedings to condemn property for that purpose under the general road law. As has been seen, however inadequate the compensation assessed by the commissioners' court under the general road law may be, and although an appeal is taken to the county court, where a judgment may be rendered for an amount largely in excess of that allowed by the commissioners' court, yet the county may enter upon, injure, and appropriate the land of its citizen without being required to give any security for the amount of damages which he may ultimately recover, except to make a deposit of the original amount awarded with the county treasurer. Especially do we regard the respective provisions of the two statutes here referred to as being essentially different and in conflict. The amount of compensation for the property taken and for all damages incident to its taking, as well as the security for the payment thereof, is a matter of vital interest to the owner of the land sought to be condemned. Clearly, this interest is best protected and safeguarded by the provisions of the special road law. Such law imposes no unjust burden upon the county, nor does it allow any interference with a proper exercise of its right of eminent

domain, and differs so materially from the general road law, and furnishes such a complete and independent method of opening and working public roads and mode of procedure by which property may be condemned to a public use, that we think it must be held to be a substitute for the general road law, and not merely cumulative of the remedy provided therein. In the case of *The State v. I. & G. N. Ry. Co.*, 57 Tex. 534, it is held, in effect, that "a statute, which, as to a certain subject-matter of a previous statute, creates a new, entire, and independent system respecting that subject-matter, will be held to repeal, without express words to that effect, so much of the prior statute as is inconsistent therewith. When express words of repeal, so far as two statutes are inconsistent, are contained in the subsequent statute, there is no room for construction, save as to the question of conflict, and in so far as they so conflict the latter must prevail." We think the special road law for Dallas county should be taken as the latest expression of the legislative will upon the subject relative to Dallas county, and therefore the rule announced in the case cited is applicable. We are also of the opinion that the use of the language in the special road law, "and the same proceedings may be had, and the same rights shall exist to each party that would exist if the [condemnation] proceedings were by a railroad, "should not be construed as indicating that the purpose of the Legislature was to confer upon the commissioners' court only discretionary power to proceed under the railroad right of way statute in the condemnation of land for road purposes in Dallas county. In the case of *Rains v. Herring*, 68 Tex. 468, the court says: "Whether the word 'may' in a statute is permissive or obligatory depends in a great measure upon the true intent and object of the Legislature in making the enactment. It means 'must' whenever third persons or the public have an interest in having the act done, or have a claim de jure that the power shall be exercised." And, as there said, we think the present case is an instance of that character. The object of the special road law, as stated in the caption, was to create a more efficient road system for Dallas county, and the mode of procedure for the condemnation of land as therein provided marks one of the most important features of the system adopted. If the enforcement of this provision and feature of the law is to be left to the will or caprice of the commissioners' court of the county, then to that extent, in our opinion, will the intention of the Legislature in the passage of the act be thwarted. A construction leading to such a result should not be adopted by the courts. Our conclusion is that the several provisions of the special road law in question, taken in connection with the articles of our statute prescribing the mode of procedure for the condemnation of land by a railway company, presents a

full and efficient system for the laying out, working, and draining public roads in Dallas county, and for the condemnation of land for that purpose, separate and distinct from our general road law; that the provisions of the special road law for Dallas county are so dissimilar, and in such conflict with the general road law, that at least the provisions of the latter law relating to the condemnation of land for road purposes are repealed by the former law in so far as Dallas county is concerned. This conclusion renders unnecessary the discussion of any other question presented. A compliance with the special road law for Dallas county was necessary to effectuate a valid condemnation of appellant's land for road purposes. There is no pretense that this was done, and it follows that there was no legal condemnation of it. This being true, appellant's remedy by injunction to restrain the opening of the contemplated road over his land cannot be questioned, and under the pleadings and proof judgment should have been entered in his favor. We think appellant was entitled, perhaps, to nominal damages for the trespass upon his land, which would have entitled him to a recovery of costs; but this result is accomplished by the disposition made of the case on this appeal, and further action upon that branch of the case becomes unimportant.

The judgment of the court below is therefore reversed, and judgment is here rendered perpetuating the injunction issued in this cause, and that appellant recover possession of the land described in his petition.

INTERNATIONAL & G. N. R. CO. v. STILL.

(Court of Civil Appeals of Texas. June 7, 1905.)

1. SERVANT'S INJURIES—NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company for injuries to a servant, owing to other servants having rolled a bale of cotton on plaintiff, *held*, that the question of their negligence was for the jury.

2. SAME—FELLOW SERVANTS.

Laws 1891, p. 25, c. 24, and Act June 18, 1897 (Laws 1897, p. 14, c. 6), provides that, in order to make the servants of railroad companies fellow servants they must be engaged in the common service of the master in the same grade and department of the service for a common purpose, and working together at the same time and place, in the same character of work, and at the same piece of work. *Held*, where several servants, constituting a "bridge gang," under the direction of one foreman, were divided into two squads, and ordered to move bales of cotton from one side of a platform, which was being repaired by the gang, to another, and one of them was injured by the servants in the other squad rolling a bale of cotton over on him, the injured servant and the others were not fellow servants.

3. SAME—CONSTITUTIONAL LAW.

Laws 1891, p. 25, c. 24, and Act June 18, 1897 (Laws 1897, p. 14, c. 6), determining who

shall be fellow servants in the employ of a railroad company, is constitutional.

4. INJURIES TO SERVANT—EVIDENCE.

In an action against a railroad company for injuries to a servant, evidence *held* not to show any negligence on the part of plaintiff's foreman.

Appeal from District Court, Rusk County; Richd. B. Levy, Judge.

Action by Joe Still against the International & Great Northern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

N. A. Stedman and Gould & Morris, for appellant. Johnson & Edwards, for appellee.

GILL, J. The appellee sued the appellant railway company for damages for personal injuries sustained by him, and in a jury trial procured a verdict and judgment, from which the defendant company has appealed.

Plaintiff's action was based on the alleged negligence of the defendant's servants in rolling a bale of cotton on his foot while he, in the service of the company, was engaged in rolling a different bale; and also on the alleged negligence of the foreman in superintendence of the work in failing to exercise care to avert the injury. The defendant answered by general denial, a plea of contributory negligence, and that the accident was due to the negligence of those who were fellow servants of plaintiff. Appellee was a member of a "bridge gang" in the service of appellant and in March, 1903, was injured under the following circumstances: The bridge gang, under the direction of its foreman, were engaged in repairing appellant's cotton platform at the town of Kilgore. There were about 25 bales of cotton on the north portion of the old platform. The workmen first reconstructed and repaired the south half or portion of the platform, leaving an open space about six feet wide between the new and the old portions. They bridged this space with planks, and undertook with their hands to roll the bales of cotton onto the new portion of the platform in order to reconstruct and repair the other portion. The men were not supplied with cotton hooks or other implements with which to handle the cotton. The foreman directed five members of his crew to move the cotton, and he divided these into two separate squads by directing appellee and one Gus Little to act together and roll the same bale, and the other three men to act together and roll a separate bale. Appellee and Gus Little, working together and rolling one bale at a time, had rolled about five bales onto the completed part of the platform; and the other three men, working together and rolling one bale at a time, had rolled about five bales onto the completed part of the platform, when appellee was injured. Appellee and Gus Little always rolled the same bale together, no other person aiding them;

and the other three men always rolled the same bale together, neither appellee nor Little aiding them. Appellee and Little were always in front with their bales, the other three men rolling their bales along behind them. On the unrepai red portion of the platform was a post supporting the corner of a small shed, and the men in rolling the cotton had to stop at or near this post each time and turn the bales by lifting or sliding the end around, so as to get them in position to be rolled directly across the planks; and this had been done by appellee and Little and by the other three men with each respective bale. After each squad had rolled about five bales of the cotton onto the new portion of the platform, appellee and Little were rolling another bale, and, reaching this post, halted an instant to turn the bale by sliding its end. Appellee was stooping to take hold of the bale again, with one foot behind the other and resting on the toe, when the other three men, rolling a separate bale, rolled the same up behind appellee, and rolled it against him, and it fell upon his leg and foot, seriously injuring him. The foreman was not immediately present at the time of the accident, but had started or gone to the business portion of the little town where the accident occurred. It is apparent from the facts stated that the negligence of those who rolled the bale on plaintiff's foot was an issue for the jury. Whether they were fellow servants of plaintiff is a question of law, the facts as to their relation to him being undisputed. The appellant assails the judgment upon four distinct grounds: First. That there was no evidence of negligence on the part of defendant's servants in rolling the bale of cotton against plaintiff's foot. Second. The employes rolling the bale which caused the accident were fellow servants of plaintiff, and this notwithstanding the fellow servants law, as amended by the act of 1897. Third. That, if the act in question be construed to apply to work of the character of that in which plaintiff was engaged at the time of the accident, the act is obnoxious to the federal Constitution. Fourth. The court erred in submitting to the jury the issue of the foreman's negligence, because there was no evidence to authorize its submission.

We have already disposed of the first objection in stating that the issue was presented by the evidence.

The second objection presents a question of greater difficulty. By the common law, as construed by our Supreme Court, all persons engaged in the service of the same master and working to a common purpose, whether or not they were in the same grade of service or in the same department, and however widely their service might be separated, were fellow servants within the rule which exempted the master from liability to one for the negligence of another. *Railway Company v. Welch*, 72 Tex. 298, 10 S.

W. 529, 2 L. R. A. 839. Against the rule thus broadly stated and as broadly applied, our Supreme Court had begun to protest, it being manifest that in many cases, under conditions now existing in many departments of business and commerce, such reasons as might justify the doctrine generally had ceased to exist. The rule, however, was too well defined and too firmly established to be set aside by the courts. *Welch's Case*, *supra*. By the act of March 10, 1891 (Laws 1891, p. 25, c. 24), the rule as applied to railway companies was modified so that, in order to make their employes fellow servants, they must be engaged in the common service of the master; in the same grade of the service, neither being in superintendence over the other; engaged in the same department of service, working to a common purpose, and working together at the same time and place. A further change was made by the act of June 18, 1897 (Laws 1897, p. 14, c. 6), which, in effect, added two other elements to the provisions of the act of 1891, so that in addition to the requirements of that act, employes of railway companies, in order to come within the fellow servant rule, must be engaged in the same character of work, and must be working together at the same piece of work. It is thus apparent that for reasons which the Legislature regarded as sufficient the fellow-servant doctrine as defined by our courts was restricted within a very narrow compass when applied to the employes of railway companies. The amendment must be held to have added some practical provision to the law then in force, or its passage would have been meaningless. Under the act of 1891 the plaintiff in this case would have clearly come within its provisions, for he and those who rolled the cotton on his foot were in the common service of the master. They were in the same grade of service. They were engaged in the same department of service. They were working for a common purpose, and working together at the same time and place. The plaintiff's case contains at least one of the additional elements of the law of 1897. He and those who injured him were engaged in the same character of work. But they were not working together at the same piece of work. The foreman had directed plaintiff and another to aid each other in moving each bale of cotton which fell to their lot to handle on the occasion in question. The foreman had directed three of his companions to aid each other in the handling of each bale which fell to their lot to move. In this sense the moving of each separate bale was a separate task, and it was not contemplated either that the three should aid the two or the two the three. The work was separable into pieces, and seems to fall within the purpose of the law. We fully realize that in applying the language of the act to the infinite variety of situations which may arise many

difficulties will be presented, but, if we are right in our conclusion that the Legislature had in mind not only a piece of work in the general sense of the phrase when applied to a whole which might consist of many parts, but also any one of those separable parts when being separately handled or treated, then it seems to us the case before us is typical. The act came up for construction in Long's Case, 94 Tex. 53, 57 S. W. 802. There the members of a section gang were returning their tools to the toolhouse at the close of a day's work. Some were carrying them on a hand car, while others walked down the track with the implements in their hands. One of the latter was injured by the negligence of those operating the handcar. It was held that the injured man was not a fellow servant of those operating the hand car. The ground on which the discussion was based was that the character of the work being done by those on the hand car was different from that being done by those who were walking, but the opinion was also expressed that those carrying the tools by means of the hand car were engaged on a different piece of work, and the trend of the mind of the court is further indicated by the following expression: "But it would seem that an employé who was carrying one or more tools without the aid of another was engaged in a different piece of work from that which was being done by any one of his co-employés." The case cited strongly supports our conclusion in the present case, even if the language quoted be disregarded as mere dicta, for in holding that men who had occupied the relation of fellow servants during the entire working day ceased to be such when by different methods and in different ways they engaged in the common task of returning the tools to the toolhouse it was, in effect, decided that the statute applied to parts of an entire task when the task was separable into smaller parts capable of independent handling. Appellant cites the cases of *Railway v. Howard* (Tex. Sup.) 80 S. W. 229; *Railway v. Cloyd* (Tex. Civ. App.) 78 S. W. 43; and *Lakey v. Railway* (Tex. Civ. App.) 75 S. W. 566. In *Cloyd's* Case he and the man by whose negligence he was injured were both engaged in wiping the same engine at the same time. They were in the same grade of employment. It was very clear that they were engaged in the same character of work, and on the same piece of work, and it was held that they were fellow servants. In *Lakey's* Case the injured person and the man whose negligence caused his injury were engaged in unloading a railroad rail from a push car. It was the duty of one to call out when the latter end of the rail was about to drop from the car, so that those in front could drop it at the same time. The man whose duty it was to call out negligently failed to call, and his co-servant was injured by the fall of the rail. This court held them to be fel-

low servants, and the holding was justified. They were clearly engaged on the same piece of work. We are unable to see in what respect *Howard's* Case, supra, bears upon the question one way or the other. If he was engaged, either actually or theoretically, in aiding the men on the engines in moving them into the roundhouse, they were all engaged on the same piece of work and in the same character of work, for there was but the one task, viz., the moving of the engines. We are of opinion the trial court did not err in assuming that the plaintiff and those who committed the act which injured him were not fellow servants.

We shall not indulge in a discussion of appellant's point that the statute is unconstitutional. Such statutes have generally been upheld. *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878, and authorities cited.

The objection that the statute cannot rightly be held to include the character of labor in which the plaintiff was engaged at the time of his injuries without doing violence to the fourteenth amendment is not without force, but the language of the statute is general, and applies in terms to railway employes, rather than to the character of the labor in which they may engage. It leaves no room for construction. No authority is cited directly in support of the proposition, and we incline to think the distinction insisted on will not be made.

The last objection must be sustained. The court committed reversible error in submitting the alleged negligence of the foreman as a ground of recovery. The evidence did not present the issue. That such an error is harmful, and requires a reversal in all cases in which the judgment is predicated upon issues determined by the jury, has been held without exception. The point that the error was invited is not well taken. For the reasons given, the judgment is reversed, and the cause remanded.

Reversed and remanded.

WHALEY v. BANKERS' UNION OF THE WORLD.*

(Court of Civil Appeals of Texas. May 10, 1905.)

1. MUTUAL BENEFIT SOCIETY—FOREIGN CORPORATIONS.

Where corporations are created by different states, they can only consolidate under concurrent legislation of each state, in which event there is a separate and distinct corporation in each state, as the laws of each have no extra-territorial effect.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2672.]

2. SAME—CONSOLIDATION.

Where two corporations organized under the laws of different states attempted to consolidate without any statute authorizing such con-

*Rehearing denied June 14, 1905, and writ of error dismissed by Supreme Court for want of jurisdiction.

solidation, the attempt was a nullity, and did not create a de facto corporation by user.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 70.]

3. SAME—LIABILITIES—EQUITABLE ESTOPPEL.

Where a mutual benefit society by which plaintiff's wife was insured for plaintiff's benefit made an ineffectual attempt to consolidate with defendant association, and the latter attempted to take over all of the assets and certificates of the former, but received nothing of value belonging to plaintiff or his wife, and made no promise or agreement with them based on any consideration, plaintiff could not recover from defendant, on his wife's certificate, after her death, on the ground of equitable estoppel.

4. SAME—ACTION AGAINST RECEIVER.

Where defendant, a mutual benefit society, made an ineffectual attempt to consolidate with an insolvent association and take over its assets and certificates, a holder of a certificate against such insolvent association could only enforce his rights through its receiver after the receiver had recovered the assets of the society so erroneously paid over.

5. SAME—DIVERSION OF BENEFIT FUND.

Acts 1899, p. 195, c. 115, § 1, provides that a fraternal beneficial association is a corporation formed and carried on for the sole benefit of its members and beneficiaries, and not for profit, and sections 2 and 3 authorize similar associations organized under the laws of other states to do business in Texas on complying with certain statutory requirements. *Held*, in the absence of proof to the contrary, it will be presumed that a foreign beneficial association doing business in Texas was created for the same purpose as that described in section 1, and hence a contract to divert its benefit fund to the payment of certificates issued by another corporation, with which it had no power to consolidate, is *ultra vires* and void.

Appeal from District Court, Cooke County; D. E. Barrett, Judge.

Action by John T. Whaley against the National Aid Association and another. From a judgment in favor of defendant the Bankers' Union of the World, plaintiff appeals. Affirmed.

Green & Blanton, for appellant. M. E. Murphy, for appellee.

NEILL, J. This suit was brought on the 12th day of March, 1902, by the appellant, John T. Whaley, against the National Aid Association and the Bankers' Union of the World, to recover \$900 and interest, as balance due upon the benefit certificate or policy described in our conclusions of fact. It was alleged, as the ground of recovery against the Bankers' Union, that on the 26th of October, 1901, it, for a valuable consideration, agreed with the National Aid Association to pay all just and lawful claims for death and disability losses of its members, and that by virtue of such agreement it became obligated to pay plaintiff the amount due on the policy or benefit certificate referred to. The Bankers' Union by its answer specially denied the alleged agreement, and pleaded that if such agreement was ever made it was unauthorized, *ultra vires*, and void. The National Aid Association neither appeared nor answered in the case, and judgment was ren-

dered against it by default. The case as to the Bankers' Union was tried before a jury, whom the court instructed, after hearing all the evidence, to return a verdict in favor of such defendant. From a judgment entered upon the verdict returned in obedience to the instruction, this appeal is prosecuted.

Conclusions of Fact.

The National Aid Association, organized under and by virtue of the laws of the state of Kansas, on the 21st day of February, 1899, issued to appellant and his wife, Caro A. Whaley, a certificate or policy of insurance whereby it promised to pay to the surviving member (being beneficiaries) the sum of \$1,000, or such sum as might be derived from one assessment upon all the members of said association. In March, 1901, Caro A. Whaley, appellant's wife, died, all dues and assessments upon the benefit certificate having been paid up to the date of her death. Wherefore the National Aid Association became liable to appellant on said policy according to its terms in effect. On October 23, 1901, the National Aid Association, having become largely indebted and hopelessly insolvent, and unable to pay its outstanding indebtedness, consisting of death claims, salaries, etc., attempted to consolidate with the Bankers' Union of the World, also a beneficiary association organized under and by virtue of the laws of the state of Nebraska, whose certificate of incorporation is as follows: "The name or title of this society or association shall be 'The Bankers' Union of the World.'" The object for which it was formed was, and is, the organization of a fraternal beneficiary society under the laws of Nebraska, as above designated, for the sole benefit of its members and their beneficiaries, and not for profit, and having a lodge system, with ritualistic form of work, and a representative form of government. By the proposition of the Bankers' Union to the National Aid Association which led to the attempted consolidation, the former offered to assume and pay all liabilities, including death claims, of the latter. The National Aid Association having received the proposition, through its directors, conducted negotiations with the Bankers' Union which led to the execution of a contract in writing purporting to be entered into between the two associations, which was signed by the president and secretary of each, the effect of which was that the management of the two associations should be combined by the resignation of all officers and directors of the National Aid Association, and the election in their places of persons for the respective offices selected by the management of the Bankers' Union; that upon consummation of such consolidation the Bankers' Union and E. C. Spinney, who was its president and general manager, should assume and agree to pay all just and lawful claims for death and disability losses, and all other claims and losses not otherwise

provided for, against the National Aid Association, which had then or might thereafter accrue; that upon consolidation the National Aid Association should turn over to the combined management of the fraternal order all moneys on hand or in bank, furniture, and supplies owned by it, and \$1,300 on deposit with the National Security Company of New York; and by which agreement the said Spinney promised to furnish a schedule of the property owned by him of the value at least \$50,000, to the end that the National Aid Association might have a full, complete, satisfactory, and conclusive proof of his ability personally to perform his part of the contract. After this agreement was made, in pursuance thereof the officers of the National Aid Association resigned, and new officers of the Bankers' Union were elected, and all the property mentioned in the agreement, with books, furniture, and money on deposit of the National Aid Association, was turned over to the Bankers' Union, and it also executed 10 notes for the sum of \$333 each to the officers of the National Aid Association.

It affirmatively appears from the evidence that there was no authority in the charter of either association, or in the statute of the state by virtue of which it was incorporated, authorizing either to consolidate or combine with the other or any other association. It does not appear from the evidence that this attempted consolidation or action on the part of the officers and directors of the respective associations was ever ratified by the lodges of the associations in the several states of the American Union to which the members of the association belonged, and which acted for and connected such members with the association to which they respectively belonged. After the attempted consolidation the Bankers' Union paid appellant, upon the benefit certificate or policy referred to, \$100, and never paid him any more afterwards, but refused to pay the balance. The Bankers' Union of the World never at any time issued a certificate or policy of insurance to appellant or his wife, Caro W. Whaley, who died eight months before the attempted consolidation, and never received any money or thing of value from either of them, and was under no obligation, other than such as may arise from the facts stated above, to pay them or either any sum of money whatsoever.

Conclusions of Law.

As there was no contract, express or implied, between the Bankers' Union of the World and appellant upon which the liability of the former can be established in favor of the latter for the demand, or any part thereof, sued on, the liability of appellee, if it exists at all, must necessarily rest upon its attempted consolidation with the National Aid Association, whose benefit certificate or policy appellant holds for the death of his wife. Corporations have no power to consolidate

unless the power is expressly conferred by their charters, or by the charter of one of them, or by some other statute, and the consolidation must be effected in compliance with the terms of the statute. And when corporations are created by different states, as were those involved in this case, they can only consolidate under concurrent legislation of each state; but in such a case, since the laws of the state have no extraterritorial effect, they cannot create or aid in creating a corporation in another state; and there is, in law, a separate and distinct corporation in each state when corporations are consolidated by virtue of concurrent legislation.

When a consolidation of corporations has been attempted, but the result of the proceedings, through some defect or want of power, has not been a corporation de jure, the rights and obligations accruing will be determined by ascertaining whether a de facto corporation has been formed. Unless a consolidation statute, in force at the time of the proceedings, authorized the proposed consolidation, the result was a nullity, even if there was an attempt in good faith to consolidate, followed by an assumption of corporate powers. *American Loan, etc., Co. v. Minn., etc., Ry. Co.*, 157 Ill. 641, 42 N. E. 153. An attempt to do that which the law does not permit can produce no result that the law will recognize. A body which cannot become a corporation de jure cannot become a corporation de facto. The mere user of corporate powers which might have been lawfully acquired, without a bona fide attempt to acquire them by forming a consolidation, does not create a consolidated corporation de facto; nor does an attempt to organize without user have that effect. An attempted consolidation, when no statute authorizes consolidation, is a nullity; and the corporate existence of a nominally consolidated corporation formed in the absence of legislative authority for such consolidation may be collaterally attacked, its acts and contracts are void, and it cannot be held liable for the debts of one of the corporations attempting to consolidate. *Noyes on Intercor. Rel.* §§ 92, 93; *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; *Continental Co. v. Toledo Ry. Co.* (C. C.) 82 Fed. 653; *American Loan, etc., Co. v. Minn., etc., Ry. Co.*, 157 Ill. 641, 42 N. E. 153; *Kavanagh v. Omaha Life Assn.* (C. C.) 84 Fed. 295; *Pearce v. Madison, etc., Ry. Co.*, 21 How. 441, 16 L. Ed. 184; *Mansfield, etc., R. Co. v. Brown*, 26 Ohio St. 223; *Mansfield, etc., R. Co. v. Drinker*, 30 Mich. 124; *Tuttle v. Michigan, etc., R. Co.*, 35 Mich. 247; *Brown v. Dibble's Estate*, 65 Mich. 520, 32 N. W. 656.

Appellant's claim cannot be based upon an equitable estoppel, for he paid nothing to appellee, nor did it receive anything of value belonging to him, or make any promise or agreement, based upon any consideration, with him. The appellee is liable, if to any one, to the National Aid Association for the mon-

ey and assets received by the former's officers under the agreement of attempted consolidation. This liability can, and no doubt will, be enforced against appellee and its officers by the receiver of the National Aid Association. And it is to this association, through its receiver, appellant must look for payment of the amount due on the certificate or policy sued on.

Under the laws of this state "a fraternal beneficiary association" (such as the Bankers' Union of the World is shown to be) "is declared to be a corporation, society or voluntary association, formed, organized and carried on for the sole benefit of its members and the beneficiaries, and not for profit." Such associations are required to make provision for the payment of benefits in case of death, etc., and the fund from which such payment shall be made is declared to be a benefit fund, and is derived from assignments, monthly payments, or dues collected from its members. Acts 1899, p. 195, c. 115, § 1. Associations coming within the description of section 1 of such act, organized under the laws of any other state, are admitted to do business in this state when they have complied with certain statutory requirements. Sections 2 and 3 of the act referred to.

In the absence of proof of the law under which appellee was incorporated, it must be presumed, for the purpose of correctly disposing of this case, that it comes within the description of section 1 of the act referred to, and that there are the same limitations upon its corporate powers that are imposed by statute upon such corporations organized under the laws of this state. *Tempel v. Dodge*, 89 Tex. 71, 32 S. W. 514, 33 S. W. 222. And any attempt, promise, agreement, or undertaking on its part to divert the benefit fund derived from assessments of its own members from the purpose for which it was provided, and appropriate it to the payment of a benefit certificate or policy issued by another corporation with which it had no power to consolidate, is ultra vires and void.

Therefore the judgment of the district court is affirmed.

FRANKLIN et al. v. BOONE et al.

(Court of Civil Appeals of Texas. May 31, 1903.)

1. WILLS — UNDUE INFLUENCE — INSTRUCTIONS.

Where, in a will contest, the evidence of undue influence was insufficient to take that issue to the jury, error, if any, in an instruction submitting that issue, was harmless to contestants.

2. SAME.

In a will contest, in which it was alleged there was undue influence, want of testamentary capacity, and that the will had been altered by one of the legatees after execution, an instruction that anything done by the legatee after the will was executed would not invalidate it, either on the ground of undue influence or want of testamentary capacity, did not take

from the consideration of the jury the question whether the will had been altered.

3. SAME—BURDEN OF PROOF.

In a suit to set aside a judgment admitting a will to probate, the burden is upon plaintiffs to establish the invalidity of the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 651-664.]

4. SAME—OPINION EVIDENCE.

In a will contest, the opinion of a witness that testator was not capable of self-control or self-government was incompetent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2198, 2242, 2243; vol. 49, Cent. Dig. Wills, § 113.]

5. SAME—EVIDENCE.

In a will contest, the question whether testator controlled his wife, or was controlled by the wife, called for a conclusion.

6. WILL—VALIDITY OF BEQUEST.

A bequest of all testator's residuary estate to an established charitable institution, and another institution which testator wanted to establish, with a provision that, if this should not be accomplished, all the residue should be divided between the established institution and testator's wife, according to her will, is valid.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by Ann Franklin and others against Sarah E. Boone and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Richard B. Semple, for appellants. Meade & McGrady and Thurmond & Steger, for appellees.

FISHER, C. J. This is a suit by appellants, as the children and grandchildren of J. R. Boone, deceased, to set aside a judgment of the probate court of Fannin county, entered January 1, 1900, probating the will of Boone. Upon a trial of the case in the county court a judgment was rendered in favor of appellants, setting aside the will. From this judgment the legatees in the will, Sarah E. Boone and Buckner's Orphans' Home, appealed to the district court of Fannin county, where judgment was rendered against the appellants. The appellants, as grounds for contest, alleged that the will, after its execution, was altered in a material respect by the principal legatee, Mrs. Sarah E. Boone, and that the execution of the will was procured by undue influence exerted by Mrs. Boone, and that the testator, J. R. Boone, was wanting in sufficient mental capacity to properly and legally execute the will. The court submitted these questions to the jury upon the following special issues:

"Question No. 1. Was the will of J. R. Boone, deceased, dated August 13, 1896, and probated in the county court of Fannin county January 1, 1900, altered after it was executed, as alleged by the plaintiffs in their amended original petition, filed in this court September 9, 1900, so that instead of reading in the latter part thereof, 'shall be divided according to her will,' as it now reads, the said will, when it was executed, read, 'shall be divided according to this will'?"

"Question No. 2. Did the said J. R. Boone, deceased, have sufficient mental capacity on August 13, 1896, to make said will? In this connection I charge you that what is meant by the term 'sufficient mental capacity to make said will,' is meant that at the date of said will he was capable of understanding the nature of the business he was engaged in, the nature and extent of his property, and the person to whom he meant to give it, and the manner in which he was distributing it between the beneficiaries under said will. If he did not have sufficient mind to comprehend such things, then he did not have mental capacity to make said will.

"Question No. 3. Was the will procured to be executed by J. R. Boone, deceased, by undue influence exercised by defendant Sarah E. Boone upon the said J. R. Boone, deceased? In this connection, I charge you that what is meant by 'undue influence' is such influence as compels the testator to do that which is against his will, from fear, desire of peace, or some feeling which he is unable to resist. Such influence must in some measure destroy the free agency of the testator, and must be sufficient to prevent the exercise of that discretion which the law requires in the exercise of the will. Mere arguments, persuasions, solicitations, or entreaties by a beneficiary in a will is not that character of undue influence which is contemplated by law when speaking of undue influence."

The court further in its charge instructed the jury as follows: "There has been submitted to you evidence of the conduct and declarations of J. R. Boone, deceased, before and after said will was executed. I charge you that such evidence was submitted to you solely for the purpose of throwing light upon his mind at the time and after said will was executed, if it does throw such light. Such evidence is not admissible to prove the actual fact of undue influence being exercised upon J. R. Boone, deceased, in making said will, but competent to establish the influence and effect of external acts, if any are shown, upon the mind of said Boone, deceased, in making said will. If you believe from the evidence that the execution by J. R. Boone of the will in controversy was not procured by undue influence upon the part of Sarah E. Boone, then you are instructed that any act or thing done by Sarah E. Boone after said will was signed and witnessed would not invalidate such will, either on the ground of undue influence or testamentary capacity."

The following special instruction at the request of the proponents was given: "You are instructed that the burden of proof is upon the plaintiff Ann Franklin and others, who are required by the preponderance of the evidence to show that at the time that the will was executed J. R. Boone was of unsound mind, and that the will in controversy was procured by undue influence exercised by Sarah E. Boone upon J. R. Boone at the time of or before said will was signed and wit-

nessed; and it is not sufficient if the evidence merely shows that Sarah E. Boone had an opportunity to exert undue influence over J. R. Boone; nor is the evidence sufficient, if it merely shows that Sarah E. Boone attempted to unduly influence J. R. Boone in the making of the will in controversy; nor is the evidence sufficient if it merely shows that Sarah E. Boone, after the will was made, prevented J. R. Boone from changing the will; nor is the evidence sufficient unless it shows that the influence by Sarah E. Boone over J. R. Boone was unduly exercised by her at the time of or before the signing of the will, and that such influence caused J. R. Boone to make a will which he was unwilling to make as his independent free act."

In response to the special issues, the jury returned the following verdict:

"Question No. 1. We, the jury, find that the will was not thus altered.

"Question No. 2. We, the jury, find that said J. R. Boone did have sufficient mental capacity on August 13, 1896, to make said will.

"Question No. 3. We, the jury, find that the will of J. R. Boone, deceased, was not procured by undue influence."

All of these findings are supported by the evidence. There is a conflict of evidence upon the question as to whether the will was altered by Mrs. Boone after its execution and also a conflict in evidence as to the mental capacity of the testator; but, as to the question of undue influence, we are of the opinion that the evidence is of such a character that would have justified the trial court in declining to submit that issue to the jury. The evidence upon this subject does not show that any undue influence was exercised. All that it tends to prove is that merely Mrs. Boone had the opportunity to exercise influence. But however, upon this question, as well as the other two embraced in the case, the verdict of the jury has settled the questions of fact in favor of appellees.

Appellants' first assignment of error complains of that portion of the charge of the court which instructs the jury that arguments, persuasions, solicitations and entreaties by the beneficiary are not that character of influence which the law would regard as sufficient to justify setting aside a will. The charge of the court, as complained of, is substantially in accord with the ruling made in *Patterson v. Lamb* (Tex. Civ. App.) 52 S. W. 99; *Barry v. Gracette*, 71 S. W. 309, 6 Tex. Ct. Rep. 378; and *Morrison v. Thomam*, 86 S. W. 1069, 12 Tex. Ct. Rep. 887. But however, as before said, we are of the opinion that the evidence did not justify an attack upon the will on the ground that its execution was procured by undue influence, and the court could well have treated this question as not arising from the evidence. Therefore, if it could be conceded that this instruction was erroneous, it could not constitute reversible error.

The second assignment of error complains of the last paragraph of the general charge of the court, as above set out. It was not the purpose of this instruction to take away from the consideration of the jury the question as to whether or not Mrs. Boone had altered or changed the will after its execution; but the question submitted by this charge was that the acts or things done by Mrs. Boone after the will was signed and executed would not invalidate the will on either the ground of undue influence or testamentary capacity. This instruction was correct, and the jury evidently understood it to relate to the question of undue influence or testamentary capacity, and they could not by this instruction have been led to believe that the court intended to exclude from their consideration the acts and things done by Mrs. Boone in passing upon the question as to whether or not she had altered the will.

The third assignment of error complains of the special charge of the court, set out in the opinion, on the subject of burden of proof. The appellants' case was an attack upon the judgment of the court probating the will; and this judgment, until set aside, is supposed to be based upon facts that would authorize its rendition, and, in order to overcome it and successfully attack it, the burden did rest upon the appellants to establish the facts relied upon by them.

The fourth assignment of error complains of the action of the court in refusing to permit the appellants to introduce in evidence the interrogatories and answers of Mrs. Belinda Morton, the divorced wife of J. R. Boone, deceased. The facts and evidence sought to be established were of a confidential nature, between husband and wife, and we think the court correctly held that they were not admissible.

There was no error in the action of the court in declining to admit the evidence of the witness Trice, as complained of in the fifth assignment of error. It was proper for Trice to state the facts, and then state an opinion as to the mental capacity of J. R. Boone, but his statement to the effect that Boone was not capable of self-control or self-government was not admissible. That was a conclusion of the witness, which the jury, from the facts detailed, would be as capable of judging and determining as the witness. A witness can express his opinion as to the unsound condition of the mind of the testator, based upon facts within his knowledge.

The sixth assignment of error complains of the action of the trial court in not permitting Lucy Spicer, a granddaughter of J. R. Boone, to answer the following question: "Which controlled, if either, the conduct of the other—J. R. Boone or Sarah Boone?" To which the witness replied that Sarah E. Boone controlled the conduct of J. R. Boone in most of the matters; that she was there at the house often, and saw it herself. The fact testified to was merely the expres-

sion of the opinion or conclusion of the witness, and was properly excluded. If the question of undue influence was properly in the case, the witness should state the acts indicating the influence, and let the jury judge and determine whether Mrs. Boone controlled the conduct of J. R. Boone.

The seventh and eighth assignments of error complain of the action of the trial court in overruling appellants' motion for new trial, on the ground that the evidence shows that the will was altered by Mrs. Boone after its execution, and of a want of sufficient mental capacity and the existence of undue influence. The verdict of the jury has settled these questions.

The ninth assignment of error is to the effect that the court erred in rendering judgment for defendants, and in refusing to set aside the will because the same is invalid, in that it provides that the testator's property, in case Boone did not establish a charity at Randolph, Tex., should be divided between Sarah E. Boone and the orphans' home according to her will; that is, the will of Mrs. Boone. The proposition submitted under this assignment is, that a gift mortis causa of a fund in trust to be disposed of for benevolent purposes, at the absolute and unlimited discretion of the donee, cannot be sustained. The clause of the will in question under which this contention is made is as follows: "Second. All the balance of my property, it is my will and desire to devote to charity, first to Buckner's Orphan Home, second, to some charitable institution which I want to establish at Randolph, Texas, but if I should die without making provisions for said institution at Randolph, Texas, then it is my will and desire that all my property, land, notes and money shall be divided according to her will between my wife and Buckner's Orphan Home." There is nothing in the record showing that the testator before his death made any provision for establishing the charitable institution at Randolph, Tex. Buckner's Orphan Home is one of the appellees in this case, and is a party to the proceeding with Mrs. Boone, interested in the probate of the will. There is no contest between these parties, and, so far as appears from the record, they seem to be satisfied that the intention of the testator, as indicated in the clause of the will quoted, will be observed. The will provides that if no institution is established at Randolph, Tex., then the property, lands, notes, and money shall be divided between Mrs. Boone and Buckner's Orphan Home, and the will empowers Mrs. Boone to make the division. This fact does not deprive the orphans' home of any right that it might have under the will, and the testator had the power, if he so desired, to select Mrs. Boone as the proper person to make the division of the property. If the orphans' home is contented with this selection, we see no lawful reason why the will, by reason of this power, should be in-

valid, or the contestants be permitted to object to it for this reason.

We find no error in the record, and the judgment is affirmed.

Affirmed.

WILLS v. CENTRAL ICE & COLD STORAGE CO. et al.*

(Court of Civil Appeals of Texas. May 20, 1905.)

1. CONSPIRACY—ACTION FOR DAMAGES.

A conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which, without the conspiracy, would give a right of action; the test being whether the act accomplished after the conspiracy is formed is itself actionable.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, §§ 1-5.]

2. SAME—REFUSAL TO SELL GOODS TO PARTICULAR INDIVIDUAL—MOTIVE.

The mere exercise of one's right to refuse to sell a certain commodity to a particular person, whatever the motive for so doing, is not actionable.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, § 7.]

3. SAME—EVIDENCE—WITHHOLDING OF PROBATIVE FORCE—EFFECT.

In an action for an alleged conspiracy to refuse to sell ice to plaintiff and to ruin his business as an ice dealer, the refusal by defendants to place in evidence certain contracts is not of such probative force as to authorize a verdict for plaintiff, though such conduct might tend to show that the terms of the contracts, had they been disclosed, might have injuriously affected defendants' interests.

4. SAME—SUFFICIENCY OF EVIDENCE.

In an action for an alleged conspiracy to refuse to sell ice to plaintiff and to ruin his business as an ice dealer, evidence held insufficient to authorize a recovery.

5. SAME—INSTRUCTING VERDICT.

Though there be slight testimony, yet, if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established, the court should instruct a verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 381-383.]

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by Joe B. Wills against the Central Ice & Cold Storage Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. M. Holland, for appellant. Read & Lawrence, Cockrell & Gray, Crane & Gilbert, Muse & Allen, and Wendell Spence, for appellees.

TALBOT, J. We adopt appellant's statement of the nature of the suit as follows: This suit was instituted by appellant in the Forty-Fourth Judicial District court of Texas on March 24, 1904, against appellees Central Ice & Cold Storage Company, C. L. Wakefield, doing business as Dallas Ice & Fuel Company, the People's Ice Company, Armstrong Packing Company, and Dallas

Ice Factory, Light & Power Company. It is a suit in the nature of a civil conspiracy for damages on account of injuries suffered by appellant by reason of an alleged conspiracy entered into by appellees on or about March 1, 1904, for the following purposes, viz., to secure a monopoly of all the ice manufactured in the city of Dallas for local consumption, to lessen competition, and to fix and maintain the price of ice in the city of Dallas; to prevent lawful competition in the dealing of ice in the city of Dallas; to boycott appellant, and to refuse to sell ice to appellant, and to otherwise unlawfully meddle and interfere with appellant's business, and deprive him of making a living out of his business as a wholesale and retail dealer in ice. The defendants answered by general and special exceptions and general and special denial. A jury was impaneled to try the case, but upon the close of plaintiff's evidence the court, upon motion of the defendants, gave a peremptory instruction to the jury to return a verdict in their favor, which was done, and judgment entered in accordance therewith. From this judgment appellant has appealed.

The petition discloses a cause of action, and the sole question presented for our determination is whether or not the evidence was sufficient to require the submission of the case to the jury.

C. L. Wakefield, one of the defendants, and witness for plaintiff, testified by deposition: "I am interested in Dallas Ice & Fuel Company. The firm doing business under this name was formed in February, 1904. It was formed for the purpose of buying and selling ice in Dallas. It is a simple partnership, composed of C. L. Wakefield, J. E. Cockrell, and El. Gray, who alone compose the firm. At the time this suit was filed there were, I think, five factories or companies engaged in the manufacture of ice in Dallas, viz., the Lemp Company, the Armstrong Packing Company, the Dallas Ice Factory, Light & Power Company, the People's Ice Company, and the Central Cold Storage Company. I have a contract for the purchase of a certain amount of ice from the Armstrong Packing Company, the Dallas Ice Factory, Light & Power Company, the People's Ice Company, and William Lemp. These contracts were made with me, and in my name. The contracts are in writing, and were made with the executive officers of said three companies and with William J. Lemp, personally. I do not attach copies, because these are contracts relating to a private business, and in which the plaintiff in this case is not interested. We bought some wagons and teams from the Lemp people. We bought them outright, and paid for them part money and part in our notes. They have no interest whatever in our business. We have paid about two-thirds of the cost of such wagons and teams in money and owe the balance on notes. It was not agreed in

*Rehearing denied June 17, 1906, and writ of error denied by Supreme Court.

said contract that the Lemp people should not sell ice to be used in the city of Dallas. They are at perfect liberty, so far as our contract is concerned, to sell ice to whomsoever they please and where they please. The Lemp people did run wagons and sell ice to retail dealers last year, but decided not to do so this year. It is our understanding that they have long desired to get out of the retail business. The ice department of the Lemp people have telephone No. 712 and Dallas Ice & Fuel Company has telephone No. 712 in its office. We pay the additional charge to get our names also on this telephone number. We need phone service there where we get, load, and deliver a great deal of ice, and we simply pay for the privilege. My agreement to purchase ice from the People's Ice Company is in writing. I do not attach a copy for reasons already given. The contract is signed by the president and secretary of said company. We were not to take their entire output, for reasons already given. I decline to go into our private affairs. We have simply complied with our contract with them, and have taken and paid for the ice we have contracted for. We bought part of their wagons and teams; not all. They sold some of the balance to other retail dealers. Under our contract it was not agreed that the People's Ice Company should sell to no one else in Dallas. They can sell to whom they please, and I understand they are selling other dealers like ourselves. I do not know what you mean by independent dealers. There is no community of interest between our firm and this company. We are as independent dealers as the plaintiff, or any one else. Mr. Jones, while in our employ, made a suggestion that we cut the selling price of ice so as to get more custom for our business. The suggestion was prompted by Ft. Worth ice being shipped into Dallas and sold here. He seemed to think the Dallas factories should sell all the ice sold in Dallas. Whether Mr. Jones made this suggestion in our interest, as he was then working for us, or in the interest of the People's Ice Company, of which he is a large stockholder, I do not know. But, in any event, we declined to adopt the suggestion or make any cut. We understand that Mr. Jones, for the People's Ice Company, sold a lot of white ice at 12½ cents to whosoever would buy it. We knew of such sales by hearsay. But, as our consent was not necessary, it was not asked. The People's Ice Company is not a subsidiary company to our firm. We have nothing on earth to do with them, save we buy ice from them. It is not a fact that the ice companies operating in Dallas agreed with my company or myself that they were not to sell ice to any person, firm, or corporation dealing in ice in Dallas City, except myself or my company. They can sell ice to whomsoever they please, so far as any contract we have with them is concerned, and on whatever terms they see

fit. I did not engage in this business for the purpose of securing a monopoly or a partial monopoly, but did engage in it because I thought by economy, with lawful, honest, and fair men for partners, I could do my share of the business, and make some money in a legitimate way. Yes, I was formerly manager of Dallas Ice Factory, Light & Power Company. My connection with said company wholly ceased on February 29, 1904, when I resigned to embark in my present business. It is not a fact that some other party is manager in name only of said power company, and that I am still its manager in fact. I have nothing whatever to do with said company, save that we buy ice from it. I decline to answer the question as to the approximate amount of money, if any, paid by myself or Dallas Ice & Fuel Company to Dallas Ice Factory, Light & Power Company up to the present time. This is a private matter. Mr. Armstrong represented his company in contracting with me for the sale of ice. Said contract was in writing. I decline to give its terms for the reasons already given. The question as to whether said contract was in violation of the anti-trust law was mentioned when the subject was first broached. It is a fact that neither myself nor my firm have any agreement, contract, or understanding of any kind, form, or character with my codefendant the Central Ice & Cold Storage Company. Neither myself nor Dallas Ice & Fuel Company ever at any time had any understanding, contract, or agreement with said codefendant. I never confederated or conspired with any person whomsoever to injure or affect the business of plaintiff, or to prevent him from buying ice wherever he could."

Joe B. Wills, plaintiff, testified that he had been engaged in the ice business since March, 1903; that he was well acquainted with the trade in that business, and with the people who bought ice; that prior to the acts of defendants complained of he had a good trade in the ice business; that, in addition to his city trade, he sold ice to country men living in the little towns near Dallas; that he got the biggest part of his ice last season from Armstrong Packing Company, and a good deal from Central Ice & Cold Storage Company, till March 1st, but that thereafter they would not sell him ice, though he made efforts to get it from them; that during the latter part of February he phoned Mr. Flippen, the secretary of the Armstrong Company, and asked him about getting ice next year, as he thought there was danger about his getting ice, and that Mr. Flippen replied that he would tell him without authority that Mr. Wakefield was going to get Armstrong's ice, and that, while the papers were not signed now, yet he could depend on getting ice elsewhere; that Mr. Wakefield was going to get Armstrong's as well as the other three; that he phoned Mr. Armstrong in August about getting ice from

him, and he said that he couldn't sell me; that he (Armstrong) had a five-year contract with Mr. Wakefield, and that he didn't have any ice to sell him (Wills) at all; that it was simply Wakefield's ice, and to sell it would simply be selling some one else's ice that did not belong to him (Armstrong); that when he (Armstrong) "pulled" the ice it belonged to Mr. Wakefield, and that he had nothing further to do with it when he turned it over to him (Wakefield), and that he (Armstrong) couldn't sell him (Wills) any ice at all; that along about March 1st he (Wills) had a contract with Gardner & Tarver, Earl S. Graham, and T. L. Benning to get ice from them that they had contracted for with the Central Ice & Cold Storage Company; that he got ice through them from Central Ice & Cold Storage Company till the 10th of March, when the Central Ice & Cold Storage Company refused to let him have any more ice; that after this he got his ice from Ft. Worth, and had it shipped over the Texas & Pacific and Houston & Texas Central Railroads; that Mr. Jones had made a statement to him about the defendant companies having an agreement; that at the time Jones made the statement he was acting for the People's Ice Company, and represented himself to be an officer of the company; that Jones came to his (Wills') place to see him about cutting off ice from the dealers who were getting ice from Wills; that Jones told him that if he would cut them off that he (Wills) could get all the ice he wanted at the People's Company, or that he (Jones) would arrange it so that he (Wills) could get ice anywhere; that Jones offered him \$500 to cut off the Oak Cliff wagons and \$4,000 to cut off the Dallas wagons without notice, or to ship them in ice that was inferior; that prior to the alleged unlawful acts of defendants he (Wills) was making money out of the ice business; that on March 1, 1904, his business had a value; that it was worth \$5,000 to \$6,000 the way he (Wills) figured it; that on December 1st of this year (1904), under the present circumstances, his business was not worth anything. He further testified: "I begun business in March, 1903. I didn't have any ice business at that time. I was in the fuel business. When I started the business I didn't have any trade. I didn't have any ice business worked up at that time, and it was worth very little in March, 1903. The business gradually grew from the time I started it. I had some mules and wagons when I started. When I first started the whole business was probably worth \$800 to \$1,100, or something like that. On December 1st, 1903, I figured that my ice business was worth \$2,000 or \$2,500. I am not doing much ice business this winter, but I did more last winter. I have not kept track of the number of pounds of ice I sold last winter, but I sold a great deal of ice compared to what I sold this December. I bought my ice from

Armstrong Packing Company and the Central Ice & Cold Storage Company last winter. I ran two wagons last year. I did not sell ice to dealers last year, except to those from the country, who would put it in their wagons and haul it out. I just had two ice wagons running, and sold from them. This year (1904) I ran two wagons to commence with, and then I got another one in July and another one in August. I ran four wagons this year and two last year. I sold a great deal of ice this year at wholesale, but didn't sell any last year. Between December, 1903, and December, 1904, I handled more ice than I did the year previous. I handled a great deal more ice during the year 1904 than I did during the year 1903. I handled a right smart of ice in March, 1904. I commenced the 10th of March, 1904, and handled a car every other day until about the 20th, and then a car every day. That was in March, 1904. I did build up my business, and sold four times as much ice as I had ever sold before. I didn't do anything like that in March, 1903, because I had just started then. In March, 1904, I handled nearly a car load a day, but not over a car a day at any time. I thought it was wise to make a contract early for my supply of ice. I did not try to get every bit of the output of the Armstrong Company. He sent for me to come down, and wanted me to handle his ice. He didn't say all of it. He said he wanted me to take about twenty-five tons a day. I was not going to take all of his ice that he could spare. I was not going to contract for all I could get from him. I wouldn't sew myself up to take any certain amount. Along about the 1st of March I had a contract with Gardner & Tarver, Earl S. Graham, and with T. L. Benning to get ice from them that they had contracted for with the Central Ice & Cold Storage Company. I went to the Central Ice & Cold Storage Company after that ice. I went there in March. I commenced, I believe, the 1st of March, and got ice there the 1st, 2d, and 3d of March, and paid Gardner & Tarver for it; and on the 4th of March I saw Mr. Drebelbis, the manager of the Central Ice & Cold Storage Company, and he told me then that they didn't have any ice there to sell to me; that if I got any ice there I would have to buy it from him; that he would be glad to sell me ice, and would sell it to me as long as there was a block in the vault; and I told him I had already made arrangements with those parties to get part of their ice any time I needed it, and that I didn't see any very good reason why I should change my arrangements with those parties, and he says, 'Well, they can't sell any ice to you; they can simply use any ice they get here;' and that was the extent of the conversation; and I said to him that I would not change my arrangements with them. That was on the 5th of March, and I continued to get ice there, and had it char-

ged to Gardner & Tarver, and paid them for it whenever I would see them, and took a written order there a time or two signed by them for blank number of pounds, and they would fill it out (I don't know how many times); and had it charged to them; and the 10th morning of March, I went down with Mr. Grigsby and Mr. Trapp, who were running a wagon, and had just started up the day before, and I hadn't got any ice on the T. & P. that morning, and I went down and asked Mr. Kiser, their engineer, for some ice, and he says, 'No, I can't let you have any;' and I told him I had paid Gardner & Tarver and Mr. Benning for it, and wanted it out, and he refused to let me have it. The engineer would not let me have the ice. He was the man that had charge of delivering the ice early in the morning before any one else came down; the time I was there was about three or four o'clock in the morning; he was the night engineer that I speak of. About 11 o'clock on the 17th of last March I telephoned for No. 84, and asked for Mr. Wakefield, and I don't know who answered the phone, but they said he wasn't in, and to call his residence, and I called his residence and was not able to talk to him, and then I called No. 62, the Dallas Ice Factory, and asked to speak to their manager, and they said to call the engine room, and give me the number to call, and I called the engine room, and they said Mr. Galloway was not there, and then they gave me still another number, the office of the Dallas Ice Factory, and I called that and asked for Mr. Galloway, and didn't get him, and I talked to Mr. Herber, who answered the telephone, and asked him if I could get some ice there. Then I phoned to Mr. Flippen at the Armstrong Packing Company. Then I phoned No. 712—that is Wm. J. Lemp's factory—and was referred to No. 46, and asked for Mr. Feickert. I talked over the phone to Mr. Feickert, and he said: 'We have no ice to sell here. You will have to call Mr. Wakefield. He has our ice.' That was the extent of the conversation between me and Mr. Wakefield."

F. A. Gillette testified that he was local freight agent of the Houston & Texas Central Railroad Company; that plaintiff, Wills, shipped considerable ice over his road this year (1904); that he had a conversation with Mr. Jones with reference to his road shipping ice for Wills; that Jones asked him if his road was shipping ice from Ft. Worth for Wills; that he told him that it was, and Jones asked him if there was any money in it for handling the ice, and that he asked Jones what he meant; that, since he thought about it, he believed Mr. Jones did ask him if there wasn't some way by which he could decline to haul the ice, and that he told him no, there wasn't; that they were common carriers, and had to haul it. "None of the other defendants approached me on that subject at any time."

R. Zink testified that last summer he was running a candy kitchen and ice cream parlor on Ross avenue and Central avenue, and that he sold ice; that about the 1st of March he called up Wakefield over the telephone, and talked with him with reference to the price of ice; that Wakefield quoted him price, and that he told him (Wakefield) that he could make better arrangements, and could get ice from Mr. Wills for 25 cents, and Wakefield answered that he could furnish ice only on those terms, and that he (Zink) replied that he could buy ice from Wills at 25 cents, and Wakefield said he (Zink) could get it till warm weather came, and then he couldn't get it, and then what would he do? That Mr. Wakefield raised the price of ice on his this year as compared with last year.

Joe Bell testified that he was running a store and blacksmith shop at Rylie; that during October he got 1,100 pounds of ice at Lemp's factory for Wills; that he got it in his wagon, not in Wills' wagon; that his wagon was a farm wagon; that when he went after the ice they asked him if he lived in the country; that when he went after the ice he went to the place where he had always gone after ice, and that they would not let him have it there, but sent him up to the office; that when he formerly bought ice from them he never did have to go to the office after it, and that they never asked him before that where he wanted to take the ice.

A. J. Pulaski testified that he lived at Mesquite; that during the summer he was engaged in the ice and meat business; that this season he had got ice from Dallas Ice & Fuel Company, from Lemp, and from Mr. Armstrong; that the only question they asked him was where he was doing business at, and that this question was only asked at Dallas Ice & Fuel Company and at Lemp's, but that Mr. Armstrong was acquainted with him, and he presumed knew where he was doing business.

Ed Tarver testified that he was engaged in the retail ice business; that plaintiff, Wills, got ice from him up to March 10, 1904; that during the latter part of February he (Tarver) asked Mr. Drebelbis, manager of the Central Ice & Cold Storage Company, if he (Drebelbis) would object to his (Tarver) selling ice to Wills, and he replied that he would not; that Wills got ice there until March 10th; that Mr. Drebelbis then told him (Tarver) that they (Gardner & Tarver) could not sell Wills any more ice. He (Drebelbis) said that he (Tarver) could neither buy any ice from Wills nor sell any ice to Wills, as he was a competitor of theirs.

W. C. Wills testified that he was a brother of the plaintiff; that he was familiar with plaintiff's business, and had worked for plaintiff; that plaintiff's business had a value prior to March 1, 1904; that the value at that time was some thousands of dollars—

between \$5,000 and \$6,000; that he left plaintiff's business in July, and that the value of plaintiff's business had depreciated until it was worth only between \$200 and \$400 at that time.

George Gardner testified that he was engaged in the ice business; that on the last day of February he and Tarver went down to the Central Company's office and talked with Mr. Drebelbis in regard to his factory allowing Mr. Wills to use their ice through them, Gardner & Tarver; that Mr. Drebelbis said he was perfectly willing for them to let Wills have ice; that this conversation took place about the last day of February, just before the Armstrong contract expired, which was on the 1st of March; that they (Gardner & Tarver) gave Mr. Wills orders for ice, and they were accepted till the morning of March 10, 1904, at which time the Central Ice & Cold Storage Company refused to honor their (Gardner & Tarver's) orders in favor of Wills; that the man in charge (Kiser) stated that he had instructions from Drebelbis, the manager, not to load out Mr. Wills and Mr. Grigsby; that Mr. Grigsby was a man that had been getting ice there under Mr. Wills—one of Mr. Wills' men.

The foregoing, we think, is all the testimony contained in the record material to a decision of the question presented and an understanding of our ruling. In the case of *Delz v. Winfree, Norman & Pearson*, 80 Tex. 400, 60 S. W. 111, 26 Am. St. Rep. 755, our Supreme Court approves the doctrine, that a conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which, without the conspiracy, would give a right of action. It is held that the true test as to whether such action will lie is whether the act accomplished after the conspiracy is formed is itself actionable. In that case the following proposition is also conceded to be correct: "A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to property." It is said, however, that the latter proposition must be limited to the individual action of the party who asserts the right; that one person, from such motives, may not influence another to do the same thing. Now, if we should concede—which we do not—that there was sufficient evidence introduced which would have justified a finding that the conspiracy had been established, still the record will be searched in vain, we think, for any testimony which would have authorized a finding by the jury that appellees, or either of them, did any act after such conspiracy was formed which in itself constituted actionable wrong and on account of which appellant was entitled to recover damages. The nearest approach

to any evidence tending to show a cause of action for damages, without the conspiracy alleged, is the testimony of Gardner and statement of appellant that he had a contract with Gardner & Tarver to get ice from them that they had contracted for with the Central Ice & Cold Storage Company, and that Mr. Drebelbis, manager of said company, on or about the 4th day of March, 1904, told him that Gardner & Tarver could not sell ice to him, and on the morning of March 10, 1904, refused to let him have ice on the order of Gardner & Tarver; and the testimony of Tarver to the effect that on the evening of the 9th of March, 1904, Mr. Drebelbis told him that the firm of Gardner & Tarver could not sell appellant any more ice; that Drebelbis said that he (Tarver) could neither buy ice from appellant nor sell any ice to him. There is no evidence, however, that Gardner & Tarver, or either of them, refused to sell appellant ice, or that he sustained any damage whatever by reason of Drebelbis' statement. Nor does the evidence show that Drebelbis ever attempted in any manner to induce Gardner & Tarver, or any one else, not to sell ice to appellant, unless his statements to appellant and Tarver referred to can be so construed. But, applying the principle recognized in the case of *Delz v. Winfree, Norman & Pearson*, supra, we think this testimony insufficient to show a cause of action against the Central Ice & Cold Storage Company. It had the right to refuse to sell its ice to appellant, either directly or through Gardner & Tarver; and the mere exercise of that right, no matter what may have been the motive for doing so, whether caprice, malice, or prejudice, did not render it liable to appellant in damages on account of such refusal. As seen in the case cited, the assertion of this privilege by the Central Ice & Cold Storage Company could not legally be carried beyond its individual action. It did not have the right to influence Gardner & Tarver, or any other person, to refuse the sale of ice to appellant, and the evidence, as said, fails to show any such attempt on said appellee's part to exercise such influence as amounted to a breach of the privilege mentioned or rule announced. It appears without contradiction that after Drebelbis told appellant that Gardner & Tarver could not sell him ice, that the appellee Central Ice & Cold Storage Company continued to let him have ice through Gardner & Tarver until March 10, 1904, and that prior to March 10, 1904, appellant had contracted to get his ice from Ft. Worth, and about 10 o'clock a. m. on that day received from Ft. Worth a car of ice, containing about 15 tons. It further appears that in the conversation in which Drebelbis told appellant that Gardner & Tarver could not sell him ice he stated to appellant that if he got any ice from the Central Ice & Cold Storage Company he

would have to buy it from him; that he (Drebelbia) would be glad to sell him ice, and would do so as long as there was a block in the vault. Appellant replied to this statement, in effect, that he had made arrangements with Gardner & Tarver to get a part of the ice they had contracted to get from the Central Ice & Cold Storage Company, and would make no change, and did not thereafter, so far as the record shows, try to buy any ice directly from that company. Nor does it appear that after the morning of March 10, 1904, he ever attempted to do so through Gardner & Tarver, or upon their order, and was refused. Again, it is shown beyond controversy that this appellee had no contract whatever with the other appellees in regard to the sale of ice. In reference to the other appellees, C. L. Wakefield, Lemp, the People's Ice Company, and the Dallas Ice Factory, Light & Power Company, the evidence fails to show that appellant made any demand upon either of them for the sale to him of any of their ice. The extent of his efforts to get ice from either of these appellees, if it can be said that such was his purpose, will be found in appellant's testimony to the effect that on March 17, 1904, he asked for Mr. Wakefield over telephone No. 84, and was informed by some unknown person to call his residence; that he called his residence, and "was not able to talk to him" (why he does not say); that he then called the Dallas Ice Factory over telephone No. 62, and asked to speak to the manager, and was directed to call the engine room, which he did, and they said Mr. Galloway was not there; that after another effort over another telephone to the Dallas Ice Factory he failed to get Mr. Galloway, but that Mr. Herber answered his call, and he asked him if he (appellant) could get some ice there, but does not state what reply Mr. Herber made; that he then telephoned Mr. Flippen, of the Armstrong Packing Company (for what purpose he does not say; neither does he say whether or not he reached and talked with Mr. Flippen); that he then telephoned to Wm. J. Lemp's factory, and talked to Mr. Feickert, and that Mr. Feickert said: "We have no ice to sell here. You will have to call Mr. Wakefield. He has our ice." If at any other time or in any other manner during the period covered by the allegations of his petition appellant tried to buy ice from either of said appellees, it is not disclosed by the record.

We think the right of O. L. Wakefield to purchase the ice of his co-appellees, as disclosed by the evidence before us, cannot be doubted. If these contracts, or either of them, which were in writing, were in violation of our anti-trust statutes, or any other law, there is no evidence of the fact contained in the statement of facts sent to this court. In so far as the testimony shows, these contracts were independent of

each other, involved only an ordinary business transaction for the purchase of the ice contracted for, and in no way infringed upon the rights of appellant or any other ice dealer. There is no concerted action or scheme shown, whatever may have been the real facts, on the part of these appellees to injure appellant's business, or to destroy or forbid competition in trade. It is true the record shows that appellee Wakefield refused to attach to his deposition copies of these contracts and failed to state the exact terms thereof; and it is argued, in effect, that the withholding of this evidence gives rise to a strong legal presumption of the truth of appellant's allegations. Now, while such conduct may furnish a circumstance tending to show that the terms of the contracts, had they been disclosed, might have affected injuriously the interest of appellees, still it was not of such probative force, either alone or considered together with all the other evidence in the record, as would have authorized a verdict for appellant. It may be that by the failure to produce these contracts and reveal their contents to the court and jury important facts were not disclosed, and the case in that respect and to that extent undeveloped. If, however, any effort was made, further than propounding interrogatories and taking Wakefield's deposition, under the ample provisions of the law to require the production of these instruments or to compel the witness to state their exact contents, instead of his conclusion of their legal effect, it is not shown.

We conclude the evidence adduced was insufficient to sustain the charge of conspiracy, or to authorize a recovery against appellees, or either of them, on account of any of the matters alleged, and that the court correctly instructed a verdict in their favor. The rule is that, though there be slight testimony, yet, "if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established, it is the duty of the court to instruct a verdict." *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1069.

The judgment of the court below is affirmed.

MOORE v. SNELL.*

(Court of Civil Appeals of Texas. April 5, 1905.)

1. COURTS—JURISDICTION — PETITION—CONSTRUCTION.

Where a paragraph of a petition showed that defendants executed a \$600 note to plaintiff on purchase of his interest in a drug business, and another showed that thereafter plaintiff purchased the drug business from them, the \$600 being put in at its face, and that the stock was turned over to plaintiff, but that subsequently defendants demanded a return of the stock, and broke into the store, to the damage of plaintiff in the sum of \$250, and another

*Rehearing denied June 14, 1905.

paragraph claimed \$32.50 for services rendered defendants, there was no cause of action shown within the jurisdiction of the district court, the indebtedness evidenced by the note having been extinguished.

2. JUDGMENT—WANT OF JURISDICTION.

Where plaintiff's petition fails to show an amount involved sufficient to bring the cause of action within the jurisdiction of the district court, the judgment of that court for plaintiff is fatally erroneous.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 23.]

Appeal from District Court, Delta County; H. C. Connor, Judge.

Action by T. J. Snell against E. O. Moore and another. From a judgment in favor of plaintiff, defendant E. O. Moore appeals. Reversed.

This purports to be a suit on a \$600 note, and for a balance of \$32.50 on account, and for \$250 damages. The suit was brought by T. J. Snell, and E. O. Moore and W. E. Moore were made defendants. The district court rendered judgment for the plaintiff against E. O. Moore for \$883.55, and that defendant has appealed.

Omitting formal parts, the petition and trial amendment upon which the plaintiff went to trial read as follows:

"(1) That the plaintiff owned an interest in the drug business of Snell & Moore, situated in Delta county, Texas, and in the town of Cooper, and on the west side of the public square of said town, and in the Patterson building, and the said drug business was also known as the Cooper Drug Company. And on the 2d day of February, 1903, the plaintiff sold out his interest in the said business to the defendants, and at that time the defendants and the business were indebted to the plaintiff in the sum of \$100, and for the said interest and the said indebtedness the defendants, through the defendant W. E. Moore, executed to the plaintiff a note for the sum of \$600, which was dated February 2, 1903, and payable to the plaintiff, and signed by the said W. E. Moore, and due on January 1, 1904, and drawing interest at the rate of ten per cent. per annum from the date thereof; and to secure the payment of said note the defendants, through the said W. E. Moore, executed to the plaintiff a chattel mortgage, which was also dated February 2, 1903, and was given on the following described personal property, viz., one Mosler safe No. —, also one soda fountain, also all fixtures now situated in what is known as the Snell & Moore Drug Store, and known as the Cooper Drug Company; said drug business being now in James Patterson brick building on the west side of the square in Cooper, Texas. And the said note also stipulated for ten per cent. attorney's fees, if placed for collection; and the plaintiff further avers that the note is now long past due, and that no part of the same has ever been paid, and he has been forced to place it for collection;

and the plaintiff says further that he is still the owner and holder of the said note and mortgage, and that the mortgage is still a valid and subsisting lien on said property.

"(2) Plaintiff further alleges that the defendants employed him on or about the 2d of February, 1903, to work for them as a prescription clerk and drug clerk in the said business for a salary of \$65 per month for the months of February, March, April, May, June, July, and August, 1903, and at a salary of \$75 per month from that time on till the 1st day of January, 1904; and the plaintiff has worked for them from February 2d, till April 27th, making three months in all, and which amounted to the sum of \$195; and of said amount the defendants paid the plaintiff the sum of \$162.50, leaving a balance still due the plaintiff in the sum of \$32.50, and which is still due the plaintiff, and which has been due the plaintiff since April 27, 1903, and for which the plaintiff is entitled to interest at the rate of 6 per cent. per annum from said date.

"(3) Plaintiff further avers that on the 27th day of April, 1903, the defendants sold to the plaintiff the said drug business, which consisted of the entire stock of drugs, soda fountain, safe, and furniture and fixtures, situated in said Patterson building, for 10 per cent. off of the invoice price of the said stock of drugs, furniture, and fixtures; and as part payment for the same the plaintiff was to be allowed to put in the said note and mortgage, and the defendants were to accept the same as part payment for the said business; and the plaintiff and the defendants duly invoiced the said stock, furniture, and fixtures, which amounted to the sum of \$2,500, and the same was duly turned over to the plaintiff, and the plaintiff employed help and began to run and conduct the said business; and on or about the said date of April 27, 1903, the defendants refused to further comply with the terms of the contract, and demanded back the stock of drugs, which the plaintiff refused to turn back to them; and while the plaintiff was away the defendants broke open the doors of the said drug store and forcibly took possession of the said business, and have refused at all times to turn back to the plaintiff the said business, and are still in possession of the same, and have converted it to their own use, to the plaintiff's damage in the sum of \$250. Plaintiff says that the drug business was worth to him the invoice price thereof, which, as aforesaid, was the sum of \$2,500; and the plaintiff further says that the defendants well knew the terms of the sale, and well knew that the entire stock of drugs, furniture, fixtures, and the entire drug business had been duly sold, transferred, and turned over to the plaintiff, and, knowing all these facts, the defendants willfully, wantonly, and maliciously broke open the said drug store, and took charge of the drug business, in willful disregard of plaintiff's

rights, and to the plaintiff's damage in the sum of \$250.

"(4) Plaintiff further says that at time of the transactions above mentioned both of the defendants owned an interest in the said business, or claimed an interest therein, and when the plaintiff sold his interest in the business and made the other deals above mentioned the defendant W. E. Moore was acting for and under the instructions of his father and codefendant, E. O. Moore; and when plaintiff sold his interest E. O. Moore told the defendant (plaintiff) that he had given W. E. Moore instructions about the matter; and, believing that the said W. E. Moore had full authority, plaintiff made the sale and took the notes and mortgage and entered into the said contract of employment, as aforesaid, which plaintiff would not have done if he had not so believed that W. E. Moore had full authority to make the deal as made, and to bind the business and property mortgaged, and all parties connected with the business, and would not have parted with his interest in the business and right to participate in the management and control of the business.

"(5) Since the above-mentioned deals, the defendants now claim and assert that W. E. Moore had no interest in the business at any time, but that the defendant E. O. Moore owned the business entirely at all times, and that W. E. Moore had no interest in the business, and was only an employé and agent of the defendant E. O. Moore, and that he had not the authority to bind E. O. Moore or the business, as herein alleged by the plaintiff, and that E. O. Moore and none of the property of the business are in any way bound by the above-mentioned deals, trades, note, mortgage, or employment. But the plaintiff says that, if the said W. E. Moore did not have the authority to make the said deals as made, that E. O. Moore allowed him to handle, manage, and control the business in a way that it led the plaintiff to believe, and the plaintiff did believe, that he did have the authority to make the said deals; otherwise plaintiff would not have entered into them. Plaintiff further avers that the defendant E. O. Moore, if he did not authorize the deals to be made as made, he nevertheless has permitted them to stand as made, and has accepted and received the benefits of and under them, and has in all things ratified them and made them his own, and has thereby become liable therefor as though he had made them or authorized them to be made. Plaintiff further alleges that E. O. Moore, knowing of the deals at the time thereof, or a short time thereafter, and accepting and ratifying them as aforesaid, plaintiff was induced to believe and did believe that the deals were acceptable in all things, and was thereby induced to work on in the employ of the defendants, and did not claim back his interest in the business, but to permanently relinquish the same as

aforesaid; whereas he would not have done so but for the conduct of the defendants, and especially of E. O. Moore, as aforesaid.

"Wherefore, all parties being duly in court, and premises considered, the plaintiff prays the court for a judgment for his debt, interest, damages, attorney's fees, and costs of suit, and for general and equitable relief, as he will ever pray."

"Now comes the plaintiff in the above styled and numbered cause, and, leave of the court first being had and obtained, files this, his trial amendment, and in addition to the facts set forth in his fourth amended original petition he alleges: That if, as the defendant E. O. Moore alleges, he did not authorize W. E. Moore to execute the said note and mortgage, as alleged by plaintiff in his said petition, then the plaintiff says that the said E. O. Moore authorized the contract by which the plaintiff sold out his interest in the said business, and the said E. O. Moore and the said business were indebted to the plaintiff in the said sum and amount before alleged, making the entire indebtedness the amount of the note and mortgage, which was the sum of \$600; and further alleges that the said E. O. Moore, knowing the condition and terms of the said sale and trade and the amount of the indebtedness as evidenced by the note and mortgage, permitted the same to stand, and acquiesced in the same, and retained charge of the entire business, and ratified the sale and trade and the terms thereof; and if the said E. O. Moore is not liable on the note and mortgage, then the plaintiff says that he is liable for the amount of the indebtedness and the price of the plaintiff's interest, which is the amount of the note and mortgage as aforesaid; and plaintiff further says that if the defendant E. O. Moore is not liable on said note and mortgage, as alleged, then he says that E. O. Moore authorized, acquiesced in, and ratified said sale and deal, and for the amount of the note, and is liable for the amount thereof. Plaintiff further alleges that E. O. Moore, as aforesaid, accepted and adopted the said note and mortgage, and is bound and liable on the same. Wherefore plaintiff prays judgment against both defendants and for general and equitable relief."

Ewing Boyd and L. L. Wood, for appellant. J. L. Young, for appellee.

KEY, J. (after stating the facts). Appellant has assigned error upon the alleged action of the court in overruling a general demurrer and exceptions to the plaintiff's petition. The assignments are not sustained by the record. We find nothing in the transcript showing that the court made any ruling on any demurrer or exceptions to the plaintiff's petition. However, an examination of the petition discloses the fact that it fails to state a cause of action within the jurisdiction of the district court, and it follows that fundamental error was committed

when that court tried the case and rendered judgment against appellant for more than the averments of the petition authorized.

Conceding that the averments of the petition show that appellant was originally bound by the \$600 note executed by W. E. Moore, and conceding that in the first subdivision of the petition averments are made which would entitle the plaintiff to recover on the note, still in the third subdivision of the petition the plaintiff alleges facts which show that the note has been paid. These paragraphs or subdivisions of the petition are utterly inconsistent, and the averments in the third contradict and nullify the averments in the first. Hence it must be held that the original petition fails to show any right to recover on the \$600 note. Nor, in this respect, is the original petition cured by the trial amendment. That pleading relates to the alleged sale from the plaintiff to W. E. Moore, and charges that appellant, E. O. Moore, ratified that sale, and does not attempt to withdraw or modify any of the averments in the third subdivision of the original petition. That subdivision alleges that the defendants sold to the plaintiff a stock of merchandise, with furniture and fixtures, of the value of \$2,500, and agreed to accept in part payment for the same, the \$600 note referred to. It alleges that the property referred to was delivered to the plaintiff, showing thereby an executed contract, which vested in the plaintiff title to the stock of goods and furniture and fixtures. These facts disclose an executed contract and a completed sale, and if they were as alleged the indebtedness evidenced by the \$600 note was extinguished. And if the defendants refused to accept the note, and permitted it to remain in possession of the plaintiff, that fact is immaterial. Hence we hold that the plaintiff's petition utterly fails to show any right to maintain an action upon the \$600 note. This being the case, the petition did not state a cause of action but for \$250 damages and \$32.50 balance on account, aggregating \$282.50, which was below the jurisdiction of the district court. A judgment rendered on such defective pleading is fundamentally erroneous. *Salinas v. Wright*, 11 Tex. 572; *Dean v. Lyons*, 47 Tex. 19; *Ins. Co. v. Davis* (Tex. Civ. App.) 45 S. W. 604, and cases cited.

For the error pointed out, the judgment is reversed, and the cause remanded.

TABET et al. v. POWELL.*

(Court of Civil Appeals of Texas, May 17, 1905. On Rehearing, June 14, 1905.)

1. FINDING ON CONFLICTING EVIDENCE—CONCLUSIVENESS—APPEAL.

The finding of the trial judge on conflicting evidence is conclusive on appeal.

2. PRINCIPAL—LIABILITY OF AGENT.

One employed merely as agent to make a contract for another, but who signs the contract as an obligor, is liable thereon only as surety.

*Writ of error denied by Supreme Court.

Appeal from District Court, Bexar County; A. W. Seeligson, Judge.

Action by David J. Powell against George Tabet and another. From a judgment in favor of plaintiff, defendants appeal. Modified.

W. H. Lipscomb and Walter P. Napier, for appellants. T. H. Ridgeway and D. J. Powell, for appellee.

NEILL, J. This is the second appeal in this case, and a full statement of its nature will be found in our opinion on the first, reported in 73 S. W. 997. It is sufficient to say here that appellee's cause of action is based upon the following allegations: (1) That on March 29, 1902, he was employed, as an attorney at law, by George Tabet, acting as the agent for and in behalf of his brother Elias Tabet, to act for Elias as his legal representative in all things connected with and pertaining to his claim against the Galveston, Harrisburg & San Antonio Railway Company, for personal injuries sustained by him on March 7, 1902, at Maxon Springs, Tex., and that, in consideration of services rendered and to be rendered by appellee, George Tabet bound himself and Elias to pay him one-half of all amounts that might be received by Elias from said railroad company in settlement of said claim; (2) that, in pursuance of such contract of employment, appellee rendered all legal services and gave all legal counsel necessary in the settlement of said claim; (3) that on April 23, 1902, appellants settled said claim with the railroad company for \$4,500; and (4) that they have failed and refused to pay appellee anything of the sum collected, of which, under the contract, he is entitled to one-half, i. e., \$2,250.00. Elias Tabet, by his answer, denied that he ever authorized or empowered his brother George to make the contract, or ever ratified or acquiesced in the same. George answered by a general denial, and specially pleaded that, if he was liable at all, his liability was as a surety only. The case was tried without a jury, and the court found that the material allegations in plaintiff's petition were sustained, and thereupon rendered judgment in his favor against both defendants for the sum of \$1,894, with 6 per cent. interest thereon from the 1st of May, 1902, aggregating the sum of \$2,178.

All of the allegations stated, constituting plaintiff's cause of action, were proved by the uncontradicted testimony, except the first; and the only controversy about it is as to the authority of George Tabet to make the contract for his brother Elias, which is copied in the opinion on the first appeal. While the evidence upon the issue is conflicting, we are not prepared to say that it is not sufficient to support the finding of the trial judge. "It is impossible to lay down any inflexible rule by which it can be determined what evidence shall be sufficient to establish an agency in any given case, but it may be said, in general terms, that whatever evidence has a ten-

dency to prove the agency is admissible, even though it be not full and satisfactory, as it is the province of the jury to pass upon it." Mech. Ag. § 106. As it is said in *Donaldson v. Everhart*, 50 Kan. 718, 32 Pac. 405: "Testimony on paper is not like testimony from the lips, and when a trial judge hears living voices, and sees the witnesses who utter it, believes one, and disbelieves others, we cannot decide that the judge, having better opportunities than we, ought to have believed and found the other way." Therefore, as there was evidence tending to support the finding of the trial judge on the issue of agency, it is our duty to make his finding our own.

The authority of George Tabet being shown to make the contract for his brother, we think he can only be held liable thereon as a surety, and, to that extent, will modify the judgment; and, as so modified, it will be affirmed.

On Motion for Rehearing.

In this motion it is insisted that the only question raised by the first assignment of error was one of law, and not of fact, and that an assignment, like this one, which asserts the nonexistence of "a certain state, condition, or thing," does not raise the question of the sufficiency of the evidence to establish such state, condition, or thing, and hence we erred in considering the question of agency as one of fact, and in finding agency established by the evidence as a fact.

It seems to be the rule that where the facts are undisputed, and different inferences cannot reasonably be drawn from them, the question is one of law. But how much law must a man know, to say that jurors cannot reasonably draw different conclusions from the undisputed testimony in any given case? Must his learning be so profound and his research so vast that he may be able to say with confidence, as do appellants' counsel in this motion, "there is not an authority in the English-speaking world that supports the decision" of the court on the question? In considering the question claimed to be purely one of law, must not the record be examined in order to determine from it whether there be any evidence upon it, and, if such evidence is found, whether it is such that different inferences cannot reasonably be drawn? No other way is perceived of determining whether the matter presented by the question is one of law or of fact, unless the court should take the ipse dixit of counsel of such extended research as those of appellants. When the original opinion was written, we were not informed of the comprehensive learning implied by what is said in this motion of appellants' counsel, and went to the record to find out whether it contained any evidence tending to prove that George Tabet had authority to execute the contract sued on. In it we found what at least we believed to be such evidence. If in this we were correct, appel-

lants' assignment which asserted there was no such evidence was overturned, and the question of law insisted upon at an end. What, then, were we to do? We thought it our duty to determine the probative force of such evidence, and, if reasonably sufficient to support the conclusion of the trial court, to register such conclusion as our own. Though the question presented was one of law, we ascertained that which was contended for was not law; and then, from the evidence in the record, we found the conclusion of fact in accordance with the finding of the trial court.

There can be no question that George Tabet was the agent, with authority of some extent, of his brother Elias, to settle the latter's claim against the railroad company. This is not denied, and is shown by the undisputed testimony. If, as we held on the former appeal, the proof establishes that he was authorized only to settle the claim, he had no power to make the contract sued on. But does the proof show that he was authorized only to settle the claim? It being proved beyond question that George had authority to settle his brother's claim, it became necessary to determine the scope and extent of such authority, or what was comprehended by it. Counsel for appellants say correctly that "an agent has the authority to do everything that is 'necessary, proper, or usual as a means to effectuate the purpose for which he was appointed.' This much is implied as a matter of law, because the principal is presumed to authorize his agent to do those things which are either usual, necessary, or proper to accomplish the purpose of his appointment." The purpose of George's appointment by Elias was to effect an advantageous settlement of the latter's claim as practicable. If to accomplish this purpose it was necessary or proper to retain an attorney at law, George Tabet had the power to employ appellee to aid, counsel, and advise him in effecting such settlement. If he had the power to effectuate it, he had the concomitant authority to contract with him, on behalf of his principal, for reasonable compensation for his services. As there is no evidence in the record tending to show that George Tabet was authorized only to settle the claim, or, in other words, that his authority was so limited as to exclude the usual, necessary, or proper means to accomplish the settlement, it cannot be said that his authority was limited only to the settlement of the claim. But it must be assumed that he had all the concomitant authority implied by the law, necessary to accomplish the purpose of his agency. Aside from this, the evidence strongly tends to show that Elias was informed by his brother George that he had employed appellee to aid, counsel, and assist him in effecting the settlement of the claim, and of the precise terms of the employment. For, if the testimony of appellee and his stenographer is to be believed, a letter was writ-

ten, properly addressed, and mailed by George Tabet to Elias, informing him of the contract of employment, and its terms, made by the former for the latter with appellee. The letter was never returned. From these facts the trial court was authorized in finding, despite the denial of Elias, that the letter was received by him, and, having received it, and being informed thereby of the terms of the contract, and having never informed appellee that such contract of employment was unauthorized, that such contract was either authorized or ratified and acquiesced in by him. These were matters of fact for the finding of the trial court, and, since counsel for appellants have assured us that "there are a thousand Texas cases supporting the proposition that, when a case has been tried before the court without the intervention of a jury, the trial judge occupies the same position the jury does, and, having heard the witnesses testify, seen their demeanor on the stand, etc., he is in a better position to pass on a question of fact than an appellate court would be, and his finding of facts will not ordinarily be disturbed," we deem it our duty to bow in obedience to such a great weight of authority, and overrule this motion.

DELANEY v. WEST.*

(Court of Civil Appeals of Texas, May 13, 1905. On Rehearing, June 10, 1905.)

1. FORMER ADJUDICATION—EVIDENCE—SUFFICIENCY.

In trespass to try title to land, where the plaintiff claimed under a purchase at a sale on foreclosure of a deed of trust, evidence examined, and held to show that the foreclosure was based on a note involved in a previous suit, in which the plaintiff was a plaintiff, and in which the note was adjudged to be void.

2. RES JUDICATA.

Where an issue is settled against a party in litigation, it is res judicata in a subsequent suit involving the same issue between the parties and their privies in estate.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1234-1241.]

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by J. A. Delaney against I. C. West. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

M. L. Dye and W. H. Clark, for appellant. Clark, Mathis & Freeman, for appellee.

BOOKHOUT, J. This is a suit of trespass to try title for certain lots in the city of Dallas, instituted by appellant, J. A. Delaney, against appellee, I. C. West, on September 22, 1904, in the district court of Dallas county. The plaintiff's petition was in the form usual in cases of trespass to try title. The defendant pleaded: (1) As res adjudicata and a bar to the action, the judgment rendered on March 26, 1903, in consolidated cause Nos. 18,720 and 20,430, styled,

"John Smith et al. v. General Walker et al.," in the district court of Dallas county, fourteenth judicial district of Texas, wherein appellant, Delaney, was a plaintiff, and General Walker and wife, Cora Walker, were defendants; said Cora Walker having sold said lots to appellee, West, after said judgment and before the institution of this suit. It was alleged by appellee that appellant's claim of title to said lots in this suit is based upon the same facts that were in controversy and were adjudicated under the pleadings and evidence in said consolidated cause, wherein said judgment was rendered against appellant, Delaney, and in favor of said Walker and wife, as to said lots. (2) Defendant pleaded not guilty.

On the 14th day of October, 1904, the case was tried without a jury, and resulted in a judgment in favor of appellee on his plea of res adjudicata. To which judgment and ruling of the court the plaintiff duly excepted, and perfected his appeal to this court.

Conclusions of Fact.

On the 10th day of December, 1892, Cora Walker and her husband, General Walker, executed their three promissory notes, each for \$360, payable to their own order and indorsed by them, to become due on December 10, 1895, with 10 per cent. per annum interest; the interest evidenced by coupon notes payable semiannually, and attached to the main notes. The notes also provided that, if any one of said semiannual installments of interest remained unpaid after maturity thereof, then, at the option of the legal holder of said promissory notes, the whole indebtedness secured by said deed of trust—principal and interest then accrued—should at once become due and payable, and the holder thereof might proceed to collect the same under the deed of trust, and providing for 10 per cent. attorney's fees if placed in the hands of an attorney for collection. These notes were delivered to and held by Lindsley & Lindsley, and were secured by a deed of trust, executed on December 10, 1892, on certain lots in the city of Dallas, constituting the homestead of the Walkers, and upon which they actually resided. Shortly thereafter General Walker and Cora Walker rented the property upon which the deed of trust was executed, and moved to Oklahoma. On the 26th of January, 1893, the Walkers received a letter from Lindsley & Lindsley, containing three new notes for same amount and of the same date of the first notes, and a deed of trust to secure the same on the same property and of the same date as the first deed of trust. The letter stated that a mistake had been made in drawing the original notes and deed of trust, and the writers wanted the Walkers to execute the new notes and deed of trust to correct the mistake. The new notes and deed of trust were executed and re-

*Writ of error denied by Supreme Court.

turned to Lindsley & Lindsley, and the old notes and deed of trust were canceled and returned to the Walkers. Thereafter General Walker got into trouble, and was sent to the penitentiary, and Cora Walker returned to Dallas. Two of these notes were paid to Lindsley & Lindsley by Cora Walker. Cora Walker subsequently procured a divorce from General Walker. After the maturity of the unpaid note, J. A. Delaney purchased the same from Lindsley & Lindsley, without recourse on them or Jas. R. Mitchell, for whom they held the same. Thereafter J. A. Delaney brought suit against General Walker and Cora Walker on said note, alleging that "on the 10th day of December, 1892, the defendants made, executed, and delivered their certain promissory notes in writing, bearing date on the day and year aforesaid, whereby they proposed to pay," etc.; that "Lindsley & Lindsley on the 3d day of March, 1898, indorsed and delivered said note, for a valuable consideration," to him. It was alleged that said note was secured by a deed of trust executed and delivered of even date therewith. There was a prayer for judgment for the amount of the note and a foreclosure of the deed of trust. The defendant Cora Walker, to this suit, among other things pleaded "that she was forced to sign said \$300 note, and the deed of trust securing the same, and did so under duress, by her husband, who was a bad man; that he threatened to kill her if she refused, and did choke her into signing the same"; that the property upon which the deed of trust was executed was at the time of its execution her separate property, and the homestead of herself and family. A trial of the case resulted in a judgment for defendant Cora Walker as to the note for \$360, and against the foreclosure of the deed of trust. Upon appeal the judgment was affirmed. 79 S. W. 601. On August 16, 1904, the property embraced in the deed of trust was, for a valuable consideration, conveyed by Cora Walker to the appellee, I. O. West. On August 16, 1904, the original trustee in said deed of trust having declined to act, the appellant, purporting to act under the terms of the deed of trust, appointed a substitute trustee, who advertised the property, and sold the same on the 6th of September at the courthouse at Dallas to J. A. Delaney, to whom a deed was executed. It is under this purchase and deed that the appellant claims title to the land. It was agreed that Cora Walker was the common source of title.

Conclusions of Law.

The question presented is, was there error in sustaining defendant's plea of *res adjudicata*? Appellant contends that the trustee's sale was to foreclose a note executed and delivered by the Walkers on January 26, 1893, whereas the suit of Delaney against General Walker and Cora Walker was to recover on a

note executed and delivered on December 10, 1892, and for this reason the suit on the note is not *res adjudicata* to this suit. It is argued that because the petition declared upon a note dated, executed, and delivered on December 10, 1892, it was for a different note than the one on which the foreclosure was had. The old notes were actually dated, executed, and delivered on December 10, 1892. They were for \$360 each, and payable December 10, 1892, drawing 10 per cent. per annum interest, payable in semiannual installments, evidenced by interest coupon notes attached to the principal note. There was a mistake in the coupon notes, in that they called for \$13, instead of \$18, the correct amount. This mistake was discovered, and new notes and new interest notes correcting the mistake, and of the same date and terms of the old notes, and also a new deed of trust, were prepared and sent to the Walkers for their execution, and to be in lieu of the original notes and deed of trust. The Walkers executed the same on January 26, 1893, and they were returned to Lindsley & Lindsley, and the old notes and deed of trust canceled and returned to the Walkers. One of these notes was not paid. The petition in the suit of Delaney v. the Walkers declared on this note. It alleged its date, amount, date of maturity, rate of interest—in fact, correctly and fully described the note. It did not allege that it was actually signed on January 26, 1893, and given in lieu of another note of the same date and for the same amount. Nor was it necessary that it should. The pleading correctly described the note, and set up its legal effect. It could not have availed the pleader, had he alleged the facts in detail as to the manner of its execution. Appellant argues that he did not know the true facts as to its execution. The appellant had in his possession the deed of trust which he acquired when he purchased the note, which recites that "this deed of trust is executed in lieu of and to correct a deed of trust of even date made by us to Philip Lindsley, Trustee, duly recorded in volume 35, page 525, Dallas County Records of Trust Deeds, it being agreed that this trust deed and the following described notes which are also given in lieu of the notes described in said recorded trust deed shall be dated December 10th, 1892." This recitation shows that the notes and deed of trust were executed in lieu of other notes described in a deed of trust recorded in Record of Trust Deeds, in volume 35, p. 525, Dallas County Records of Trust Deeds. The deed of trust under which appellant claims is recorded in volume 70, p. 341, Records of Mortgages and Trust Deeds of Dallas County.

It was, under the facts, immaterial whether or not appellant knew the facts in reference to the execution of the note. It cannot be successfully controverted, and is in fact admitted, that the note and debt for which the deed of trust was foreclosed is the same

note and debt sued upon in the case of Delaney against the Walkers. The issue there involved was whether Cora Walker was liable for this note and debt. The same issue is here involved. The judgment in that suit settled this issue against appellant and in favor of Cora Walker, and is *res adjudicata* as to this suit. *Moore v. Snowball* (Tex. Sup.) 81 S. W. 5, 66 L. R. A. 745; *Scott v. Bank*, 84 S. W. 445, 11 Tex. Ct. Rep. 845.

It follows that the judgment should be affirmed.

Affirmed.

On Rehearing.

The appellant complains of our conclusions of fact, and asks that the same be modified. Possibly the statement in the opinion that "it cannot be successfully controverted, and is in fact admitted, that the note and debt for which the deed of trust was foreclosed is the same note and debt sued upon in the case of Delaney against the Walkers," is too sweeping. It was the same note declared upon in that case, and Mr. Dye, one of appellant's attorneys, testified that it is the same note that he introduced in evidence in that case. It is apparent from our conclusions of fact that it is for the same debt. While it is not admitted by counsel that the note and debt for which the deed of trust was foreclosed is the same note and debt sued upon in the case of Delaney against the Walkers, it is clear that such is the case. To this extent the opinion is modified.

MORRIS & CROW v. KESTERSON.

(Court of Civil Appeals of Texas, May 20, 1905. On Rehearing, June 10, 1905.)

1. ATTORNEY AND CLIENT — EMPLOYMENT — EVIDENCE—SUFFICIENCY.

In an action by an attorney for services in defending an action of trespass to try title in the district and appellate courts, and in a partition suit following as a result of an unsuccessful defense, evidence examined, and *held* to show that a fee paid plaintiff included services only in the district court in the trespass action, entitling him to a reasonable fee for services in the appellate courts in that case.

On Rehearing.

2. SAME.

Evidence *held* to show that plaintiff, as attorney, assisted in the partition suit without the knowledge or consent of his client, and was not entitled to recover for services therein.

Appeal from Camp County Court; M. Reynolds, Special Judge.

Action by Morris & Crow against W. A. Kesterson. From a judgment in favor of defendant, plaintiffs appeal. Reversed in part.

Morris & Crow, in pro. per. Sam D. Snodgrass, for appellee.

BOOKHOUT, J. This suit was brought by appellants against appellee to recover cer-

tain fees claimed by them for services as attorneys. The county judge being disqualified, a special judge was agreed upon, who tried the case. The trial before the court without a jury resulted in a judgment for defendant, to which plaintiffs excepted, and perfected an appeal.

Conclusions of Fact.

Morris & Crow, a firm of attorneys at law residing in Dallas, were employed as assistant counsel to represent W. A. Kesterson in the case of John Bailey et al. against W. A. Kesterson, in trespass to try title to 409 acres of land near the town of Pittsburg, of the value of about \$25 per acre, then pending in the district court of Camp county. E. A. King was leading counsel for Kesterson, and Morris agreed to assist him in the defense of said cause in said district court for a fee of \$100, which was paid. The contract of employment was made by letter written by King at Kesterson's request to Morris. This letter has been lost. Morris testified that the offer by letter was to pay \$100 for his services in the district court. King, after testifying to writing the letter to Morris offering him \$100 to assist him in the case, says: "I do not remember that I said anything about any court or courts. Just wrote that we wanted him to go into the case with me." Morris replied that he would accept the offer for employment, but Kesterson would have to pay his expenses in attending court. Morris was present and assisted King in the trial of said cause in said district court, and, judgment having been rendered for plaintiffs for one-half the land, he assisted in the preparation of the statement of facts and other necessary papers preparatory to an appeal by Kesterson. Morris returned to Dallas, and wrote a letter to Kesterson demanding an additional fee of \$150 for representing him on appeal. To this letter no reply was made. After waiting a short time, Morris wrote E. A. King, and asked him to see Kesterson about such fee, and see if it was to be arranged. King replied that Kesterson was sick, and not able to attend to the matter of answering Morris' letter. Not wishing to desert the cause of a sick man, and knowing the time would soon expire for perfecting the appeal, Morris continued to assist with the appeal. Some time thereafter King wrote Morris that Kesterson understood that the \$100 paid to him was to cover his services through all the courts, and further stated that he wanted him to go ahead with the appeal. Morris procured the transcript, briefed the cause, and did all necessary work to prepare it for submission in the appellate court. The case having been affirmed, Morris prepared and filed a motion for rehearing, and upon its being overruled he prepared a petition for writ of error to the Supreme Court. This was refused. Kesterson paid the expenses of Morris to Camp county to try the cause, and also

paid for printing the brief. During the pendency of the appeal Morris and Kesterson met at Pittsburg. At this meeting Morris demanded a fee of \$150 for his services on appeal, but Kesterson refused to pay; claiming that the \$100 paid was to pay for his services in all the courts. Kesterson told Morris that he expected him to go on with the case in the appellate court, and Morris replied that he would have to pay his fee of \$150 if he did so. It was shown that \$150 was a reasonable fee for representing Kesterson in the land suit on appeal. In fixing fees it is the custom of the attorneys of the Pittsburg bar to fix the amount for representing the case through all the courts, unless the services are definitely limited to the trial court. Morris had no knowledge of this custom. Morris testified that in the conversation between King, Kesterson, and himself, which occurred on about the 7th of March, 1904, King told Kesterson that in the event the Supreme Court decided the title case against him, and affirmed the decision of the trial court and the Court of Civil Appeals, the Baileys would bring a partition suit, but that he (King) would represent him (Kesterson) in that case without any additional fee. Kesterson then asked Morris if he would do the same thing, and Morris replied that he would if Kesterson would pay the \$150 that he charged for the appeal in the original case. Kesterson then told Morris that he wanted him to go on and represent him in the partition suit in the event it came up. Shortly after this time the partition suit was filed to the May term, 1904, of the district court of Pittsburg, and Morris was present and filed an answer in said cause, setting up, as an offset to rent, taxes and improvements amounting to about \$3,180, and asking that the improvements set out in said answer be given to Kesterson on the land set aside to him, if it could be done. Later, in May, 1904, the decree was agreed to and entered, dividing said land and appointing commissioners. This agreement judgment was prepared by Morris, and is in his handwriting. Kesterson does not, in his testimony, deny that Morris, with his knowledge, assisted in the partition suit, but says he did not employ him in that suit, and did not know that he was claiming anything for his services in that suit. It was shown that Morris' services were reasonably worth \$100 in the partition suit.

.Opinion.

The testimony of Morris is positive that the letter of King, making the offer for his services for assisting in the defense of the case of Bailey et al. against Kesterson, had reference alone to the district court. King's testimony shows that he does not remember that he said anything about the court or courts. This is all the direct evidence there is on the question. It was shown that \$100

was a very small fee for the services of Morris & Crow in the district court alone. There being positive evidence that the employment of Morris & Crow had reference alone to the district court, and that the fee of \$100 paid was for their services in that court, they were entitled to recover for the reasonable value of their services rendered at Kesterson's request in the appellate courts. The evidence shows that \$150 would be reasonable compensation for such services.

Again, Morris assisted in the partition suit, and he says that he was induced to do so by Kesterson, and that his services were rendered with his knowledge and for his benefit. Kesterson does not deny knowledge of the fact that Morris was assisting in that case, but does say he did not employ Morris, and did not know until this suit was brought that he was claiming pay for his services in the partition suit. There was evidence that Morris' services were worth \$100 in that case. It is held that if a party induces an attorney reasonably to suppose that his services are desired, and avails himself of them, without objection, a promise is implied on his part to pay the attorney what such services are reasonably worth. *Fore v. Chandler*, 24 Tex. 146; *Ector v. Wiggins*, 30 Tex. 55. The offer of Morris not to charge for his services in the partition suit was made in a spirit of compromise, and was conditioned upon Kesterson's payment of the \$150 fee for Morris' services in the appellate courts. This offer was not accepted, Kesterson having failed to pay that fee. It follows that the appellants were entitled to recover the reasonable value of the services rendered by them, and the trial court erred in not so holding.

The case having been tried by the court without the intervention of a jury, the judgment is reversed, and here rendered for appellants for \$250.

Reversed and rendered.

Opinion on Rehearing.

We were in error in our conclusion to the effect that Kesterson did not deny knowledge of the fact that Morris was assisting in the partition suit. In the motion for rehearing our attention is called to the following statement in Kesterson's testimony: "I did not know that he [Morris] had ever done anything in that case [the partition suit] as an attorney until he testified in this case today." This evidence escaped our attention when the case was decided. In view of this testimony, the judgment allowing appellants \$100 for services in the partition suit is error.

The motion for rehearing is granted, and the judgment is reversed, and here rendered for appellants for \$150 for the services of appellants in representing Kesterson in the case of Bailey et al. v. Kesterson in the appellate courts.

WILLIAMSON et al. v. GULF, C. & S. F.
RY. CO.*

(Court of Civil Appeals of Texas. June 3,
1905.)

1. NEGLIGENCE — RAILROAD ABUTMENTS —
PLACES ATTRACTIVE TO CHILDREN.

Defendant's railroad on each side of a creek in a city was built on a dump. A bridge had been constructed over the creek, with stone abutments 30 feet high, similar to those constructed by railroads generally, so laid as to form steps leading from the base of the dump to the railroad track on each side. Across defendant's railroad at that point was a beaten track, used by the public, connecting with the stone stairway; but there was no obstruction on the precipice side of the abutment to prevent a person from falling over the same, and defendant's right of way fence did not extend across the abutment. Such abutment was attractive to children, and while plaintiffs' child, four years of age, was attempting to walk down such steps, he fell from same, and received injuries from which he died. Held, that such facts were insufficient to show an invitation or permission to the public or to plaintiffs' child to use the abutment as a passway.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 47, 55.]

2. SAME—CARE AS TO TRESPASSEES.

Where plaintiffs' child, in using the stone abutment of a railroad bridge as a passway, was a trespasser, the railroad company owed him no duty except to avoid willfully injuring him.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 45-47; vol. 41, Cent. Dig. Railroads, §§ 1235-1239.]

Error from District Court, Dallas County: Richard Morgan, Judge.

Action by E. B. Williamson and others against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of defendant, plaintiffs bring error. Affirmed.

This is an action for damages, brought by plaintiffs in error against defendant in error for causing the death of plaintiffs' minor son. The trial court sustained a general demurrer to the first amended petition of plaintiffs, and, they declining to amend, the court dismissed the suit, rendering judgment for defendant, and from this action plaintiffs prosecute this writ of error.

The petition alleged: That defendant owns and operates a railroad in Dallas county, which runs through the city of Dallas and city of Oak Cliff, and on or about July, 1900, constructed a bridge on its right of way across Cedar creek, in Oak Cliff, in a thickly settled and populous part of said city, near and north of the paper mill. That the abutments to said bridge are about 30 feet high above the creek, built of square or oblong stones, and so constructed as to form stone steps leading up each side from the outer edge of the base of the dump up to the track of said railway, forming a most attractive, beautiful, and fascinating stairway leading up the embankment, overlook-

ing the sparkling stream below as an overhanging precipice, and looking across said railroad, forming a most attractive and inviting footpath and roadway for pedestrians to cross the railroad at said point, whereby an invitation, direct and implied, was extended by defendant to the public and the child mentioned to use said stairway as a crossing of said railroad at said point. That at the time the child was injured there was a well-beaten path across defendant's roadway at said point, used by the public, and connected with said stairway leading over said railroad dump. That the fence extends along the right of way of defendant to said stairway, but not across same, leaving negligently an open way and invitation by defendant to the public and to said child to use said stairway, and it was so used by the public at the time said child was injured. That on the precipice side of said stairway there was no railing or obstruction whatever to prevent a person crossing from falling overboard, and the same was negligently omitted, and any one crossing said stairway who might lose his balance was sure to fall on the hard rocks and gravel at the bed of the stream underneath same, which at the highest point of the stairway was about 30 feet high. That said stairway was fascinating and dangerous, and was on the route along the railroad bed, and down said stairway along a path in common use by the public leading to South Oak Cliff, known as "Thomas' Hill," and to a pond to which people commonly resorted for the purpose of catching fish. That all of said facts were known to the defendant, or by reasonable diligence could have been known to it, and it negligently and knowingly constructed and so maintained said stairway as an open, unobstructed way across its right of way knowing it was in use by the public, and that it was attractive and dangerous, and without any notice to the public of its dangerous nature and character, whereby there was a direct and implied invitation to use said stairway and an intention to injure those who might use it. That June 3, 1902, George Dewey Williamson, son of plaintiffs, four years of age, on said direct or implied invitation of defendant, was attempting to walk down said stone steps of said abutments, when he lost his balance and fell a distance of about 25 feet on the dry stone bottom of the bank of said creek, and received injuries from the effects of which he died in about eight hours. That he was attracted to said stone steps by the direct or implied invitation of defendant and his childish inclination to walk or play thereon, and while going on the path from the railroad down said stairway to a fish pond beyond. That the dangerous nature of said steps rendered them attractive, but a dangerous place for children, and this fact was, or ought to have been, known by defendant. That at the time and before said injury

*Rehearing denied June 17, 1905, and writ of error denied by Supreme Court.

plaintiffs were newcomers in said neighborhood, and had no knowledge whatever of said steps, and did not know of their attractive or dangerous condition. That said bridge is located near a large number of residences, and the children from that locality frequently go there to play and walk over said steps, and there was then no notice posted warning against trespassing on said premises. That said child, being of tender years, was not guilty of negligence in going on said steps, and it was accompanied by a brother eleven years old and a sister nine years old, all going fishing; and these children were of tender years, and not of sufficient discretion to know the danger of going down said steps, and were not guilty of negligence in allowing said injured child to go on same; and plaintiffs had no knowledge whatever of said piers, or that their children would go down same on their way to said fish pond, and were not guilty of negligence in allowing same. Plaintiffs claim damages in the sum of \$20,000.

Morris & Crow, for plaintiffs in error. Alexander & Thompson, for defendant in error.

BOOKHOUT, J. (after stating the facts). The question presented is, did the court err in sustaining a general demurrer to the petition? The material allegations of the petition are, in substance, that defendant's railroad on each side of Cedar creek, in Oak Cliff, is built on a dump and that in constructing a bridge over said creek the defendant erected abutments of stone, so laid as to form stone steps leading from the base of the dump up to the railway track on each side; that from the top of the abutments to the bed of the creek is about 80 feet; that there was a well-beaten path across defendant's railway at said point, used by the public, and connecting with said stairway, leading over said dump; and that these steps formed "a most attractive, beautiful, and fascinating stairway leading up the embankment, overlooking the sparkling stream below as an overhanging precipice, and looking across said railroad, forming a most attractive and inviting footpath and roadway for pedestrians to cross the railroad at said point, whereby an invitation, direct and implied, was extended by defendant to the public and the child mentioned to use said stairway as a crossing of said railroad at said point." It was further alleged that there was a fence extending along the right of way of defendant to said stairway, but that it did not extend across the same, and that this was an invitation to the public and to plaintiffs' child to use said stairway. It was shown that there was no railing or other obstruction on the precipice side of said abutments to prevent a person from falling over the same. The petition did not show that this abutment was constructed in any manner different from the ordinary railroad bridge abutment where

the track is built on a dump, or that this bridge abutment is not the same as the usual bridge abutments of all railroads. The abutment was on the defendant's right of way. Are these facts sufficient to show an invitation to the public and to the plaintiffs' child to go upon or cross over this bridge abutment? The rule established in this state is that, where the owner maintains upon his premises something which, on account of its nature and surroundings, is especially and unusually calculated to attract and does attract another, the court or jury may infer that he intended it as an invitation to the public to enter upon such premises. But where the owner makes such use of his property as others ordinarily do throughout the country, there is not, in legal contemplation, any evidence from which a court or jury may find that he had invited the party injured thereon, though it be conceded that his property, or something thereon, was calculated to and did attract. *Railway Co. v. Morgan*, 92 Tex. 98, 46 S. W. 98. The fact that the slope of the abutment was constructed with recess steps, in the absence of evidence that this is not the usual and ordinary way of constructing the same, does not show an invitation, express or implied, to make use of the steps as a stairway. Railway bridge abutments, whether constructed on a grade or on a dump, are so common and in such general use in the operation of railroads, that when erected on the railway right of way they cannot be said to furnish any evidence of an invitation to the public or children to go upon the same. *Railway Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825; *Dobbins v. Railway*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856. The facts alleged do not show an implied invitation to plaintiffs' child to go upon said bridge abutment.

Again, it is insisted that there was a well-beaten path over the right of way, connecting with said abutment, which was used by the public in crossing the railroad at said point. No such use of this pathway by the public was shown as would justify the conclusion that a person crossing the track over such pathway was a licensee. No express or implied permission on the part of the railroad company for the use of its right of way for a crossing was shown. *Railway Co. v. Shiflet*, 11 Tex. Ct. Rep. 490, 83 S. W. 677. The failure to extend the right of way fence so as to include the abutment to the bridge did not show an intention to make a crossing of the bridge abutment. The fact that no railing was placed on the precipice side of the abutment would tend to negative such a conclusion. Plaintiffs in error's child not being a licensee, but a trespasser, in entering upon the bridge abutment, the defendant in error only owed him the duty to avoid willfully inflicting injury to him.

We conclude that the demurrer to the petition was properly sustained, and the judgment is affirmed.

KIRBY v. PANHANDLE & G. RY. CO.*

(Court of Civil Appeals of Texas. April 29, 1905.)

1. CONDEMNATION PROCEEDINGS — SPECIAL VERDICT—RESPONSIVENESS.

In a proceeding to condemn a railroad right of way, the court submitted a special verdict asking the market value of the 5.23 acres of land taken at or just prior to the appropriation, the value of the residue of defendant's land at or just before the condemnation of the 5.23 acres, and the market value of the residue of defendant's land just after the appropriation. The jury answered the first two questions "\$12 per acre," and the third "\$10.65 per acre." *Held*, that the answers were not responsive to the issues, and were insufficient to sustain a judgment.

2. SAME—PETITION.

Under Sayles' Ann. Civ. St. art. 4447, providing that in proceedings to condemn land the statement filed with the county judge shall "state in writing the real estate and property sought to be condemned," the purpose of such condemnation, the name of the owner thereof, and his residence, if known, the petition need not allege the amount of defendant's land not taken which might be injured by the appropriation, such subject being a matter of proof.

3. SAME—TAKING LAND FOR RAILROAD RIGHT OF WAY—INSTRUCTIONS.

In proceedings to condemn land for a railroad right of way, an instruction requiring the jury to consider, in estimating defendant's damages, the construction of a proposed depot and switch at the intersection of plaintiff's railroad and that of another railroad, was erroneous as on the weight of evidence, in assuming that such construction constituted a special benefit to defendant's land.

4. SAME—DAMAGES—DEDUCTION OF BENEFITS.

Where the construction of a certain railroad depot and switches a half mile from defendant's land was a benefit to him only in common with the community in general, it was not a special benefit, which the railroad company was entitled to have deducted from the amount of damages recoverable by defendant in condemnation proceedings.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 390-393.]

5. SAME—ADMISSIBILITY OF EVIDENCE.

In condemnation proceedings, evidence as to particular purchases of land made by a witness in the vicinity was inadmissible without further proof that the lands purchased were similar in situation and otherwise to those of the defendant.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 267.]

6. SAME—DAMAGES—FLOODING LAND.

Since a railroad is bound by statute to construct its railroad with necessary culverts and sluiceways, and is liable to a property owner for injuries caused by its failure to do so, damages sustained by an overflow caused by the construction of plaintiff's railroad embankment were not recoverable in a proceeding to condemn certain of defendant's land for a right of way.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 236.]

Appeal from Hardeman County Court; W. J. Jones, Judge.

Proceeding by the Panhandle & Gulf Railway Company to condemn certain land, belonging to R. H. Kirby, for a right of way.

From a judgment assessing damages, Kirby appeals. Reversed.

Osbourne, Marshall & Hall and Bowyer & Tillett, for appellant. H. C. Hord, Fires & Decker, and Duncan G. Smith, for appellee.

SPEER, J. This is a condemnation proceeding instituted by appellee against appellant, and the appeal is from a judgment in the county court awarding appellant \$1,203.51.

After instructing the jury by general and special charges, the court submitted to them for determination the following special issues: "(1) What was the market value of the 5.23 acres of land at or just before the appropriation of same for roadbed and right of way purposes on the 12th day of April, 1902? (2) What was the market value of the residue of defendant's body of land at or just before the condemnation and appropriation of said 5.23 acres by appellant? (3) What was the market value of the residue of defendant's body of land just after the appropriation by plaintiff of said 5.23 acres?" The jury answered the first two questions, "\$12 per acre," and the third, "\$10.65 per acre," and upon this verdict the court proceeded to render judgment for the amount of \$1,203.51, as aforesaid.

It is insisted that the answers of the jury were not responsive to the special issues submitted, and were incomplete, and therefore the court erred in receiving and entering judgment on them. It is clear that within itself the verdict does not authorize judgment for any amount whatever, and that the court looked beyond it in entering the judgment he did. *Du Bose v. Battle* (Tex. Civ. App.) 84 S. W. 148; *Galveston, H. & S. A. Ry. Co. v. Botts* (Tex. Civ. App.) 55 S. W. 514; *Oriental Investment Company v. Barclay* (Tex. Civ. App.) 64 S. W. 80. It is not a case for the application of the rule that a cause will not be reversed for the failure of the court to submit an issue where there has been no request for such submission, because the court did submit these special issues in a manner satisfactory alike to both parties, but the difficulty is that the answers are not responsive and practically no answers at all. We apprehend the court arrived at the amount of the judgment upon a basis of 850 acres, the amount of land alleged by the appellee to be in appellant's farm. But in this statutory proceeding there is nothing to require such an allegation in the petition, and we do not think the owner can be thus limited in his recovery of damages to his entire tract by reason of the condemnation of a right of way through it. The demand of the statute with reference to the description required in the statement to be filed with the county judge is that it shall "state in writing the real estate and property sought to be condemned, the object for which the same is sought to be condemned, the name of the owner thereof and his residence, if known."

Sayles' Ann. Civ. St. 1897, art. 4447. Upon the filing of this statement the county judge is required to appoint three disinterested freeholders as commissioners to assess the damages, who, after having issued a notice in writing to each of the parties of the time and place selected for the hearing, are authorized to proceed to fully hear said parties, and to assess such damages as will be sustained by the owner. And while it is provided that, "If either party be dissatisfied with the decision of such commissioners he may within ten days after the same has been filed with the county judge file his opposition thereto in writing setting forth the particular cause or causes of his objection, and thereupon the adverse party shall be cited, and said cause shall be tried and determined as in other civil causes in said court," still we find nothing in the statute that would require either party in his pleadings to define the limits or extent of the holding of the owner whose property is sought to be condemned. This we take to be a matter wholly of proof. For it is contemplated by the very letter and spirit of the statute that the owner is entitled to recover, not only the market value of the land actually taken, but, in addition thereto, the damages sustained as to the remaining portion. In this case there is no admission that appellant's land consisted of only 850 acres, and there is evidence indicating that it contained much more. To allow him damages upon 850 acres only is to compensate him in part only for the loss sustained.

There was also error in the following part of the court's charge: "I therefore charge you as the law that you may consider, in estimating the damages, if any, sustained by defendant, the proposed construction of a depot and switch at the intersection of the plaintiff's railroad and that of the Denver Railroad," etc. This charge is clearly upon the weight of the evidence, in that it assumes that the proposed construction of a depot and switches at the intersection of the plaintiff's railroad and that of the Denver Railroad constitutes a special benefit to appellant's land. At most, it is a question of fact, to be determined by the jury trying the case, what is or is not a special benefit. Under the facts as the record is presented to us, it is extremely doubtful if the erection of a depot and switches at the point designated, which is one-half a mile from appellant's land, can in any event be considered a special benefit. Rather, we think it is one of those benefits which appellant receives in common with the community generally. This benefit is by virtue of the fortuitous circumstance of the depot's being located in his vicinity, and not in any sense because of the condemnation of, and the construction of the railroad across, his particular parcel of land. He would receive this benefit if the railroad never crossed his land, and could not, of course, be required to pay for it. Why, then,

should he be required to pay merely because a part of his land is condemned for right of way, to the injury of the remaining portion? *Pochila v. Railway* (Tex. Civ. App.) 72 S. W. 255, and authorities there cited.

It follows from this that the court erred in admitting the testimony complained of in the seventh, eighth, ninth, and tenth assignments of error, relating to the proposed establishment of a depot and town at the intersection of the two roads.

We understand the statute to lay down a clear rule of damages in this character of case, which itself will constitute a sufficient guide for the trial court upon another trial. Article 4459 is: "Said commissioners shall hear evidence as to the value of the property sought to be condemned, and as to the damages which will be sustained by the owner thereof by reason of such condemnation, and as to the benefits that will result to the remainder of such property belonging to such owner, if any, by the construction and operation of such railroad, and shall according to this rule assess the actual damage that will accrue to such owner by said condemnation." Article 4461 provides: "In estimating either the injuries or the benefits when only a portion of a person's real estate is condemned the commissioners shall estimate the injuries sustained and the benefits received thereby by the owner as to the remaining portion of such real estate; whether such remaining portion is increased or diminished in value by such condemnation, and the extent of such increase or diminution, and shall assess the damages accordingly." And, finally, article 4462 declares that: "In estimating either the injuries or the benefits, as provided in the preceding article, those injuries or benefits which the owner of such real estate sustains or receives in common with the community generally, and which are not peculiar to him and connected with his ownership, use and enjoyment of the particular parcel of land, shall be altogether excluded from such estimate." When tested by the rule as here laid down, the charge of the court in this case in several respects is erroneous, but we deem it unnecessary to call further attention to the same.

The testimony elicited from the witnesses Neece, Williams, and others with reference to the extent of the injury to appellant's lands, if considered as segregated and as separate parcels, was probably admissible upon cross-examination. We think, however, there was error in allowing the witness Pyron to testify as to particular purchases made by him, unless it had been further shown that these lands were similar in situation and otherwise to those of appellant.

The court should not have heard testimony one way or another as to the damage to the 100 acres of wheat land caused to overflow by the construction of appellee's embankment. The statute requires every railway company in the construction of its line to

provide necessary culverts and sluiceways, and, for any failure so to do, an injured party has his remedy in a suit at law. Such issue is independent of, and should not be confounded with, a condemnation proceeding which contemplates a proper construction and operation of the proposed railway. *Gregory v. Gulf, etc., Railway Company* (Tex. Civ. App.) 54 S. W. 617.

As the case is now presented to us, there is practically but one question to be presented to the jury upon another trial, and that is the amount of appellant's damages to be determined by the rule of the statute above quoted, for in the present state of the evidence there is little or no testimony tending in any way to show any special benefits to appellant's land by reason of the condemnation and use of the right of way in question.

For the errors discussed, the judgment is reversed, and cause remanded for another trial.

NORTHERN TEXAS TRACTION CO. v. YATES.*

(Court of Civil Appeals of Texas. April 19, 1905.)

1. TRIAL — INSTRUCTIONS — ASSUMPTION OF FACTS.

It is not error to assume in the charge facts established by uncontroverted evidence.

2. DAMAGES — PERSONAL INJURIES — INSTRUCTIONS.

Where, in an action for personal injuries, plaintiff, under his pleadings and the evidence, was entitled to compensation for impairment of his nervous system and memory in addition to damages for pain, suffering, impairment of ability to earn money, etc., it was proper to instruct the jury to that effect.

3. NEGLIGENCE — INJURY AVOIDABLE NOT WITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where, in an action for personal injuries, plaintiff seeks recovery solely on the ground that at the time he was injured he was in a position of peril, which defendant discovered in time to have prevented the injury by the exercise of ordinary care, contributory negligence is no defense.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 115.]

4. APPEAL — STATEMENT OF FACTS — BILL OF EXCEPTIONS.

Under the express provisions of Sayles' Ann. Civ. St. 1897, art. 1362, where evidence in the statement of facts would explain or show the relevancy of evidence embraced in the bill of exceptions, it is sufficient for the bill to refer to such evidence as it appears from the statement of facts, without setting it out.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, §§ 13-17.]

5. NEGLIGENCE — ACTION — EVIDENCE — RELEVANCY.

In an action for personal injuries, in which plaintiff alleged that the injuries had impaired his memory, defendant offered evidence that before the accident, and while plaintiff was a conductor on one of its cars, he had had an altercation with a passenger, in which he had sworn at her, and treated her harshly. This evidence was excluded. On cross-examination

plaintiff was asked if conductors were not required by rule of the company to treat passengers courteously, and stated that he did not remember. There was no direct evidence that there was any such rule. *Held*, that it did not appear that the testimony excluded had any tendency to show that plaintiff's memory was poor before the accident, and hence was properly excluded as irrelevant.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by J. K. Yates against the Northern Texas Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Perkins, D. Upthegrove, and Edward G. Perkins, for appellant. W. P. Finley, for appellee.

EIDSON, J. This was an action brought by the appellee for damages for personal injuries alleged to have been caused by the negligence of appellant, its agents and servants. Appellant answered by general denial, and pleaded contributory negligence upon the part of appellee. The trial resulted in a verdict and judgment for appellee in the sum of \$2,000.

Appellant's first assignment of error and propositions thereunder complain of the charge of the court upon the grounds that it assumed that appellee was injured, and that he was in a dangerous position at the time of such injury. It appears from the record that the court in its charge did assume these facts; but there was no error in this action of the court, as the uncontroverted evidence, according to the record, shows that appellee was injured, and that at the time he was injured he was in a position of peril. *Railway Co. v. Stewart*, 57 Tex. 166; *Railway Co. v. Pearce*, 75 Tex. 281, 12 S. W. 804; *Railway Co. v. Bowen*, 95 Tex. 366, 67 S. W. 408; *Railway Co. v. Breadow*, 90 Tex. 26, 36 S. W. 410; *Railway Co. v. Dalwigh* (Tex. Civ. App.) 48 S. W. 528.

By its second assignment of error appellant complains of the following paragraph of the main charge of the court, to wit: "If you find that plaintiff is entitled to a verdict, then the amount of your verdict, if any, should be such sum of money as, in your best judgment, with the light of the testimony before you, will be a reasonable pecuniary compensation to plaintiff for all such physical pain, if any, and mental suffering, if any, and impairment of his nervous system, if any, and impairment of his memory, if any, and impairment of his ability to earn money, if any, and expense, if any, incurred by plaintiff for the reasonable value of such services of a physician as it may have been reasonably necessary for him to incur for the treatment of the wound on his head as plaintiff may have sustained as the direct result of the injuries sustained by him in falling off of said car on the 13th of October, 1902." Appellant's contention is that the charge quoted is

*Rehearing denied June 14, 1905.

misleading, confusing, and authorizes a double recovery, for the same injuries. The alleged vice in the charge, according to appellant's contention, arises from the authority given to the jury to allow compensation for impairment of his nervous system and impairment of his memory in addition to the compensation the jury are authorized to allow appellee on other grounds stated in the charge. We do not think appellant's contention is sound. We are of the opinion that appellee, under his pleadings and the evidence, was entitled to compensation for impairment of his nervous system and memory, independent of and in addition to the compensation he was entitled to upon the other grounds stated in the charge. And therefore, there was no error in the court's so instructing the jury. *Railway Company v. Warner* (Tex. Civ. App.) 54 S. W. 1064; *Railway Co. v. Boehm*, 57 Tex. 152; *Railway Co. v. Greenlee*, 62 Tex. 344; *Railway Co. v. Randall*, 50 Tex. 261.

Appellant's third, fourth, fifth, sixth, seventh, and twenty-second assignments of error relate to the refusal of the court to submit to the jury the question of contributory negligence on the part of appellee as the proximate cause of the injury, and the exclusion of testimony offered by appellant to show such contributory negligence. Appellee's action being predicated solely upon the allegations that he was in a position of peril, and that appellant, its agents and servants, discovered his perilous position in time to have prevented injury to him by the exercise of ordinary care, contributory negligence on the part of appellee was not involved or properly an issue in the case; and therefore could not be availed of by appellant as a defense. *Railway Co. v. Breadow*, supra; *Railway Co. v. Bowen*, supra.

There was no error in the action of the court complained of in appellant's twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth assignments of error. The answers of the witness to the cross-interrogatories mentioned in these assignments are not subject to the objections interposed to them by appellant. They were practically responsive to the interrogatories, and were as positive and complete as was practicable, in view of the witness' knowledge and information relative to the matters inquired about as gathered from the entire deposition; and the deposition, when considered in its entirety, furnishes appellant with the information desired to be elicited by the cross-interrogatories, the answers to which it claims were evasive, and not responsive; and therefore the action of the court complained of was not error. *Cohen v. Oliver*, 9 Tex. Civ. App. 38, 39, 29 S. W. 81.

We overrule appellant's twentieth assignment of error. The witness whose answers are complained of, while using the word "believe" in answering the interrogatories, evi-

dently was testifying according to his best recollection, and such testimony was admissible.

Appellant's twenty-fifth assignment of error is as follows: "The court erred in excluding the testimony of the witness Mrs. Jessie Vesta Lytle, because the testimony was material and relevant, and in contradiction of plaintiff's testimony on material issues in this case, and was not an attempt to impeach plaintiff on collateral matters." And its proposition thereunder is as follows: "In a suit brought by a party, in which he claims that the injuries received affected his mind by weakening his memory, it is reversible error for the court to refuse to allow the defendant to show the condition of his mind and memory prior to the time of the alleged injury." The only allegation in appellee's petition which charges that his mind was affected as a result of the injuries received by him, is the allegation that the cut on his head affected his mind by weakening his memory, and this allegation does not charge that his mind was affected in any respect except as to his memory, and that was alleged to have been weakened. From appellant's bill of exceptions, upon which this assignment is based, it appears that it sought to prove by the witness Mrs. Jessie Vesta Lytle as follows: "That on Sunday, August 24, 1902, she was a passenger on one of defendant's cars; that said witness knew plaintiff J. K. Yates; that on the afternoon of that day witness got on an east-bound car at Arlington and handed the conductor, Mr. Yates, her transportation, which was a request in writing, 'given me by the conductor that carried me past stop 17, and told him that I had been carried by stop 17, and wanted to get off there. He did not say anything else to me until we got to stop 17 and I started to get off, but the car had passed the stop 75 or 100 yards, and when I got to the bottom step of the car I found there was no one to meet me, and told Mr. Yates I would not get off, but would go on to Dallas. He told me to either get off or get on the car. The car at this time was out in the middle of a field, 75 or 100 yards from the stop, and it was dark. I went back in the car, and he asked me for my fare to Dallas. I told him I had paid my fare to stop 17, and that the car had failed to stop, and I thought he ought to take me to Dallas, as I had no one to meet me at stop 17 at that time of night. He then left me, but came back in a short while, and again asked me for my fare, and told me if I did not pay it he would stop the car and put me off. He again threatened to put me off, and I appealed to the motorman in the car, and he told me that he would see that Mr. Yates did not put me off. While I was talking to the motorman, Mr. Yates came to me, and caught hold of my arm, and ordered me back to my seat, and said

that he (Mr. Yates) was running that car. I started to go back to my seat, and the motorman told me that he should not put me off. Mr. Yates told the motorman that it was none of his God damn business. The motorman told him that he would stop at the first telephone station, and talk to headquarters for instructions, which they did, and both of them got off of the car, and the motorman came back to me with Mr. Yates, and told me to stay on the car, which I did. He was exceedingly rough when he first demanded my fare after he had passed stop 17, and he was angry all the time while talking to me, and then he cursed while I was talking to the motorman, and for some time previous he had been very rough with me. I was worried and harassed and humiliated and mortified and embarrassed greatly, and can't say how long. I sued the company, and the case was settled by them paying me \$300.'" There is nothing in this bill of exceptions, when considered by itself, to show the relevancy or materiality of this testimony; and, thus considered, it clearly appears to relate to a collateral matter. There is nothing in it tending to show that appellee's memory was not weakened by the injury. It does not tend to show that he has a good memory now, or that he had a defective memory prior to the injury. It does show that he acted discourteously, rudely, inconsiderately, and very harshly towards this lady, but such conduct does not necessarily proceed from a defective memory. When the evidence in the statement of facts would explain or show the relevancy and materiality of the evidence embraced in the bill of exceptions, it would be sufficient for the bill to refer to such evidence as it appears in the statement of facts, without setting it out; but if there is any evidence in the statement of facts which would explain or show the relevancy or materiality of the testimony set out in the bill of exceptions, the bill makes no reference thereto. Sayles' Ann. Civ. St. 1897, art. 1362. If, however, we are permitted to look to the statement of facts for such evidence, without a reference thereto in the bill of exceptions—which is not conceded—an examination of the statement of facts does not, in our opinion, disclose any evidence showing the relevancy or materiality of the testimony sought to be introduced by appellant. The only matter embraced in the statement of facts claimed by appellant to in any wise tend to show the relevancy or materiality of the testimony excluded is contained in the following answers of appellee and question propounded to him on cross-examination: "They have printed rules and regulations with reference to the management of the business. I had one of the books. I should think I was familiar with those rules at the time. I tried to learn them as I was working for the company, and should think

I probably familiarized myself with them. I suppose at that time I was familiar with the rule of the company in reference to the ejection of passengers. I can't say now what that rule was. Question: Now, to refresh your memory, wasn't it that you should treat passengers in a courteous manner, and not have any disturbances with them, or any trouble with them on the car? Answer: Well, any gentleman would be courteous, you know. I had no trouble with my passengers, that I know of. I don't remember having what you would call trouble with a young lady by the name of Miss Potts. I had some difference with a young lady on my car. The best I can remember, she got on the car, and wanted to get off at a certain place, and there was no one there to meet her, and it was night, and she said she would go to Dallas, and refused to pay her fare from there on. I insisted on her paying her fare, is all. I did not talk a little raw to her. I did not swear in her presence, or at her, or swear at the motorman in her presence. I did not call her a dead beat, or tell her I would throw her off of the car in the dark, and did not make the young lady cry, and call for protection from the passengers on that car, and tell her I would throw her off of the car. I did not know that the young lady filed suit against the company for my conduct toward the young woman. I swear that the above things enumerated did not happen on my car. I told the young lady, unless she paid her fare, she would have to get off at Grand Prairie." Appellee's objections to the testimony sought to be introduced by appellant of the witness above named were that said testimony was irrelevant and immaterial, and was an attempt to impeach the witness appellee upon collateral matters concerning which the appellant by its questions and the answers of appellee was concluded and barred; and that said testimony was an attempt to introduce into the case prejudicial matters, which were calculated to injure the appellee's case before the jury; and that the exclusion of said testimony in no manner interfered with the proper and legitimate examination as to the party's mental capacity; and further, that the court had already sustained an exception to the cross-action of the appellant, which involved the same state of facts. Appellant contends in its argument under this assignment that it appears from appellee's testimony above quoted that he knew what the rule of appellant was in reference to the ejection of passengers from its cars at the time he was working as conductor, and that said rule was that passengers should be treated in a courteous manner, if it became necessary to eject such passengers from the car. It will be observed that while appellee testified that at the time he was conductor he supposed he was familiar with the rules of the company in reference to the ejection

tion of passengers, he testifies that he at the time of testifying could not say what the rule was, and in answer to the question intended to refresh his memory on the point he does not say that he then knew what the rule was. Hence there is no proof in the record to show what the rule was. If the proof had shown that the rule required conductors to treat passengers, under the circumstances mentioned, courteously, it is possible that a part of the testimony excluded might have been admissible as tending to show that he had forgotten his duty, as required by the rules, and thus been relevant on the question as to the injury weakening his memory; because, if he had a defective memory prior to the injury, it would be a circumstance which the jury might consider in determining whether his memory was impaired by the injury at all. But when the character of testimony excluded is considered it is a matter of great speculation whether it tended to show defective memory in any degree. It does show a harsh, inconsiderate, and ungentlemanly disposition upon the part of appellee.

It is further to be observed that the appellee was interrogated about his conduct towards and treatment of a Miss Potts, and there is nothing in the record or bill of exceptions tending to show that she and the person whose testimony was excluded were the same persons. If we consider the identity of Miss Potts and Mrs. Lytle to be shown, this testimony, in connection with that quoted of appellee, would tend equally as much to show defective memory at the time of trial as a desire to tell those matters favorable to him and omit those unfavorable to him, and to that extent would have been unfavorable to appellant. It appears from the record that appellant was given great latitude in the introduction of evidence tending to negative impairment of appellee's memory as a result of the injury. As stated in *Railway Co. v. Johnson*, 86 S. W. 34, 12 Tex. Ct. Rep. 76, by Chief Justice Fisher, quoting from *Railway Co. v. Lester*, 84 S. W. 401, 11 Tex. Ct. Rep. 817: "It is the rule in Texas, established by a long line of decisions, that a bill of exceptions should state the facts in regard to the matter of which complaint is made in such a manner as to exclude any reasonable hypothesis upon which the decision of the trial court can be explained. Every point in the bill of exceptions must be so clear and full that nothing will be left to inference or implication." Following this rule, and in view of the suggestions above mentioned, we conclude that there was no reversible error in the action of the court of which complaint is made in this assignment.

The verdict of the jury is supported by the evidence, and is not excessive in amount. All assignments of error are overruled, and the judgment of the court below is affirmed.

Affirmed.

HORSTMAN et al. v. LITTLE.*

(Court of Civil Appeals of Texas. April 12, 1905.)

1. FRAUDULENT CONVEYANCES—ATTACHMENT—BOND—TRIAL OF RIGHT OF PROPERTY.

After an insolvent had transferred property in fraud of creditors, certain creditors attached it, and the transferees gave a bond and commenced proceedings to try the right of property. After the property had been returned to them under the bond, they sold it. The attachment suit was subsequently dismissed. *Held*, that the dismissal of the attachment suit terminated all liability on the bond, so that the second purchasers were not entitled to hold the property as against creditors of the insolvent.

2. SAME—EVIDENCE OF FRAUD.

On an issue whether a transfer by an insolvent was fraudulent, evidence that, shortly before the transfer, the insolvent had transferred other property to another party for less than it was worth, was admissible.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 842.]

3. BANKRUPTCY — PREFERENTIAL TRANSFERS—RIGHTS OF CREDITORS—SURETIES.

A surety is a creditor, within the meaning of the provision of the bankrupt act condemning preferential transfers to creditors.

4. SAME—CONSIDERATION FOR TRANSFER.

Where an insolvent transferred property under an agreement that the transferee should pay a debt owing by the insolvent to a bank, and the transferees again transferred, receiving no consideration except an agreement by their transferees to pay the debt to the bank, and the bank received payment with the knowledge of the various agreements, it was guilty of receiving a preferential transfer, within Bankr. Act July 1, 1893, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], declaring such transfers void.

5. SAME—UNSECURED CREDITORS.

The fact that a debt owing by an insolvent is secured does not prevent a transfer of property by the insolvent to pay it from being preferential as to creditors not secured.

6. TRIAL—SUBMISSION OF SPECIAL ISSUES—FINDINGS—PRESUMPTIONS.

Under the statute regulating the practice when cases are submitted upon special issues, the court must be presumed to have found in favor of the prevailing party upon an issue which was not submitted to the jury, but as to which there was evidence justifying its submission.

7. TRIAL—ADMISSION OF EVIDENCE—RESTRICTION TO SPECIAL PURPOSE.

Where, in an action against several defendants to recover property transferred by a bankrupt in fraud of his creditors, certain testimony given by the bankrupt in a proceeding before the referee was read by agreement between the plaintiff and certain of the defendants, the court stating to the jury that it was only to be considered as against such defendants, other defendants, whose liability rested upon issues not affected by the testimony, were not prejudiced.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action by Sam G. Little, as trustee in bankruptcy of Francis M. Johnson, against H. Horstman and others. From a judgment for plaintiff, defendants appeal. Affirmed.

See 83 S. W. 679.

*Rehearing denied June 14, 1905.

T. V. Adams and Henderson, Morrison & Freeman, for appellants. Davis & Cocke and Nelson & Little, for appellee.

KEY, J. In April, 1901, Francis M. Johnson was merchandising in the town of Buckholts, in Milam county, Tex., and on the 22d day of that month he borrowed \$800 from the Citizens' National Bank of Cameron, Tex. A note was executed for the \$800, payable January 1, 1902, signed by Johnson and H. Horstman and H. W. Steinmann. Horstman & Steinmann were accommodation makers, and received no part of the \$800, all of which was used by Johnson in his mercantile business. October 10, 1901, Horstman & Steinmann bought the stock of merchandise, notes, and accounts from Johnson, and, as part of the consideration therefor, agreed to pay the \$800 note, and a note for \$420 owing by Johnson to the First National Bank of Cameron, Tex. A few days thereafter the Cooper Grocery Company and the Behrens Drug Company brought separate suits against Johnson, and caused attachments to be issued, which were levied on the stock of goods referred to on October 14, 1901. The suits referred to were instituted in the district court of McLennan county, but the writs of attachment were executed by the sheriff of Milam county. Horstman & Steinmann filed with the sheriff of Milam county a claim bond and oath for the trial of the rights of property, which bond and oath were delivered by the sheriff to the clerk of the district court of Milam county, who failed to docket the same as required by statute. There has never been any trial of the rights of property under that proceeding, and the attachment suits referred to have been dismissed. Thereafter, and about the 1st of November, 1901, Horstman & Steinmann sold the stock of goods to Newton & Lyon, who continued the business as partners. November 29, 1901, an involuntary bankruptcy proceeding was instituted against Johnson in the United States District Court, and about the 27th day of December, 1901, he was adjudged to be a bankrupt, and Sam G. Little was appointed trustee of his estate. May 17, 1902, Sam G. Little, as trustee, instituted this suit in the district court of Milam county against H. Horstman and H. W. Steinmann to recover the value of the stock of goods and notes and accounts transferred by Johnson to the defendants; alleging that the sale was made with intent to defraud the creditors of Johnson, and for the purpose of creating a preference in favor of Horstman & Steinmann, within the meaning of the federal bankruptcy statute. September 4, 1903, the plaintiff filed his first amended original petition, making both the banks referred to and W. H. Lyon and W. R. Newton parties defendant; alleging that the notes held by the banks were paid with the proceeds of the stock of goods, and that New-

ton & Lyon purchased with knowledge of the fraud in the sale from Johnson to Horstman & Steinmann. The petition also charges a conspiracy on the part of all the defendants to defraud Johnson's creditors, and to create preferences in violation of the federal bankruptcy law. In addition to a general denial, the defendants severally interposed special defenses, not necessary here to be enumerated; and the defendants Newton & Lyon attempted to implead the Cooper Grocery Company and the Behrens Drug Company, but the trial court sustained exceptions and dismissed the cross-action against them. There was a jury trial, resulting in a judgment for the plaintiff against Horstman & Steinmann, Newton & Lyon, and the Citizens' National Bank for \$912, and against Horstman & Steinmann and Newton & Lyon for the further sum of \$478.80. The plaintiff recovered nothing against the First National Bank. All the defendants who were cast in the suit have appealed, submitting the case upon separate assignments and briefs.

The case was submitted to the jury on special issues, and in response thereto the jury found that Johnson was insolvent on the 10th day of October, 1901, and for four months next preceding the filing of the petition in bankruptcy; that the \$420 note held by the First National Bank and the \$800 note held by the Citizens' National Bank were part of the consideration for the sale from Johnson to Horstman & Steinmann and Newton & Lyon; that the sale from Johnson to Horstman & Steinmann gave preference to certain creditors of Johnson, and that Horstman & Steinmann and Newton & Lyon and the Citizens' National Bank had reasonable cause to believe that it was intended to give such preference, and that the First National Bank had no cause to believe that such preference was intended; that Horstman & Steinmann, the Citizens' National Bank, and J. C. Watson were intended to be benefited by the transfers from Johnson to Horstman & Steinmann, and from the latter to Newton & Lyon; that the transfer from Johnson to Horstman & Steinmann was made with intent to hinder, delay, and defraud some of Johnson's creditors; that the stock of goods was worth \$1,220 at the time it was transferred to Horstman & Steinmann; that the latter, in making the purchase, did not act in good faith, but paid a valuable consideration for the property.

The undisputed testimony shows that when Horstman & Steinmann purchased the property from Johnson, they agreed with Johnson that they would pay the two debts owing to the two banks, as hereinbefore stated, and, when Horstman & Steinmann sold the property to Newton & Lyon, the latter agreed that they would pay the debts referred to. It was also shown by undisputed testimony that Newton & Lyon com-

plied with their contract, and paid the debts owing to the banks.

Considering the appeal of Horstman & Steinmann first, we hold that the objections urged by them against the findings of the jury are untenable. We find testimony in the record which supports all the findings. We also hold that the court did not err, as against Horstman & Steinmann, in the rulings complained of in admitting testimony. The findings of the jury show that the sale from Johnson to Horstman & Steinmann was in bad faith, and made for the purpose of defrauding creditors. Therefore it was proper to render judgment against them, and all their assignments of error will be overruled.

Newton & Lyon urge as a defense their purchase of the property from Horstman & Steinmann after the latter had taken the necessary steps as prescribed by statute to try the rights of property, and the property had been restored by the sheriff to them. Their contention is that the bond of Horstman & Steinmann took the place of the property, and, in effect, vested title in them, and that their sale to Newton & Lyon vested title in the latter, free from liability to any one claiming under Johnson. The correctness of this contention may be conceded as against Johnson and the Cooper Grocery Company and the Behrens Drug Company, the attaching creditors, though we make no ruling on that point; but it is not correct as against the plaintiff in this case, who is litigating on behalf of all the creditors of Johnson, the bankrupt. While such expressions may be found in some of the reported cases, it is not true in all cases that a trustee in bankruptcy always stands in the shoes of the bankrupt, and can assert no title that the latter could not assert. The bankruptcy statute expressly authorizes a trustee to sue for and recover property disposed of by the bankrupt within four months prior to the filing of the petition in bankruptcy with intent to defraud, or for the purpose of creating a preference, while it is a well-settled principle that the bankrupt himself could not maintain such an action. The dismissal of the attachment suits destroyed the attachment liens, and terminated all liability created by the execution of the claimant's bond. *Bank v. Bates, Reed & Cooley*, 76 Tex. 329, 13 S. W. 309. Nor was error committed in refusing to permit Newton & Lyon to litigate in this case the matters referred to in their cross-action against the Cooper Grocery Company and the Behrens Drug Company. *Fidelity Co. v. Fossati* (Tex. Sup.) 80 S. W. 74.

We do not believe that error was committed in permitting the plaintiff to prove that Johnson transferred other property to another party shortly after the transfer to Horstman & Steinmann. There was testimony tending to show that the property so transferred was worth more than the considera-

tion received for it. The testimony was admissible on the issue of fraud in the sale by Johnson to Horstman & Steinmann. *Green v. Banks*, 24 Tex. 517; *Day v. Stone*, 59 Tex. 614; *Dwyer v. Bassett*, 1 Tex. Civ. App. 517, 21 S. W. 621.

We also hold that the trial court committed no error in refusing to submit to the jury the issue of estoppel sought to be raised by Newton & Lyon. It was not shown that the attorney whose conduct was relied on as an estoppel had authority to bind the plaintiff in the matters referred to.

The judgment against Horstman & Steinmann can be sustained upon two theories: First, that of fraud; and, second, that the sale to them had the effect of creating a preference under the bankruptcy statute. As between them and Johnson, they occupied originally the relation of surety upon the debt owing to the bank, and as such were creditors within the meaning of the statute condemning preferences. *Swarts v. Siegel*, 117 Fed. 13, 54 C. C. A. 399.

As to the Citizens' National Bank, this court holds that the judgment can be sustained upon the theory that they have obtained a forbidden preference, within the meaning of the bankruptcy law. Section 60 of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) declares that a preference is given when an insolvent debtor has procured or suffered a judgment to be entered against him or made a transfer of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other creditor of the same class. It also declares that when such preference has been given within four months prior to the filing of the petition in bankruptcy, and the person receiving it or to be benefited thereby shall have had reasonable cause to believe that a preference was intended, it shall be voidable by the trustee, and he may recover the property or its value from such person. The verdict of the jury, in effect, finds that the two sales were made for the purpose of creating a preference in favor of the bank, and that when it received the payment from Newton & Lyon it had notice that such preference was intended. After careful consideration we have reached the conclusion that these findings are supported by sufficient testimony. The payment was not made until after Johnson had been adjudged a bankrupt, and there is testimony warranting a finding that the bank had actual knowledge of that fact at the time the payment was made. In fact, there is testimony sufficient to show that Johnson transferred his property to Horstman & Steinmann, intending that they should use it to pay the debt owing to the bank; that Horstman & Steinmann disposed of it for that purpose, and, instead of receiving the proceeds themselves and paying them over to the bank, they

directed Newton & Lyon, the purchasers, to make the payment to the bank; and that the bank, at the time it received payment of the note, had reasonable ground to believe that it was the intention of Johnson and Horstman & Steinmann, in making the sales referred to, that the property thereby disposed of should be used for the purpose of paying the bank's debt; and if such were the facts, then the payment to the bank constituted a forbidden preference. *Swarts v. Fourth National Bank of St. Louis*, 117 Fed. 1, 54 C. C. A. 387; *Western Tie & Timber Co. v. Brown*, 129 Fed. 728, 64 C. C. A. 236. It not being shown that Newton & Lyon sold the stock of goods and used the proceeds in paying the bank's debt, if they had been originally obligated to pay that debt, then, in the opinion of the writer, a different and more difficult question would be presented. In such a case the liability of Newton & Lyon would not arise solely out of a contract made in furtherance of a purpose to violate a statute and create an unlawful preference, but, on the contrary, would exist by force of a contract free from any taint whatever; and it would be plausible to contend that the bank had the right to accept payment from debtors so bound, unless it was made to appear that they used the Johnson stock of goods, or sold it and used the proceeds, in paying the bank's debt. But such was not the case, and the bank having notice of the fact that Newton & Lyon, in agreeing to make payment to it, and in fulfilling that agreement, were in fact paying Johnson, the bankrupt, for his goods, and enabling the bank to receive more than its share of his estate, the bank, by accepting the payment from Newton & Lyon, became liable to the legal representative of the estate of the bankrupt, who is the plaintiff in this case.

On the question of a preference, counsel for appellants have cited *In re Harpke*, 116 Fed. 295, 54 C. C. A. 97, where it was held that a preference was not given to a creditor whose debt was secured by an indorser, although the payment was made with the funds of the bankrupt. It was there held that a debt secured by an indorser was not of the same class with those not so secured, and that for that reason the transaction did not constitute a preference, within the purview of the bankruptcy law. That doctrine was repudiated by a court of equal dignity in *Swarts v. National Bank*, supra, and we believe the latter case announces the sounder doctrine.

As to Newton & Lyon, the judgment can be sustained upon the theory of fraud in the sale from Johnson to Horstman & Steinmann, and notice of such fraud by Newton & Lyon at the time they purchased the property. That theory of the case was not submitted to the jury, nor was the court requested to submit it, but there is testimony in the record which will support the judgment upon that theory; and, under the statute regulating the practice when cases are submitted upon spe-

cial issues, we must presume that the court found in the plaintiff's favor against Newton & Lyon on that issue.

By agreement between the plaintiff and the defendants Horstman & Steinmann, the plaintiff read to the jury the written testimony of Johnson, the bankrupt, given in a proceeding before the referee in bankruptcy. The other defendants objected to the testimony, and the judge stated to the jury that it was only to be considered as against the defendants Horstman & Steinmann. The bank and Newton & Lyon assign error upon the ruling of the court in permitting the evidence to be read to the jury for any purpose. Johnson's testimony was not important, except upon the issue of fraud. The judgment against the bank does not rest upon the question of fraud, but upon a forbidden preference. The judgment against Newton & Lyon is based upon the existence of fraud as found by the court, and not upon any issue decided by the jury; and we think it a reasonable presumption that, in deciding the question of fraud, the judge made the proper discrimination, and did not consider Johnson's testimony. Hence we hold that no reversible error is shown in that regard. If the complaining appellants desired the jury to be instructed in writing not to consider Johnson's testimony as against them, they should have requested an instruction to that effect.

Our conclusion is that no reversible error has been shown, and the judgment will be affirmed.

Affirmed.

ASPLEY v. HAWKINS et al.

(Court of Civil Appeals of Texas. June 28, 1905.)

APPEAL—REVERSAL—MANDATE—FAILURE TO FILE—DISMISSAL.

Act 1901, requiring the mandate in reversed and remanded cases to be filed within 12 months after rendition of final judgment by the appellate courts, and authorizing a dismissal of the suit in case the mandate is not filed, applied to a judgment of reversal in part and a remand rendered in June, 1904, in which case no mandate was filed in 1903, when the motion to dismiss was made.

Error from District Court, Dallas County; T. F. Nash, Judge.

Action between R. F. Aspley and W. E. Hawkins and others. From a judgment in favor of the latter, the former brings error. Affirmed.

Chas. I. Evans, for plaintiff in error. Geo. H. Plowman, Hilbrant & Scott, and Hawkins & Haynes, for defendants in error.

KEY, J. This writ of error is prosecuted from a judgment of dismissal. The case had been tried before, and on appeal was in part affirmed and in part reversed and remanded. The judgment of the appellate court was rendered in June, 1894, and the

motion to dismiss was filed in 1903. No mandate from the appellate court has been filed in the court below, and that fact was made one of the grounds upon which the motion to dismiss was predicated. The act of 1901, requiring the mandate in reversed and remanded cases to be filed within 12 months after rendition of final judgment by the appellate courts, authorizes a dismissal of the suit when it is made to appear that no mandate has been issued within the time stated. We think that act is applicable to this case, and therefore the judgment is affirmed. *Scales v. Marshall* (Tex. Sup.) 70 S. W. 945; *Watson v. Boswell* (Tex. Civ. App.) 73 S. W. 985.

Judgment affirmed.

SAN ANTONIO TRACTION CO. v. MENK.*

(Court of Civil Appeals of Texas. May 31, 1905.)

DAMAGES — PERSONAL INJURIES — INSTRUCTIONS.

Where, in an action for injuries to plaintiff's wife, the court charged that recovery could be had only for expenses for medical services and medicines theretofore incurred, and there was no evidence before the jury of a greater amount for such expenses than that claimed in the petition, the refusal to caution the jury not to go beyond the amount so claimed, and consider future expenses, was not error.

Appeal from District Court, Bexar County; A. W. Seeligson, Judge.

Action by Johann Menk against the San Antonio Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ogden & Brooks, for appellant. Webb & Goeth, for appellee.

JAMES, C. J. This is an appeal from a recovery for \$3,500, rendered upon a general verdict, on account of personal injury alleged to have been sustained by appellee's wife. The assignment of error which raises the question of excessive verdict is not sustainable, in view of testimony which the jury appears to have believed. Our conclusion of fact is in accordance with such testimony.

The only other point raised is error in refusing to give the following requested charge: "Plaintiff in this case is only entitled to recover such sums, if any, as have been expended by him for drugs and medical attention for his wife, not to exceed the sum named in this petition." The charge of the court instructed the jury to allow the amounts only that plaintiff may have theretofore expended or incurred for the employment of doctors and the purchase of drugs and medicines necessary for the cure and relief of Mrs. Menk, if any, not to exceed the reasonable and fair value thereof, as a result of her injuries, if any. It is there-

fore seen that the jury were expressly confined to the consideration of such expenses in so far as they had already been paid or incurred, and the only question left is whether or not defendant had the right to have the jury cautioned to not go beyond the amount claimed in the petition in respect to such items. In *Brunswick v. White*, 70 Tex. 512, 8 S. W. 85, the Supreme Court said that a jury of ordinary intelligence would not need such a caution from the judge. All the cases involving the giving of a charge of this nature have expressed disapprobation of the practice. In a case in which the plaintiff would not be entitled to recover for items in the future, and evidence had been introduced going beyond the recovery to which he would be legally entitled, defendant would probably have the right to an instruction cautioning the jury not to consider the items or amount for which plaintiff could not legally recover. The court in this instance allowed the jury to find for only such items as had already been expended or incurred, thus forbidding the consideration of future amounts. It is stated in appellant's brief that such expense already incurred amounted practically to that claimed in the petition. There being no testimony before the jury of a greater amount for such expense, there was no occasion to suppose that the jury were misled into going beyond the sum claimed. If they were men of common intelligence, which is presumed, and instructed to consider only such expenses as had already been incurred according to the evidence, the presumption cannot be indulged, even in the absence of the cautioning instruction sought as to their not going beyond the sum claimed, that the jury did not observe the charge given them.

It is further claimed that defendant was entitled to have the instruction given in view of the fact that plaintiff's counsel had argued the question with reference to future expenditures. There is nothing pointed out in the record showing that counsel indulged in such argument.

Affirmed.

ONEAL v. WEISMAN et al.*

(Court of Civil Appeals of Texas. May 27, 1905.)

1. SALE—DECEIT—FALSE REPRESENTATIONS.

Ordinarily a statement of a vendor as to the value of the property is a mere expression of opinion, on which the purchaser may not rely.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 67, 79; vol. 48, Cent. Dig. Vendor and Purchaser, § 52.]

2. SAME.

Statement of a vendor as to the fertility of the land is one of fact, which, if false, and relied on and inducing the purchase, is ground

*Rehearing denied June 28, 1905, and writ of error denied by Supreme Court.

*Rehearing denied June 17, 1905.

for damages, if the circumstances warranted the purchaser in relying thereon.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 53.]

3. SAME—EVIDENCE—RELIANCE OF PURCHASER.

Evidence of false statements as to fertility of land made by the vendor, and admitted in evidence before the facts were fully developed, should be excluded where the facts do not make it a question for the jury whether the purchaser was warranted in relying thereon and did rely thereon, but show that he was not so warranted or did not rely thereon.

4. PLEADING—VERIFICATION.

Evidence under a plea is not open to the objection that the plea is not verified in the absence of exception to the plea on such ground.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1433.]

5. TRIAL—OBJECTIONS TO EVIDENCE.

A party may not complain of testimony of value, though immaterial on any issue; it having been introduced in rebuttal of testimony introduced by him.

6. SALE—DECEIT—EVIDENCE.

Evidence material only on a question of title, issue as to which is not raised, should not be admitted.

7. SAME.

The letter written by defendant to plaintiff during his negotiation for plaintiff's stock of goods, and before the trade was closed, not showing the details of the trade, nor defendant's understanding of how the goods were marked, but stating "and take you stock at marked price," does not prevent his testifying that the agreement was to take the goods at cost, plus 10 per cent., and that he understood the goods were so marked.

8. SAME—RIGHT TO DAMAGES.

A purchaser may recover damages not only where the seller intentionally makes material false representations to the purchaser, inducing him to purchase, but where he innocently makes such representations with such effect.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 4; vol. 43, Cent. Dig. Sales, § 66; vol. 48, Cent. Dig. Vendor and Purchaser, § 43.]

9. TRIAL—INSTRUCTIONS.

Omission in a charge correct as far as it goes cannot be complained of by one asking no special charge covering the omission, but one in effect like that given.

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Action by S. Weisman against George M. Oneal and others. From the judgment, Oneal appeals. Reversed in part.

Garnett & Smith, for appellant. Church & Doyle and Abernathy & Mangum, for appellees.

RAINEY, C. J. There was a deal made between George M. Oneal and S. Weisman, by which S. Weisman transferred to Oneal blocks 29 and 30 in the town of McKinney, upon which Weisman resided, and a stock of goods, wares, and merchandise located in said town. In consideration therefor, Oneal transferred to Weisman 3,365½ acres of land in Morris county, executed his note for \$1,400, and assumed the payment of two notes owing by Weisman—one for \$1,600, owing to W. B. Newsome, and the other for

\$500, owing to L. L. Elliott. A lien was reserved on said two blocks of land in McKinney to secure the payment of said notes. The \$1,400 note becoming due, and default in its payment being made by Oneal, suit was brought to recover thereon by Weisman, and to foreclose the lien, and also prayer that the said land be sold, and the proceeds be applied to the payment of all of said notes. All necessary persons were made parties to the suit. Oneal answered, setting up a failure of consideration, fraud by Weisman in making certain misrepresentations as to the stock of goods, etc. Weisman replied by alleging fraud by Oneal in making certain misrepresentations as to the value, fertility, etc., of the land, and as to the condition and volume of business done by a certain sawmill on the land, etc.

The jury returned the following verdict:

We, the jury, find for the plaintiff,	
Weisman, in the sum of.....	\$2,035 57
Less the amount of.....	324 40

Judgment for \$1,711 17

Also in favor of Newsome and Elliott on the notes due them, and a foreclosure of the lien on the two said blocks of land in McKinney for all the notes due; the note of Newsome to have preference.

From this judgment, Oneal appeals.

The note due W. B. Newsome for \$1,600 was executed by Weisman to Maggie Mathews. Newsome was interpleaded by both Weisman and Oneal, and there is no contention here that said note is not due and payable, nor any assignments as to the judgment not being correct as to said note. The judgment as to Newsome will therefore be affirmed.

Further discussion herein will relate to the matters between Weisman and Oneal.

Appellant objected to the admission of Weisman's testimony that Oneal told him prior to the trade that the Morris county land was good, fertile land, very productive, would raise corn, cotton, fruits, and vegetables, and was well worth \$15 per acre; that there was a sawmill running daily, and it was in good order and of the value of \$5,000. The objections were that plaintiff's pleadings were not verified—there being a plea of failure of consideration—and such evidence was irrelevant and immaterial, and its tendency was to prejudice the defendant's case. The rule is that, where a party is trying to effect a sale of his property, it seems, he has the right to puff the same in the most extravagant manner, and to exalt the value to the highest point the vendee's credulity will bear. The vendee in such cases is not expected to place confidence in such statements, and, if he does, it is not sufficient upon which to base an action for damages, it matters not how false they may be. Such statements are regarded as mere opinions, and the purchaser is not expected to rely thereon, but must rely on his own judgment. The foregoing is based on the

proposition that the parties to a contract stand upon an equal footing, and their opportunities for knowing the facts or forming judgment as to the true condition of the property are equal. Where, however, there is a fiduciary relation existing between the parties, or where the situation of one of the parties is such that he has not an equal opportunity of forming a correct judgment and is ignorant of the true conditions, but is induced to rely upon such statements and to purchase by reason of his faith therein, then "the vendor may be held liable as for false representations, because by them the purchaser has fraudulently been induced to forbear inquiry as to their truth." Warvelle on Vendors, § 946, vol. 2. As it is difficult at times to distinguish opinions from statements of facts, the general rule as above stated must be accepted with some qualification. Mr. Warvelle, § 947, states the distinction as follows: "Thus, if the vendor, knowing them to be untrue, makes statements with the intention of misleading the vendee, and if the latter, relying upon them, is misled to his injury, or if he induces the vendee not to make inquiries with respect to value, or any extrinsic facts affecting values, or makes statements in such a manner that the vendee, instead of being put on inquiry, is put off his guard, it has been held that a substantial right to recover damages is created, or the vendee may, at his option, avoid the contract. To effect this, however, the representations must, as a rule, be coupled with other circumstances, as where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced by the vendor's artifice to forbear inquiries which he would otherwise have made; but whether a representation as to value is merely an expression of opinion or belief, or an affirmation of fact to be relied on, is a question for the jury, and should properly be left to their decision. Again, while the purchaser must rely upon his own judgment in questions of value, yet, in regard to any extrinsic facts affecting the quality or value of the subject of the contract, he may rely upon the assurances of the vendor; and, if he does so rely, and those assurances are fraudulently made to induce him to enter into the contract, he may maintain an action for the injury sustained."

From the circumstances shown by the evidence, the statement as to the value was but the expression of Oneal's opinion, and upon which an action of fraud could not be predicated. As to the statements of Oneal as to the fertility, etc., of the land, and as to the qualities of the sawmill, we think such were statements of facts, which, if false, and were relied on and induced the purchase by Weisman, were admissible in evidence. But whether or not they would constitute fraud, and be sufficient upon which to base

an action of deceit, depends upon whether or not the situation under the circumstances surrounding the parties warranted Weisman in relying on such statements, and that he did so rely thereon. If the facts show that he was not so warranted, or did not rely thereon, then the court should have excluded said testimony, though it had been admitted before the facts were fully developed. If it does not conclusively appear, then it is a question to be submitted to the jury.

The objection urged that Weisman's plea was not verified, we do not think tenable. The defendant filed no exception to the plea for want of being verified. Under such circumstances, such objection to evidence will not be heard, because the want of verification will be considered waived. *Ashcroft v. Stephens*, 16 Tex. Civ. App. 341, 40 S. W. 1036.

The foregoing also disposes of the assignments relating to the testimony of witnesses Enloe and Rambo as to the value of the land, and shows that such testimony was immaterial on any issue, and was therefore inadmissible, but it seems that the testimony of these witnesses was introduced in rebuttal of testimony introduced by defendant. Such being the case, defendant will not be heard to complain.

The trial court should not have allowed the introduction in evidence of the proceedings in the matter of the guardianship of Reynolds Oneal on the question of value. It seems the only issue upon which said proceedings were material was that of title in Reynolds Oneal to the land, and that issue was not raised. An issue was raised as to whether or not Oneal was to take the stock of goods at prime cost, with 10 per cent. added; there being testimony that the goods were marked at prime cost in some instances, with 20 per cent. and more added. In support of Weisman's contention, he introduced a letter written by Oneal to him during the negotiations, and before the trade was closed, in which was used the following expression, "and take you stock at marked price." In explanation of this expression, Oneal offered to show what he intended by said language; that is, that he meant he would take the stock at the cost in the eastern market, with 10 per cent. added thereto. Objection was made which was sustained by the court. We think the court erred in this. Oneal pleaded that the trade was that he was to receive the stock at cost price, plus 10 per cent., and, further, that, after the invoice was prepared, plaintiff represented to him that the invoice showed the goods at cost, and 10 per cent. added. It seems the letter was not the basis of the trade. It does not show the details of the trade, nor the understanding of Oneal as to how the goods were marked. The letter does not state how the goods were marked, and, if Oneal was laboring under a wrong impression in that regard, he should be al-

lowed to show it. The testimony was admissible.

The court, in effect, charged the jury that, in order for Oneal to recover damages, it was necessary for them to believe that Weisman intentionally made false representations to Oneal, which induced him (Oneal) to make the trade. This is correct, as far as it goes, but it stops short of the full law, that entitled him to recover. If Weisman innocently made material representations that were false upon which Oneal relied, and Oneal was thereby induced to make the trade, he was entitled to relief. The court should have embraced in his charge the full law on this point, as indicated. Defendant complains of this omission, but we doubt his right to relief therefor, as no special charge covering the omission was asked, but, instead, the special charge requested by defendant was in effect the same as that of the court. But as the case is to be reversed on other grounds, attention is called to the omission in the charge, that it may be supplied on another trial.

The judgment is affirmed as to Newsome, and reversed, and cause remanded, as to the other parties.

GARRETT et al. v. SPRADLING.*

(Court of Civil Appeals of Texas. April 12, 1905.)

1. APPEAL—ASSIGNMENTS—PROPOSITIONS.

A proposition stating that when defendant files an affidavit that a deed under which plaintiff claims is a forgery the burden of proving the execution of the deed is cast upon plaintiff, is not germane to assignments of error complaining of the admission of evidence of the execution of an alleged forged deed because not shown to have been executed or acknowledged in the form prescribed by law, and such assignments need not be considered.

2. LOST INSTRUMENTS — EXECUTION — EVIDENCE.

On an issue of the due execution of a lost deed, testimony that the grantee in the alleged deed bought the land from the grantor, and paid for it; that the deed, which had been destroyed by fire, was signed and acknowledged by the grantor and his wife; and that the acknowledgment showed that the wife was examined separately and apart from her husband, and that the deed had been explained to her; and that she willingly signed the same—is admissible.

3. APPEAL—ASSIGNMENTS OF ERROR.

A proposition stating that the burden is on plaintiff to prove the execution of a deed which was lost and not recorded, is not germane to assignments of error complaining of the admission of testimony of the acknowledgment and execution of the deed and the certificate of acknowledgment on grounds of immateriality and irrelevancy.

4. LOST DEED—EXECUTION—EVIDENCE.

On the issue of the execution of a lost deed, testimony of a lawyer that he remembered plaintiff's consulting him concerning some deeds and about looking into the title of a tract of land, and that a deed was presented to him for examination, which might have been the deed in issue, and that his recollection was that he considered the acknowledgment proper, was admissible for what it was worth.

Appeal from District Court, Rains County; H. C. Connor, Judge.

Action by T. C. Spradling against D. L. Garrett, executor of James Garrett, deceased, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

B. M. McMahan and Perkins & Craddock, for appellants. J. W. Humphrey and C. J. Crabb, for appellee.

EIDSON, J. This is an action of trespass to try title, brought by appellee in the court below against D. L. Garrett, Jolly Ivey, and his wife, Emily Ivey, for the recovery of 190 acres of land, part of the 320-acre survey patented to James Garrett, assignee of W. H. Garrett. Appellant D. L. Garrett disclaimed any interest in the land individually, but claimed same for the estate of James Garrett, of which he was the executor, and in that capacity answered by general demurrer, general denial, plea of not guilty, limitations of three, five, and ten years, suggested improvements in good faith, and filed a sworn plea alleging that the two deeds purporting to be executed by appellant Emily Ivey, then Holbert, joined by her husband, J. H. Holbert, one to J. R. Allcorn and his wife, Susan B. Allcorn, for 100 acres out of said W. H. Garrett survey, and the other to S. M. Woodrum for 90 acres out of said survey, and which deeds constitute links in appellee's chain of title to the land in controversy, were never in fact executed by said Emily Holbert and her husband, J. H. Holbert, but were forgeries. Appellants Emily Ivey and her husband, Jolly Ivey, answered by general demurrer, general denial, plea of not guilty, and adopted that part of the answer of appellant D. L. Garrett alleging that the two deeds above mentioned were forgeries. Jas. B. Burdett, by his guardian, W. W. Burdett, filed a plea of intervention, claiming title to the land in controversy; but as the grounds upon which he claims title to same do not in any wise affect the questions presented on this appeal, it is unnecessary to state them. The case was submitted to the jury by the court below on special issues, which being found by the jury in favor of appellee, judgment was rendered in his favor for the land in controversy.

Appellants' first and second assignments of error are as follows:

"(1) The court erred in permitting the plaintiff to read in evidence the sixth direct interrogatory propounded by plaintiff to his witness W. S. Allcorn, and the answer thereto, which answer is as follows: 'My father bought this land from J. H. Holbert and wife. J. H. Holbert and wife, at the time the land was bought by my father, resided in Bell county, Texas, at or near the town of Belton. He bought the land about 1877. He paid for the land in sheep. It was all paid for'—because the deposition of said witness did not show that the deed of conveyance claimed to have been made by Emily

*Rehearing denied June 7, 1905, and writ of error denied by Supreme Court.

Holbert, a married woman, conveying her separate estate, had been acknowledged in the form prescribed in the statute for a married woman conveying her separate estate, and did not show who the officer was, either by name or title, or where he lived, whether authorized to take acknowledgments or not; and did not show whether or not the officer who took the acknowledgment knew the grantor or his wife, Emily Holbert, or was introduced to them, or that they were proven to him by any one to be the persons whose names were signed to the instrument; and because the interrogatory and answer thereto does not show that the instrument was explained to Mrs. Emily Holbert, as is required to pass title to the separate estate of a married woman; and because there was on file among the papers of the case an affidavit charging forgery, if such deed was ever in existence, and the execution of the deed had not been proven. All of which is fully shown by defendant's bill of exception No. 1.

"(2) The court erred in permitting in evidence the eighth direct interrogatory, and the answer thereto of plaintiff's witness W. S. Allcorn, who testified by deposition that he had then in his possession a deed executed by J. H. Holbert and wife to J. R. Allcorn; that the deed was destroyed by fire in the year 1887 in Walker county, Texas. The deed was made in the year 1877; as well as witness remembers, in the summer. 'J. H. Holbert and his wife signed and acknowledged said deed. I cannot remember before what officer it was acknowledged. Mrs. Holbert's acknowledgment was to the deed. I did not see her appear before the officer, but the officer's certificate of acknowledgment was to the deed, taking her separate acknowledgment to the deed. I cannot remember the name of the officer who took the acknowledgment. The certificate of acknowledgment showed that she appeared before the officer, and was privily examined by him separate and apart from her husband, and the certificate showed that he had fully explained the deed to her, and that she had acknowledged to him upon her privy examination separate and apart from her husband that she had willingly signed the deed as her own act and deed, and that she did not wish to retract it. It was a general warranty deed'—because the same was irrelevant and immaterial; and because the evidence in the case nor the deposition of the witness did not show that there was any deed executed and acknowledged by J. H. Holbert and his wife, in the form prescribed by law, conveying any portion of the property in controversy; and because there had been an affidavit filed with the papers in the case charging that, if such a deed had ever been in existence, that the same was a forgery, and its execution had not been proven; and because the deposition of said witness did not show that the deed or conveyance

claimed to have been made by Emily Holbert, a married woman, had been acknowledged in the form prescribed in the conveyance of the separate estate of a married woman."

Appellants' only proposition presented under this assignment of error, which is as follows: "In an action of trespass to try title, when the defendant files an affidavit that a deed under which plaintiff claims title is a forgery, the burden of proving the execution of the deed attacked is cast upon the plaintiff," is not germane to the assignments, and on that account we are not required to consider same. However, in our opinion, these assignments are not well taken, as the testimony, while perhaps not sufficient within itself to prove the due execution of the deeds to which it referred, was admissible, in connection with other testimony in the record, as tending to prove such execution, and it was proper for the court to permit same to go to the jury for their consideration.

Appellant's sixth and seventh assignments of errors are as follows:

"(6) Because the court erred in permitting the plaintiff, T. C. Spradling, to testify that he knew the land in controversy, and had acted as agent for S. M. Woodrum for some land, and bought some once owned by him; that he was agent for Woodrum for some of the W. H. Garrett land; that it was out of the southwest corner of the survey, 90 acres, more or less; that he knew what Mr. Woodrum did with the 90 acres; he sold it to James Cotton; that he knew it by having secured the deed from James Cotton; that the deed was signed by Woodrum, and acknowledged before an officer, a notary public of Marlon county; witness did not remember his name; that he took the certificate to be in due form; investigated before he bought this land; that the certificate showed, as he understood it, two separate acknowledgments; that the parties were personally known and the certificates of acknowledgment were in due form, the form they usually have on blank deeds; the deed was dated somewhere between 1887 and 1895, somewhere about 1892; witness did not recollect the date; witness brought the deed and filed it with Mr. Fitzgerald, county clerk of Rains county—because there was better evidence, and because the plaintiff was attempting to prove a lost deed alleged to have been executed by S. M. Woodrum to James Cotton, without proving its execution; was immaterial and irrelevant; and because the witness did not see the deed executed, and it was not proven by the testimony of any other witness; and because the evidence showed the deed had never been recorded. All of which is shown in defendant's bill of exception No. 6.

"(7) The court erred in permitting the plaintiff to prove by his witness W. H. Clendenin that witness was a lawyer, and

that witness' recollection was that plaintiff, T. C. Spradling, talked to him at one time and had some deeds. He remembered the name of Cotton very distinctly being connected with some of their papers. That the plaintiff, T. C. Spradling, spoke to him once—he did not recollect the time—something about looking into the title of a tract of land, and his recollection was that it was some land mentioned in these papers that Spradling had. That he could not be positive about it, but did not look into the title, and did not remember what survey of land it was, except it was Garrett's survey. Could not be positive what Garrett. Witness could not be positive whether the deed presented to him for examination was the particular deed that had Cotton in it or not, but his best recollection was that Mr. Spradling said something to witness about writing a deed, and perhaps witness did write a deed for him. His recollection was that Mr. Flanagan was a party to that deed, and that the Cotton deed was in connection with the same land, and that Spradling showed witness a deed. He could not be positive, but it was his recollection that it was at the time of the conversation relative to writing the deed to which the name of Flanagan appeared. And that if the deed witness examined was the Cotton deed, that he could not be positive, but his recollection was that he considered the acknowledgment in good shape, but could not be positive whether or not the deed he examined was a deed from Cotton or not—because it was immaterial, irrelevant, and uncertain, and because the plaintiff was put upon proof of the execution of the deed, and the evidence showed that the deed had never been recorded, and because it was not shown by the evidence that S. M. Woodrum ever executed a deed to James Cotton to any portion of the land in controversy."

The proposition submitted by appellants under these assignments of error is to the effect that in an action of trespass to try title, when the plaintiff claims under a deed as one of the links in his chain of title, which deed having been lost and never recorded, the burden of proof rests upon him to prove the execution of the deed alleged to have been lost and not recorded. This proposition is not applicable to the assignments of error under which it is submitted; but, in our opinion, the testimony, the admission of which is complained of by said assignments of error Nos. 6 and 7, was admissible as tending to prove a material issue in the case, and its weight was a matter for the jury to determine.

The only issues submitted by the court below to the jury were as follows: "(1) Did Emily Holbert, joined by her husband in the manner above explained, convey to J. R. Allcorn the 100 acres of land described in the deed from the Allcorns to T. C. Spradling? (2) Did the deeds from Holbert

and wife to S. M. Woodrum, from Woodrum and wife to James Cotton, and from James Cotton to J. W. Flanagan convey 'the 90 acres of land described in the deed from J. W. Flanagan to T. C. Spradling?' Preliminary to and in connection with the above-quoted special issues the court instructed the jury as follows: "The conveyance of land by a married woman must be by a deed of conveyance signed by her and her husband, and acknowledged by her privily and apart from her husband, before some officer authorized by law to take acknowledgments to deeds. A notary public is one of the officers authorized by law to take acknowledgments to deeds. The burden of proof is upon the plaintiff to establish by a preponderance of the evidence the affirmative of the following issues." Thus it will be observed that the court properly instructed the jury that the burden was upon the appellee to establish by a preponderance of the evidence the affirmative of both issues submitted to the jury. No reversible error being pointed out in the record, the judgment of the court below is affirmed.

Affirmed.

STATE NAT. BANK OF EL PASO v. STEWART.

(Court of Civil Appeals of Texas. May 31, 1905.)

1. PLEADING — EXECUTION OF WRITTEN INSTRUMENT—DENIAL UNDER OATH — NECESSITY.

Rev. St. 1895, art. 2318, provides that, when any pleading is founded on a written instrument, such instrument shall be received as evidence without proof of execution, unless the party by whom it is charged to have been executed shall file a written affidavit denying the execution thereof. Article 1192 provides that a counterclaim may be pleaded to under the rules prescribed for pleading defensive matter, and whenever, under such rules, defendant is required to plead under oath, plaintiff shall in like manner plead under oath. Article 1265, subd. 8, requires an answer to be made under oath when it contains a denial of the execution of a written instrument upon which any pleading is founded. Plaintiff sued a bank to recover a balance of deposits. Defendant specially pleaded that the money was withdrawn on a check or draft drawn or executed by plaintiff. Held, that plaintiff could not show that the check or draft was a forgery, without having denied under oath the execution thereof.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 864, 866.]

2. SAME.

Rev. St. 1895, art. 1193, providing that it shall not be necessary for plaintiff to deny any special matter of defense pleaded by defendant, does not, when the defense is founded on a written instrument charged to have been executed by plaintiff, obviate the necessity, imposed by articles 1192, 1265, and 2318, of plaintiff's denying under oath that such written instrument was executed by him or by his authority.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 864, 866.]

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Charles Stewart against the State National Bank of El Paso. From a judgment for plaintiff, defendant appeals. Reversed.

Beall & Kemp, for appellant. Sam B. Gillett, for appellee.

NEILL, J. Charles Stewart brought this suit against the State National Bank to recover the sum of \$740, an alleged balance of certain deposits made by him with the bank. The defendant answered that all sums at any time deposited with it by plaintiff had been duly paid to him or to his order, on his checks or drafts, and that defendant owed him nothing when this suit was instituted. The defendant then specifically pleaded "that the sum of \$740 sued for was paid to plaintiff, or to his order, on or about the 15th day of February, 1904, on a check or draft in writing dated January 28, 1904, drawn or executed by plaintiff, or purporting to have been drawn or executed by him, in favor of one R. W. Bradley, on defendant, which draft or check was received and paid by defendant in regular and usual course of business, and without notice of any infirmity or invalidity." No pleading in any way denying the execution of the check or draft specially pleaded by defendant was filed by the plaintiff. The case was tried before a jury, and the trial resulted in a judgment in favor of plaintiff for the amount sued for.

The deposits with the bank were proven as alleged by plaintiff, and it was shown that the check or draft for \$740 described in defendant's answer was presented to and paid by the defendant, and that its payment exhausted plaintiff's deposit. Hence the principal issue in the case was whether such check or draft was executed by plaintiff or by his authority, or, in other words, whether such instrument was a forgery. Upon this issue, after the instrument was introduced in evidence by the defendant, plaintiff introduced evidence tending to show that it was a forgery, and defendant then introduced testimony tending to show that it was genuine. And after the introduction of such evidence pro and con, the issue was submitted by the court to the jury.

The contention of defendant is that, inasmuch as plaintiff failed to deny under oath that such check or draft was executed by him or by his authority, the court erred in permitting him, after defendant had offered such instrument in evidence, to introduce testimony tending to show that it was a forgery, and in refusing to instruct the jury at defendant's request that "plaintiff not having denied under oath the execution by his authority of the check for \$740, dated January 28, 1904, and offered in evidence, to find for the defendant."

By article 2318, Rev. St. 1895, it is provided that "when any petition, answer, or other pleading shall be founded, in whole or in

part, on any instrument or note in writing, charged to have been executed by the other party or by his authority, and not alleged therein to be lost or destroyed, such instrument or note in writing shall be received as evidence without the necessity of proving its execution, unless the party by whom, or by whose authority, such instrument or note in writing is charged to have been executed, shall file his affidavit in writing denying the execution thereof." By article 1192 it is provided that "when the defendant sets up a counter claim against the plaintiff, the plaintiff may plead thereto under the rules prescribed for the pleadings of defensive matter by the defendant so far as the same may be applicable; and, whenever under such rules the defendant is required to plead any matter of defense under oath, the plaintiff shall in like manner be required to plead such matters under oath, when relied on by him." Article 1265, subd. 8, Rev. St. 1895, requires an answer to be made under oath when it contains a denial by the pleader "of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed." Article 2318, Rev. St. 1895, is identical with article 466, Oldham & W. Dig. In *May & Co. v. Pollard*, 28 Tex. 678, the defendant, being sued on a note and open account, charged in his answer that plaintiff had executed to him in writing a certain receipt for 2,578 pounds of cotton delivered by defendant to plaintiff on the day the receipt was dated; and the court held that: "The receipt was a written instrument charged in defendant's answer to have been executed by the plaintiff, and nothing in the nature of a plea of non est factum could be heard against it, unless the plea had been supported by the affidavit in writing of plaintiff. Without such a defense to it, supported by affidavit, the receipt must be read in evidence without proof of its execution. There was no such affidavit made, and the objection to it was in the nature of a plea of non est factum, and was properly overruled by the court below." Citing *Oldham & W. Dig. art. 466*; *Drew v. Harrison*, 12 Tex. 279; *Kelly v. Kelly*, Id. 452; *Tulshear v. Randon*, 18 Tex. 275, 70 Am. Dec. 281. *Hendricks v. Cameron*, 2 Willson, Civ. Cas. Ct. App. § 351, is a case where Cameron sued Hendricks & Etchison, as partners, on a note for \$134.50. Hendricks pleaded payment of the note in full, setting out in his answer two receipts in writing which he alleged had been executed by authorized agents of Cameron. Upon the trial, Cameron was permitted, over objections of Hendricks, to introduce evidence to show that the receipts were not executed by his authority. Upon appeal from a judgment in favor of Cameron, it was held by the Court of Appeals that the trial court erred in admitting evidence, ob-

jected to by the defendant, impugning the receipts upon which his plea of payment was founded, and that such evidence would only be admissible under a written pleading verified by affidavit. These cases are directly in point, and, though it be considered that, as between plaintiff and the bank, the check pleaded in the latter's answer is in the nature merely of a receipt, seem to us conclusive of the correctness of appellant's contention. It cannot be doubted that appellant's answer is founded on an instrument in writing charged to have been executed by appellee or by his authority, and if there were any doubt as to whether, on account of the check being in the nature of a receipt, as between the parties, the answer was such as is contemplated by article 2318, Rev. St. 1895, such doubt is dispelled by the opinions referred to.

The record does not support appellee's contention that the appellant introduced evidence of the genuineness of the check before he introduced the testimony tending to show it was a forgery. Therefore it is not necessary for us to pass upon appellee's proposition that, inasmuch as evidence was first introduced by appellant to prove the genuineness of the check, he had the right to introduce in rebuttal evidence to prove that it was a forgery. But we will remark that we are not able just now to detect any strength in the proposition, conceding that the hypothesis upon which it is based was established.

Article 1193, Rev. St. 1895, which provides that "it shall not be necessary for the plaintiff to deny any special matter of defense plead by defendant, but the same shall be regarded as denied unless expressly admitted," does not, when the special matter of defense pleaded is founded in whole or in part on an instrument in writing charged to have been executed by the other party, obviate the necessity of the plaintiff's denying under oath that such written instrument was executed by him or by his authority.

On account of the errors indicated, the judgment of the district court is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. ST. JOHN.*

(Court of Civil Appeals of Texas. May 17, 1905.)

1. TRIAL—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The exclusion of evidence was not prejudicial where the fact sought to be proven was testified to by the opposite party.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4194-4196.]

2. SAME—ADMISSION OF INCOMPETENT EVIDENCE.

There was no reversible error in the admission of incompetent evidence on an issue as to damages, where the item sought to be proven

by the testimony was not submitted in the charge.

3. APPEAL—ASSIGNMENTS OF ERROR.

Where, on appeal, an assignment is not a proposition, and no propositions are submitted under the assignment, and no statement is made, consideration thereof is not required.

Error from District Court, Johnson County; Nelson Phillips, Judge.

Action by W. M. St. John against the Gulf, Colorado & Santa Fe Railway Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

J. W. Terry and A. H. Culwell, for plaintiff in error. Cleveland & Haynes and Odell, Phillips & Johnson, for defendant in error.

FISHER, C. J. This is a suit by St. John against the railway company for damages arising from personal injuries sustained while attempting to board one of plaintiff in error's passenger trains. It is substantially alleged in his petition that on or about November 20, 1901, he purchased a round-trip ticket from Cleburne to Joshua and return, and that on the 30th of November, 1901, he went to the depot of the defendant's company at Joshua to take passage on the train for Cleburne; that Joshua was a flag station, and that, after the train had been flagged and stopped, he undertook to get on the train, carrying at the time a heavy instrument, weighing 25 pounds, and just as he stepped upon the lower step of the entrance to the coach, and before he had time to get any farther, and without any notice, the train suddenly and violently jerked forward, causing him to lose his balance and fall backwards, receiving serious and permanent injuries. The conduct of the railway company in this respect is alleged to be negligent. The case was tried before a jury, and verdict and judgment were in defendant in error's favor for the sum of \$3,000.

There is evidence in the record which justifies the conclusion that the injuries sustained by the defendant in error were occasioned by the sudden movement of the train when the defendant in error was attempting to board the same as a passenger in the manner as alleged, and that such movement was negligence, under the circumstances, as charged; and there is evidence which tends to show that the injuries sustained are of such a character that we cannot say that a verdict and judgment for \$3,000 is excessive. And we further find that the defendant in error was not guilty of contributory negligence in his effort to board the train. These conclusions dispose of the plaintiff in error's assignments of error which complain of the verdict and judgment as contrary to and not supported by the evidence, and that the same is excessive.

There was no error in the ruling of the court in declining to permit the plaintiff in error to prove the fact sought to be intro-

*Rehearing denied June 28, 1905, and writ of error denied by Supreme Court.

duced as set out in the bill of exceptions under the fifth assignment of error. We fail to see the relevancy of this proposed testimony, but, however, if it could be held admissible, the fact sought to be proven was testified to by the defendant in error.

There was no error in the ruling of the court in admitting the evidence complained of in plaintiff in error's sixth assignment of error. If the testimony of the witness Gaether was not admissible, no error resulted from its admission, because the question there testified to, and the item of damages sought to be proven by this testimony, were not submitted by the charge of the court.

The 7th, 8th, 9th, 10th, 11th, 12th, and 13th assignments of error complain of certain portions of the charge of the trial court. None of these assignments, in our opinion, is well taken. The charge of the court, when considered as a whole, was correct.

The question submitted in defendant's special charge No. 2, as set out under its 14th assignment of error, was practically given to the jury in the charge of the court. Further, we are of the opinion that this assignment, and the question presented under it, is not submitted in the manner required by the rules. The assignment is not a proposition, nor are any propositions submitted under this assignment, nor is any statement made. Therefore we are of the opinion that we would not be required to consider it, but we think the questions presented in the special charges were substantially submitted in the charge of the court.

We find no error in the record, and the judgment is affirmed.

KNEALE & WATKINS et al. v. THORNTON.*

(Court of Civil Appeals of Texas. April 26, 1905.)

FRAUDULENT REPRESENTATIONS — AGENTS — ACTIONS — PLEADING — SPECIAL EXCEPTIONS — RULINGS — WITHDRAWAL — SUBMISSION TO JURY.

Where, in an action to recover certain money alleged to have been paid to defendant trust company through the fraudulent representations of its agents, the trust company's special exception to that part of plaintiff's petition alleging such representations made by such agents was sustained, such ruling did not prevent the court from thereafter submitting the company's liability arising from such agent's misrepresentations to the jury, which, in effect, was a withdrawal of the court's ruling on the exception.

Appeal from Navarro County Court; A. B. Graham, Judge.

Action by Franklin E. Thornton against Kneale & Watkins and others. From a judgment in favor of plaintiff, defendant Standard Guarantee & Trust Company appeals. Affirmed.

A. E. Firmin, for appellant. W. W. Bal-
lew, for appellee.

*Rehearing denied June 28, 1905.

KEY, J. Appellee brought this suit in the county court, making the Standard Guarantee & Trust Company and Kneale & Watkins defendants. The plaintiff alleges in his petition that Kneale & Watkins, as agents for the Standard Guarantee & Trust Company, made certain fraudulent representations to him, by which he was induced to pay to them, as such agents, the sum of \$294. The Standard Guarantee & Trust Company answered by general demurrer, special exceptions, and general denial. Kneale & Watkins adopted the answer of their codefendant. The plaintiff filed a supplemental petition, alleging that Kneale & Watkins had forged his name to two applications made to the Standard Guarantee & Trust Company for what that company designated "home-purchasing contracts." The pleadings are voluminous, and it is unnecessary to here state them in full. At the trial the plaintiff dismissed his suit as to Kneale & Watkins, and obtained a verdict and judgment against the Standard Guarantee & Trust Company, and that defendant has appealed.

The first, second, third, fourth, and fifth assignments of error complain of the verdict, and the action of the court in not instructing the jury to find for the defendant, and in not granting the motion for new trial. We think the plaintiff submitted testimony sufficient to sustain the essential averments of his petition, and warrant the jury in finding that, on account of misrepresentations made to him by Kneale & Watkins as agents for the Standard Guarantee & Trust Company, he paid to them for that company the amount of money claimed, and that the company, after being apprised of the wrongful conduct referred to, retained and refused to refund the money. Hence we overrule the assignments referred to.

The sixth assignment complains of the refusal by the court of a special charge instructing the jury not to consider any representations made to the plaintiff by Kneale & Watkins, and it is contended that the charge referred to should have been given, because the court had sustained a special exception to that part of the plaintiff's petition. The record does show that, when the defendant presented its demurrers to the plaintiff's petition, the exception referred to was sustained; but we presume that the trial judge subsequently changed his mind, because he submitted to the jury the liability of the company arising from alleged misrepresentations made by Kneale & Watkins as agents of the company. It was the privilege of the judge to change his mind, and withdraw or otherwise nullify the ruling sustaining the exception to the plaintiff's petition; and the charge given to the jury, in effect, accomplished that result. The record does not show that appellant was misled or deprived of any right by the course pursued by the trial judge.

There are several other assignments of er-

ror in appellant's brief, many of which relate to the questions already discussed. They have all received due consideration, and none of them found to present reversible error.

The judgment is affirmed.

**BUTTERICK PUB. CO., Limited, v. GULF,
C. & S. F. RY. CO.**

(Court of Civil Appeals of Texas. June 3,
1905.)

**CONNECTING CARRIERS — TRANSPORTATION—
DELAY—CONCURRING NEGLIGENCE — DAM-
AGES.**

Plaintiff shipped over defendant's railroad certain wool for transportation to New York in connection with a steamship line, under a bill of lading limiting defendant's liability to its own line. Had the wool been transported with reasonable dispatch to the port where the water transportation was to begin, it would have arrived before 10 o'clock a. m., October 20, 1900, but did not in fact arrive until October 26th, when it was transported by steamer to New York, and delivered on November 21, 1900. From October 19 to November 14, 1900, the market value of wool in New York was 20 cents per pound, but thereafter the price continually declined until after delivery. *Held* that, in the absence of explanation, the long delay on defendant's line constituted negligence which at least concurred with the negligence of the steamship line, if any, and hence defendant was liable for damages resulting therefrom.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 767, 768.]

Appeal from Bosque County Court; B. J. Wood, Judge.

Action by the Butterick Publishing Company, Limited, against the Gulf, Colorado & Sante Fé Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Wood & Henderson and Robertson & Robertson, for appellant. J. W. Terry and A. H. Culwell, for appellee.

CONNER, O. J. This action was brought by appellant against the appellee in the county court of Bosque county to recover damages in the sum of \$441.74 and interest, because of alleged negligent delay in the transportation and delivery of two car-load lots of wool from Clifton, Tex., a station on appellee's railroad, to the city of New York. The trial resulted in a judgment for appellee, and we are asked to set it aside because the evidence is insufficient to support it.

The following facts are undisputed: That one of appellant's agents on the 19th day of October, 1900, delivered to appellee at Clifton, Tex., 22,087 pounds, or two car loads, of wool for transportation to New York. Some of the circumstances tend to show that the shipment was to be made via Galveston and the Mallory Steamship Line. It is certain that such was the route the shipment was made to take. The distance from Clifton to Galveston, Tex., by appellee's line of railway, is 270 miles. At the time of this ship-

ment the regular schedule of appellee's local freight trains between these points was 12 miles per hour, and the schedule time for its through freight trains was 15 miles per hour. Adopting the schedule time for local freight trains as a reasonable time, the wool should have arrived in Galveston about 10 o'clock a. m., October 20th. The wool did not arrive there, however, until October 26th. The wool was not actually unloaded upon the wharf of the transporting steamer of the Mallory Line until about November 12th, after which it seems to have been transported to New York in the usual time of such transportations by the steamship company, and delivered in New York to appellant's commission agent on November 21, 1900. The proof shows that from October 19, 1900, to November 14, 1900, the market value of the wool in question in New York City was 20 cents per pound. Thereafter there seems to have been a continuous decline in the market until after the delivery in New York as stated.

As presented to us, the only controversy in the evidence is as to the time of the delivery by appellee at Galveston. The shipping contract provided that appellee's liability should "terminate on tender of delivery to a connecting carrier," and the contention of appellee, and the theory upon which the case seems to have been tried, is that a tender of delivery of the wool in question was made to the steamship line on October 26, 1900, and that, had the Mallory Line exercised due diligence in the further transportation, the wool would have arrived in New York prior to any decline of the market. If this be admitted, however, it does not follow that appellee should be relieved of liability. The earliest date that the evidence shows that there was a "tender of delivery," as insisted upon by appellee, was October 26, 1900. No explanation of the long delay from October 19th to October 26th appears, from which, hence, negligence on appellee's part may be inferred. It cannot be said, therefore, that this did not contribute, with the negligence, if any, of the Mallory Line, in bringing about the injury complained of. The precise question in principle has been before us in several cases. In the case of *Texas & Pacific Ry. Co. v. Smith & White* (Tex. Civ. App.) 79 S. W. 614, in which a writ of error was refused, the appellant therein sought to relieve itself of its own negligence on the ground that, had the connecting carrier used due diligence in the further transportation, the cattle involved in the shipment would have arrived at their destination prior to a decline in the market price. We there said: "While appellant was not liable for the delays resulting alone from the negligence of the other carriers, each and all of them were liable to appellees for the consequences of their combined negligence. It cannot be said that appellant's negligence was not in part the efficient cause of the loss of a better market

merely because it would not have caused such loss if there had been no negligence on the part of the other carriers, for the same might be said by them of appellant's negligence, and they might not have delayed the train if appellant had not first done so. Where loss actually results from concurring causes, no one of them is remote, but all are proximate. A cause cannot be concurrent with a proximate cause and remote at the same time." We think the principle so announced is the law, and that its application to the facts of the case now before us requires the reversal of the judgment. See, also, *Shelton v. Northern Texas Traction Company* (Tex. Civ. App.) 75 S. W. 338, and authorities therein cited.

Judgment reversed, and cause remanded.

AMERICAN COTTON CO. v. WHITFIELD & MITCHELL.*

(Court of Civil Appeals of Texas. May 31, 1905.)

PARTNERSHIP—DISSOLUTION—RIGHT TO SUE.

A suit may be maintained in the partnership name, though the firm has been dissolved, when its affairs have not been entirely settled.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 689.]

Appeal from Fannin County Court; Thomas C. Bradley, Judge.

Action by Whitfield & Mitchell against the American Cotton Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Eugene Williams, for appellant. J. G. McGrady, for appellees.

FISHER, C. J. The appellees sued the appellant for \$698.60, on a written contract, whereby the appellees obligated themselves to gin and compress cotton at Bonham, Fannin county, and deliver the same to appellant, free on board cars at Bonham, in round lap bales, to be paid for by appellant on draft drawn by appellees—the first 90 per cent. of the price of the cotton when the bills of lading and invoice were presented, attached to appellees' draft, and the balance, 10 per cent., later, by appellant's check. Appellant is a foreign corporation, and pleaded its privilege of being sued in the county in which it had its principal office, which was not Fannin county, and also pleaded a misjoinder of parties, on account of the incapacity of appellees to bring their suit as partners, for the reason that the partnership had been dissolved. The pleas of venue and abatement were overruled, and, on the trial, judgment was rendered in favor of appellees for \$848.20, which is the principal sum sued for, with interest.

The facts stated in connection with the ruling of the court on the plea of privilege

and abatement show that the court committed no error in overruling the plea. On the question of venue, the evidence set out in the bill of exceptions, together with the contract described and mentioned in plaintiffs' petition, brings the case substantially within the ruling made by the court in *Westinghouse Electric Mfg. Co. v. Troell* (Tex. Civ. App.) 70 S. W. 324.

The court was also justified in overruling the plea of misjoinder of parties plaintiff. It is true that the firm of Whitfield & Mitchell was dissolved at the time that the suit was brought, but the facts alleged in the supplemental petition, together with the facts bearing on this question, as shown in the bill of exceptions, are to the effect that, while the firm was dissolved, still the firm affairs and business were not entirely settled. This, in our opinion, justified the suit by Whitfield & Mitchell.

The third assignment of error complains of the action of the court on the ground that Mitchell was made a party plaintiff without his consent. There is evidence to the contrary upon this question. Therefore we are of the opinion that there was no error in the ruling complained of.

There is no statement of facts in the record, except what is embraced in the written agreement signed by the parties; and, in view of the statement made in this agreement, practically to the effect that the appellant was indebted to the appellees for the amount sued for, we are of the opinion that no error was committed in overruling appellant's special exceptions. We have closely examined the petition, and we find that it is not subject to a general demurrer. If the appellees' petition was subject to the special exceptions set out in appellant's brief, we are of the opinion that the admission of liability for the amount sued for cures the error in the petition pointed out.

We find no error in the record, and the judgment is affirmed.

Affirmed.

CITY OF CLEBURNE v. GUTTA PERCHA & RUBBER MFG. CO.*

(Court of Civil Appeals of Texas. May 31, 1905.)

1. TRIAL — INSTRUCTIONS — IGNORING DEFENSES.

Where, in an action on a note given by a city, the defense was breach of warranty and invalidity of the debt under a constitutional provision, it was error to instruct the jury to find for plaintiff unless they found that the note was invalid.

2. SAME—CURING ERROR.

An erroneous instruction is not cured by subsequent correct ones which do not refer to it, or in terms attempt to modify it.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 703-718.]

*Rehearing denied June 23, 1905.

*Rehearing denied June 23, 1905.

Appeal from District Court, Johnson County; Nelson Phillips, Judge.

Action by the Gutta Percha & Rubber Manufacturing Company against the city of Cleburne. From a judgment in favor of plaintiff, defendant appeals. Reversed.

John B. Warren, for appellant. Walker & Baker, for appellee.

KEY, J. The Gutta Percha & Rubber Manufacturing Company brought this suit against the city of Cleburne, a municipal corporation, on two promissory notes, for the sum of \$825 each. In addition to a general demurrer, several special exceptions, and a general denial, the defendant pleaded specially that the notes were given in part payment for certain fire hose, and that the plaintiff had breached its contract of warranty in reference thereto. It was also alleged that the execution of the notes created a debt, within the meaning of article 2, § 5, of our state Constitution, and was invalid because at the time of creating the debt provision was not made for its payment, as required by the Constitution. The trial resulted in a verdict and judgment for the plaintiff for the full amount of the two notes, and the defendant has appealed.

On account of the volume of business pending in this court, if for no other reason, we shall not undertake to discuss in this opinion the numerous questions presented in appellant's brief.

There may be some merit in the assignment of error which complains of the eighth paragraph of the court's charge, on the subject of contributory negligence. Some of the language used in that paragraph is rather vague and confusing, and we suggest that it be made more definite upon another trial.

We decide against the appellant on all the other questions presented, except the one raised by the seventh assignment, which complains of the third paragraph of the court's charge, which reads as follows:

"(3) As to the second note in question, you will find for the plaintiff the amount of the principal thereof, with interest thereon at 5% per annum from October 16, 1900, unless you find for the defendant on its plea of failure of consideration, submitted hereafter in paragraphs 6 and 7 of this charge, and unless you find for the defendant on its plea of the invalidity of said note submitted hereafter in paragraph 4 of this charge."

This charge is complained of because it required the jury to find for the plaintiff unless the defendant had established both of its defenses, when, under the law, the establishment of either defense would result in defeating, in part, at least, the claim asserted by the plaintiff. Appellant's contention is correct, and the charge is subject to the criticism urged against it. Counsel for appellee contend that subsequent portions of the charge corrected the paragraph referred to,

and therefore reversible error is not shown. Subsequent paragraphs of the charge, in effect, state the law differently, but they do not refer to or, in terms, attempt to modify or correct, the paragraph complained of. In this respect the case is quite similar to *Railway Co. v. Lehman*, 66 S. W. 214, 3 Tex. Ct. Rep. 866, which was reversed on account of a similar error. See, also, *Railway v. Robinson*, 73 Tex. 277, 11 S. W. 327; *Baker v. Ashe*, 80 Tex. 361, 16 S. W. 36; *Pound v. Turck*, 95 U. S. 461, 24 L. Ed. 525; *Sullivan v. Railway*, 88 Mo. 169.

On account of the error referred to, the judgment is reversed, and the cause remanded.

Reversed and remanded.

GULF, C. & S. F. RY. CO. v. COOPER.

(Court of Civil Appeals of Texas. May 10, 1905.)

1. RAILROAD—KILLING OF LIVE STOCK—NEG- LIGENCE.

Plaintiff's horse passed into defendant's inclosed right of way through a defective cattle guard. The cattle and horses had frequently for a month prior to the accident passed over the guard and entered the defendant's right of way. A man who was kept at the point where the accident occurred, to watch the guards and crossings, saw the horse enter the right of way, and endeavored to turn him out; but the horse ran down the track, and was killed by a train. The train was running rapidly, and no bell was rung or other signal given, and no effort was made to stop the train or decrease its speed, though the horse could have been seen for a mile before he was struck. *Held*, that defendant was liable for the killing of the horse.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1453, 1476, 1496, 1500.]

2. SAME—EVIDENCE—ADMISSIBILITY.

Where the horse killed had no market value, evidence that he had been trained to be used in roping contests, and that he had a peculiar value on that account, was admissible, though a law against roping contests had been passed subsequent to the use of the horse for that purpose.

Appeal from Bosque County Court; B. J. Ward, Judge.

Action by A. W. Cooper against the Gulf, Colorado & Santa Fe Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant. J. P. Word and P. S. Hale, for appellee.

FLY, J. This is a suit for damages alleged to have accrued to appellee by the killing of a horse through the negligence of appellant. There were a verdict and judgment for appellee in the sum of \$375.

The evidence showed that the horse passed into the inclosed right of way through a defective cattle guard. Cattle and horses had frequently, for at least a month before the horse was killed, passed over the cattle guard and entered the right of way of appellant. A man was kept at that point to watch the

cattle guards and crossings, and he saw the horse enter the right of way over the defective stock guard. He endeavored to turn him out, but the horse ran down the track, and was killed by a train belonging to appellant. The train was running rapidly, and no bell was rung or other signal given, and no effort was made to stop the train or to decrease its speed, although the horse could have been seen for a mile before he was struck. The evidence in the case was uncontradicted, and showed beyond doubt that appellant negligently killed the horse. Even if the track had been properly protected by safe cattle guards, the proof established a case of negligence, because the horse must have been seen by the employes of appellant, and no precaution whatever was taken to keep from killing him. They must have seen the horse running near the track for 400 yards, and yet the speed of the train was not decreased, and the bell was not rung, nor whistle sounded. They must have known the horse was greatly frightened, and, being stopped by the fence, that he would probably try to cross the track.

It was shown that the horse had been trained to be used in roping contests, and that he had a peculiar value on that account. He had no market value, and it was proper to show his intrinsic value for the purposes for which he had been trained and was used. Until a law against roping contests was passed by the present Legislature, there was no law against roping contests in Texas; and the horse, in being used for such purpose, was not employed in an illegal manner. The fact that horses and cattle were sometimes killed in the contests did not render those engaged therein guilty of malicious mischief, as contended by appellant.

The court did not err in his charge, and did not err in refusing the charges asked by appellant.

The judgment is affirmed.

TOWNSEND v. TEXAS & N. O. RY. CO. (Court of Civil Appeals of Texas. June 10, 1905.)

1. CARRIERS—FAILURE TO TRANSPORT PASSENGER—SPECIAL DAMAGE—PLEADING.

Where, in an action for breach of a contract of carriage, plaintiff claimed special damage on the ground that because of his failure to reach a certain town at the time he would have reached it, had defendant performed its duty, he had failed to consummate a deal by which he would have realized a large profit, failure to name the parties with whom the deal was to be made rendered the petition defective.

2. MALICIOUS ACT OF SERVANT—LIABILITY OF MASTER.

Exemplary damages cannot be recovered from a railroad company for the malicious acts of its agents in failing or refusing to carry a passenger, where it is not shown that such malicious acts were ratified by the company.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1083; vol. 34, Cent. Dig. Master and Servant, § 1273.]

Error from District Court, Angelina County; Tom C. Davis, Judge.

Action by W. J. Townsend against the Texas & New Orleans Railway Company. The action was dismissed, and plaintiff brings error. Affirmed.

W. J. Townsend and Fiset & McClendon, for plaintiff in error. Baker, Botts, Parker & Garwood, Blount & Garrison, and J. S. McEachin, for defendant in error.

PLEASANTS, J. Plaintiff in error brought this suit against the defendant in error to recover damages for the alleged breach of a contract of carriage. The petition alleges, in substance, that on February 7, 1904, plaintiff purchased a ticket from defendant's agent at Beaumont, Tex., entitling him to transportation as a passenger over defendant's road from the city of Beaumont to the town of Huntington, in Angelina county, Tex.; that, at the time he purchased the ticket, defendant's train to Huntington was bulletined to leave Beaumont at 9:30 a. m., which was its regular, scheduled time, but that after plaintiff had procured his ticket, and paid therefor, said train was side tracked, and did not leave until 12 o'clock of that day; that after the train left, and before it reached the town of Kountze, in Hardin county, plaintiff complained to the assistant conductor, who was one of defendant's agents in charge of said train, of the delay in starting from Beaumont, and informed him that he had important business engagements on that day in the town of Lufkin, where he resided, and had ordered a conveyance to meet the train at Huntington and take him to Lufkin, and that he fully discussed with said agent the importance of his business; that when the train reached Kountze the assistant conductor came through the car, and informed plaintiff that the engine had broken down, and the train would be kept there for an hour and a half waiting for an engine to be sent from Beaumont; that plaintiff thereupon, in the hearing of said agent, and with his full knowledge, invited a number of his fellow passengers to go with him to dinner at an eating house a short distance from the railway station, and in sight of the train, and, this invitation having been accepted, plaintiff went to said eating house and ordered the dinner, but, before it could be served, the train left on its way to Huntington; that as soon as he saw the train start he and those with him rushed to catch it, and some of them succeeded in doing so, but plaintiff failed, and was left at said station; that, being then unable to reach Lufkin on that day, he returned to Beaumont and went to Lufkin the next day by way of Houston; that, on account of his failure to reach Lufkin on said 7th day of February, he was prevented from making a trade from which he would have realized a profit of \$3,500; and that the additional ex

penses incurred by him by reason of his having been left at Kountze as aforesaid amounted to \$11.70. It is further alleged that the agent of defendant willfully and maliciously, and with full knowledge of the facts, caused him to be left by the train as aforesaid, which act of said agent was ratified by the defendant, and it thereby became liable to him in exemplary damages in the sum of \$5,000.

The allegations giving the details of the business transaction which plaintiff claims he was prevented from concluding by the failure of the defendant to comply with its contract to carry him to Huntington within a reasonable time are as follows: "Your said plaintiff would further represent unto the court that he had an important deal under consideration at Carlsbad, N. M., and that your said plaintiff, in connection with W. H. Bonner, had sent T. J. Bonner and A. J. Vinson, who resided in said town of Lufkin, Angelina county, Texas, to said town of Carlsbad, N. M., for the purpose of making examination into said deal, and closing the same by making payment thereon if the same was found to be in substance as had been submitted in the written proposition to your said plaintiff and said W. H. Bonner, and that the actual expenses of said two parties aforesaid cost your said plaintiff and the said W. H. Bonner \$160, and the one-half of this sum, to wit, \$80, was paid by your said plaintiff to A. J. Vinson. Your said plaintiff would further represent unto the court that he had authorized his said agents as aforesaid, T. J. Bonner and A. J. Vinson, to go to the said city of Carlsbad, N. M., to make a careful examination into the land deal and stock of horses and cattle that had been offered to your said plaintiff, and, after they reached there, if they found the condition of things as represented, or in substance as such as he desired them, to close the deal at once by putting up earnest money, and checking on your said plaintiff to protect same, by giving your said plaintiff such information concerning said deal, so he could protect the same at once. Your said plaintiff would further represent unto the court that, in response to said deal as aforesaid, that the said T. J. Bonner, agent of your said plaintiff, who had gone there for the express purpose of closing and passing on said deal for your said plaintiff, wrote your said plaintiff on the 3d day of February, 1904, fully as to what he found, the condition of each and every thing which had been submitted by the owners thereof to your said plaintiff in writing, in connection with said W. H. Bonner, and in said letter the said T. J. Bonner, agent as aforesaid, itemized each and every thing that he had found, showing said property to be of the value of \$24,000, which property had been offered to your said plaintiff, in connection with W. H. Bonner, for the sum of \$18,000, and after the arrival of the said T. J. Bonner and A. J. Vinson, as afore-

said, to the said city of Carlsbad, N. M., they found that the property was forced to be sold, and could be had for \$15,000, and in fact said property did sell on Monday evening, on the 8th day of February, A. D. 1904, for the sum of \$15,000, instead of \$18,000, as had been submitted to your said plaintiff and W. H. Bonner, being the price said property was offered for. This would leave a net profit on said deal of \$7,000, which your said plaintiff would have made to his part the sum of \$3,500. Your said plaintiff would further represent unto the court that he would have made on said deal the sum of \$3,500 profit if the said deal had been closed within the time agreed upon by the said T. J. Bonner and the owners of said property, and your plaintiff here alleges, charges, and says that he was damaged in the sum of \$3,500 by said defendant company failing to comply with their contract as aforesaid, and as hereinafter stated, and your said plaintiff would further represent unto the court, and here allege, charge, and say, that the acts of said defendant company and its employees as aforesaid were wantonly, willfully, and maliciously done, for the express purpose of vexing, harassing, and damaging your said plaintiff, and he here sues for the sum of \$5,000 as exemplary damages, as well as the sum of \$15.20 as actual funds paid out by your said plaintiff in reaching his said home, all of which was caused through the negligent, willful, and malicious acts of your said defendant's company. Your said plaintiff would further represent unto the court that if he could have reached his home, in the said town of Lufkin, Angelina county, Texas, on Sunday, the 7th day of February, A. D. 1904, that he would have reached there in time to have answered the letter he received, or which reached its destination, to say, Lufkin, Texas, during the absence of said plaintiff, which would have been in time to have protected the trade as aforesaid in New Mexico, which he would have wired at once, closing said deal, but owing to the fraud and neglect of defendant's company in not transporting your said plaintiff according to their said contract, and causing your said plaintiff to get out and leave said car at Kountze, Texas, as aforesaid, your said plaintiff failed to reach the said town of Lufkin in time to protect said deal as aforesaid, and lost the same through the fraudulent acts of said defendant's company and its employees; and he here sues for the sum of \$3,500 as actual damages lost in said deal as aforesaid." The prayer is for the recovery of each of the three amounts before stated. The trial court sustained special exceptions interposed by the defendant to the allegations of the petition claiming special and exemplary damages, and, plaintiff declining to amend, the suit was dismissed; the amount claimed as additional expenses incurred by plaintiff being below the jurisdiction of the court.

Without considering other questions pre-

sented by defendant's special exception to that portion of the petition claiming special damages by reason of plaintiff's having been prevented from making his "land and cattle deal," we are of opinion that the objection that the petition fails to "give the names of the parties with whom said deal was to be made" was properly sustained. The defendant was entitled to have the petition state all the facts in regard to the alleged transaction, in order that it might make the investigation necessary to a proper preparation of its defense. Information as to names of the parties with whom it was alleged the deal could have been made was necessary, in order to enable the defendant to investigate and meet the allegation, and the trial court properly sustained the special exception asking for this information.

The exception to the claim for exemplary damages was also properly sustained, because, even if it should be conceded that facts are alleged from which malice could be implied, no act of ratification by the defendant of the alleged wrongful act of its agent is shown, and no facts are alleged from which such ratification can be implied. *Jones v. George*, 61 Tex. 346, 48 Am. Rep. 280; *Ry. Co. v. Garcia*, 70 Tex. 207, 7 S. W. 802; *Ry. Co. v. Gordon*, 72 Tex. 50, 11 S. W. 1033; *Ry. Co. v. McDonald*, 75 Tex. 47, 12 S. W. 860; *Ry. Co. v. Reed*, 80 Tex. 366, 15 S. W. 1105, 26 Am. St. Rep. 749.

These exceptions having been properly sustained, and the plaintiff declining to amend, and the amount involved in the suit after the claims for special and exemplary damages were eliminated being below the jurisdiction of the court, it was rightly dismissed. *Haddock v. Taylor*, 74 Tex. 216, 11 S. W. 1093.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

STEPHENS v. TOMLINSON, HENDERSON & CO.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. REAL ESTATE BROKERS—RIGHT TO GIVE COMMISSIONS TO PURCHASER.

A broker employed to sell land on commission has a right to give a part of his commissions to the purchaser.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 51.]

2. SAME—COMPENSATION—IMPLIED CONTRACT.

Where a real estate agent renders services in procuring a purchaser for land with the owner's consent, but without any agreement for the payment of a certain sum for such services, the agent is entitled to recover the reasonable value of the services.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 55.]

Appeal from Tarrant County Court; R. F. Milam, Judge.

Action by Tomlinson, Henderson & Co. against Ernest L. Stephens. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wynne & McCart and Bowlin & McCart, for appellant. A. A. Henderson, for appellees.

FLY, J. Appellees, a firm of real estate agents, instituted this suit in the justice's court to recover of appellant the sum of \$160, claimed to be due as commissions on a sale of land made by them for appellant. On appeal to the county court the cause was tried by jury, and resulted in a verdict and judgment for appellees in the sum of \$64.

The evidence of F. L. Estes, one of the members of appellees' firm, was to the effect that appellant authorized a sale of the land for \$3,200—\$1,000 in cash, and the balance in one and two years. This was denied by appellant, but the jury accepted the evidence of Estes, and found the value of the services of appellees for the labor performed for appellant. The jury was authorized to do that, and there is no force in the contention that the verdict was not supported by the evidence.

Appellees had the right to give the intending purchaser a part or all of their commissions on the sale, if they so desired; and it was not evidence of bad faith on their part towards appellant for them to give the commissions, or any part thereof, to the purchaser. By giving a part of their commissions to the purchaser, appellees did not make themselves agents of both parties. It is a very different case from receiving commissions from both buyer and seller. As is said in *Chase v. Veal*, 83 Tex. 333, 18 S. W. 597: "The defendant introduced evidence to show that the plaintiffs had a secret agreement with Bailey, one of the purchasers, to divide with him the commissions that they were to receive from Chase for making the sale to Bailey and his associate. We are unable to see how Chase was injuriously affected by that agreement, nor why it should be treated as cause for the reversal of the judgment."

Appellees did not sue on an express contract, and the court properly instructed the jury to find for what the services were reasonably worth. The charge fully embodied the law applicable to the pleadings and facts, and it was not error to refuse the special instructions requested by appellant. It did not matter if appellant did not agree to pay any certain sum for appellees' services; after a performance of them with his consent, he must pay their reasonable value. That value was satisfactorily shown by the evidence.

There is no error in the judgment, and it will be affirmed.

SHARP v. E. NATHAN MERCANTILE CO.
(Supreme Court of Arkansas. May 27, 1905.)

1. **BILLS AND NOTES—CHECKS—PAYMENT.**

Giving a check which is never paid is not an extinguishment of a debt, unless shown to have been accepted absolutely as payment.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, §§ 86-88.]

2. **SAME—NEGLIGENCE IN PRESENTING.**

A debtor who draws a check in favor of his creditor, which the latter promptly forwards to the bank for payment, cannot, on the check's being lost in the mail, and notice being sent to him of that fact, acquiesce in the loss and non-payment of the check, and do nothing to assist in procuring payment, and then plead as a release of his debt the negligence of the creditor in failing to procure payment of the check, and the intervening wrongful withdrawal of the debtor's funds from the bank by his partner.

Appeal from Circuit Court, Sevier County; James S. Steele, Judge.

Action by the E. Nathan Mercantile Company against S. C. Sharp & Co. From a judgment for plaintiff, Sharp, surviving defendant, appeals. Affirmed.

S. C. Sharp & Co., a firm composed of appellant, S. C. Sharp, and one Manning, were indebted to appellee in the sum of \$390 on account for goods, wares, and merchandise sold to them, and on January 22, 1902, gave appellee their check on the Howard County Bank, of Nashville, Ark., for that amount in payment of the debt. The check was delivered to appellee's traveling agent by Sharp & Co. at their place of business, at Lockesburg, Ark., and was immediately sent by mail to appellee, at Ft. Smith. Appellee credited the amount to S. C. Sharp & Co., and immediately deposited the check, properly indorsed, in the American National Bank of Ft. Smith, for collection, which bank immediately forwarded the check by mail to the Howard County Bank for payment. The check was lost in the mail, and never received by the last-named bank. Letters were written by appellee and by the Howard County Bank to Sharp & Co., which letters, appellant admits, were duly received, informing them of the loss of the check, and requesting that a duplicate be sent. Sharp & Co. made no response to either of these letters. They had funds sufficient to cover the check in the Howard County Bank from the date of the check until April 7, 1902, when all their funds were drawn out of the bank by Manning, and the check was never found, nor the amount thereof paid to appellee. This suit was brought by appellee against Manning and appellant, Sharp, to recover the amount of the account. Manning died during the pendency of the action, and thereafter the action proceeded against appellant alone. Appellant defends upon the ground that the firm of S. C. Sharp & Co. was dissolved on December 31, 1901; that Manning, without his knowledge or consent, and without right or authority, withdrew

from the Howard County Bank all the funds standing to the credit of the firm, and converted them to his own use; that Manning was insolvent, and largely indebted to him (appellant); and that appellee, by failing to present the check for payment in due time, released appellant from all further liability. It is not shown that appellee received any notice or information of the dissolution of the firm, or the condition of the accounts between the partners, or that Manning was indebted to appellant. A trial before a jury resulted in a verdict for the plaintiff for the amount of the debt, and the defendant appealed to this court. The case was submitted to the jury upon instructions declaring the law that if, at the time the check was given, "the defendant had sufficient funds in said bank to pay said check, and that said plaintiffs or their assignees neglected or failed for an unreasonable length of time to present said check to said bank for payment, and that the firm of S. C. Sharp & Co. dissolved partnership shortly after the execution and delivery of said check to plaintiff, and left the \$390 in said bank to pay said check, and after the dissolution of said partnership one Will Manning drew the \$390 out of the bank without the knowledge or consent of the defendant Sharp, and converted the same to his own use and benefit, and that the said Manning was and is insolvent," the verdict should be for the defendant Sharp. And in another given at the request of defendant the court told the jury that by "a reasonable time" it was meant that the plaintiff must have forwarded the check to the drawee by the regular course of mail on the following day after its receipt.

Feazel & Bishop, for appellant. Youmans & Youmans, for appellee.

McCULLOCH, J. (after stating the facts). Appellant has no just cause of complaint at the instructions of the court. They were quite as favorable to his defense as he was entitled to. According to the undisputed facts, appellee was entitled to a verdict against appellant for the amount of the debt.

Giving the check, which was never paid, was not an extinguishment of the original debt, unless shown to have been accepted absolutely in payment. *Deyampert v. Brown*, 28 Ark. 166; *Henry v. Conley*, 48 Ark. 267, 3 S. W. 181. Appellee forwarded the check for payment as soon as received, and notified appellant of its loss. Appellant, though repeatedly notified of the nonpayment and loss of the check, remained passive and silent, and took no steps to cause payment to be made. Conceding that the loss of the check in the mail did not excuse appellee from presenting the same for payment, and that appellant was not bound to give a duplicate check, appellee did notify the Howard County Bank and appellant that the check was

outstanding and lost. Appellant, after having acquiesced in the nonpayment on account of the loss of the check, and after having failed to assist in procuring payment, cannot now plead the nonpayment in release because his quondam partner had in the meantime wrongfully drawn the money out of the bank. In other words, he pleads as a defense the negligence of his creditor in failing to procure payment of the lost check whilst he, with full knowledge of the loss, stood by, quiescent, and failed when called upon to object to the delay or to assist in bringing about the payment. This he cannot do. In *Kilpatrick v. Home Building*, etc., 119 Pa. 30, 12 Atl. 754—a case cited by counsel for appellant—the settled rule is stated to be that “a check received for debt is merely conditional payment—that is, satisfaction of the debt if and when paid—but that acceptance of such a check implies an undertaking of due diligence in presenting it for payment; and, if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as an actual payment.” Applying the rule thus announced, it is not perceivable wherein appellee has failed to exercise the full measure of diligence in this instance in presenting the check for payment, and in notifying appellant of its loss and nonpayment.

The judgment is affirmed.

CLAY v. STATE.

(Supreme Court of Arkansas. May 27, 1905.)

ASSAULT—PRINCIPALS—EVIDENCE.

One cannot be convicted of assault as a principal where it does not appear that he took any part therein, was present when it took place, or that what he did after the assault had any connection therewith.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 18; vol. 14, Cent. Dig. Criminal Law, §§ 71, 76.]

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Styles T. Rowe, Judge.

Cal Clay was convicted of assault with intent to kill, and appeals. Reversed.

T. S. Osborne, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

WOOD, J. At the March term, 1905, of the Sebastian circuit court, Ft. Smith district, the grand jury returned an indictment against Kent Peggee, Cal Clay, and Green Robinson for assault with intent to kill and murder. At the trial a severance was taken, and appellant was tried on a plea of not guilty, found guilty, and his punishment assessed at three years in the penitentiary. His motion for a new trial having been overruled, he appealed to this court.

The Attorney General confesses error. The proof does not show that appellant took part in the assault. What he did was done

after the assault was over, and is not shown to have had any connection therewith. The appellant was indicted as principal offender. But he was not present when the offense was committed. The confession of error is sustained.

Reversed, and remanded for new trial.

PINE BLUFF IRON WORKS v. BOLING & BRO.

(Supreme Court of Arkansas. May 27, 1905.)

1. BAILMENT FOR REPAIR—IMPROPER DELAY—SPECIAL DAMAGE.

Where one employed to repair the cylinder of an engine improperly delayed the return of the cylinder, but had no notice that it was part of an engine used in running a sawmill, he was not liable for special damage caused by the idleness of the mill during the delay.

2. SAME—LIEN.

A repairer of machinery has a lien thereon, entitling him to retain possession until the repair charges are paid or tendered.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bailment, §§ 78, 82.]

Appeal from Circuit Court, Ashley County; Zachariah T. Wood, Judge.

Action by Boling & Bro. against the Pine Bluff Iron Works. From a judgment for plaintiffs, defendant appeals. Reversed.

Austin & Danaher, for appellant.

BATTLE, J. “Boling & Bro. shipped from Hamburg to Pine Bluff Iron Works, Pine Bluff, Ark., an engine cylinder, to be repaired. They did not send any letter or other notice of the intended shipment, but asked their friend, W. E. Kittrell, to write, telling appellant what repairs to make on the cylinder. Kittrell wrote the letter as requested, and appellant repaired the cylinder, charged the repair bill of \$12.42 to Kittrell, and on January 24, 1902, shipped the cylinder back to Kittrell, at Hamburg, sending it under a shipper's order bill of lading, which appellant attached to a draft on Kittrell for \$126.27, being the amount due from Kittrell to appellant, including the \$12.42 for repairs on the cylinder in controversy.

“Just before the return shipment of the cylinder, Kittrell wrote to appellant, saying that the cylinder had been sent by and belonged to Boling & Bro., and that Kittrell was not responsible for the repairs. This letter is dated January 23d. The evidence does not show that this letter ever reached appellant, but, from the way mails are carried, which was familiar to the jury, the letter could not have reached appellant until late in the afternoon of the 24th, the day the cylinder was shipped. On February 1st R. S. Boling wrote to appellant that he was the owner of the cylinder, and complained of its having been returned with bill of lading attached to a draft on Kittrell. Appellant replied, referring Boling to Kittrell; saying Kit-

trell had ordered the work done, and to him they looked for a settlement of the repair bill. Without further ado, Boling & Bro. then replevied the cylinder, without having paid or tendered the repair charges to appellant.

"Upon the measure of damages, R. S. Boling testified that he was kept out of the use of the cylinder eight days by reason of appellant's action; that the only attempt he ever made to pay the repair charges was to offer the railroad company's agent \$15. He likewise testified that he was engaged in running a sawmill; that the engine of which the cylinder was a part was the motive power of the mill; that his mill was necessarily shut down while the cylinder was delayed. All of this testimony was objected to by defendant, and exceptions duly saved. He was further asked, over defendant's objection, this question:

"What was the usable value of that piece of machinery a day to you?"

"W. E. Kittrell was asked and permitted to answer similar questions, and gave similar testimony. The court instructed witness Kittrell, on this part of his testimony, as follows:

"You may take into consideration the purpose for which it was used, and say what the cash value of that cylinder was to that mill per day."

"The witness answered, 'Not less than \$10 nor more than \$20 per day.'"

"R. S. Boling, in answer to similar question, and under similar instructions from the court, likewise testified that the value of the cylinder per day to the mill was \$12 to \$15.

"On cross-examination both of these witnesses (Kittrell and Boling) testified that the cylinder was worth about \$40, and that \$40 per year would be a big rental value for it.

"The two Bolings and Kittrell were also permitted to testify, over appellant's objection, as to the character of the mill operated by plaintiffs.

"John L. Mills, witness for the defendant, testified that the rental value of the piece of machinery was not over \$2.50 per month."

The jury returned a verdict in favor of the plaintiffs for the cylinder, and \$75 damages, and the defendant appealed.

The testimony of Boling and Kittrell as to the value of the cylinder to plaintiffs, as a part of their sawmill, was incompetent, and should not have been admitted. There is nothing in the record to show that appellant had any notice or knowledge that it was a part of an engine used in running a sawmill, or how it was used. Appellees were not, therefore, entitled to special damages on that account. Hooks Smelting Company v. Planters' Compress Company, 72 Ark. 275, 79 S. W. 1052.

Appellant had a lien on the cylinder for work and labor performed thereon, and was

entitled to possession of it until such lien was satisfied by payment or tender. 1 Jones on Liens (2d Ed.) §§ 731, 732, 745, and cases cited.

Reverse, and remand for a new trial.

CHURCH v. GALLIC.

(Supreme Court of Arkansas. May 27, 1905.)

1. INJUNCTION—RESTRAINING EXECUTION OF JUDGMENT—LOSS OF RIGHT OF APPEAL.

The mere fact that one against whom a judgment has been rendered has lost his right of appeal through the loss by unavoidable accident of a bill of exceptions is no ground for enjoining the execution of a judgment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 773.]

2. SAME—JUDGMENT AGAINST MARRIED WOMEN.

The fact that defendant was a married woman when the action was instituted against her, and that her husband was not made a party, is no ground for enjoining the execution of the judgment against her.

Appeal from Garland Chancery Court; Alonzo Curl, Chancellor.

Bill by Mahala Church against Gus Gallic. From a decree for defendant, plaintiff appeals. Affirmed.

This was a bill to enjoin the execution of a writ of possession issued upon a judgment rendered against the appellant in favor of the appellee, Gus Gallic, in the Garland circuit court, and to compel the appellee to submit to a new trial. The writ of possession was issued upon a judgment rendered in a suit in ejectment for the possession of the land, the title to which is being litigated in case No. 5,254, now pending in this court on appeal. The complaint alleged that the said Gus Gallic, on the 5th day of May, 1902, filed a complaint at law against the appellant for the possession of certain land therein described, and made a copy of the complaint at law an exhibit to her complaint; that the appellant answered said complaint, and that upon a trial of the cause judgment was rendered against the appellant for possession of the property; that in due time appellant filed a motion for a new trial, which was overruled, and that she saved her exceptions, and prayed an appeal to this court, which was granted, and the appellant given until the 3d of August, 1903, to tender and file her bill of exceptions; that the appellant lost her right of appeal from said judgment, which was unjust and inequitable, by the loss of the bill of exceptions, an accident unavoidable on her part; that the appellant was, at the time said suit at law was filed against her, and had ever since been, a married woman, and that her husband was not made a party to said suit; that the appellee, Gus Gallic, had caused a writ of possession to be issued against the appellant, Mahala Church, upon said judgment, and that the

appellee R. L. Williams, as sheriff, was threatening to eject her from said premises. The prayer was for an injunction, and for the judgment at law to be annulled, or that appellee be required to submit to a new trial, and for other and further relief. The appellee filed a demurrer and answer. In his answer he denied that appellant filed a motion for a new trial, and denied all of the allegations as to the time given in which to file a bill of exceptions and the loss of same, and alleged negligence in the appellant.

James E. Hogue, for appellant.

WOOD, J. (after stating the facts). The complaint was defective. It did not state a cause of action. The general allegation that appellant lost her right of appeal by the loss of a bill of exceptions—an accident unavoidable on her part—states no ground for equitable interposition under *Kansas & Arkansas Valley Ry. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211. This defect in statement, however, might have been reached by motion to make more specific. But the complaint, even if treated as sufficient on demurrer in this particular, did not state any ground for relief on the merits. The fact that appellant was a married woman at the time a suit at law was filed against her, and that her husband was not made a party to such suit at law, presents no reason whatever why a judgment should not have been rendered against her at law, and no reason for the intervention of chancery to prevent the enforcement of such judgment. It does not appear that the demurrer was insisted upon in the lower court. The cause was heard by the chancellor upon depositions concerning the failure to obtain bill of exceptions. The testimony of the circuit judge before whom the case at law was tried, shows conclusively that appellant was entitled to no relief under the rule announced by this court in *Ry. Co. v. Fitzhugh*, supra, "that when a party who is himself free from fault, and against whom an unjust and inequitable judgment has been rendered, has lost his right of appeal by unavoidable accident, a court of equity in this state has the power to grant relief." No unavoidable accident and no unjust and inequitable judgment were shown.

The decree of the chancellor dismissing appellant's bill is therefore affirmed.

MISSOURI, K. & T. RY. CO. v. KIDD.*
(Court of Appeals of Indian Territory. Oct. 19, 1904.)

APPEAL—BRIEFS—FAILURE TO FILE—DISMISSAL.

Where, after submission of a case on appeal, by agreement of counsel, appellant was given 30 days in which to file a brief, and ap-

pellee was given a similar time to reply, but no briefs were filed, the appeal would be dismissed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3103.]

Appeal from the United States Court for the Northern District of the Indian Territory; before Justice John R. Thomas, March 15, 1901.

Action by Erby Kidd, by Henry Kidd, his father and next friend, against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Clifford L. Jackson, for appellant. Hutchings & West and Wells & Bonner, for appellee.

RAYMOND, C. J. This is an action for personal injury brought by plaintiff against the defendant. The record was filed in this court on the 15th day of May, 1901. The case was submitted October 1, 1901, by agreement of counsel, and the appellant was given until November 1, 1901, in which to file brief. The appellee was to file his brief under the same rule of court in 30 days thereafter, and appellant was given leave to reply. No briefs by either party have been filed.

The appeal is therefore dismissed for want of compliance with the rule.

CLAYTON, TOWNSEND, and GILL, JJ., concur.

WALLACE et al. v. ADAMS et al.
(Court of Appeals of Indian Territory. June 16, 1905.)

INDIANS — CITIZENSHIP — COURTS — ESTABLISHMENT — STATUTES — CONSTITUTIONALITY.
Act Cong. July 1, 1902, c. 1362, para. 31-33, 32 Stat. 646-648, establishing a Choctaw and Chickasaw citizenship court for the purpose of determining citizenship in such tribes, and providing the procedure therein, is constitutional.

Appeal from the United States Court for the Southern District of the Indian Territory; before Justice Hosea Townsend, April 8, 1905.

Action by Ella Adams and others against Hugh Wallace and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Cruce, Cruce & Bleakmore, for appellants. H. H. Brown, for appellees.

PER CURIAM. The main question presented by this appeal is one involving the constitutionality of paragraphs 31, 32, and 33 of the act of Congress of July 1, 1902 (32 Stat. 646-648, c. 1362). These paragraphs are as follows:

"(31) It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in

*Rehearing denied June 16, 1905.

the Choctaw and Chickasaw Nations, respectively, without notice of the proceedings in such courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable; and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial de novo of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within 90 days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw Nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his

claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and, upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes and as if no judgment or decision had been rendered therein.

"(32) Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said act of Congress of June tenth, eighteen hundred and ninety six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally ratified. In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review and revise all such judgments, both as to findings of fact and conclusions of law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations. Provided, that paragraphs thirty one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this act by Congress.

"(33) A court is hereby created, to be known as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits

and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a Circuit Court of the United States in compelling the production of books, papers and documents, the attendance of witnesses and in punishing contempt. Except where herein otherwise expressly provided, the pleadings, practice and proceedings in said court shall conform, as near as may be, to the pleadings, practice and proceedings in equity cases in the Circuit Courts of the United States. The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. The judges shall be appointed by the President, by and with the advice and consent of the Senate, and shall each receive a compensation of five thousand dollars per annum, and his necessary and actual traveling and personal expenses while engaged in the performance of his duties. The clerk, stenographer and bailiff shall be appointed by the judges, or a majority of them, and shall receive the following yearly compensation: Clerk, two thousand four hundred dollars; stenographer, twelve hundred dollars; bailiff, nine hundred dollars. The compensation of all these officers shall be paid by the United States in monthly installments. The moneys to pay said compensations are hereby appropriated, and there is also hereby appropriated the sum of five thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secretary of the Interior, to pay such contingent expenses of said court and its officers as to such Secretary may seem proper. Said court shall have a seal, shall sit at such place or places in the Choctaw and Chickasaw Nations as the judges may

designate, and shall hold public sessions, beginning the first Monday in each month, so far as may be practicable or necessary. Each judge and the clerk and deputy clerk shall be authorized to administer oaths. All writs and processes issued by said court shall be served by the United States marshal for the district in which the service is to be had. The fees for serving process and the fees of witnesses shall be paid by the party at whose instance such process is issued or such witnesses are subpoenaed, and the rate or amount of such fees shall be the same as is allowed in civil causes in the Circuit Court of the United States for the Western District of Arkansas. No fees shall be charged by the clerk or other officers of said court. The clerk of the United States Court in Indian Territory having custody and control of the files, papers and proceedings in the original citizenship cases, shall receive a fee of two dollars and fifty cents for transferring and certifying to the citizenship court the files, papers and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification. The judgment of the citizenship court in any or all of the suits or proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States."

This court, after examination of the record, is of opinion Congress had the power to enact the provisions above set out, and that they are not in conflict with the Constitution of the United States; and the opinion of the court below is therefore affirmed.

TOWNSEND, J., did not sit in the cause.

WHITNEY v. WHITNEY (two cases).

(Court of Appeals of Kentucky. June 17, 1905.)

1. PARTNERSHIP—SUIT BETWEEN PARTNERS—SALE OF ASSETS.

In a suit to settle a fire insurance partnership, the book showing expirations of policies should have been sold with the other property and effects of the firm.

2. SAME—SETTLEMENT.

Where, in a suit to settle a fire insurance partnership, one of the parties moved the chancellor for sale of the book of expirations with the other property of the firm, which was overruled, and an order granting him an appeal from the ruling was subsequently set aside, and all the property was sold except the book—the purchaser at the sale not claiming to have been prejudiced by the court's error—and the book being almost valueless, it was no ground for setting aside the sale.

3. SAME—SALARY.

In a suit for the settlement of a fire insurance partnership, it appeared that plaintiff was taken into the firm by defendant as a partner when plaintiff was young and inexperienced, while defendant was a well-known and active business man, with an established insurance business, and that his position as assessor of the city gave him a wide acquaintance, and that he used his position to good effect in obtaining business, spending but little of his time in the office; the clerical work and other active work being done by plaintiff. *Held*, that the mere fact that plaintiff did the greater part of the clerical and other work did not justify the court in allowing him a salary.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 131.]

4. SAME—CHARGE FOR SERVICES.

Partners are not entitled to charge each other or the firm for services in the firm business unless there is a special agreement to that effect, or the agreement can be implied from the course of business.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 131.]

5. SAME—LEGAL EXPENSES.

On a partnership accounting, one of the partners should have been charged with half of the attorney's fees and costs expended by the other partner in a suit brought by him in pursuance of firm business and in the name of the firm.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 132, 701.]

Appeals from Circuit Court, Kenton County.

"Not to be officially reported."

Suit by H. A. Whitney against John Whitney, and suit by John Whitney against H. A. Whitney for a partnership accounting, and from the decree H. A. Whitney appeals in each case. Reversed.

See 74 S. W. 194.

B. F. Graziani and Greene & Van Winkle, for appellant. Wm. A. Byrne, for appellee.

SETTLE, J. Appellant is a nephew of appellee. In 1884 they became equal partners in the insurance business, and this partnership continued until March, 1902, and was then dissolved by act of the partners. Following the dissolution, each partner brought suit against the other for a settlement of the partnership business and affairs. The two actions, in effect the same, progressed

as one. Before a settlement of the partnership was effected by the commissioner to whom the two causes were referred for that purpose, the chancellor entered a judgment directing the sale of the book of expirations owned by the firm, which contained entries showing the names of the persons holding policies issued by the insurance companies formerly represented by appellant and appellee as agents, and when such policies would expire. The chancellor soon thereafter entered a second judgment for a sale of all the partnership property and effects of the firm, except the book of expirations. An appeal was taken from the first judgment by appellee, and from the second by appellant. This court reversed the first and affirmed the second judgment. Upon the return of the cases to the court below appellant moved the chancellor for an order of sale of the book of expirations with the other property and effects of the firm directed by the second judgment (affirmed by this court [77 S. W. 206]) to be sold. His motion was overruled, and, from the judgment overruling same, appellant prayed and was granted an appeal, and he thereafter executed an appeal bond. Later the appeal thus granted by the lower court was by order set aside, over appellant's objection. But appellant thereafter renewed his motion for a sale of the book of expirations with the other property and effects of the firm, which was again overruled, and to this judgment overruling his motion for an order for the sale of the book of expirations with the property of the firm he excepted. In the meantime the commissioner sold all the property and effects of the firm, except the book of expirations, under the second judgment, after its affirmance by this court, and also made and reported to the court a settlement of the partnership. Appellant excepted to the report of sale, and both he and appellee excepted to the settlement, but the exceptions were all overruled and both reports confirmed by the chancellor; and, from the judgments confirming the sale and settlement, appellant also prayed and was granted an appeal.

We deem it unnecessary to decide whether or not the chancellor was in error in setting aside so much of the first judgment as granted appellant an appeal, though we think his motion for an order directing the sale of the book of expirations with the other property and effects of the firm should have been sustained, as it could have been sold to much better advantage with the other property than alone; and, besides, under the opinion and mandate of this court, it could not properly be sold alone. But we do not think the refusal to order the sale of the book of expirations with the other property of the firm, or the setting aside of the order granting appellant an appeal therefrom, will now authorize this court to direct the setting aside of the sale. Besides, all questions that

might have arisen on that appeal can now be raised on the exceptions to and appeal from the judgment confirming the sale of the other property. We do not think the chancellor erred, however, in overruling the exceptions to the report of sale, notwithstanding his error in refusing to sell the book of expirations with the other property sold. The purchaser at the sale did not claim to have been prejudiced by that error of the court, and, in all probability, the book of expirations at the time of the sale had become practically valueless from the lapse of time, and the expiration, in large part, of the policies, the dates of which appear therein. The book of expirations should yet be sold by order of the court.

Appellant complains that the commissioner's report of settlement and the judgment rendered thereon should have allowed him, in addition to his share of the profits of the partnership business, compensation or salary as manager of the business during the existence of the partnership, which compensation, he insists, should be at least \$100 per month. It is contended by appellant that he had, during the existence of the partnership, the active management of the business of the firm, and was faithful and efficient in the conduct thereof, whereas appellee during the whole of the partnership, except the last two years, was assessor of the city of Covington, at a salary of \$2,400 a year, and, by reason thereof, had no time to devote to the business of the firm, and did not, in fact, do so. It, however, appears that, when taken into the firm by appellee as a partner, appellant was quite young and inexperienced, and out of employment. Upon the other hand, appellee at that time was a well-known and active business man, with an established insurance business, and his position as assessor of Covington gave him a wide acquaintance with the people of that city having property to insure; and it appears from the evidence that he used his official position to good effect in obtaining business for the firm. Though but little of his time was spent in the office, and the clerical and other active work of the firm was done by appellant, there can be no question but that appellee, by reason of his older business head and experience as the senior member of the firm, his official position, and personal popularity, was at all times during the continuation of the partnership a potent factor in maintaining its financial standing and bringing to it business and patronage. The mere fact that appellant did the greater part of the clerical and other work of the firm, and had the active management of its business, would not have justified the court in allowing him a salary. It is a well-recognized rule of law in respect to partnerships that partners are not entitled to charge each other, or the firm of which they are members, for their services in the firm business, unless there is a special agreement

to that effect, or such agreement can be readily implied from the course of business between the partners. The evidence in this case does not show such an agreement between the partners, nor does it, in our opinion, raise the implication that such an understanding existed between them. Therefore the chancellor did not err in refusing appellant the additional compensation asked.

It is also insisted for appellant that the commissioner and court erred in allowing appellee one-half the profit of \$1,100 made on the Stem property. An option was taken on this property by appellant in the name of the firm, and sold to Overman & Scroder Cordage Company at the profit named. We think the evidence shows that while this transaction was, in the main, conducted by appellant, it was done in the firm name and for the firm. And the suit which was brought against Stem to recover the profit realized on the transaction was in the name of the firm. If no recovery had resulted, appellee would have been equally liable with appellant for the attorney's fees and other costs incident to the action. It was not error, therefore, to allow appellee one-half of the profit on the Stem property.

There are, however, at least three errors in the report of settlement and judgment: First. They fail to charge appellee with half the attorney's fee and costs expended by appellant in the suit against Stem. Second. They fail to charge the firm with certain expense moneys necessarily paid out by appellant from year to year during the partnership in the conduct of the firm's business. Appellant should have credit by such of these expenditures as the evidence may show were made by him for the firm. Third. Appellant should have been allowed one-half of the dividends collected by appellee on four shares of stock in the Covington Coal Company which had never been charged to appellee on the books of the firm. We think the evidence shows that this stock was the property of the firm, though transferred to and held by appellee alone to enable him to become a director in the coal company.

Because of the errors indicated, the judgment confirming the report of settlement is reversed, and the cause remanded for further proceedings consistent with the opinion.

ILLINOIS CENT. R. CO. v. BUCHANAN.

(Court of Appeals of Kentucky. June 15, 1905.)

CORPORATIONS — AFFILIATED INSTITUTIONS — SEPARATE ORGANIZATIONS — LIABILITY OF DOMINANT CORPORATION.

A railroad hospital association was organized as a corporation independent of the railroad, and by its articles its directors were declared to be certain officers of the railroad and their successors in office; and all employees of the railroad were, as such, made members thereof. By its by-laws, employees of the railroad were entitled to its benefits in case of illness or accident, and were required to pay a

monthly assessment, proportionate to their salaries, for its support. These assessments were deducted by the railroad from the employees' salaries, and paid over to the treasurer of the hospital association for its benefit. *Held*, that the hospital corporation was a separate and distinct organization from the railroad, and the latter was not liable for the conduct of the hospital directors, nor for the negligence of physicians or attendants of the hospital in treating a railroad employe.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Charities, § 103.]

Hobson, C. J., and Nunn, J., dissenting.

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by Ed Buchanan against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. M. Dickinson, Trabue, Doolan & Cox, and Gordon, Gordon & Cox, for appellant. C. J. Waddill and Wm. Worthington, for appellee.

PAYNTER, J. While appellee was in the service of the Illinois Central Railroad Company his kneecap was broken, and he was sent to the Illinois Central Hospital for treatment. He claims that while under the care of the physicians and nurses of the hospital he was unskillfully and improperly treated, and thereby sustained damages, and this action was instituted to recover them, a trial of which resulted in a verdict for him. The alleged right to recover of the Illinois Central Railroad is based upon the averment that it had entered upon a contract with him by which it undertook, in the event of his injury, "that he should be properly and skillfully treated by proper and skillful surgeons in attendance." The court, by its instructions, in substance, submitted to the jury the issue made by a denial of the above averment.

The appellee had been in the employ of the Illinois Central Railroad Company for more than four days, and therefore was entitled to be received by the Illinois Central Hospital Association at Paducah for treatment. The Illinois Central Railroad Hospital Association is a corporation organized under the general laws of this state. The articles of incorporation read as follows:

"That M. Gilleas, W. J. Harahan, A. Philbrick, D. G. Murrell, John L. McGuire, John W. Whedon, have associated themselves pursuant to an act of the General Assembly of the commonwealth of Kentucky of March 22, 1892, which act is incorporated into chapter 32, section 879, 880, and 881, Kentucky Statutes, to form a charitable corporation, from which no private pecuniary profit is to be derived, and have formed and now form such corporation and adopt the following articles of incorporation:

"Article 1. The name of the corporation is Illinois Central Railroad Hospital Associa-

tion. The hospital of said association is located at Paducah, Kentucky, and the principal office and place of business is at Paducah, Kentucky.

"Art. 2. The object for which the corporation is formed is to give proper care and treatment to the sick and wounded employees of the Illinois Central Railroad Company on the Louisville Division, and that portion of the Memphis Division extending from Paducah, Kentucky, to Memphis, Tennessee, and including Memphis, Tennessee.

"Art. 3. The corporation shall have the right to sue and be sued, contract and be contracted with, have and use a common seal and alter the same at pleasure, and receive and hold such property real and personal, whether obtained by purchase, gift, or devise as may be necessary to carry on or promote the objects of the corporation, and may sell or dispose of such property at pleasure, unless the property has been received as a gift or devise, for some special purpose and if so received it shall be used and applied only for such purpose. The corporation may adopt such rules for its government and operation not inconsistent with law as the directors may deem proper, but it shall not be operated, managed or used for private gain or engaged in any plan or scheme of banking or insurance. The corporation by the consent of two-thirds of the directors may amend any part of the articles of incorporation by filing and recording the amendment in the office of the Secretary of State and recording in the county clerk's office of McCracken county, Kentucky. The corporation for the support of its hospital shall have power to levy a monthly assessment upon the members of the corporation of such sums as shall be fixed by the by-laws of the corporation and enforce the payment of such assessment in the manner provided by the by-laws of the corporation.

"Art. 4. All officers and employees of the Illinois Central Railroad Company on the Louisville Division and that portion of the Memphis Division extending from Paducah, Kentucky, to Memphis, Tennessee, including Memphis, Tennessee, shall be members of the corporation except persons of known disability or suffering from chronic disease.

"Art. 5. The corporation shall be governed by a board of eleven directors constituted as follows: M. Gilleas, the assistant general superintendent of the Southern lines of the Illinois Central Railroad Company and his successors in office; D. G. Murrell, the assistant chief surgeon of the Illinois Central Railroad Company, located at Paducah, Kentucky, and his successors in office; W. J. Harahan, superintendent of the Louisville Division of the Illinois Central Railroad Company, and his successor in office; A. Philbrick, the superintendent of the Memphis Division of the Illinois Central Railroad Company, and his successor in office; H. R. Dill, the assistant superintendent of the Ev-

ansville District of the Illinois Central Railroad Company, and his successor in office; L. A. Downs, the road master of the 10th Division of the Illinois Central Railroad Company, and his successor in office; D. Sheahan, the road master of the 13th Division of the Illinois Central Company, and his successor in office; John McGuire, John W. Whedon, and John Lane. The term of office of the first-named eight members of the board of directors shall be continuous. The term of office for the last named three of the board of directors shall be for one year, and until their successors shall be elected. The successors of the said three members shall be elected by the other eight members of the board on the second Friday in August, 1901, and annually thereafter, and shall be so selected as to represent as nearly as possible the employees of the transportation department, of the mechanical department and of the road department and such persons shall be selected from said departments as will best be able to attend all meetings of the board of directors. M. Gilleas shall be chairman of the board of directors and shall be succeeded in the chairmanship of the board of directors by his successor in office, the assistant general superintendent of the southern lines of the Illinois Central Railroad Company. The regular meetings of the board of directors shall be held quarterly on the second Friday in February, May, August and November of each year, and the meeting held in August shall be the annual meeting of the board of directors. All the corporate powers of the corporation shall be vested in the board of directors. The board of directors shall elect all officers except chairman of the board, and shall fix the term of office of the officers of the hospital at one year with power to remove such officers for cause, which shall be stated in writing and acted upon by a majority of the members constituting the board. The by-laws shall provide for the government of the hospital, for proper committees of the board and for such officers as the board of directors may deem proper for conducting the business of the corporation. The principal officer of the corporation shall be the chairman of the board of directors.

"Art. 6. The corporation shall begin its existence when these articles have been filed in the office of the Secretary of State of Kentucky and recorded in the office of the county clerk of McCracken county, Kentucky, and shall continue for fifty years from that date."

These articles of incorporation were signed by the persons designated as directors therein, and were duly acknowledged and recorded, and the corporation was thus regularly formed. It is contended that the directors are officers and agents of the Illinois Central Railroad Company, and therefore the Illinois Central Railroad Company is liable for the misconduct or unskillful act of

the physicians and nurses in charge of the institute. It will be observed, by article 4, that all officers and employes of the Illinois Central Railroad Company are members of the corporation, with certain exceptions. By article 3, the hospital corporation, for its support, shall have power to levy upon its members such sums as shall be fixed by the by-laws of the corporation, and enforce their payment as provided by the by-laws. Under the by-laws of the corporation, those entering the service of the Illinois Central Railroad Company who work more than four days are entitled to the benefits of the hospital. Under the by-laws, the members of the association who receive \$40 per month and under are required to pay 40 cents monthly, and the amounts to be paid by other employes are governed by the salary or compensation received by them. Members of the association are entitled to free medical and surgical attendance, medicine, board, and nursing at the hospital while disabled, whether from sickness or injury, unless the disability arises from certain diseases. Sums which the members of the association are required to pay are collected by the Illinois Central Railroad Company to pay the expenses of the hospital, and it goes into the hands of the treasurer of the hospital association, who is also the treasurer of the Illinois Central Railroad Company. There is no evidence that the Illinois Central Railroad Company retains or gets the benefit of a cent of the money or enjoys any profit by the operation of the hospital. Under the articles of incorporation, the appellant does not even retain control of the funds which it gathers for the association, for they go to the treasurer of the hospital association. The parties who are designated as directors are not made so as the officers of the Illinois Central Railroad Company, but they are selected by the hospital association by reason of the fact that they hold such positions with the Illinois Central Railroad Company. The evident purpose is to make it easy to keep a full board of directors of the hospital, and that that board shall be composed of persons who are entitled to the benefits of it, and who are interested in its success. The mere fact that the board of directors are selected by the hospital association by reason of the fact of their connection with the Illinois Central Railroad Company does not make them the agents or officers of the Illinois Central Railroad Company in the performance of a duty for another and distinct corporation. The duties which they are required to perform are not such as are required in the execution of the purposes and objects of the organization of the appellant.

There is no evidence showing that the Illinois Central Railroad Company made any contract with the appellee that he should be "properly and skillfully treated by proper and skillful surgeons and attendants." The

fact that the hospital association was organized for that purpose does not tend to prove that the appellant made such a contract with the appellee. There is an implied contract between the employé who becomes a member of the association and the Illinois Central Railroad Company that the latter will pay over the money which it retains out of his earnings to the treasurer of the hospital association for its benefit. The Illinois Central Railroad Company is simply the agent that gathers the funds for the benefit of the hospital association—consequently for the benefit of its members. So the proposition is presented that, because the Illinois Central Railroad Company simply acts as the agent in the gathering of the funds from its employés for the hospital purposes, it thereby made a contract to be responsible for the conduct of those in control of the hospital—a separate and distinct corporation. If the Illinois Central Railroad Company was the real party in interest, and was simply using the hospital association for its financial profit, then the court might consider whether or not it was a case where it should look at the substance, and not the shadow, of things, in determining its liability. But this question has not arisen because of the facts we have detailed. Doubtless the Illinois Central Railroad Company is indirectly benefited by its employés having proper and humane treatment at the hospital prepared for them, but that incidental benefit cannot raise the question suggested, or make it liable for the act of servant or agent of an independent corporation.

Our conclusion is that the hospital corporation is a separate and distinct corporation from the Illinois Central Railroad, and that the latter has no financial interest in the result of its management, and in no way is it liable for the conduct of its directors, or the physicians or the attendants at the hospital. The appellee is a member of the hospital association, and those in charge of it in part serve him and his interest; and he contributes to help pay the expenses of those performing that service, and for the care and treatment of his associate employés. A peremptory instruction should have been given to the jury to find for the appellant.

We have not seen proper to discuss the question as to the liability of the Illinois Central Railroad Company for plaintiff's injury, had it owned or controlled the hospital, nor the liability of the hospital association for the alleged unskillful acts of the surgeons and attendants in charge of it, because, from the conclusions we have reached, these questions do not arise, and had best be discussed when a case involving them is brought to the consideration of the court.

The judgment is reversed for proceedings consistent with this opinion.

NUNN, J. (dissenting). The appellee recovered a judgment against appellant on account

of injuries and damages sustained by the malpractice of the house surgeon of the Illinois Central Railroad Hospital Association. The evidence shows that this surgeon was either incompetent, or that he treated appellee so negligently and carelessly that he was injured, rather than benefited, and was amply sufficient to authorize the court to submit the question to the jury. This court reverses this judgment upon the ground that there was a failure of proof showing any contract on its part to furnish appellee competent and skillful surgeons to treat his injuries while in its employ; that the hospital association was and is a charitable, independent corporation; that appellant was and is in no wise responsible for its conduct; that the services performed by the appellant for the hospital association were performed as its agent. The effect of the opinion by a majority of the court is to overrule the case of this appellant against Gheen, 66 S. W. 639, 23 Ky. Law Rep. 1052.

I have the record in the Gheen Case before me, and have examined it with care. The appellant made the same defense as to non-liability for the acts of the association in that case as in this. The same proof upon this question was introduced in that case as in this. The by-laws for the operation and control of the association were introduced in that case and in this, and they are identical, except in verbiage, and also at that time there were 9 directors, while now there are 11. In that case, as in this, the court told the jury, in substance, that if they believed from the evidence that the hospital association was operated and controlled by its members, and was not operated and controlled by the appellant, they should find for it. The only difference between the facts in the two cases with reference to the point under discussion is that the association was then a copartnership, while now it is a corporation. In the Gheen Case, *supra*, this court said: "The testimony as to the formation, conduct, and management of the hospital presents no material disagreements as to the facts. These appear to be that each employé on the Louisville and Memphis Division, who is employed as much as four days in a month, contributes to the maintenance and support of the hospital. The sum payable is fixed by a scale according to wages earned per month, and the amount payable is withheld by the paymaster of the appellant out of the wages due the employé, and turned into the hospital fund, which is held by the treasurer of the appellant. The hospital association is not incorporated, nor, on the other hand, is it purely voluntary. If the fact that an employé has no option about paying out of his earnings the fixed assessment for the support of the hospital could be termed a voluntary payment, then the hospital association might be termed a voluntary association. It has a board of directors, but these are such, save two, by reason

of the official position with appellant's road. The two exceptions are a conductor and an engineer, who are selected by the other members. The surgeon in charge is practically appointed by the chief surgeon of appellant. The men who contribute the monthly assessment to pay the hospital expenses have in fact no voice in the management or control of the hospital, save and except that of giving certificates of admission thereto to subordinate employes when sick or injured. Employes of the class of appellee have no rights or powers in regard to the hospital, save that of paying the monthly assessment, which in fact they never see, and the right of treatment in case of injury or sickness. As to the ownership of the hospital grounds and buildings and equipment there is no proof. We are of opinion that these facts, proven without serious, if any, contradiction, would have authorized the court to instruct the jury peremptorily that, if appellee had been engaged more than four days, he was entitled to admission into the hospital, and, if he was refused permission to enter, or certificate entitling him to transportation and entrance to the hospital, and was injured by such refusal, he was entitled to recover. It is clear, that if appellant corporation ceased to exist or should attempt to withdraw from the hospital, the hospital would cease to be of any service. The appellant is the very life of the hospital association. Its funds, management, control, and service are all furnished by appellant. In fact, the hospital association is the Illinois Central Railroad."

The facts stated in this opinion agree precisely with the facts as shown by the record in the case at bar, except that the hospital was then an association or copartnership, and, since then, and in the year 1900, it attempted to become incorporated as a charitable organization. If in the Gheen Case the facts proven showed conclusively that the appellant operated and controlled the hospital, then, under the same facts, why or how is it to be said that it does not operate and control the same association? Can it be that it is because it now has the name of "corporation"? Has the word "corporation" about it some magic which prevents its control by anybody or anything? In my opinion, if the appellant controlled and operated the hospital as an association or a copartnership, it controls and operates it as a corporation. By a unanimous opinion in the Gheen Case this court decided that appellant did control and operate this hospital, and that the hospital was a part of appellant. The incorporation of the hospital did not give it any greater rights or higher powers than it had before the incorporation, the only difference being that it would be more convenient to sue and be sued in its corporate name than as a copartnership. Under the articles of incorporation, copied in the opinion, it is provided that the term of office of the first-named eight members of the board of directors

shall be continuous. The term of office of the last-named three of the board of directors shall be for one year, and also the successors of the last three shall be elected by the other eight members of the board. By section 8 of the by-laws it is provided: "The association shall be governed by a board of eleven directors constituted as follows, the assistant general superintendent, Southern lines, who shall be chairman of the board, the assistant chief surgeon, Paducah, Ky., the superintendent, Louisville Division, the superintendent, Tennessee Division, the assistant superintendent, Evansville District, the road master, Louisville Division, the road master, Tennessee Division, the master mechanic, Paducah shops, an employee of the transportation department, an employee of the machinery department and an employee of the road department." By section 8 of the by-laws it is provided that the chief surgeon of the Illinois Central Railroad Company will appoint the surgeon in charge of the hospital, and is also required to appoint and fix the salaries of the local physicians within the territory covered by the association. By section 9 it is provided: "The local treasurer of the Illinois Central Railroad Co. at Chicago shall be the treasurer of this association, and shall receive all moneys belonging to the hospital, and pay all bills against it, upon vouchers certified to by the surgeon in charge and approved by the chief surgeon of the Illinois Central Railroad Co." By section 10 it is provided: "The auditor of disbursements of the Illinois Central Railroad Co. shall act as the auditor of this association." It appears from the proof that these three officials last named have their offices in Chicago, and are the chief officers of their respective departments of the appellant, and it is not contended that they are or ever have been members of the hospital association. It is, indeed, singular, if it is a fact that this hospital association is an independent association, and not governed or controlled to any extent by appellant, that it would organize by selecting the chief officials of appellant, who are not members of the association, and give them full and complete power to control and govern the association, and take from itself all power and right to manage the institution. As will be seen, the association is controlled by the officials of the appellant, and the employes have no voice in its control. The board of directors provided in by-law No. 2 that all officers and employes in the above territory shall be members of the association, except those afflicted with chronic or other named diseases. By section 15 it is provided: "Any member of the association in any manner leaving the service of the company, ceases at once to have any participation in the funds." Thus it appears that a prerequisite to membership in this association is that the party must be an employe of appellant, and, when he ceases to be an employe of appellant, it matters

not for what cause, he is no longer a member of the association. He is dropped, leaving all that has been deducted from his wages in the hands of appellant's chief officials. This is true of all the employes, and all combined would be powerless to change the by-laws. This matter is completely within the power of the eight directors, chief officials of the appellant. In view of these facts, it is apparent why the court in the Gheen Case supra used the following language: "The appellant is the very life of the association. Its funds, management, control, and service are all furnished by appellant. In fact, the hospital association is the Illinois Central Railroad Company." Under that case, the judgment herein must be affirmed, as the evidence is the same, unless the bare fact that since then the hospital association has been incorporated changes the rule. To so hold is to recognize form, not substance. The operatives of the railroad company have no option as to the retention by it of a percentage of their wages for the support of the hospital. They have no control over the hospital or its management, and no voice in its affairs. If they do not acquire a right to be treated in the hospital, they get nothing for their money; and, if they have this right, it must be against the railroad company, who retains their money, and is the only person who deals with them. If a surplus of the funds retained is left, the operatives have no right to it, and have no voice in the determination of how much shall be spent. The incorporated hospital association simply takes the place of the old, unincorporated association, and, like it, is merely an agency of the railroad company for the accomplishment of its purposes, formed and controlled by it, and cannot exist for a day without the railroad company. The action may be maintained against the real party in interest, the railroad company. The hospital association is nothing more than a form under which the railroad company transacts the business.

The court, in its opinion, says that appellant is only the agent of the hospital association. This, to my mind, is an unwarranted conclusion, under the facts as they appear in this record. We have a case where the pretended principal, the hospital association, is without power to appoint or elect its board of directors, or name their successors; to enact or change a by-law; to appoint its own surgeon, assistants, or attendants; to in any way govern or control the admission or exclusion of its members. In fact, it cannot perform any act to change its affairs, or contract any debt for any purpose, without first obtaining the consent and approval of persons not members, and who are the chief officials of appellant, the pretended agent. To me this appears inconsistent, unless the shadow is to be regarded, rather than the substance.

It is stated in the opinion that there was no evidence showing that the Illinois Central Railroad Company made any contract with

the appellee that he should be properly and skillfully treated by proper and skillful surgeons and attendants. The proof does show that it retained of his wages a sum each month for three or four years for the purpose of giving him treatment in its hospital in the event he should become sick or receive an injury. This being true, it amounted to a contract. At least, it was implied on the part of appellant that it would place in charge of the hospital physicians and surgeons of reasonable skill and learning, and that the sick and the injured should have reasonably proper and skillful treatment, and for a failure in this the appellee has a cause of action. In the case of *Union Pacific R. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 582, the court said: "If one contracts to treat a patient in a hospital, or out of it, for that matter, for any disease or injury, he undoubtedly becomes liable for any injury suffered by the patient through the carelessness of the physicians or attendants he employs to carry out that contract." In the case of *Richardson v. Carbon Hill Coal Co.* (Wash.) 32 Pac. 1012, 20 L. R. A. 340, the court said: "If, on the other hand, the company was conducting a hospital with its own physicians for the purpose of deriving profit therefrom, or if it contracted with appellant to furnish him with the services of a competent physician and to properly treat him in case of an injury, it would be liable for the negligence or want of skill of its physician in attending him." But it is contended that, if such a contract existed, it was without consideration, and not enforceable; that appellant derives no benefit or profit from the hospital. This is error, for it receives from its thousands of employes a monthly sum, amounting to many thousands of dollars annually, to officer and maintain this hospital. In addition to this, there are other ways that the appellant derives great benefit from the maintenance of the hospital. Under this contract with its employes, it can send the injured to the hospital at once, and get them into hands friendly to it, thus avoiding many damage suits. This method also saves appellant the payment of medical bills when an employe recovers judgment against it for negligent injuries. Again, it enables its capable and efficient employes to be treated and return to work at the earliest possible moment. This is commendable, but it ought not to attempt to shift the responsibility of maintaining the hospital upon a pretended charitable organization. This is not a charitable organization, within the meaning of the statutes. What these employes receive, they pay for. There is nothing given or contributed, and, in addition, the articles of incorporation include only the employes of appellant, and exclude the ones who are afflicted with chronic and other named diseases.

For the above reasons, I dissent from the majority opinion.

HOBSON, O. J., concurs in this dissent.

BASSETT & STONE v. ABERDEEN COAL & MINING CO.

(Court of Appeals of Kentucky. June 13, 1903.)

1. COMMON CARRIERS—NATURE OF BUSINESS—TUGS—INDISCRIMINATE CARRIAGE—EVIDENCE—QUESTION FOR JURY.

Where, in an action against defendants for loss of a cargo of brick it was towing for defendant under private contract, there was evidence that defendant's boats carried passengers, produce, and merchandise, and that they received all freight offered for transportation on the river at M., most of which was brought in empty barges as they returned from towing coal, while defendant's proof was that the boats had no termini nor times of arrival nor departure, and did all towing by private contract for others when there was no work to do for a certain drain company, and then only did such work as they saw fit to take, whether defendant held itself out as a common carrier for the time being was for the jury.

2. SAME—WHAT CONSTITUTES—LIABILITIES.

Where, in an action for loss of a cargo of brick towed by one of defendant's steamers, defendant denied that it was a common carrier, the court should have charged on such issue that, if defendant had expressly and publicly offered to carry for all persons indiscriminately, or by its conduct and manner of business it held itself out as ready to carry for all on such trips as the boat was then making, it was a common carrier, and plaintiff was entitled to recover, though there was no negligence on defendant's part in the loss of the brick, but that if it had not offered to carry for all persons indiscriminately, etc., but merely carried the brick in pursuance of a special employment, it was not a common carrier, nor liable, in the absence of negligence.

Appeal from Circuit Court, Butler County.
"To be officially reported."

Action by Bassett & Stone against the Aberdeen Coal & Mining Company. From a judgment in favor of the defendant, plaintiffs appeal. Reversed.

J. S. Wortham, Howard & Gardner, and Green & Van Winkle, for appellants. A. Thatcher and W. A. Helm, for appellee.

HOBSON, C. J. The Aberdeen Coal & Mining Company operated two boats—the Carson and I. N. Hook—on Green river. Bassett & Stone made a contract with the company to bring a lot of brick from Evansville to Rochester for \$160, the brick to be loaded by them at Evansville on a barge belonging to it, and then to be towed by it up to Rochester. The contract was made by telephone, and afterwards confirmed by letter. While the boat I. N. Hook was going up the river the barge struck a hidden snag and was sunk. Bassett & Stone then filed this suit against the company to recover for the loss of the brick, alleging that it was a common carrier, and that the brick were lost by its negligence. The allegations were denied, and on final hearing the court refused to submit to the jury whether the defendant was a common carrier, and on the question of negligence the jury found for the defendant. The plaintiffs appeal.

The only question which need be considered on the appeal is whether there was sufficient evidence to go to the jury on the question whether the defendant was a common carrier. The proof on this subject is as follows: J. L. Dent testified as follows: "I requested plaintiffs to ship their stuff from Evansville to Rochester with defendant because I had done considerable shipping with them on Green river, and the defendant had requested me to get the company any business I could. * * * I did considerable shipping with the defendant on the Hook and Wilford and other boats on Green river. At the time I represented a fertilizer company. I shipped my fertilizers on their boats at so much per ton, to be delivered at different points on Green river; freight being paid by the parties receiving it in some cases and by me in some cases. I have known the defendant's boat to carry passengers, flour, chickens, eggs, oil, and other goods and merchandise for merchants doing business along the river." Noah Daugherty made these statements: "I am wharfmaster at Morgantown Ferry. The defendant operated towboats on Green river up to the time they went out of the river. They did the business of common carriers. They brought freight to my wharf and took freight from there. They did this in 1900 and 1901. The boats were the Hook and Carson." Cross-examined: "Witness said they had no regular times for coming and going, no fixed terminals. Their chief business was towing ties and coal. Most of freight brought by defendants was in empties returning from towing coal to Bowling Green." W. H. Fuller testifies as follows: "I was wharfmaster at Morgantown wharf from ——— till ———, 19—. I know the defendant company. They were doing business on Green river between Evansville and Bowling Green, and operated towboats. The I. N. Hook and J. T. Carson were common carriers. They brought freight to my wharf from Bowling Green and Evansville, Ind. They received all the freight offered to them at my wharf." Cross-examined: "I remember they brought some drummer's trunks on a barge. They brought some brick for the town, and charged no freight for same. They would not land and take on freight and passengers regularly like other boats, but only occasionally. Their chief business was towing ties." In appellee's letter head was this: "Towing a specialty," and in letter to appellants it said: "This rate we gave you is confidential, and we would not like to hear it spoken of by outsiders." The proof for defendant by J. D. Render was as follows: "I am secretary and treasurer of the Aberdeen Coal & Mining Company. We owned the Hook and Carson. They were towboats, and operated on Green and Barren rivers. We did a general towing business. We only took freight by contract, and carried it on barges. We did not hold

ourselves out to the public to take freight for all who wanted to ship, but only by private contract. George Fletcher applied to me to tow the freight sued for. He talked to me by telephone from Rochester. I offered to do it for \$160, he to be responsible for barge and cargo. The contract was finally settled through Mr. Walker, my bookkeeper. I told him he was to be responsible for cargo and barge, and he (Fletcher) wanted to know if that was customary. I told him it was. Fletcher said he would let me know about it. I never talked to Fletcher at Leitchfield. I told Mr. T. F. Walker about it and went West, and Mr. Walker closed the trade. When I came home I learned the barge and material had been sunk. My company is not a common carrier. At the time the contract was made with plaintiff, we were under contract with the Evansville Grain Company to do all their towing, and were then engaged in towing their ties from Green and Barren rivers to Evansville, Ind. We had no fixed termini or times of arrival and departure. We did all towing by private contract. When not rushed by said grain company, we would sometimes bring some freight from Evansville in empties. We had no regular stopping places, but went direct to the yards, and there loaded our barges. * * * We did carry some fertilizer in barges to upper Green river for Mr. Dent. We carried same in empties, and in large quantities. We brought some trunks from Woodbury to Morgantown to accommodate some drummers." Cross-examined: "I have carried freight to Morgantown on several occasions with these boats along about the time the barge was sunk. I carried chickens and eggs from Millshed, Threlkel, Edgars, and Lock No. 5—all these landings, and took freight to them the same summer that the barge was sunk, and had done so before. I carried fertilizer for — before the barge was sunk by my boat." Grace Davis, the pilot, testified as follows: "Occasionally she would tow a barge of stuff for others, in order to fill out her tow; and on this occasion she was towing a barge of brick. This occurred only a few times." Several other witnesses on behalf of the defendant gave in substance the same evidence, stating that the boats only carried occasionally a barge of stuff to fill out their tow, and that they were engaged by the Evansville Grain Company altogether.

In *Varble v. Bigley*, 77 Ky. 698, 29 Am. Rep. 435, it was held that a towboat is not a common carrier, but in that case the boat which was sought to be held liable had been simply hired to move some coal barges belonging to the plaintiff. The boat was simply furnishing the motive power. In the case before us the barge belonged to the defendant. It is not easy to see why there should be a distinction between freight put on the steamboat Hook and freight put on the barge which it propelled, both being the prop-

erty of the defendant, and controlled by it. Whether it would carry the freight on the steamboat or on the barge was for it to determine, and its liability in either case will depend upon whether it was acting as a common carrier or a private carrier for hire. In the case referred to the court, after examining the authorities, thus laid down the rule for determining whether a person is chargeable as a common carrier: "When a person has assumed the character of a common carrier, either by expressly offering his services to all who will hire him or by so conducting his business as to justify the belief on the part of the public that he meant to become the servant of the public, and to carry for all, he may be safely presumed to have intended to assume the liabilities of a common carrier, for he was bound to know that the law would so charge him, and, knowing, must have intended it. But, in order to impress upon him the character and impose upon him the liabilities of a common carrier, his conduct must amount to a public offer to carry for all who tender him such goods as he is accustomed to carry. When this is the case, then those who tender him goods to carry accept his offer, and he becomes bound to carry them; and if he refuses to do so, 'having convenience,' and being tendered satisfaction for the carriage, he is liable to an action, unless he has reasonable excuse for his refusal." After elaborating on this the court thus summed up the matter: "Our conclusion, then, is that a carrier of goods is not liable as a common carrier, unless he was under a legal obligation to accept the goods and carry them, and would have been liable to an action if, without reasonable excuse, he had refused to receive them; and that he could not be liable to such an action unless he had expressly and publicly offered to carry for all persons indifferently, or had, by his conduct and the manner of conducting his business, held himself out as ready to carry for all. We are aware that the rule has not always, and perhaps not generally, been thus restricted. But, as we have already said, the law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it." This case is in accord with the great weight of authority. *Hutchinson on Carriers*, §§ 47-57.

Appellants rely upon *Gordon v. Hutchinson* (Pa.) 37 Am. Dec. 464, *Chevallier v. Strahan* (Tex.) 47 Am. Dec. 639, and the cases therein cited. But these cases are exceptional, and not in keeping with the general current of authority (*Hutchinson on Carriers*, §§ 49, 52), and are the authorities referred to by the court in *Varble v. Bigley* when it said, "We are aware that the rule has not always, and perhaps not generally,

been thus restricted." We regard this case as settling the rule in this state. The case of *Robertson v. Kennedy*, 2 Dana, 430, 26 Am. Dec. 466, is not in conflict with it, for in that case the plaintiff introduced proof showing that the defendant was in the habit of hauling for hire for all who applied to him. The same is true of the case of *Farley v. Lavary*, 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383. After collecting a large number of cases, *Hutchinson on Carriers*, § 55, thus states the rule: "These cases undoubtedly state the law as it is settled in England and generally understood in this country, and it would seem clear that no one should be treated as a common carrier unless he has in some way held himself out to the public as a carrier in such manner as to render himself liable to an action if he should refuse to carry for any one who wished to employ him in the particular kind of service which he thus proposes to undertake; otherwise he does not come within the description, nor can he be subjected to the liability of the common carrier when the goods have been lost without negligence."

The question we are to determine is whether under this rule there was any evidence that the defendant held itself out to the public as a carrier in such a manner as to render it liable to an action if it had refused to carry the plaintiff's brick when applied to for that purpose. While one of the witnesses states that the boats did the business of common carriers, and another states that they were common carriers, this seems a mere expression of an opinion of law. The witnesses may have used the words in their popular sense, meaning that the boats carried for the public generally or without distinction. But, however this may be, the court must determine the law from the facts stated. The proof for the plaintiffs shows that the defendant's boats carried passengers, produce, and merchandise; also that they received all the freight offered them at Morgantown, most of the freight being brought in empties as they returned from towing coal. On the other hand, the proof for the defendant is to the effect that the boats had no terminal times of arrival or departure; that they did all towing by private contract, and only worked for others when they had no work to do for the Evansville Grain Company, and only did such work as they saw fit to take. Although the boats were not common carriers at all times, still if, on certain trips, when they had no towing to do, they held themselves out as ready to carry for all, they would be common carriers for the time being. The rule is thus stated in 6 Cyc. p. 366: "A common carrier is one who holds himself out as ready to engage in the trans-

portation of goods for hire as a public employment, and not as a casual occupation. It is sometimes said that one who undertakes for a single occasion only to carry goods for any person who desires to employ him for that occasion is a common carrier for that transportation. But the cases of this kind will be found to be those in which, whilst the business of carriage is not the exclusive, or perhaps the principal, business of the one sought to be charged as a carrier, it is incidentally his business for the time being. In general, the liability of carrier does not attach to one who does not hold himself out as pursuing that business, but in the particular case, and in each particular case, acts only in consequence of a special employment." Under the rule that, if there is a scintilla of evidence, the question is for the jury, we conclude that under the evidence the jury should have been left to determine whether the defendant had assumed the character of a common carrier. There was evidence on the part of the plaintiffs, in view of the amount of carrying which it was shown the defendant did, from which the jury might have inferred that it held itself out as offering to carry for the public, or as ready to carry for all. The barges were brought down the river loaded with ties, and would be returned empty unless loaded with freight. The fact that the defendant requested the witness Dent to get the company any business he could must be taken in connection with the letter head, "Towing a specialty." Although the defendant did not hold itself out at all times as a common carrier, there was some evidence from which the jury might have found that such was its business for the time being. *Robertson v. Kennedy*, 2 Dana, 430, 26 Am. Dec. 466; *Farley v. Lavary*, 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383. The court should have instructed the jury that if the defendant had expressly and publicly offered to carry for all persons indifferently, or had by its conduct and the manner of conducting its business held itself out as ready to carry for all on such trips as the boat was then making, then it was a common carrier, and they should find for the plaintiffs, although there was no negligence on the part of the defendant in the loss of the brick; but if it had not offered to carry for all persons indifferently, or by its conduct or the manner of conducting its business held itself out as ready to carry for all, but only in each case acted in consequence of a special employment, it was not a common carrier, and was not liable, unless the bricks were lost by its negligence.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

MEMPHIS TRUST CO. v. SPEED, County Court Clerk.

(Supreme Court of Tennessee. July 5, 1906.)

1. COLLATERAL INHERITANCE TAXES—ASSESSMENT—FOREIGN ASSETS.

Under Shannon's Code, §§ 724, 735, providing for the assessment of a collateral inheritance tax, except on property passing to the widow of the person dying seised or possessed thereof, where a nonresident died possessed of personal property in Tennessee, which was a part of the residue of his estate, one-half of which he bequeathed to his widow, and she elected to take one-half of such property in kind, such half was not taxable.

2. SAME—DEBTS.

Where a portion of the assets of a nonresident deceased person passed to collateral legatees under the will, the executor was not entitled to deduct from the amount of such assets subject to collateral inheritance taxation the amount of Tennessee debts owed by the testator at the time of his death, but paid by the executor prior to the institution of proceedings for the assessment of the tax, in the absence of proof that they were paid from Tennessee assets.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Proceedings for the assessment of a collateral inheritance tax against the estate of Bem Price, deceased. From an order assessing the tax in favor of R. A. Speed, clerk, the Memphis Trust Company, executor, appeals. Affirmed.

S. J. Shepherd, for Memphis Trust Co. Attorney General Cates, W. P. Eldridge, and G. P. Smith, for R. A. Speed, clerk.

McALISTER, J. The question presented for determination upon this record is whether \$20,000 of stock in the Bank of Commerce is subject to a collateral inheritance tax. It appears that Bem Price died domiciled in the state of Mississippi, and left an estate in Tennessee appraised at the value of \$34,000. The deceased left a last will and testament, of which the Memphis Trust Company was duly appointed executor by the chancery court of Mississippi, and ancillary letters testamentary have been granted to it by the probate court of Shelby county, Tenn. It is averred that such ancillary letters testamentary were only granted to said trust company for the purpose of enabling it to collect and secure possession of certain assets, and also to enable it to pay off and discharge certain debts which were due and owing in the state of Tennessee. The will provides as follows: "I give and bequeath and devise to my beloved wife, Mary D. Price, my home place consisting of 105 acres, more or less with all improvements thereon situated in the town of Oxford, Mississippi, and on the west side of North Street in said town. I also give to my wife all of the household furniture in said house, my carriage and horses and such of my milk cows as she may desire for her private use. I also give and devise to my wife, Mary D. Price, the

tract of land containing forty acres more or less and situated on the north side of the town cemetery in Oxford, Mississippi. I further give, bequeath and devise to my wife, Mary D. Price, one half of all the residue of my estate whether real or personal or mixed and wherever located and I request and desire her to entrust to the Memphis Trust Company that portion of my estate given to her, except," etc.

The trust company, in its answer, states that in the division of the estate of the late Bem Price his stock in the National Bank of Commerce embraced in the appraisement was selected by and set apart to Mrs. Mary D. Price, widow of testator, as a part and portion of one-half of his estate to which she was entitled under the terms of his will. Defendant further avers that Mary D. Price had the right to select and insist upon the shares of stock in the National Bank of Commerce as a part and portion of her one-half interest in the estate of her deceased husband, and that this respondent, as executor, had no right to object to her selection of said stock, provided only it was taken at a fair valuation, which was actually done.

Respondent therefore avers that, inasmuch as the shares of stock in the National Bank of Commerce were never held in any way by the collateral relatives of testator, it is not responsible or liable for any collateral inheritance tax thereon. Respondent further stated that said stock in the National Bank of Commerce was set apart for said Mary D. Price in kind, and so transferred to her.

Respondent further avers that at the time of the death of Bem Price, he was indebted to the National Bank of Commerce, which is a Tennessee corporation, in the sum of \$7,539, and also owed to said National Bank of Commerce an additional sum of \$5,000, thus making a total indebtedness of said Bem Price in the state of Tennessee of the sum of \$12,539.

Respondent further avers that it is its duty to set off and charge against the value of stock in the Memphis Trust Company the indebtedness of said Bem Price due to Tennessee creditors, inasmuch as this stock constitutes a fund peculiarly and especially liable therefor. Respondent therefore avers that after the allotment to Mrs. Mary D. Price, widow of testator, of the stock in the National Bank of Commerce, which she selected in kind, as she had a right to do, and after charging against the stock in the Memphis Trust Company the amount of the indebtedness due to the estate of Bem Price, no personal assets or assets of any kind remain in the state of Tennessee subject to a collateral inheritance tax or other tax of any kind. It appears from the record that Gilmer P. Smith was appointed by R. A. Speed, county court clerk, to appraise the estate of Bem Price, deceased, situated in Shelby county, Tenn., which was or might be liable to taxation under the collateral inheritance tax

law. The appraiser found that at the time of testator's death he was the owner of 100 shares of stock, par value, of the Memphis Trust Company, and also owned 100 shares of stock in the National Bank of Commerce, also at par value. The value of all this stock was assessed by the appraiser at \$34,000. The appraiser was asked the following question: "Question 4. In answer to question 2 you say that the Tennessee property of this estate amounted to \$34,000, and in answer to question 3 you say you only appraised for taxation \$17,000, or rather you only found \$17,000 subject to taxation. Explain why you only found this amount subject to taxation, and not the whole \$34,000. Ans. The \$34,000 referred to in question 2 was the total valuation of the Tennessee property belonging to this estate, and by the terms of the will of Bem Price one-half of this property went to his wife, namely \$17,000. Under the collateral inheritance tax law any property left to or inherited by the wife of the deceased from the deceased's estate is not subject to collateral inheritance tax. Now, by the will of Bem Price, one-half his property went to his wife, and he did not designate any particular parts of the property to go to her, and as he gave no election of the kind she was to have, I assume she, of course, took one-half of this \$34,000 worth in Tennessee property; consequently only the half left to collaterals was subject to taxation, and I therefore only appraised half for taxation, and so reported."

The circuit judge, who heard the cause without the intervention of a jury, found that Bem Price, resident of the state of Mississippi, died, leaving an estate in Tennessee, which, from report of appraiser, appeared to be of value of \$34,000, "and it appearing that under the will of said Bem Price one-half of his entire estate (exclusive of specific bequests and legacies to his wife) was devised and bequeathed to his wife, Mary D. Price, and the other one-half to said collateral relatives and strangers in blood mentioned in said will, it is therefore adjudged by the court that said estate pay a collateral inheritance tax of 5 per cent. on one-half of the valuation of said estate, or \$17,000, amounting to the sum of \$850, together with fee of \$127.50 to W. B. Eldridge, attorney for R. A. Speed, together with the costs of this cause." The court declined to allow exemption of \$12,739 on the debts due by the estate of Bem Price in the state of Tennessee, though the court recites the fact that such debts existed and were Tennessee debts. The court further found that the setting apart to Mary D. Price, wife of testator, of the stock in the Bank of Commerce, did not exempt said stock, or any part thereof, from liability for the collateral inheritance tax. The Memphis Trust Company, as executor, appealed from this decree, and has assigned the following errors: (1) The court erred in estimating the stock in the National Bank of

Commerce which had been set apart to Mrs. Mary D. Price, widow of testator, as a basis upon which collateral inheritance tax, or any part thereof, could be assessed. (2) The court erred in refusing to consider the indebtedness of \$12,539, due by Bem Price to Tennessee creditors, in estimating the collateral inheritance tax due on his estate or any part thereof.

In support of the first assignment of error counsel for the Memphis Trust Company propounds the proposition that there can be no claim for collateral inheritance tax upon the stock in the Bank of Commerce, because that has been selected by, and has become the property of, the widow, and under the provision of the collateral inheritance tax law of 1893 property inherited by or bequeathed to the widow is exempt.

It is undoubtedly true that under the act of 1893 property passing to the widow from the testator is not subject to collateral inheritance tax, for the plain reason that the widow is exempt from its provisions. But the contention is that the widow had no right to elect under the will and its codicils to take any particular portion of decedent's property after the payment of specific legacies and devises. As already seen, testator made specific bequests to his wife, and then a general bequest of one-half of the residuary property. The argument is that, if the testator had intended that his widow should have the right to make selection of one-half of the remainder of his property, he would have so directed in his will. This intention, it is claimed, is excluded by the specific bequests and the general bequest of one-half of the remainder of the estate. It is further insisted that the fact that the executor permitted the widow to take the National Bank of Commerce stock as her share of the residuary estate did not bind the estate, or relieve the executor of the payment of collateral inheritance tax on this stock. The argument seems to be based upon the following language in the act of 1893, namely: "And all owners of such estates and all executors and administrators, and their sureties, shall only be discharged from liability for the amount of such taxes and duty, the settlement of which they may be charged with, by having paid the same over for the use of the State as hereinafter directed." Shannon's Code, § 724; section 1, c. 174, p. 347, Acts 1893. Counsel then cites section 10, c. 174, p. 350, Act 1893, which provides as follows: "Whenever any foreign executor or administrator or trustee shall assign or transfer any stock, or loans in this state standing in the name of decedent, such tax shall be paid, on transfer thereof, to the clerk of the county court where such transfer is made; otherwise the corporation or person permitting such transfer shall become liable to pay such tax." Shannon's Code, § 735. It is therefore the contention of the state that, as Bem Price left property in the state of Tennessee, con-

sisting of 100 shares of stock in the National Bank of Commerce, and 100 shares of stock in the Memphis Trust Company, it was the duty of the executor, when the National Bank of Commerce stock was turned over to Mrs. Mary D. Price, widow, to pay to the county court clerk collateral inheritance tax based upon the value of one-half of said stock, as under the will only one-half of said stock could go to the widow, and this property was clearly divisible in kind. It is further argued that the widow could make no selection of property she wished to take, nor could the executor assent to allotment of such specific property so chosen. Act 1893, p. 347, c. 174, § 1, and Act 1893, p. 146, c. 89, § 7, provides as follows: "All estates—real, personal and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seized thereof be domiciled within or out of this state, passing from any person who may die seized or possessed of such estates, either by will or under the intestate laws of this state, or any part of such estate or estates or interest therein transferred by deed, grant, bargain, gift or sale, made in contemplation of death, or intended to take effect in possession or enjoyment after the death of the grantor or bargainor to any person or persons, or to bodies corporate or politic, in trust or otherwise, other than to or for the use of the father, mother, brother, sister, the wife or widow of a son, or husband of a daughter, or any child or children adopted as such in conformity with the laws of the State of Tennessee, husband, wife, children, and lineal descendants born in lawful wedlock of the person dying seized and possessed thereof, shall be subject to a duty or tax of five dollars on every hundred dollars of the clear value of such estate or estates so passing, and at and after the same rate for any less amount, to be paid to the use of the state," etc. So it is very clear, and counsel concede the proposition, that no property passing to the widow under the provisions of this act is subject to the payment of collateral inheritance tax; but the main contention of counsel for the state is that under the residuary clause of this will the wife has no right to make a selection of specific property left in the residuary estate. This question arose in the Matter of James, 144 N. Y. 6, 38 N. E. 961. In that case the question arose on a construction of the collateral inheritance tax law of New York, which is substantially similar to the Tennessee act of 1893. The facts were that at the time of his death in Africa testator was a citizen of the Kingdom of Great Britain, and was domiciled there. By his last will, which he had made at the place of his domicile, he disposed of a very large estate. He left property in Great Britain, which was valued at \$447,630, and property in this country, which was valued at \$2,303,472.53. He gave legacies to collateral relatives and charities, which in the aggregate

amounted to \$236,810. The residue of his estate was given to his executors, upon trust for the benefit of his two brothers. The charitable bequests were to foreign corporations, and persons to whom legacies were given were residents of Great Britain, with the exception of two, who resided in this country. He left no debts here. His will was proven in England in June, 1890, and afterwards, as a result of an action brought in the courts of this state (New York) by the executors, was established here, and letters testamentary were issued thereon to John Arthur Jones, one of the executors named, and also a resident of Great Britain. He applied to the surrogate of the county of New York for the appointment of an appraiser for the purpose of appraisal under the laws of this state imposing a tax upon gifts, legacies, and collateral inheritances. It appeared that by the will the legacies were to be paid within three months of testator's death free of duty; that a portion of the amount given as legacies had already been paid in Great Britain out of the estate there, together with the duties imposed on legacies by the law of that country, and that the property in this country consisted, among other things, in stocks and bonds of corporations of this and other states, which securities were deposited in this state at the time of testator's death.

On these facts the Court of Appeals of New York, in the midst of its opinion, said: "In the present case the property which testator died possessed of in Great Britain is largely in excess of the amount given by him in legacies. Some portion of that has already been paid from the English estate, and the executor has declared his determination of appropriating that part of testator's property to their payment, so that the American estate shall constitute the residuary estate disposed of by the will in favor of the testator's brothers. This he may rightly do, and thus save the estate from the payment of the succession taxes imposed by our laws. The fact of such an appropriation will, of course, appear upon his accounting. If the executor determines to pay the legacies from the English estate, the American estate is thereby freed from the burden of the special taxes, the imposition of which depends upon the fact of a succession by the legatee to some property which is within the state. If the American estate is appropriated to persons who are within the exempted degrees of relationship to testator, the right to claim the tax from executor is gone. It does not lie with the officers of the state to say in such a case which part of testator's property shall be appropriated to the payment of the legacies. The law is not arbitrary in its application. It is simply absolute in its requirements, when the precise case arises which it was framed to meet; and where, as here, the case is not presented of an appropriation of any part of the American estate in payment of legacies to foreign leg-

atees, this special tax law can not and should not apply."

It will be seen from the excerpt of the opinion that the New York case bears a striking analogy in some of its essential features to the case now under consideration. The reasoning of the court commends itself to our judgment, and without further elaboration we hold that the executor of the estate of Bem Price had a right, upon the election of the widow, to transfer to her the stock in the National Bank of Commerce in payment of her one-half interest in the residuary estate; provided, of course, it was taken at a fair valuation as compared with the balance of the residuary estate wherever situated. The stock in the Memphis Trust Company, amounting to \$14,000, which, under the will, goes to collateral kindred and strangers in blood, is clearly subject to the tax.

The second assignment is that the court should have allowed, as against any collateral tax imposed on the stock in the Memphis Trust Company, and valued by the appraiser at \$14,000, the indebtedness of \$12,539 due creditors in the state of Tennessee. It is well to understand in the first place whether there are any debts outstanding in this state which are due from the estate of Bem Price, and the character of that indebtedness. We find this matter explained in the deposition of Mr. John H. Watkins, vice president of the Memphis Trust Company, as follows: "Q. State what debts, if any, were due by the estate of Bem Price to creditors in the state of Tennessee. Ans. At the time of the death of Bem Price he was indebted to the National Bank of Commerce in the sum of about \$7,539. He also owed the National Bank of Commerce the sum of \$5,000. This last item was two-thirds of a debt of \$7,500 due by the firm of Price & Price, of which he was a member, and in which he had an interest of two-thirds, being responsible, of course, for two-thirds of its debts. These debts have been paid off, and the estate of Bem Price now owes no debts to creditors in Tennessee." Again, the witness was asked: "Did the general estate of Price pay the firm debts, or were they paid out of his individual estate? Ans. The firm of Price & Price was solvent, and it paid the indebtedness of \$7,500 to the Bank of Commerce, of which amount \$5,000 was owned by Bem Price. The individual estate of Bem Price did not pay this \$7,500."

Again, the witness was asked: "What relationship did this Tennessee debt of \$12,539.00 bear to his entire indebtedness? Ans. About 50 per cent. Q. For this debt did the Bank of Commerce have any security? If so, what was it? Was it exhausted before other property was used in paying these two debts? Ans. The indebtedness of Price & Price to the

Bank of Commerce, amounting to \$7,500, was secured to the Bank of Commerce by 80 shares of stock in the Bank of Oxford, belonging to Bem Price, which was deposited as collateral. None of this security was used or exhausted in paying the debt."

Again, this witness was asked: "What per cent. or part of this whole estate were the Bank of Commerce stock and the Memphis Trust Company stock? Ans. $12\frac{1}{2}$ per cent., or one-eighth."

It may be conceded as sound law that debts must be deducted from the aggregate value of the estate before it can be ascertained what amount is subject to the inheritance tax. *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Matter of King*, 172 N. Y. 616, 64 N. E. 1122. The Tennessee act of 1893, already quoted supra, provides that the tax should be levied on the clear value of the estate so passing.

It is the net value of the share of the estate inherited by or devised to the collateral kindred that is subject to the tax. In the present case one of the debts due Tennessee creditors was an individual debt of the testator, and the other an indebtedness of a partnership wherein he owned a two-thirds interest. Both debts have been paid, and were paid before the institution of the tax proceedings herein. It does not appear that the individual debt was discharged with Tennessee assets, and we have no concern with the partnership debt, since that was discharged with firm assets. We infer that the individual indebtedness of Bem Price to the National Bank of Commerce for \$7,539 was paid with Mississippi assets, since the appraiser found that the entire value of the estate in Tennessee was \$34,000, and that amount still remained intact for distribution when the appraisal was made.

In addition to this, if the executor sought to deduct debts due Tennessee creditors from the shares of the estate passing to the collateral kindred, it was incumbent on it to show they were discharged with Tennessee assets. This fact does not appear in the record. We concur with the circuit judge in disallowing these debts as credits on the stock of the Memphis Trust Company appraised for taxation at \$14,000. We nonconcur with the circuit judge in his holding that the setting apart of the stock in the Bank of Commerce to the widow did not exempt said stock, or any part thereof, from liability for the collateral inheritance tax. We hold that the part of said stock so set apart to the widow is exempt from said tax. We think the fee allowed the attorney for the county court clerk was altogether proper and reasonable.

For the reasons stated herein, the judgment of the circuit court is affirmed.

McCAUL v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Tennessee. June 18, 1905.)
TELEGRAPHS — MESSAGES — DELIVERY — DELAY—NEGLIGENCE.

Where plaintiff sent a telegram to a relative, asking that money be wired for the transportation of the body of her dead son, and, though the addressees of the message resided $3\frac{1}{2}$ miles in the country from destination of the message, plaintiff did not inform the sending agent of such fact, nor arrange for immediate delivery at the addressees' residence, the telegraph company, on receiving the message after hours, when it had no messengers available to deliver it, was not guilty of negligence in failing to deliver the message until the next day.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 33.]

Error to Circuit Court, Gibson County;
Levi S. Woods, Judge.

Action by Jennie McCaul, by next friend, against the Western Union Telegraph Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

W. W. Powers and Harwood & Wade, for plaintiff in error. Deason, Rankin & Elder and Shields, Cates & Mountcastle, for defendant in error.

BEARD, C. J. The plaintiff in error, a married woman, living in Gibson county, Tenn., was notified by telegram from Sikeston, Mo., where her young son was visiting, that he had been accidentally wounded. On the receipt of this intelligence she left for that place, reaching the bedside of her son on the 17th of November, 1903. The day after her arrival, he died. Desiring to take his body back to her home for interment, but lacking the means to do so, after his death she prepared and caused to be delivered to the operator of the Western Union Telegraph Company at Sikeston, for transmission to Trenton, Tenn., the following message:

"11-18-1903. Dated—Sikeston, Missouri—18, To Mrs. M. C. McCaul, c/o Hugh McCaul, Trenton, Tennessee. Have bank wire bank of Sikeston \$50.00, my son Hugh dead here. [Signed] Jennie McCaul."

On delivering this telegram to the operator at Sikeston, there was paid to him the regular tariff rate of 25 cents for its transmission to Trenton, to which place it was at once started over the wires of the defendant company, reaching there about 7:10 o'clock of the evening of the 18th. When received, as there was no messenger service from 7 p. m. to 7 a. m., the telegram was put on file, by the operator receiving it, to be sent out the following morning.

At the hour of 7 a. m. of the 19th, a messenger came to the office, and he was at once given the message, with direction that he take it out for delivery to the sendees, if they, or either of them, could be found in the town of Trenton. Not finding either of the parties, it was returned to the office, and in the afternoon was sent by special hand to

the home of the sendees, which was $3\frac{1}{2}$ miles in the country, and was delivered there at 4 p. m.

Mrs. McCaul, the sender of this message, knew the sendees lived at that distance from Trenton, but she failed to communicate the fact to the operator at Sikeston, and also failed either to pay, or guaranty payment, for the extra service required in its delivery to the home of the sendees.

The record shows that while this telegram was thus delivered after the banking hours observed in Trenton, yet, if application had been made to the officers of the bank, with which Mrs. McCaul did business, either by herself or Mr. Hugh McCaul, during the evening of the 19th, that they would have immediately wired the sum asked for to the bank in Sikeston. No application, however, was made to these officers until the following day, when the money was at once transmitted, reaching Sikeston, however, too late to answer the purpose of the sender of the message. It was then found the body of young McCaul was so far advanced in decay that it would be dangerous to undertake to carry it to Gibson county, so it was buried at or near Sikeston.

Upon these facts the trial judge said to the jury, in substance, that the obligation of the defendant in error was to transmit and attempt to deliver, without unreasonable delay, this message to the sendees, or one of them, at Trenton; that there was no obligation resting on the company to send it out to the home of the sendees, $3\frac{1}{2}$ miles in the country; and, if they found that diligence was used in an effort to deliver at Trenton, then they should find for the defendant.

We think this instruction was correct. The money which was paid by the sender at Sikeston was for the service of transmission and delivery at Trenton. If it should be held, in the absence of all knowledge on the part of the operator at Sikeston that the sendees lived $3\frac{1}{2}$ miles from the place to which it was directed, the company was to be held liable for lack of prompt delivery at the residence of the sendees, then it might be so equally held, if it had happened that these sendees resided 10 miles, or even a greater distance, from there. Such a holding would impose an unreasonable burden on the company, especially in view of the fact that the telegram on its face, as we think, implied that the sendees, one or both, were to be found in Trenton.

It is an easy matter for the sender to provide for the delivery of his telegram, whatever may be the distance of the sendee from the point to which it is directed. All that he has to do is to notify the receiving operator, when delivering the telegram for transmission, that the sendee lives at a place other than the one to which it is directed. If received for transmission unconditionally by one authorized so to do after such notice, the law will imply an obligation upon the part

of the company to deliver the message at the place of the sendee's residence, or if, at the time of such receipt, payment is made or guaranteed for such delivery, in either case a failure to deliver within a reasonable time would be a breach of duty on the part of the company, for which it would be liable. But when it appears, as in this case, that the receiving operator had no such notice, and charges were neither paid nor guaranteed for delivering the message at the residence of the sendees, living, as they did, at a point remote from Trenton, the company was under no legal obligation to deliver it at that point. *Western Union Co. v. Harvey* (Kan.) 74 Pac. 250; *Western Union Tel. Co. v. Swearingen* (Tex. Sup.) 67 S. W. 767.

We think the charge of the trial judge correctly stated the rule of law controlling in this case, and without more his judgment is affirmed.

NASHVILLE, C. & ST. L. RY. CO. v. FLAKE.

(Supreme Court of Tennessee. June 18, 1905.)

CARRIERS—INJURIES TO PASSENGERS — MIS- CONDUCT OF THIRD PERSONS—NEGLIGENCE.

Where certain passengers boarded defendant's train, and, while under the influence of liquor, exploded dynamite sticks in the car, and on the platforms, and fired pistols, but the carrier's servants, though knowing or having an opportunity to know of such acts, neglected to take proper precautions to prevent injury to others until plaintiff, another passenger, was shot by the alleged accidental discharge of one of such weapons, the carrier was liable for the injury so sustained.

Error to Circuit Court, Henderson County; Levi S. Woods, Judge.

Action by James Flake, by his next friend, against the Nashville, Chattanooga & St. Louis Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

T. A. Lancaster, for plaintiff in error.
Barham & Davis and M. F. Ozler, for defendant in error.

BEARD, O. J. A boy 13 years of age, while riding on one of the passenger trains of the plaintiff in error on the afternoon of the 24th of December, 1903, while en route from Huron, a small station on the line of the railway, to Lexington, in this state, was shot. He was wounded by a pistol fired by a party whose name was unknown, and this suit was brought to recover damages for the injury thus received, upon the theory that the conditions existing upon that train, which either were known or should have been known to those in charge, were such as to have caused them reasonably to anticipate this result, and, failing to exercise property diligence, the plaintiff in error was liable. There was a verdict and judgment in favor of the plaintiff, and the case has

been brought into this court for review. A number of errors have been assigned, all of which save one are disposed of in a memorandum opinion which is not intended for publication. The one not there embraced is regarded as of sufficient importance for an opinion to be carried into our Reports.

The record shows that at Jackson, Tenn., the train in question was boarded by a number of persons then under the influence of strong drink. These parties carried upon the cars bottles of liquor, from which they freely drank as the train proceeded. They were boisterous in manner and speech, and by their conduct attracted the attention and gave considerable alarm to other passengers. They had possession of dynamite sticks, on which they placed caps. These, on being struck upon the floor, exploded. These explosions were as loud as pistol shots. While one or more of these explosions took place in the coach in which the defendant in error was riding, the others were produced upon the platform outside. Young Flake entered the coach, in which he was sitting at the time he received his wound, at Huron. He took his seat just back of the water cooler, with his face fronting in the direction the train was moving. This coach was immediately in the rear of the smoking car. In it were crowded many passengers, filling all the seats and occupying the aisle. The parties who have been referred to as boisterous, or at least some of them, came occasionally into this coach, elbowing their way down the aisle, and, after remaining for a few minutes, would retrace their steps, and on passing out they either stopped upon the platform or else would enter the smoking car. The passengers in this coach observed that they were under the influence of liquor. Loud and boisterous talking in the smoking car was heard. Much firing was done on the platform between the coach and the smoking car. This firing began soon after the train left Jackson, and continued at intervals until this boy was shot. Unquestionably, some of the explosions which occurred on this platform came from the use of dynamite sticks, but some were from the use of pistols in the hands of some of these parties. One of them made an effort to have a witness, whose testimony is in the record, shoot a negro, who, at one of the stations along the line of the road, rode for a short distance upon the steps of this smoking car while engaged talking to a friend on the platform, offering him a pistol for that purpose. The witness, however, declined the offer. Immediately after the firing of the shot that wounded young Flake, one of these rowdies, with a pistol in his hand, went out of the coach to the platform, and stated that his weapon had accidentally been discharged, and he had wounded a boy.

The employes in charge of the train testify that they saw no one with pistols, and heard no firing. They say that there were crows

collected at the stations along the railroad, consisting of whites and negroes, engaged in shooting firecrackers and otherwise making a noise as such crowds will do in anticipation of Christmas. They further testify that there was some boisterous conduct in the smoker, which, however, was promptly suppressed by the manager of trains, who happened to be on board at that time. They deny that they knew, save for the single incident just referred to, of any improper conduct committed by any one, either on the platform or in the coaches making up that train. The jury evidently credited those witnesses who testified so positively with regard to the shooting of pistols and other explosives on the platform, as well as to the boisterous conduct in the coach, and believed, where so many persons were aware of these things, that the railroad employes either knew, or by the slightest diligence might have been informed, of them. That the jury imputed the wound of this boy to the failure of those in control of the train to discharge their duty is evident from the verdict which was rendered. While it is true they could not foresee the wounding of the defendant in error, yet they should have anticipated that drunken ruffians armed with pistols, unless suppressed, would either accidentally or intentionally inflict injury upon their fellow passengers.

We think there is abundant evidence to support the verdict of the jury, and to indicate that they were inexcusably negligent in preserving order. The principle of law controlling in the case is that "wherever a carrier, through its agents or servants, knows, or has opportunity to know, of threatened injury, or might have reasonably anticipated the happening of an injury, and fails or neglects to take the proper precaution, or to use proper means, to prevent or mitigate such injury, the carrier is liable." 5 Am. & Eng. Ency. of Law, p. 553.

This rule was applied in *Ferry Co. v. White*, 99 Tenn. 256, 41 S. W. 583. In that case the court quoted and approved a clause from the charge of Shipman, J., given to the jury in a suit involving the liability of a steamer and its owners for an injury sustained by one passenger from the violence of a fellow passenger. This clause was as follows: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatever source arising, which might be reasonably anticipated, or naturally be expected to occur, in view of all the circumstances, and of the number and character of persons on board."

Public policy requires the strict enforcement of this rule. No relaxation of it should be indulged by the courts. The comfort and safety of passengers who commit themselves to a carrier depend upon it. The facts of the present case eminently call for its application.

We are satisfied no error was committed by the trial judge in his charge, embodying as it did this rule of liability, and his judgment is therefore affirmed, with costs.

WALKER v. BOBBITT et al.

(Supreme Court of Tennessee. June 24, 1905.)

1. WILLS—ELECTION BY WIDOW.

Where a husband devises to his wife a portion of lands held by them by entirety, he dying intestate as to a portion of the lands, the fact that the wife took under the will did not prevent the remainder of the lands from vesting in her by virtue of her survivorship; the doctrine of election not being applicable.

2. SAME — WIDOW'S FAILURE TO RENOUNCE PROVISIONS.

Shannon's Code, §§ 4146, 4147, in effect provide that when a husband dies testate, and the widow, not being satisfied with the provisions for her, dissents from the will within a specified time, she shall be entitled to one-third of the personal estate. *Held*, that where a widow failed to dissent from the will within the time required, and the husband died intestate as to a portion of his personal property, the same passed to his distributees to the exclusion of the widow.

3. STATUTES — INTERPRETATION — RE-ENACTMENT.

Where a statute has received a judicial interpretation, and it is re-enacted, it will be presumed the Legislature intended it should have the same construction which was given to the earlier statute.

Appeal from Chancery Court, Henry County; A. G. Hawkins, Chancellor.

Suit between T. B. Walker, as executor of Mrs. Henry Bobbitt, deceased, and James Bobbitt and others, and from the decree the latter parties appeal. Affirmed.

Farabaugh & Rye, for appellants. Lamb & Marr, Quintin Rankin, and W. S. Coulter, for appellee.

BEARD, C. J. One Henry Bobbitt died intestate in Henry county, Tenn., in the year 1890. He left surviving him a widow, Jane Bobbitt, but no lineal descendants. While the owner of some personal property, the only real estate in which he had an interest at the date of the making of his will or at any time thereafter was in a tract of 100 acres lying in that county, which had been conveyed to him and his wife, and of which they owned the estate by entirety.

In the first clause of his will the testator provided for the payment of his funeral expenses and his debts, and by the third clause he nominated his wife, Jane, as executrix. The second clause of the will is as follows: "I give and bequeath to my beloved wife, Jane Bobbitt, all of my estate, both real and personal for and during her natural life, and at her death, I will and bequeath two-thirds of whatever may remain to the Hope-well Presbytery, of the Cumberland Presbyterian Church, to be used by said Presbytery in any way they may see proper." By a cod-

icll to the will, duly executed, the two-thirds interest given in this clause to Hope-well presbytery was changed so as to give it to the trustees of the Cumberland University for the endowment of the theological department. It will be observed that the testator made no disposition of the other one-third remainder interest in either his real estate or personal property.

Upon his death, his wife, surviving him, took upon herself the execution of the will, and at the same time accepted its benefits. From sources not disclosed in the record she received as executrix \$6,168.81 from personalty belonging to the estate. From this she paid to the trustees of Cumberland University the sum of \$2,000, which was received by them in full satisfaction of the residuary legacy given to them by the codicil. This payment left in her hands the sum of \$4,168.81, derived from the personal estate of the testator. She also sold the tract of land of which mention has been made, and received therefor the sum of \$4,000. Subsequently she died, leaving a will by the terms of which she gave all of her estate to certain of her collateral kindred. A controversy having arisen between these legatees and the distributees of Henry Bobbitt as to the ownership of these two funds, the present bill was filed by the executor of Mrs. Bobbitt's will, asking the chancery court to fix and determine the rights of the respective claimants to these funds.

As has already been stated, the testator, Henry Bobbitt, died intestate as to one-third of his estate, and no provision was made in his will for the contingency which subsequently occurred of the remaindermen, the trustees of the Cumberland University, taking a part for the whole of the two-thirds given to them. As to the balance thus left upon this settlement, it is clear that it also constituted a portion of his estate undisposed of by his will.

Upon these facts the chancellor held that, surviving her husband, Mrs. Bobbitt took the entire interest in the tract of land of 100 acres, and that her right of survivorship was not affected by the doctrine of election invoked by the distributees of Henry Bobbitt, and further that, her husband having died intestate as to the portions of the personal estate, she took them under the general statute of distribution; the whole passing to the legatees named in her will. From his decree so holding the heirs and distributees of Henry Bobbitt have appealed and assigned errors.

We agree with the chancellor that the doctrine of election neither as to the land in question nor its proceeds can be invoked by the appellants. This doctrine properly arises where a testator manifests a clear intention to dispose of property not his own, and by other parts of his will from his own estate confers benefits upon the owner of that property. *Dashwood v. Peyton*, 18 Vesey,

41. In such case the owner is put upon his election, and if he accepts the benefits he is excluded or estopped from asserting claim to the property so disposed of. But as we understand, this rule or doctrine is not applied save in a case of property in which the testator has no interest. If he has some interest of his own (more than mere possession) in the thing disposed of, bequeathed by him, he will be deemed by his use of general terms to have intended only a bequest or a devise of his interest, and the owner will not be put to an election between maintaining his former title and claiming the new benefits provided by the will. *McGinnis v. McGinnis*, 1 Ga. 496; *Havens v. Sackett*, 15 N. Y. 365; *Leonard v. Steele*, 4 Barb. 20.

That the testator, Henry Bobbitt, had an interest in this realty at the time he made his will, is well settled. This continued in him until his death. This interest might ripen into a full and complete ownership upon the death of his wife leaving him surviving. We think the existence of this interest, upon principle as well as the authority of the cases cited, would preclude the application of the rule in question. This interest was a valuable one which his creditors might have reached and subjected by execution. *Mfg. Co. v. Collier*, 95 Tenn. 115, 31 S. W. 1000, 30 L. R. A. 315, 49 Am. St. Rep. 921. But the event which made the will operative (that is, his death) was the same which carried the whole estate in this land into Mrs. Bobbitt, by reason of the fact that she, of the two, was the longer liver.

The question as to the devolution of the personal estate of which Henry Bobbitt died intestate is now to be considered. In doing this it is necessary to examine the older statutes, as well as the Code provisions with regard to the distribution of the estate of persons dying intestate, and the cases in which some or all of these have been construed and applied.

At common law a devise to the wife by her husband did not prevent her from setting up claim to dower unless it was so expressed in or arose by implication from the terms of the will too strong to be resisted; otherwise she could take both her dower and her bequest. This, however, was changed by a provision in chapter 22 of the Acts of 1784. By section 8 of the act, among other things, it was provided that "if any person should die intestate, or make his last will and testament and not therein make any express provision for his wife by giving and devising unto her such part or parcel of his real and personal estate as shall be fully satisfactory to her, such widow may signify her dissent thereto before the judge of the circuit court * * * in open court within six months after the probate of said will, and then * * * she shall be entitled to dower * * * to wit, one third part of all the

lands * * * of which her husband dies seised * * * and furthermore if such husband should die leaving no child, or not more than two, then in that case she shall be entitled to one-third part of the personal estate; but if he should die leaving more than two children, then, and in that case, such widow shall share equally with all the children, she being entitled to a child's part."

It will be seen this statute provides for widows belonging to two different classes, the first of which embraces those whose husbands died without leaving a will; and the second, widows who, being dissatisfied with the provisions in their favor made in the wills of their husbands, dissented therefrom in the manner and time fixed by the statute. A widow belonging to the second class by a statutory renunciation of the will was put upon the same plane with one whose husband died intestate, and both were let into the estates of their deceased husbands in the same decree.

So far as this act dealt with the case of a widow whose husband died intestate, it was but a re-enactment, with some modification, of section 1 of chapter 3 of the Acts of 1766; but the provision for the widow who, dissatisfied with, renounced, her husband's will, was a new departure.

By that statute, as was said in *Malone v. Majors*, 8 Humph. 577, "a provision for a wife in a will of itself forces her to elect whether she will take under or against the will, and that within six months from the probate of the will, for, if she do not express her dissent in open court within that time, the provision for her shall be considered as fully satisfactory to her." So it was held that the widow whose claims were there in controversy was not entitled to any part of the estate of which her husband died intestate.

Beyond all doubt, this was regarded as a sound interpretation of the statute, and it is a part of the judicial history of the state that, so construed, it was often applied by the courts. In *McClung v. Sneed*, 3 Head, 218, decided in 1859, but involving matters which arose many years prior thereto, in speaking of one whose husband had provided for her in his will, but who had failed to renounce the provision, the court said: "It is a settled law of this state that she is bound by its provisions, and can take no other part of his estate."

Thus stood the law at the compiling of the Code of 1858. Under section 2404 of that Code (*Shannon's Code*, § 4146) there was brought forward so much of section 8 of chapter 22 of the act of 1784 as related to the rights of a widow for whom provision was made in her husband's will, but who, dissatisfied therewith, dissented; the time for her dissent being extended to 12 months. As in the original act, it was there provided that such widow so dissenting should par-

ticipate in his estate as if her husband had died intestate.

It will be observed that this section fails to fix (unlike the original act) the extent to which the dissenting widow would be permitted to share in his estate. As compiled, this was determined by section 2429 (*Shannon's Code*, § 4172), which provided in cases of intestacy, in the first subsection, that the personal estate of the intestate should go to the widow and children, or the descendants of children—the widow taking a child's share—and in the second subsection to the widow altogether, if there were no children nor the descendants of children. This omission in the codification was corrected by section 1, c. 3, of the Acts of 1859-60, which is in these words: "When a husband shall die leaving a will, from which the widow dissents within the time and in the manner provided by law, and leaving no child, or not more than two, his widow shall be entitled to one third part of the personal estate, in addition to her dower in the real estate as provided by law. But, if the husband had more than two children, the widow shall share equally with all the children, she being entitled to a child's share." This now constitutes section 4147 of *Shannon's Code*.

So taking the provision of the Code with regard to the dissent by the widow from the will of her husband, and this section of the act of 1859-60, and we have in substance, and without marked change in phraseology, a reproduction of so much of the statute of 1784 as had regard to this matter. This being so, why should the court repudiate the construction so long acquiesced in of that statute?

It is a rule well established, and perhaps universally accepted by courts and text-writers, that where a statute has received a judicial interpretation, and it is re-enacted, it will be presumed the Legislature intended it should have the same construction which was given to the earlier statute. *Black on Inter. of Laws*, 369; *Sutherland on Stat. Con.* §§ 255, 258, 424; *Bates v. Sullivan*, 3 Head, 632; *Tenn. Hospital v. Fuqua*, 1 Lea, 608.

That this rule was recognized, at least by implication, and the construction given to the original statute in *Malone v. Majors*, supra, and other like cases, was assumed to be a part of its texture as re-enacted in the Code, is apparent in the case of *Waddle v. Terry*, 4 Cold. 51. There *Milligan, J.*, speaking for the court, said: "By our law (*Code*, § 2404) she [the widow] has the right, within one year after the probate of the will, to elect whether she will accept its provisions or * * * renounce them. * * * If she fails within the time limited to express her dissent according to the forms of law, she is held to be satisfied with the will, and bound by its provisions."

Still later, in *Waterbury v. Netherland*, 6 Heisk. 513, it is said that, from the failure of the widow to express her statutory dissent to her husband's will, it will be conclusively presumed she is satisfied with its provisions, and will not be permitted to share in any estate of which he died intestate.

We think this is a sound view of the law. However, a different one was expressed in *Demoss v. Demoss*, 7 Cold. 256. The rule there announced was the one applied by the chancellor in the present case. We have carefully examined the opinion in that case, and we are satisfied that its premises were unsound, and the conclusion there reached is in the face of the canon of interpretation to which reference has been made. It stands as against the great weight of authority. We regard it as misleading, and it is therefore overruled.

The result is that the decree of the chancellor is affirmed in so far as it disposed of the proceeds of the realty in question, and is reversed as to the personal estate of which Henry Bobbitt died intestate. Under the statute this estate passed to his distributees.

PATRICK v. MISSOURI, K. & T. RY. CO.*
(Court of Appeals of Indian Territory. Oct. 19, 1904.)

1. CARRIERS — BILL OF LADING—SIGNATURE.

Where a bill of lading containing a carrier's limited liability contract was delivered unsigned by the carrier's agent to the wife of the shipper, who was illiterate, and its contents were not made known to her, it was ineffective as a contract to limit the carrier's common-law liability.

2. SAME — PLEADINGS — AMENDMENT—CONFORMITY TO PROOF.

Where a complaint against a carrier for loss of goods as originally filed contained no statement concerning a pretended bill of lading, which was first disclosed on a motion made by defendant to have the complaint made more definite and certain, when it was inserted in the complaint by way of interlineation, it was proper for the court, on its appearing that the bill of lading had never been signed by the carrier's agent, to permit an amendment of the complaint to conform to the proof as authorized by Mansf. Dig. § 5080 (Ind. T. Ann. St. 1899, § 3285).

Appeal from the United States Court for the Central District of the Indian Territory, before Justice Wm. H. H. Clayton, June 6, 1901.

Action by W. G. Patrick against the Missouri, Kansas & Texas Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

On August 3, 1900, the plaintiff filed with G. T. Ralls, United States commissioner, a complaint, and alleged that defendant, as a common carrier, received from the plaintiff at South Canadian, on September 22, 1899, "two certain boxes or packages for shipment, consigned to the plaintiff at Durant, Indian

Territory, of the value of \$60.40, as shown by account hereto attached, marked 'Exhibit A,' and made a part of the complaint. Plaintiff says that 24 hours was a reasonable time for the delivery of the goods at Durant; that he had called for said goods at various times; that defendant had failed and refused to deliver the same, to his damage in the sum of \$60.40. Wherefore plaintiff asks judgment against the defendant for said sum and costs." Summons was issued, returnable September 3, 1900. On the same day the defendant filed its motion to require plaintiff to make his complaint more definite and certain, and to allege whether the contract under which the goods claimed by plaintiff were shipped was verbal or in writing, and, if in writing, that plaintiff be required to attach his original shipping contract to his complaint. Motion was sustained, and amendment made by interlineation as follows: "And said company made its bill of lading for said property, which is filed herewith as 'Exhibit B.'" And on the same day defendant filed its answer, and admits that it received from the plaintiff at South Canadian, Ind. T., on or about September 22, 1899, two boxes or packages for shipment, and admits that the same were consigned to the plaintiff at Durant, Ind. T., but denies that they were of the value of \$60.40, or other sum; denies that a reasonable time for the delivery of said goods at Durant would not exceed 24 hours; denies that the plaintiff had called for the same, or the defendant refused to deliver the same. The defendant, further answering, states that said boxes "were received by this defendant for shipment by virtue of a written contract, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this answer; that said contract was entered into on the 22d of September, 1899, between the plaintiff and the defendant, * * * it being provided in said contract that, in the event of any loss or damage thereto, the liability of the defendant railway company should be limited to the sum of five dollars per hundredweight; * * * that under the terms of the contract aforesaid the measure of damages, if any, in this case, should be five dollars per hundredweight." Defendant states that the weight of said two boxes was 150 pounds, that said written contract provided that any claim which the plaintiff might have or prefer against the defendant should be presented to some general officer or agent of said company within 30 days after the loss or damage had been sustained, and that defendant had a station agent at South Canadian and at Durant, Ind. T., to whom such claims might have been presented, but that plaintiff failed to present any such claim within said period of 30 days, and further states that the failure to receive the goods was not due to any negligence of the defendant, and was due to the negligence of the plaintiff, and asks judgment for its costs.

*Rehearing denied June 14, 1905.

Said cause was tried by said United States commissioner on the 3d day of September, 1900, and verdict and judgment had for plaintiff for \$60.40, from which the defendant appealed to the United States court, Central District, at Atoka. On February 13, 1901, petition for change of venue was filed by defendant, and said cause was transferred to the United States court at South McAlester, Ind. T. On June 8, 1901, the same being a day of the regular May, 1901, term of said court, this cause came on for trial. The same was tried by a jury, and after the introduction of evidence the plaintiff was permitted to amend his complaint by adding the words, "which bill of lading was not signed," to which amendment the defendant at the time excepted; and thereupon the court instructed the jury to return a verdict for the plaintiff, and the jury returned the following verdict: "We the jury duly empaneled and sworn to try the issue in the above entitled cause, do find the issues in favor of the plaintiff and assess his damages at sixty and forty hundredths dollars. [Signed] William T. Thurman, Foreman."

On June 8, 1901, the defendant filed its motion for a new trial, and on the 10th day of June, 1901, "the court, having seen and heard said motion, and being well and truly advised in the premises, doth overrule the same, to which ruling of the court the defendant then and there in open court excepted." Whereupon judgment was rendered in favor of the plaintiff against the defendant for \$60.40, with interest thereon at the rate of 6 per cent. per annum from this date until paid, together with his costs. On the same day defendant was allowed 60 days in which to file his bill of exceptions, and that in the meantime execution under the judgment be suspended. Said bill of exceptions was filed with the clerk of said court on the 21st day of June, 1901, and on the 18th day of July, 1901, upon the application of the defendant, an appeal was granted to the United States Court of Appeals for the Indian Territory by William P. Freeman, clerk of the said United States Court of Appeals. On the 15th day of July, 1901, a supersedeas bond was executed by the defendant, and the case was thus appealed to this court.

Clifford L. Jackson, for appellant. Fortune & Fort and L. D. Horton, for appellee.

TOWNSEND, J. (after stating the facts). The appellant in this case (the defendant below) has filed four specifications of error, which are as follows: (1) The court below erred in refusing to instruct the jury to return a verdict for the defendant as requested, (2) The court below erred in refusing to give the following instructions asked by the defendant: "The court instructs the jury that even if you should find the defendant liable in this case under the other instructions of the court, then you are further in-

structed that in assessing the damages of the plaintiff you cannot fix a higher valuation upon the goods in question than at the rate of five dollars per hundredweight." (3) The court erred in instructing the jury as follows: "You are instructed to find your verdict for the plaintiff, and to assess his damages at the sum of \$60.40." (4) The court erred in overruling defendant's motion for a new trial.

It is hardly necessary to notice or discuss any other than the second specification of error, the defendant contending "that the contract governing the shipment of goods in controversy was in writing, and fairly limited the value of the goods, and the jury should have been so instructed, and should not have been instructed to assess the damages of the plaintiff below at the full amount sued for, and because of the error of the trial court in these respects the motion for a new trial should have been granted." The question is thus fairly presented as to whether the paper which was attached to the plaintiff's complaint on motion of the defendant, and subsequently set forth as an exhibit to the answer of the defendant, constituted a bill of lading under the law. The appellant in his brief says, "This bill of lading was not a bill of lading in accordance with the technical commercial law, in that the agent of the carrier failed to sign it." The only effect that could be attached to the failure of the agent to sign this bill of lading would be that it would not be negotiable on the market, in accordance with the mercantile usage; but the failure of the agent to attach his signature could not even have had that effect in this instance, because in the bill of lading was a stipulation as follows: "Not negotiable unless shipment be consigned to shipper's order." Is this statement correct? This paper purports in the first instance to be a receipt for the two boxes of household goods. Is a receipt that is unsigned a valid receipt? It also purports to contain a stipulation of a special contract; but when the same has not been signed by the appellant's agent, and there is no evidence that the plaintiff has ever assented to the special stipulation thus set up, is it such a contract as would bind either the appellant or the appellee? Mattie Patrick, the wife of the appellee, in her deposition introduced in evidence, as shown by the bill of exceptions, states as follows: "The porter took the goods out of the wagon and put them on the platform of the depot at South Canadian, and afterward he gave me a bill of lading. I asked the agent to give me a bill of lading. When I first asked him, he said it was no use; that the goods would come on the local behind me. I insisted that he give me a bill of lading, which he did, and I afterward delivered the same to my husband. * * * I cannot read or write, but the paper which the agent gave me as a bill of lading was the one I turned over to Mr. Patrick. * * * The agent did not read the bill of

lading to me nor explain its contents to me, and failed to put the war revenue on it, but afterwards called me back and put the revenue stamp on it."

It thus appears, if the contention of the appellant is to be sustained, that this paper, which purports to be a receipt, and also containing a special contract, though not signed by the appellant's agent, and delivered to the agent of the shipper, who could not read or write, to whom the contents were not known, is a bill of lading, and limits the common-law liability of the appellant. Hutchinson on Carriers (2d Ed.) § 120, in defining a bill of lading, says: "These contracts assume somewhat different forms, and are known by different names, according as they may be with carriers by water or carriers by land. Those with the former are called 'bills of lading,' while those with land carriers are commonly called 'receipts.' They are, however, the same in effect, and are intended merely to evidence the true intent of the transaction between the parties. * * * They must be signed by the carrier or his authorized agent to bind him, and must be accepted by the shipper. And any contract with the carrier having these characteristics is entitled to the effect of a bill of lading, no matter how informally it may be drawn." In *The Tongoy* (D. C.) 65 Fed. 329, a bill of lading is defined as follows: "Now, a bill of lading is a written acknowledgment, signed by the master, that he has received the goods therein described from the shippers, to be transported on the terms therein expressed. It is a receipt for the quantity of goods shipped, and a promise to transport and deliver them as therein stipulated." 4 Am. & Eng. Enc. of Law says: "A bill of lading must be signed by or on behalf of the party undertaking the carriage, but need not be, and generally is not, signed by the party shipping"—citing *Porter on Bills of Lading*. "A bill of lading is a memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order, on board of his ship or vessel therein named, at the place therein mentioned, certain goods therein specified," etc. *Rapalje & Mack's Digest of Railway Law*, vol. 1, p. 601, citing *Union R. & Transp. Co. v. Yeager*, 34 Ind. 1. In the case of *The Delaware*, Justice Clifford, in delivering the opinion of the court, says: "Different definitions of the commercial instrument called 'the bill of lading' have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated." 81 U. S. 600, 20 L. Ed. 779. "Bills of lading are usually on printed forms and signed by the carrier or his agent." *Elliot on Railroads*, § 1417, vol. 4, p. 2200.

In *Montague et al. v. The Henry B. Hyde* (D. C.) 82 Fed. 682, the court says: "A bill of lading is an instrument well known to the commercial law, and, according to mercantile usage, is signed only by the master of the ship, or other agent of the carrier, and delivered to the shipper. When thus signed and delivered, it constitutes not only a formal acknowledgment of the receipt of the goods therein described, but also the contract for the carriage of such goods, and defines the extent of the obligations assumed by the carrier. *The Delaware*, 14 Wall. 579, 20 L. Ed. 779. In my opinion, the rule which governs the point now under consideration is that a common carrier may, by special contract with the shipper, stipulate for a more limited liability than that which he assumes under the ordinary contract for the carriage of goods; and such special contract, in the absence of any statute to the contrary, may be contained in a bill of lading signed by the carrier alone; and the acceptance of such bill of lading by the shipper at the time of the delivery of his goods for shipment, in the absence of fraud on the part of the carrier, is sufficient to show the assent of the shipper to the terms set out in the bill of lading. It is the rule, rather than the exception, for common carriers to stipulate for a release from the stringent liability of an insurer, and which otherwise the law would impose upon them; and according to the customary course of business such stipulations are contained in the bill of lading issued by the carrier. This custom is so general that all persons receiving such bills of lading must be presumed to know of such custom, and they are also charged with the knowledge that it is one of the offices of such instruments to state the terms and conditions upon which the goods therein described are to be carried; and for this reason the acceptance of such a paper by the shipper, without dissent, at the time of the delivery of his goods for shipment, when no fraud or imposition has been practiced upon him, is to be regarded as conclusive evidence that he agrees to be bound by all lawful stipulations contained in such bill of lading; and this I understand to be the rule sustained by the Supreme Court of the United States in the case of *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872, and is supported by the following well-considered cases: *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Dorr v. Navigation Co.*, 11 N. Y. 485, 62 Am. Dec. 125; *Railroad Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *McMillan v. Railroad Co.*, 16 Mich. 79, 93 Am. Dec. 208. In the case last cited, Mr. Justice Cooley, speaking for the court, said: 'Bills of lading are signed by the carrier only; and, where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with

deeds poll, and with various classes of familiar contracts; and the evidence of assent derived from the acceptance of the contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing." Am. & Eng. Enc. of Law, vol. 4 (2d Ed.) p. 514: "A bill of lading, though signed, can have no effect until delivery."

It thus appears that, if a bill of lading is issued by a common carrier, it must be signed by it, in order to make the same a binding contract between itself and the shipper. The appellant has cited numerous authorities to establish the proposition that a common carrier can limit its liability without any written bill of lading. There is no question but that a verbal contract can be made, and the only serious objection to it is the difficulty of proving the same, in the event of controversy between the shipper and the carrier. When a common carrier seeks to limit its common-law liability, the law interposes no objection, but such a contract must be clearly established.

"In the absence of a statute to the contrary, no particular form or mode is required to constitute such a contract as will be binding upon the carrier's employers. * * * Whenever, however, it appears that what has been proposed on one side has been accepted by the other, a contract is proven which will be mutually binding, whether the proposition is made in the form of notice or in any other manner. But the proof of assent to the terms proposed by the carrier must be clear in such a case, for the law, having imposed an important duty upon him, upon grounds of public policy, will not permit him to divest himself of its responsibilities and throw the loss upon his employer, when the proof that the latter has so agreed is doubtful. But it is not required that such proof, if otherwise satisfactory, shall be written. A verbal contract is as obligatory as a written one when established. The only difference is in the manner and in the degree of certainty of the proof." Hutchinson on Carriers (2d Ed.) § 242.

"A special contract limiting the liability of the carrier as an insurer may be verbal as well as written, unless the statute requires it to be in writing. It may be more difficult to establish a specific parol contract, but, when once clearly established, it is as obligatory as a written one. Of course, where there is a complete written contract, it cannot, as a rule, be contradicted or varied by oral evidence, and all verbal agreements made prior to the execution of the bill of lading are usually merged therein; but, as we have seen, there are cases in which, after the carrier has once accepted and shipped the goods under an unconditional parol contract, it cannot afterwards limit its liability by a receipt or bill of lading; and so, on the other hand, after a receipt or bill of lading has been executed, a new contract may doubt-

less be made in parol upon a new consideration, whereby the liability of the carrier may be properly limited or other changes made in the terms of the original contract." Elliott on Railroads, vol. 4, § 1503.

The appellant has also introduced authorities to establish the proposition that the acceptance of a bill of lading by a shipper, without any objection, when the same is issued by the carrier, binds the shipper to all limitations of liability embraced in said bill of lading. "According to the English cases and the clear preponderance of authority in the United States, if a bill of lading is accepted by the shipper without objection, he is ordinarily—i. e., in the absence of fraud, accident, or mistake—presumed to have knowledge of and to have assented to its terms, and he cannot afterwards be heard to say that he did not read it, but will be bound thereby. And the general rule is that prior negotiations cannot be resorted to for the purpose of varying the terms of the instrument." Am. & Eng. Enc. of Law, vol. 4 (2d Ed.) pp. 516, 517.

But the paper issued and denominated a bill of lading in the case at bar was never signed by the carrier, and by reason of that fact it was not a bill of lading, and, consequently, pretended limitations of liability stated therein were not binding on the appellee, and none of its provisions were binding on either the carrier or the shipper. Therefore, there is no evidence that any verbal or written contract was made between the parties, limiting the common-law liability of the carrier. The suit, as originally instituted, contained no statement about this pretended bill of lading. It was first disclosed on the granting of a motion by the United States commissioner, made by the appellant, to make the complaint more definite and certain, and was inserted in the complaint by way of interlineation. The appellant answered, insisting that its liability had been limited, but, when the case was tried in the district court, the discovery was made that the pretended bill of lading had never been signed, and the court allowed an amendment to the complaint to make same correspond to the proof in the case, which he was authorized to do by section 5080, Mansf. Dig. (Ind. T. Ann. St. 1890, § 3285), as follows: "The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." This simply placed the suit where it was when instituted before the commissioner, and, before the error was committed by the commissioner, requiring the plaintiff to produce the pre-

tended bill of lading. The appellant admitting that it had received the goods and had failed to deliver the same, the court very properly directed the jury to return a verdict for the plaintiff.

We think the judgment of the court below was correct, and it is therefore affirmed.

RAYMOND, C. J., and GILL, J., concur.

WILLIAMS v. UNITED STATES.*

(Court of Appeals of Indian Territory. Oct. 19, 1904.)

1. CRIMINAL LAW—ABSENCE OF WITNESS—CONTINUANCE.

Where accused was granted a continuance on May 20, 1903, until the second Monday of the next term, and on December 26th a subpoena was issued for an absent witness who could not be found, and from the time of the continuance until the date of the subpoena no steps were taken to secure the witness' attendance, the overruling of a motion for a continuance for his absence on January 15, 1904, was not an abuse of discretion.

2. SAME — NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

An application for a new trial for newly discovered evidence, based on the affidavit of a negro stating that a colored man, unknown to affiant, came into his restaurant and made statements concerning the case, and that affiant made no inquiry concerning the name of such colored man, and did not know his whereabouts, was properly denied.

3. SAME—CHANGE OF VENUE.

Where, on an application for a change of venue, two witnesses made affidavits that the people in the vicinity were hostile to the defendant, and that they believed they were so prejudiced against defendant that he could not obtain a fair trial therein, but, on being brought into court for cross-examination, the witnesses testified that the only information they had on the subject was acquired from statements made by one of defendant's counsel, who had asked them to sign the affidavits simply as a matter of form, for the purpose of getting a continuance, they were properly permitted to withdraw the same.

4. SAME — WITNESSES — CREDIBILITY—HABITS.

In a prosecution for homicide, defendant was not entitled to prove that one of the government's witnesses was a "coke fiend," for the purpose of affecting her credibility.

5. SAME—WEAPONS—INSTRUCTIONS.

Where, in a prosecution for homicide, there was evidence that defendant shot deceased without any conversation having taken place between them, and that deceased at the time had a pistol, it was not error for the court to charge that deceased had a right to draw his gun, and, if defendant pressed him, he would have the right to use it.

6. SAME—FAILURE TO CHARGE—REVIEW.

An objection to an omission of the court to charge particular propositions in a criminal case will not be reviewed where no exceptions were saved or requests made to give such instructions.

7. SAME—JURY—CUSTODY—BAILIFF.

Where the record in a criminal case disclosed that the jury were placed in charge of a sworn bailiff, it would be presumed after verdict that the bailiff was duly sworn.

8. SAME—OBJECTIONS—TIME.

Objections not made at the trial, nor included in the grounds for a new trial, but first appearing in the assignments of error, will not be considered on appeal.

Appeal from the United States Court for the Central District of the Indian Territory: before Justice Wm. H. H. Clayton, Feb. 3, 1904.

Grant Williams was convicted of murder, and he appeals. Affirmed.

On the 5th day of December, 1901, defendant (appellant here) was indicted for the murder, on October 8, 1901, of one Ed. Dolan, which indictment is as follows: "The grand jurors of the United States of America, duly selected, summoned, impaneled, sworn, and charged to inquire within and for the body of the Central District of the Indian Territory aforesaid, at South McAlester, in the name and by the authority of the United States, upon their oaths do find, present, and charge that one Grant Williams, who was not then and there a member of any Indian tribe or nation, on the 8th day of October, A. D. 1901, within the Central District of the Indian Territory aforesaid, with force and arms, in and upon the body of one Edward Dolan, then and there being, feloniously, willfully, and of his malice aforethought did make an assault, and that the said Grant Williams, with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said Grant Williams, in his hand then and there had and held, then and there feloniously, willfully, and of his malice aforethought did discharge and shoot off, at, to, against, and upon the body of the said Edward Dolan, and that the said Grant Williams, with the leaden bullets aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Grant Williams discharged and shot off as aforesaid, then and there feloniously, willfully, and of his malice aforethought did strike, penetrate, and wound him, the said Edward Dolan, in and upon the neck of him, the said Edward Dolan, giving to him, the said Edward Dolan, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Grant Williams in and upon the neck of him, the said Edward Dolan, one mortal wound, of which said mortal wound he, the said Edward Dolan, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that upon the day and year aforesaid, and at the place aforesaid, the said Grant Williams him the said Edward Dolan, in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America." Defendant was arraigned on May 18, 1903, and pleaded not guilty, and on May 20,

*Rehearing denied June 19, 1905.

1903, defendant filed motion for continuance, which was by the court allowed. On January 12, 1904, defendant filed his motion for change of venue, alleging that the inhabitants of the Central District are so prejudiced against him that he cannot obtain a fair and impartial trial of his cause therein, to which motion was attached an affidavit made by J. H. Walton and U. S. Goings, which in part was as follows: "That the people of Craig, Halleyville, and Hartshorne are very hostile to the defendant, and that they believe that the minds of the inhabitants of the whole of South McAlester Court Division of the Central District of the Indian Territory are so prejudiced against him that he cannot obtain a fair and impartial trial of his cause therein." Upon the hearing of said motion for a change of venue, the court permitted the district attorney to bring said J. H. Walton and U. S. Goings into court and cross-examine them, and upon said cross-examination it was developed that said Walton and Goings had heard of the crime for which defendant was charged, but had not heard the question of public sentiment or public feeling toward the defendant discussed, and had no knowledge of the same, except what they were told by Mr. Tarter, one of defendant's counsel, and that it was from the information received from him that the affidavits were made; defendant's counsel also stating to said witnesses that the making of the affidavit for a change of venue was simply a mere matter of form, and that its purpose was to get a continuance. Whereupon the court overruled the said motion for change of venue, and on January 15, 1904, defendant filed motion for continuance, which was also overruled. And thereafter, on the 18th day of January, 1904, this cause came on for trial before a jury, and on January 19, 1904, the jury returned into court the following verdict: "We, the jury, find the defendant, Grant Williams, guilty of murder as charged in the within indictment." Defendant filed motion for new trial on February 3, 1904, and on same day filed his amended motion for new trial, which motions were overruled, and on same day the court rendered judgment as follows: " * * * It is considered by the court that the said Grant Williams be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of this district cause the said Grant Williams to be taken hence, and him, the said Grant Williams, safely and securely keep from the date hereof until Friday, the 18th day of March, A. D. 1904, and on that day, between sunrise and sunset of said day, the said Marshal cause the said Grant Williams to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between sunrise and sunset on Friday, the 18th day of March in the year of our Lord Nineteen Hundred and Four, cause the said Grant Williams to be hanged by

the neck until he is dead. And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same. Whereupon defendant, by his attorney, prays an appeal herein, and is allowed 20 days in which to prepare and file his bill of exceptions herein."

Wiley H. Jones (Robert Tarter, of counsel), for appellant. J. H. Wilkins, U. S. Atty.

TOWNSEND, J. (after stating the facts). Appellant has filed eighteen assignments of error, as follows:

"(1) There is no competent evidence in the record to support the verdict.

"(2) The court erred in overruling and disallowing appellant's motion for a continuance.

"(3) The court erred in overruling and disallowing appellant's motion for a new trial in that particular in which it is based upon newly discovered evidence.

"(4) The court erred in overruling and disallowing appellant's motion and application for a change of venue, and in allowing the district attorney, over appellant's objection, to bring the witnesses making the supporting affidavit for a change of venue into open court and cross-examine them, and in submitting to the witnesses making the affidavit the alternative of either withdrawing the affidavit, or of having the matter of making it investigated by the grand jury.

"(5) Persons of appellant's own race having been excluded by the grand jury preferring the indictment against him because of their race and color, he has been denied the equal protection of the laws guaranteed by the Constitution, which is now assigned as error.

"(6) The court erred in excluding from the jury the following question and answer propounded to witness Anna Cook: 'Is Eliza Dixon, witness for the government, a coke fiend [meaning a cocaine fiend]? Ans. Yes.' And excluding from the jury the same question and answer thereto propounded to Henderson Covington. Also in excluding from the jury expert medical testimony to the effect that the excessive use of cocaine makes of its user a liar and unreliable.

"(7) The court erred in charging the jury as follows: 'If Berger was in the car, and the defendant approached him in a threatening manner, so as to indicate to Berger that he was in danger from this man, then Berger had the right to draw his gun, and, if the defendant pressed upon him, he would have the right to use it.'

"(8) The court erred in charging the jury as follows: 'If Lee Berger was at a place where he had a right to be, attending to his duties, and the defendant armed himself and went there expecting a conflict, then the defendant was the assailant.'

"(9) The court erred in charging the jury as follows: 'No man can take another man's life, and justify it before a jury on the ground of self-defense, unless he is prepared to show that there was a necessity to take that man's life; and, in order to show that, it must appear that the danger to his own life or of receiving great bodily harm from the hands of the deceased was then and there hanging over him and about to fall upon him, and that he could not prevent it except by slaying his adversary.'

"(10) The court erred in charging the jury as follows: 'In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or to prevent his receiving great bodily harm, the killing of the other person was necessary.'

"(11) The court erred in charging the jury as follows: 'The defendant's defense is, "I did not do the act." You understand that, as far as the killing of Berger is concerned, this defendant is not charged with that in this indictment. You are not trying him for killing Lee Berger. The proof of the killing of Berger, however, is before you, not because you are to convict him for killing that man, but only for the purpose of characterizing his acts and conduct, and as throwing light upon his action and motives in regard to the killing of the other man. That is the only reason that evidence is before you, it being so closely connected with the other case that it becomes a part of the *res gestæ* of the transaction. The case could not be intelligently tried without telling the whole story of the killing of both.'

"(12) The court erred in failing and refusing to charge the jury on the law of manslaughter, and announcing from the bench, 'I do not charge you as to the law of manslaughter.'

"(13) The court erred in refusing to submit to the jury the request following: 'If you should be of the opinion that the defendant is guilty of some offense, but should entertain a reasonable doubt as to whether he is guilty of murder or manslaughter, it will be your duty to acquit the defendant of murder, and convict him of manslaughter.'

"(14) The court erred in refusing to submit to the jury the request following: 'If you should entertain a reasonable doubt as to the defendant's guilt of the charge of murder, but entertain no such doubt as to his guilt of manslaughter, it will be your duty to acquit the defendant on the charge of murder, and convict him of manslaughter.'

"(15) This cause should be reversed and a new trial granted because the record fails to show that the jury, upon adjournment of

the court, and upon being respited to the morning following, were placed in charge of an officer sworn as the law directs. The record shows the following: 'And after hearing a portion of the evidence, it being adjourning time, said jury was put in charge of a sworn bailiff, ordered kept together, and lodged and fed at the expense of the government.'

"(16) This cause should be reversed because the record fails to show that the jury, upon being respited until the morning following were returned into court in charge of the same officer in whose custody they were placed upon being respited. The record entry is: 'Also comes the jury heretofore impaneled for the trial of this cause in charge of a sworn bailiff, and take their seats in the jury box,' etc.

"(17) The court erred in not admonishing the jury, as required by statute, upon them leaving the presence of the court, that it is their duty not to permit any one to speak to or communicate with them on any subject connected with the trial, etc.

"(18) The court erred in overruling and disallowing appellant's motion for a new trial, and in passing sentence upon him."

As to the first assignment, we will say that we have read the testimony brought up by the bill of exceptions in this case, and are thoroughly convinced that the jury were fully justified in returning the verdict they did, and hence we are of the opinion that this assignment is not well taken.

As to the second assignment, it appears from an examination of the record that the indictment in this case was returned by the grand jury on December 5, 1901, and filed by order of the court; that on May 18, 1903, the defendant was formally arraigned, and pleaded not guilty; that on May 20, 1903, defendant filed his motion for continuance, which was granted, and case continued until the next term of the court, and set for trial on the second Monday of the next term. On January 12, 1904, defendant filed his application for change of venue, which on January 15, 1904, was overruled by the court, to which defendant excepted, and on same day defendant filed motion for continuance, supported by his own affidavit that the evidence of certain witnesses therein named was material to his defense. It appears that a subpoena for said witnesses was issued December 26, 1903, but they could not be found. It thus appears that from May 20, 1903, until December 26, 1903, no step was taken to secure the attendance of witnesses. The court overruled the motion for continuance. In *Jackson v. State*, 54 Ark. 243, 15 S. W. 607, the court quotes with approval *Thompson v. State*, 26 Ark. 323, as follows: "In *Thompson v. State*, 26 Ark. 323, it was held that continuances in criminal as well as in civil cases are, as a general rule, within the sound discretion of the court, and that a refusal to grant a contin-

uance 'is never ground for a new trial unless it clearly appears to have been an abuse of such discretion, and manifestly operates as a denial of justice.'" In *Loflin et al. v. State*, Use, etc., 41 Ark. 156, the court said: "It must be a flagrant instance of the arbitrary or capricious exercise of power by the circuit court, operating to the denial of justice, that will induce us to interfere." We are of the opinion that the court acted correctly in refusing the continuance.

As to the third assignment, that the court erred in not granting new trial on ground of newly discovered evidence, the motion is based upon the affidavit of Bob Hill, a negro, which is vague and indefinite. He states that a colored man came to his restaurant in South McAlester and made statements about the case; "that said colored man was unknown to affiant; that affiant did not make inquiry to his name, not knowing anything about the case or the circumstances of the killing, and in no way interested in it, and does not know the whereabouts of said colored man." We do not think the court erred in refusing new trial on ground stated.

The fourth assignment is overruling motion for change of venue. Granting change of venue is regulated by Mansf. Dig. §§ 2195, 2196, which are as follows:

"Sec. 2195. Any criminal cause pending in any circuit court may be removed by the order of such court, or by the judge thereof in vacation, to the circuit court of another county, whenever it shall appear, in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial can not be had therein.

"Sec. 2196. Such order of removal shall be made on the application of the defendant by petition setting forth the facts, verified by affidavit, if reasonable notice of the application be given to the attorney for the state, and the truth of the allegations in such petition be supported by the affidavit of some credible person."

It thus appears that the application shall be by petition, supported by affidavit of some credible person; reasonable notice to be given to the attorney for the state. In *Ourtis v. State*, 36 Ark. 286, the court said: "The prosecuting attorney filed the counter affidavits of four persons, in which they severally stated, in substance and effect, that they were well acquainted with Silvia Finch; that she was of bad moral character and unworthy of credit as a witness. Defendant filed no affidavits to sustain her credibility, and the court overruled the motion for change of venue. The statute requires the application for change of venue to be verified by affidavit, and the truth of the allegations thereof to be supported by the affidavit of some credible person. Gantt, Dig. § 1869.

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It seems that the court below decided, upon the counter affidavits filed, that Silvia Finch was not a credible person, and we cannot undertake to say that she was." In *Jackson v. State*, 54 Ark. 247, 15 S. W. 609, the court said: "We are of the opinion that it was within the discretion of the court to receive the oral testimony of those witnesses as to facts affecting their own credibility, and their testimony, as set forth in the bill of exceptions, is such as we think amply supports the finding of the court that they were not credible witnesses. It follows that the court did not err in denying either of the appellant's applications for a change of venue." In this case the witnesses, upon examination, stated that they " * * * had not heard the question of public sentiment or public feeling toward the defendant discussed, and had no knowledge of the same, except what they were told by Mr. Tarter, one of defendant's counsel, and that it was from the information received from him that the affidavits were made. * * * " The court permitted the said witnesses to withdraw their affidavits, and thereupon held the statute had not been complied with, and we think the court acted correctly.

The fifth assignment states that persons of his own race were excluded from the grand jury because of their race and color. If the statement of fact made in this assignment was true, it would be reversible error, but nowhere does the record disclose such a state of facts; and a statement of a fact in an assignment of error which is absolutely false, so far as the record is concerned, is not only illegitimate practice, but deserves the condemnation of this court.

The sixth assignment was the alleged error in excluding from the jury a certain question and answer—as to whether Eliza Dixon, a witness for the government, was a "coke fiend" (meaning a cocaine fiend); and appellants cite Underhill on Criminal Evidence, § 168, in support of their assignment, but Mr. Underhill says: "The habitual use of morphine may be shown, and, if proved, is a circumstance for the jury to consider in determining the mental condition of the accused." Hence it appears that the mental condition of the accused may be examined into, but not a witness. The jury are the judges of the credibility of the witnesses. "And it has been held inadmissible, in order to attack veracity, to prove the bad character of a female witness for chastity, or to show she is a prostitute (*Pleasant v. State*, 15 Ark. 624), or to prove habits of intemperance, which do not affect the perceptive or narrative powers." *Whar. Cr. Ev.* (9th Ed.) 486; *Thayer v. Boyle*, 30 Me. 475; *Holt v. Moulton*, 21 N. H. 586. Evidence of the use of opium cannot be introduced to impair credit unless it be shown that the witness was under the influence of opium when examined, or that his powers of observation or recollection

tion were affected by the habit. Whar. Cr. Ev. (9th Ed.) 384a. Hence the court committed no error in excluding this question.

The seventh assignment was the alleged error in charging that Berger had the right to draw his gun, and, if the defendant pressed upon him, he would have the right to use it. In the cross-examination of the witness Jones the following testimony was given: "Q. At the time the first shot was fired, who were in the car? A. Mr. Garvey, Lee Berger, myself, and Duffy. Q. Berger was leaning with his left arm on the counter? A. Yes, sir; facing the south door. Q. Where was he shot? A. He was shot about an inch below the navel. Q. The defendant did no talking to Lee Berger, did he? A. No, sir; he did not. Q. Do you know whether he and Berger were good friends? A. I don't know what the relation was between them at all. * * * Q. Did you see Berger with a pistol? A. Berger had a pistol at that time; yes, sir." Berger was shot by the appellant, and the court probably had in mind the fact that the testimony showed that Berger had a pistol at the time. We think there was sufficient evidence to support the instruction, and consequently no error.

The eighth, ninth, tenth, and eleventh assignments were charges given to the jury, and were entirely applicable to the testimony in the case, and we might add that no exceptions were saved to any of them. Appellant complains in his ninth and tenth assignments that they do not instruct that defendant had a right to act in self-defense, from an honest belief that he was in danger; but no exceptions were saved, and no request made of the court to give such an instruction. We are of the opinion that these assignments were not well taken, and the authorities cited by appellant are not applicable to this case.

The twelfth, thirteenth, and fourteenth assignments was the refusal of the court to charge on the law of manslaughter. From an examination of the evidence in the bill of exceptions, we can find no evidence whatever tending to prove the crime of manslaughter. "It is error for the court to assume facts in an instruction not authorized by the evidence." *St. Louis, I. M. & S. Ry. Co. v. Rosenberry*, 45 Ark. 256. "On a trial for homicide, where there is no evidence whatever tending to prove a degree of the offense below that charged in the indictment, the court should refuse to instruct the jury as to such lower offense." *Fagg v. State*, 50 Ark. 506, 8 S. W. 829. We are of the opinion that the court was correct in his refusal to charge on the law of manslaughter.

The fifteenth and sixteenth assignments are the failure of the record to show that the jury was placed in charge of an officer sworn as the law directs, and a failure to show that the jury, when returned into court, were in charge of the same officer in whose custody they were placed. Sections 2265, 2266, 2281,

Mansf. Dig., regulate and direct the manner juries shall be cared for during the recess of the court. They are as follows:

"Sec. 2265. The jurors, before the case is submitted to them, may, in the discretion of the court, be permitted to separate, or be kept together in the charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves.

"Sec. 2266. The jury, whether permitted to separate or kept in charge of officers, must be admonished by the court that it is their duty not to permit any one to speak to or communicate with them on any subject connected with the trial, and that all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, or form or express any opinion thereon until the cause is finally submitted to them. This admonition must be given or referred to by the court at each adjournment."

"Sec. 2281. Where the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge, their names called by the clerk, and, if they all appear, their foreman must declare their verdict."

"When the jury goes out to deliberate on its verdict, it is committed to the care of a sworn officer of the court." 1 Bishop, Cr. P. & Practice, 991. In *Hurley v. State*, 29 Ark. 28, the court said: "That the jury were not sworn in accordance with law, but were illegally sworn: The record entries show that the jurors were sworn, but the form of oath administered is not set out in the entries, nor in the bill of exceptions. In the absence of any showing to the contrary, it must be presumed that the oath was administered in proper form. *Greenwood v. State*, 17 Ark. 332." It does not appear from the record that any objection was made or exception saved to the officer not being sworn as the law directs, but the record does show that the jury were placed in charge of a "sworn bailiff." We are of the opinion that this is sufficient, and that the same presumption will be indulged as to the officer as is indulged when the record shows that the jury were duly sworn. But this objection was not made at the trial, nor was it included in the grounds of the motion for new trial, and the first we hear of it is in these assignments of error. In *Atterberry v. State*, 56 Ark. 520, 20 S. W. 412, the court said:

"* * * We hold that it is too late, after verdict, to object for the first time that a jury retired from court in charge of an officer to whom the special oath had not been administered, where it appeared that the defendant was present when it retired, and neither asked that the special oath be administered to him, nor objected to his tak-

ing charge of the jury, and it does not appear that either the officer or the jury was guilty of any misconduct." We therefore are of the opinion that the assignments are not well taken.

The seventeenth assignment is the alleged error of the court in not admonishing the jury as required by statute. No objection was made or exception saved, and we are of the opinion that the presumption is that the court did his duty, and hence there was no error.

A special brief has been handed to this court as a reply to the proposition that the court will not entertain any presumption that the officer was sworn as required by law, and it is insisted that the state must show the fact affirmatively. We have already expressed our view to the contrary, but, be that as it may, it is evident, under the decision in *Atterberry v. State*, supra, that appellant is too late to raise that question after verdict.

Being satisfied that there is no substantial error in the record, we are of the opinion that the judgment of the court below was correct, and it is therefore affirmed.

RAYMOND, C. J., and GILL, J., concur.

TALLY v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1905.)

1. CRIMINAL LAW — TRIAL — ARGUMENT OF COUNSEL.

On a prosecution for burglary, where the only testimony tending to show a conspiracy to burglarize as charged was inadmissible, and for that reason excluded, it was error to permit the district attorney, in argument to the jury, to refer to the exclusion of the evidence, and forcibly state what the evidence would have been, had he been permitted to introduce it, and that it would have shown a conspiracy, even though he was challenged by plaintiff's counsel to state why proof of the conspiracy was not introduced.

2. SAME—EVIDENCE—ADMISSIBILITY.

On a prosecution for crime, evidence of defendant's intoxication is inadmissible to affect his credibility.

3. SAME—INSTRUCTIONS.

Where the defendant's testimony had not been attacked, nor his credibility assailed, but evidence was admitted of his intoxication, a charge that evidence of defendant having been drunk might weaken his testimony and affect his credibility as a witness was erroneous, as in violation of the statute prohibiting charges on the weight of testimony.

Brooks, J., dissenting.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Henry Tally was convicted of burglary, and he appeals. Reversed.

H. E. Taylor, J. H. G. Lee, and James H. Lyday, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary. The state asked the wit-

ness McKee the following question: "Had you received instructions that there was a plan on foot to burglarize that house?" Objections were urged and sustained, and the question was not answered. The district attorney, in his opening remarks to the jury, stated, in substance, while commenting upon the excluded question and proposed evidence of McKee: "If defendant's counsel had not objected, and if the court had not excluded the proffered testimony of said McKee, he could have shown by said witness why the officers were watching said house and defendant and Haney on said night, and that this evidence, to which counsel for defendant objected, and which the court excluded, would have fully warranted all honest men to convict of the crime charged." "That the district attorney, in his closing argument to the jury, made an inflammatory appeal to the jury to convict on the excluded evidence, and, among many other illegal and unwarranted statements, stated in his closing argument to the jury that defendant's attorney had objected to said testimony, and had same excluded by the court, because they were afraid, and because it would have shown a plot to burglarize said house before they reached it, and would exclude the pretense that defendant was taking said Haney home because he (Haney) was drunk; and the further contention that he was gagging at the door, and defendant thought he was vomiting; and that the officers knew it beforehand, and were watching defendant and Haney; and, if the said evidence had not been excluded, it would have shown a prior conspiracy to rob the house by defendant and Haney; and that no honest jury could afford to acquit defendant." Exception was reserved to these statements, and the court refused to stop the district attorney and instruct the jury to disregard the remarks on the excluded evidence. Whereupon appellant appealed to the district attorney, and asked him if he wanted to convict defendant on excluded and illegal evidence; and he refused to stop, and continued his remarks on said excluded evidence. The court explains this bill as follows: "The district attorney, in his opening argument, did argue to the jury that the house was being watched, as was testified to by one of the witnesses (J. W. McKee), but did not in his opening argument refer to the question asked, as shown by bill No. 2. The counsel for the defendant, in their arguments, repeatedly called upon the district attorney to show why these men were watching the house, and asked him if he wanted to convict the defendant by withholding testimony, and, if he wanted to convict defendant, why did he keep back testimony, etc., and insinuated that he had testimony that he would not produce, and asked the district attorney if he wanted to convict the defendant on illegal testimony; referring to testimony in bill No. 2. And the argument of the district at-

torney in his closing speech was simply brought out in answer to the argument of defendant's counsel. The counsel for the defendant did not request a charge instructing the jury to disregard the remarks of the district attorney." This is the bill as qualified. The matter referred to, as contained in bill of exceptions No. 2, is the question asked by the district attorney, above set out, to wit: "Had you received instructions that there was a plan on foot to burglarize that house?" We have held in many cases that where illegitimate argument has been indulged, unless of a serious character, it will not call for a reversal, and in quite a number of cases that it is incumbent on the accused to ask instructions to the jury to disregard such illegitimate argument. This practice of requiring the accused to ask for special instructions has been a gradual growth under the decisions of this court, since Kennedy's Case, 19 Tex. App. 618. The writer is not clear in his mind that this line of decisions is correct. It is the duty of the court, under our statute, to give all the law applicable to the case; and if illegitimate argument is indulged, and the jury are misled, or likely to be misled, against the law and the facts, the court should guard against this error, as well as any other error in which charges are necessary. Be this as it may, there is no question as to the condition of this matter under this bill of exceptions. The state had undertaken to prove testimony which the court ruled out as inadmissible and illegal. Upon the argument of the case, counsel for the state went over this matter, and informed the jury that, but for the interposition of appellant's exception, he could have proven a previous conspiracy to burglarize the house. So far as the bill of exceptions is concerned, it seems that the only attempt to prove any conspiracy or previous knowledge of a conspiracy on the part of the officers was that shown in bill No. 2. The court held that said testimony was illegitimate, and, in our judgment, that ruling was correct. The evidence was ruled out, and yet the district attorney forcibly stated before the jury what this would have been if he had been permitted to prove it, and that it would have shown a conspiracy. It would hardly be questioned that this was very damaging, because it was supplying illegitimate testimony, and evidence that the court had ruled could not go to the jury. Yet in the argument of the prosecution this was made to play the part of testimony against the accused. This was not justifiable under any circumstances. However, the court says that this was in answer to argument of counsel for appellant. We do not agree with this statement. It is true that counsel for appellant asked why the conspiracy, if such existed, was not proved. This he had the right to do. If there was anything indicating a conspiracy, he had the right to ask the state why it did not introduce such testi-

mony. In other words, accused had the right to ask, if there was testimony that could have been before the jury, why it was not placed there. This, of course, means legitimate testimony. It does not mean illegitimate testimony, or such evidence as was not permitted to go before the jury, even as a circumstance for the jury to consider in arriving at a conclusion of guilt. We think the court erred in permitting this line of argument, and further erred in not instructing the jury to disregard it. Conviction ought not to be obtained in this way. In fact, convictions should always be predicated alone upon testimony introduced before the jury, and not upon that excluded.

The state, without objection, introduced evidence to the effect that appellant had been drunk at the theater, and had been put out of the house. The court limited this evidence to the question of impeachment of appellant as a witness. Exception was reserved to this portion of the charge, which we think was well taken. If it be conceded that appellant was drunk in the theater, this is not such an offense as would justify its introduction to attack the credibility of the defendant or the weight of his testimony. Nor do we think that it is likely that it was introduced for that purpose. In fact, the indications are rather that it was introduced for another purpose. It might reflect somewhat upon his general standing, but could not affect his credibility as a witness. Drunkenness is not one of those crimes recognized as involving moral or legal turpitude. The fact of his being drunk at the theater was culled out and charged upon. This was a charge upon the weight of the testimony, and that fact relegated to a position before the jury on the testimony which the law does not recognize. Appellant's testimony had not been attacked, nor his credibility assailed, and yet the court informs the jury that this testimony may or does weaken his testimony before them, and affects his credibility as a witness. The evidence was injurious, and not only so, but the charge is directly violative of the statute which prohibits the court from charging upon the weight of the testimony.

The judgment is reversed and the cause remanded.

HENDERSON, J. I agree to a reversal of the case on the last proposition.

BROOKS, J. (dissenting). I do not agree to the reversal, and believe the judgment should be affirmed. My reasons are as follows:

In the motion for new trial, appellant criticises the sixteenth paragraph of the charge, which reads:

"The statement of the witness Andy P. Evans, introduced by the state, wherein he stated, in substance, that he saw Henry Tally at the theater some time before the bur-

glary, drunk, and that he put him out of the theater because he was drunk, was not admitted before you as original testimony, but only for the purpose of aiding you in determining the weight and credibility of the testimony of the said witness Henry Tally, and you will consider it for no other purpose whatever."

The testimony on which this charge was predicated was admitted without any objection being offered. If objection had been offered, it would have been error for the court to permit the same to be introduced for the purpose of impeachment, since it would be an effort to impeach upon an immaterial issue. Under the authorities of this court, we have never held that drunkenness brought about that degree of moral turpitude which authorized its introduction in evidence to discredit a witness. However, the testimony having been introduced without objection, for the court to limit it to one purpose, whereas the jury might have considered the same for other purposes without said limitation in said charge, I cannot see how appellant can complain thereof. Without said charge it could have been considered for all purposes, but under said charge it could be considered only for the one purpose. To this extent this charge is not injurious to appellant. In other words, appellant would have been injured more if the charge had not been given than by its being given. It is a well-known rule, under article 723, Code Cr. Proc. 1895, that a charge which does not injure defendant will not authorize a reversal.

COLE v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

1. HOMICIDE—EVIDENCE—ADMISSIBILITY.

It is not error on a trial for homicide to admit evidence of blood found on the ground where the homicide occurred and of the wounds inflicted on decedent, where the same is pertinent to issues in the case.

2. SAME—HEARSAY EVIDENCE.

On a trial for homicide, evidence that decedent's wife had stated that decedent had threatened to kill defendant was hearsay, and inadmissible.

3. SAME—EVIDENCE—PREJUDICIAL ERROR.

The admission of evidence, on a trial for homicide, that defendant, a married man, had visited at the house of a woman who had two daughters—one married, living apart from her husband, and one unmarried—and that he had on one occasion gone with the daughters to church, though erroneous, because immaterial, was not prejudicial.

4. SAME—EVIDENCE — DEFENDANT'S CONDITION OF MIND.

Where, on a prosecution of defendant for the murder of his father-in-law, the defense was that decedent was forcing defendant's wife to remain away from him, and the state's evidence tended to show that decedent was kindly disposed toward defendant, and had no desire to separate his wife from him, it was error to exclude evidence offered by defendant, showing what he had told others prior to the homicide about his family troubles and the acts of de-

cedent in endeavoring to keep defendant's wife from living with him, including what passed between defendant and a third person with reference to procuring a writ of habeas corpus to secure the custody of the wife, living in her father's house; such evidence not being self-serving, but showing defendant's condition of mind at the time.

5. SAME—SELF-DEFENSE—EVIDENCE.

A defendant on trial for murder, who relies on self-defense, has the right to show any fact tending to prove the good faith of his belief that he was in danger, and he is entitled to rely on proof of the desperate character of decedent, and on proof of special acts communicated by decedent to him indicating his dangerous character, but cannot show that decedent told him that he had run away from a place where he had had difficulties with the officers without showing what the difficulties were.

6. SAME—EVIDENCE—ADMISSIBILITY.

Where, in a prosecution of defendant for the murder of his father-in-law, the defense was that decedent was forcing defendant's wife to remain away from him, and the state endeavored to show that the relations between defendant and his wife were not friendly, letters written by defendant to the wife prior to the homicide, showing that their domestic relations were pleasant, were admissible in rebuttal, and as showing the state of his mind with reference to his wife and decedent.

7. SAME.

On a trial for homicide it is error to permit the state to show that defendant, while in jail awaiting trial, was studying law, in order to learn to fabricate a defense.

8. SAME.

Where defendant, on trial for homicide, relied on self-defense, the testimony that decedent, a few weeks before the homicide, looked feeble, and had an injury to his side, was inadmissible, in the absence of a showing that defendant had knowledge thereof.

9. WITNESSES—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS.

Code Cr. Proc. 1895, art. 774, providing that neither husband nor wife shall testify as to any communications made by one to the other while married, etc., does not render the wife of defendant on trial for murder incompetent to testify that defendant, immediately after firing the shot which killed decedent, exclaimed in the presence of his wife and her mother, "I told you I would do it," the exclamation not being a confidential communication.

10. SAME.

On a trial of defendant for the murder of his father-in-law it was error to admit in evidence a letter written by decedent to defendant's wife, when living with her husband, about a year before the homicide, containing expressions of decedent's good will to defendant, and by the wife handed to defendant, who read the letter, it being a confidential communication by the wife to defendant.

11. HOMICIDE—HEARSAY EVIDENCE.

On a trial of defendant for the murder of his father-in-law, defended on the theory that decedent was forcing defendant's wife to remain away from him, evidence of what defendant's wife stated defendant had said to her on the occasion of a quarrel was inadmissible.

12. SAME—MANSLAUGHTER — PROVOCATION—SUFFICIENCY.

The provocation that will reduce a homicide to manslaughter must arise at the time of the killing, but the jury may look to all the circumstances in order to make out the provocation at the time.

13. SAME.

A husband has the right to the custody of his wife, and her father has no right to attempt to gain possession of her, and, if he does, the husband has the right to use force necessary to

resist and overcome the attempt; and if he uses only such force, and becomes excited because of the interference, and is rendered incapable of cool reflection, and then kills the father, the offense is only manslaughter.

14. SAME—JUSTIFIABLE HOMICIDE.

If in the struggle which ensues the husband's life is in danger from an attack about to be made on him by her father, he is justified in killing him.

Appeal from District Court, Brown County; John W. Goodwin, Judge.

Sam Cole was convicted of murder in the second degree, and he appeals. Reversed.

I. J. Rice, Wilkerson & Lee, and Woodward, Baker & Woodward, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment fixed at six years' confinement in the penitentiary. This case came before us on a former appeal, and was reversed. See 75 S. W. 527, 8 Tex. Ct. Rep. 141. The facts are fully stated in that opinion, and those presented in this record are substantially the same, and we accordingly refer to that opinion for the facts.

Appellant objected to the evidence offered by the state of blood found on the ground near where the homicide was committed; and, further, that the court improperly admitted evidence of the wounds on deceased's body; that there were two holes; and the evidence of another witness that the wound was a large one—that he could stick his two fingers into the hole. Under the explanation given by the court to the effect that this testimony was pertinent to certain issues in the case, it occurs to us there was no error in its admission.

Nor do we think the exceptions taken by appellant to the remarks of the district attorney or counsel for the state, as presented in bills Nos. 3 and 5, show any error.

Bill No. 8 is an exception taken to the action of the court refusing to permit Mrs. Lewis and Mrs. Thompson to state what Mrs. Hudson (wife of deceased) told them at the house of Mrs. Lewis some time before the homicide, to wit: "That she did not know whether defendant's wife was going to stay with her. That Sam Cole had written for her to come to him, and she cried and wanted to go, and I consented. I must consent to let her go. But Mr. Hudson says before he shall take her he would kill him." The court explains that all of this testimony was admitted except the last portion thereof, to wit, the threat of Mr. Hudson. Of course, it would have been competent for the defendant to have proven by original testimony—by Mrs. Hudson herself—that deceased had threatened appellant; but this could not be proven by hearsay testimony, such as that offered. Possibly, if Mrs. Hudson had been placed on the stand by the state, and she had been asked about this

threat, and had denied it, she might have been contradicted on this subject by the defendant. But such is not the attitude of the question as shown in the bill of exceptions.

We do not think it was relevant to any issue in this case, for the state to have proven, as was done, that Mrs. Lewis had two daughters—one married, and that she had left her husband; and one unmarried—and that defendant visited her house sometimes, and on one occasion went with her daughters to church. While this does not appear to have been material to any issue in the case, we fail to see any special injury on account of its introduction to appellant.

We believe it was competent, as shown by bills 11, 12, and 13, and some other bills, for appellant to have shown what he told others about his family trouble, and the acts of deceased in endeavoring to keep his wife from living with him. We believe it was particularly pertinent in this connection to have shown by the witness Baker what occurred between appellant and himself some time prior to the homicide with reference to getting a writ of habeas corpus in order to secure the custody of his wife, or to take her away from her father's house. All this testimony was objected to on the ground that it was self-serving. It does not occur to us that it was made to serve any purpose appellant then had in view; certainly not with reference to the slaying of deceased and fabrication of testimony against such event. On the contrary, it shows, as we take it, an earnest effort on the part of appellant to get his wife away from the control of her father; and it shows a belief on his part that her father was endeavoring to separate them; and it shows in this respect the condition of appellant's mind at the time, which has an important bearing on the case as made by the state against him. The state's case tends to show that deceased was kindly disposed toward appellant, and he had no desire to separate appellant's wife from him. *Poole v. State* (Tex. Cr. App.) 76 S. W. 565.

Appellant insists that the court committed an error in rejecting evidence on the part of appellant to the effect that some time before the homicide he went to the town of Coleman with his father-in-law, and that his father-in-law's mission was to ascertain if he had been indicted for improperly rendering his taxes; that his father-in-law on their return home stated that the tax assessor had not indicted him; that, if he had indicted him, he would have killed him, or words to that effect. Appellant relied on self-defense, because of an attack on the part of deceased at the time of the homicide, and his apprehension of danger in that connection. The doctrine seems to be that under such circumstances appellant has the right to have in evidence any fact which tends to prove the bona fides of his belief that he was in danger. In that respect he can rely on

proof of the desperate character of his adversary, or on proof of some special act or communication by deceased to him, which indicates his dangerous character. *Childers v. State*, 30 Tex. App. 193, 16 S. W. 903, 28 Am. St. Rep. 899; *Dodson v. State* (Tex. Cr. App.) 70 S. W. 969. However, we do not believe it was competent to show that deceased could have told appellant on one occasion that he had run away from East Texas, and that he had a great deal of trouble with officers, and it cost him a good deal to get out of it, as it is not shown what this trouble was.

It occurs to us that the two letters offered by appellant in evidence, written by him from San Angelo to his wife, who was then at her father's, in April, 1902, were admissible in evidence. On the former appeal we held that the letters of appellant's wife written about the same time to him were admissible as showing their domestic relations; that they were affectionately inclined to each other. This was in rebuttal of the state's case that the relations were not friendly; that appellant was unkind to his wife. Now, it occurs to us that, if his wife's letters were admissible, by a stronger reason his own letters were admissible. They serve to show directly his affection towards his wife, his dissatisfaction at her living with her father, and his desire to have her come and live with him; and in this connection his idea that his father-in-law did not want him about him, and did not want his daughter (appellant's wife) to leave his roof. We note the court explains that these letters offered do not seem to be in response to any letters of his wife to him. It does not occur to us that their admission would depend on their being responsive, unless it could be said that his wife's letters having been introduced, and his in response thereto being a part of the same transaction, should also be admitted on that account. We believe they were admissible on another principle—that they were not self-serving; that they were in rebuttal of the state's case on an important feature thereof, and served to show defendant's state of mind with reference to his wife and his father-in-law at that time.

Nor do we think it was proper, as was done, to permit the state to prove that appellant during his confinement in jail was engaged in studying law. Not that the study of law should at any time be the subject of censure, but the peculiar use which the state made of this fact before the jury was calculated to injure him. It must be admitted that among certain classes there is an antipathy to lawyers. Whether this is well or ill founded is not the question. But this is not the serious matter complained of here. It is that counsel used this testimony to show that appellant was engaged in the study of law in order to enable him to fabricate a defense to the prosecution. The testimony was not relevant or pertinent to any issue

in the case, and the use of it was calculated to injure appellant.

On the former appeal we held that the testimony of certain witness regarding the physical condition of deceased shortly before the homicide was inadmissible. It appears that on this trial some of this same testimony, to wit, that of Mrs. Hanks, was admitted to the effect "that C. O. Hudson looked very feeble. I saw his side. There was a sink in his side. [This was a few weeks before the homicide.]" This testimony was objected to on the ground that said witness was a nonexpert, and her testimony was a mere opinion, except as to the sink in his side; and that the same was made in the absence of appellant, and he was not shown to have had any knowledge thereof. The court, however, explains this by stating "that defendant offered evidence tending to show that deceased was a man of fine physical power, and this evidence was admitted in rebuttal of this; there being evidence that deceased received an injury a few weeks before he was killed, and that defendant knew it." If defendant knew that the sink in deceased's side was caused by the injury said to have been received, and knew of that injury, then the explanation of the court might have rendered the same admissible. We believe that this testimony should have been rejected. Of course, it was competent to prove, in rebuttal of the state's evidence, that the deceased had been sick or had been injured recently, and was still feeble, suffering from such recent illness, if this matter was reasonably within the knowledge of appellant; and it occurs to us that it was, though, as stated, it does not appear that appellant had any knowledge there was a hole or sink in deceased's side. Nor are we informed how this affected deceased.

Appellant strenuously urges that the court committed error in allowing the wife of appellant to testify against him to the effect that appellant immediately on shooting deceased exclaimed, "I told you I would do it," and, further, that immediately thereafter he drove the buggy a little piece, and hurriedly returned, and again made the same declaration. It was shown in this connection that since the homicide appellant's wife had procured a divorce from him; but it is claimed by appellant that, notwithstanding this divorce, the testimony here complained of was a confidential communication between husband and wife, and that under our statute her lips were forever closed against testifying thereto. In support of this proposition we are cited to *Brock v. State*, 71 S. W. 20, 6 Tex. Ct. Rep. 319; *Davis v. State*, 77 S. W. 451, 8 Tex. Ct. Rep. 768. It does not occur to us that either of these cases apply to the question here presented. *Brock's Case* merely held that a wife could not testify against her husband, although no objection was made, and no bill of exceptions taken to her testifying. In *Davis' Case* it appears

there was a confidential communication introduced through the wife after her divorce from her husband. Article 774 (Code Cr. Proc. 1895) provides that neither the husband nor wife shall in any case testify as to communications made by one to the other while married, nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offense, and the declaration or communication made by the wife to the husband or by the husband to the wife goes to extenuate or justify the offense for which either is on trial. So the question here is, was the declaration of appellant a confidential communication between husband and wife? We hold not. It was unquestionably a part of the *res gestæ*. It was an exclamation of the husband immediately on firing the shot which killed deceased, made in the presence of both his wife and his wife's mother. It was the transaction voicing itself in the presence of his wife and another, and not a confidential communication. We held that it was admissible. See *Kenney v. State*, 79 S. W. 817, 9 Tex. Ct. Rep. 888, and authorities there cited, especially *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749.

In this same connection the state was permitted to introduce the contents of a letter written by deceased to his daughter when she was living with her husband at Big Springs, some year or more before the homicide. There are some expressions of good will and esteem on the part of deceased toward his son-in-law, and appellant objected to these expressions of good will on the ground that they were confidential communications, because the letter in question was received by appellant's wife, and the same was handed to appellant, who read it. It occurs to us that this letter was within the rule of confidential communications. But for the fact that appellant was the husband of deceased's daughter, he would not likely have been permitted to read the letter in question. We can see no difference between this and if deceased had told his daughter of his regard and esteem for her husband, and she had been allowed to testify that she had told her husband of these expressions of deceased, during their marriage. We believe that this testimony was inadmissible.

It does not occur to us that the refusal of appellant's wife to answer questions in the divorce proceedings by her husband until she should see her lawyer was admissible in evidence; much less that the certificates of officers to that effect were admissible.

The testimony of Mrs. Hanks to the effect that on one occasion prior to the homicide appellant and his wife were at Mrs. Hanks' house, and that they had a little quarrel at the breakfast table. Afterwards appellant went to the lot, and his wife followed him there, "and afterwards came back

crying as if her heart would break, and said that Sam had told her to 'go to the house, God damn your soul to hell'"; that she did not hear Sam say this, but his wife told her. It seems that this testimony was admitted without objection, or, rather, it was adduced by appellant. It appears in this connection that he had endeavored to elicit what occurred at that time, and Mrs. Hanks refused to answer the direct question, and said she would have to explain it. As soon as this witness made the statement as to what Mrs. Cole told her on her return from the lot, appellant made a motion to strike it out. The state objected on the ground that appellant had drawn it out, and ought not to be allowed to withdraw it. The defendant's attorney abandoned the objection at that time, and let it go; but later in the trial he renewed his motion to expunge said testimony from before the jury, which the court refused to do. In this, we think, the court was in error. *Burke v. State*, 15 Tex. App. 187.

Appellant questions the court's charge on manslaughter, contending that the court should have grouped all the various instances of provocation which he claims were committed against him by the deceased, and have instructed the jury, in effect, that this constituted adequate cause. We do not agree with this contention. The court told the jury that the provocation must arise at the time, but they could look to all the facts and circumstances in evidence in order to intensify and make out the provocation at the time. This, we think, was sufficient.

The court also instructed the jury that, if appellant killed deceased to prevent him taking his wife and child from him, but not in defense of himself from an attack by deceased in connection with his effort to take possession of appellant's wife and child; that appellant's mind was thereby excited, and he was rendered incapable of cool reflection, and on that account he slew deceased—it would be manslaughter. It is contended that this charge unduly limits the right of appellant in regard to maintaining his custody of his wife and child, inasmuch as it instructs the jury that he would have the right to resist such interference or restraint on the part of deceased by such means as reasonably appeared necessary to resist such restraint, but he could use no greater force than reasonably appeared to him necessary to resist such restraint. It must be admitted that this charge is not very clear, and is susceptible of the construction placed on it by appellant. The court should have told the jury in plain language that appellant had the right to the custody of his wife and child, she consenting to go with him, and that deceased had no right to interfere with this custody, and that, if deceased did interfere, or attempted to gain possession of appellant's wife and child, appellant had the right to resist such attempt, and to use all force necessary to overcome such interference and protect his own

possession; and, if he was using only such force as was reasonably necessary for that purpose, and his mind became excited because of the deceased's interference to get possession of his wife and child, and he was rendered incapable of cool reflection, and he slew deceased not in his necessary or apparently necessary self-defense, then his offense would be no more than manslaughter. The same vice above pointed out enters into a subsequent charge, which is complained of. For instance, the court instructs the jury that the resistance which appellant would have the right to make must be proportionate to the injury about to be inflicted. It must only be such as is necessary to repel the aggression, and the use of any greater force would be illegal. We understand the law to be that he cannot only repel the aggression, but he can overcome the aggression by the use of any force that is reasonably necessary for that purpose so as to maintain and secure the custody of his wife and child, and prevent deceased from gaining such custody. However, a subsequent portion of the charge does seem to express the idea intended to be conveyed by what has been said; that is, the court fairly presented this matter to the jury, as follows: "Now if, from the evidence in this case, you believe that defendant, Sam Cole, shot and killed C. C. Hudson, but believe that at the time he did so, if he did so, C. C. Hudson, either alone or acting with his wife, was restraining, or at the time was endeavoring to restrain, Lydia Cole from voluntarily leaving the home of said Hudson with defendant, or if from the evidence you believe that it reasonably appeared to defendant at the time, from the acts and conduct of said C. C. Hudson or said Hudson and his wife, or from the acts and statements, if any, of said Hudson or said Hudson and wife, that said Hudson was restraining, or was at the time attempting to restrain, Lydia Cole from voluntarily leaving the home of said Hudson with defendant, then you are instructed that defendant would have been justified in using a degree of force sufficient to overcome such restraint, but no greater."

We also believe that the charge on self-defense, which follows this, was in accord with the law; that is, we understand said charge to announce a correct principle in this: that appellant had a right to the custody of his wife and child, she consenting to go with him, and that deceased had no right to interfere to prevent her from so doing, and that if he alone, or in conjunction with his wife, did interfere, appellant had the right to resist such interference, and to oppose force with force, in order to protect his custody of his wife and child; and if in the struggle which ensued appellant's life was in danger, or his person in danger of serious bodily injury from an attack made or about to be made on him by deceased, or deceased in conjunction with his wife, then he had

a right to slay deceased. We understand the charge above referred to embraces this principle.

We do not deem it necessary to discuss the charge further, nor any of the requested special instructions.

For the errors pointed out, the judgment is reversed, and the cause remanded.

GARLAS v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

1. SEDUCTION — TRIAL — CHARGE ON THE WEIGHT OF THE EVIDENCE.

In a prosecution for seduction, an instruction that the jury could not find a verdict of guilty upon the testimony of prosecutrix unless the same was corroborated by other testimony, and that it was necessary that the witness be corroborated both as to the promise of marriage and as to the fact of intercourse, was on the weight of the testimony in assuming that prosecutrix had told the truth.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1731, 1772, 1773.]

2. SAME—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to support a conviction for seduction.

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Emmal Garlas was convicted of seduction, and appeals. Reversed.

R. E. Taylor and J. C. Simmons, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of seduction, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The facts, briefly stated, show that appellant was a farmer, living in Tom Green county, near Fred Hoenghaus, the father of prosecutrix, a farmer in the same neighborhood. Appellant at the time was a widower with three small children. Prosecutrix, a girl of 19 years of age, at the time was living in Ballinger, some 15 or 20 miles distant. Appellant, on the day before the alleged seduction, went over to where Hoenghaus was at work. The latter asked him if he did not want to marry. Appellant told him he would if he could find a good woman. Hoenghaus told him he had a mighty good girl, and he need not be ashamed, if he wanted his girl, just to ask for her. Appellant asked where his girl was, and he told him she was in Ballinger at work; that if he wanted to marry his daughter he would have to see his wife about the matter, and if she was willing he could go to Ballinger and bring her home, but he did not have the money to pay her railroad fare back to Ballinger. Defendant told him that was all right, to go and bring her home, and that he would furnish the money to pay her fare back, and that if she suited him he would marry her. On the next morning Hoenghaus and his

wife went in the wagon to Ballinger for their daughter Lissie. They told her of appellant's proposition, and she agreed to it, and accompanied them home from Ballinger on the same day. When they arrived at home, appellant was either there, or came shortly afterwards. After supper, Lissie and defendant went in the room, adjoining Honeghaus and wife, and Honeghaus relates that he heard the cot creak in the room after they had been in there a little time; and that directly the parties left the room, and went outdoors, and did not return until about 2 o'clock in the morning. Prosecutrix here takes up the story, and she relates that before supper, while appellant and she were in the room together, appellant said to her, "I wish you would be my wife," and she replied, "I wish the same." When they went into supper he said to prosecutrix, "Now we are engaged." After supper they went out into the yard, and talked a while where her father and mother were. They then went back into the house and sat down on a lounge. Appellant asked her to take a walk with him. They got up, went out of the house about 10 o'clock, walked about 300 yards from the house, and sat down on a rock. After they had been sitting there a short time, defendant asked her if she would give him some. She told him she did not want to. They then got up and walked about 30 or 40 yards further, and he again asked her and begged her for about five minutes to let him have some. She then submitted. They then waited about five minutes, and he did it to her again. Twice was all that he did it to her that night. Defendant said nothing to her about wanting to marry her that night, except as above related. She further states that she would not have permitted him to do it to her if he had not told her at the house that he wished she would be his wife, and she had agreed to be his wife; that defendant is the father of the baby she then held in her arms; that, after they got up from where they were having intercourse and started back to the house, defendant gave her 50 cents to pay her railroad fare back to Ballinger. On cross-examination she stated that she had only known defendant two or three hours before she had intercourse with him; never met him before that evening; that, when he first proposed to copulate with her, she told him she would rather wait until they were married, but he insisted on having intercourse with her then; that they were engaged, and that was all he said to her before she submitted to him. This is substantially the state's case. Appellant relates the matter about as follows: He tells how prosecutrix's parents sent to Ballinger for her about as the state's witnesses testified. He says, "I did not tell Mr. Honeghaus I would give her 50 cents to pay her railroad fare back to Ballinger if she did not suit me;" that on the evening of the day they brought her back from Ballinger

he went over and met the girl. They stood in the door awhile, and then went in to supper. After supper, they went back in the house and sat down on a little single lounge. Soon after they sat down, he said, "I guess you know what I came for?" and she said, "Yes, my father told me." "I then put my arm around her, and began to feel her; felt all over her, and she did not raise any objections." He then asked her if she would take a walk with him, and she said she would. They walked away from the house about 250 yards, and sat down. He asked her if she would give him some. She at first did not say whether she would or not. He then proposed to walk a little farther, and he asked her again if she would copulate with him. She said yes; that he might if he would do it to her standing up; that he tried it, and told her she had been tampered with; that they could not do anything that way. She then told him that Fritz Schlakey was the only fellow that had ever done it to her, but that he had. He then told her to lie down, and she pulled off her drawers and lay down, and he copulated with her. He had no trouble in penetrating her; she did not complain of it hurting her. Saw her unbutton her drawers on the side, and took them off. "We waited awhile and I done it to her again, and then we went on back to the house, and I went home." That he did not promise her at any time that he would marry her. All that he said to her about marrying was, "I guess you know what I came for?" and she said that her father had told her. That it was a fact that he intended to marry her, and would have done so had she not told him that Fritz Schlakey had done it to her, and if he had not heard so much about her character. This is a sufficient statement of the case in order to discuss the assignments.

Appellant excepted to the charge given by the court on accomplice testimony, on the ground that the same is upon the weight of the testimony. Said charge is as follows: "You are further instructed that you cannot find a verdict of guilty in this case upon the testimony of Lissie Honeghaus unless the same is corroborated by other testimony tending to connect defendant with the offense committed, and it is necessary that said witness be corroborated both as to the promise of marriage and as to the fact (if such is a fact) that defendant had carnal intercourse with said witness." This charge is on the weight of the testimony in assuming that prosecutrix had told the truth, and that all that was required was that she should be corroborated. This charge has often been condemned. *Hart v. State*, 82 S. W. 652, 11 Tex. Ct. Rep. 190; *Crenshaw v. State*, 85 S. W. 1147, 12 Tex. Ct. Rep. 758. and authorities there cited.

The appellant's counsel in their brief discuss a number of assignments of error, both as to the admission and rejection of testimony, and as to the failure of the court to

give certain special requested instructions. Some of these assignments are well taken, but, in the view we take of this case, it is not necessary here to discuss them, as we believe the case should be reversed because of the insufficiency of the testimony to sustain the verdict. The facts here, to our minds, do not show that prosecutrix was a chaste woman. It is an essential requisite that she be such, as only a chaste woman can be led from the path of virtue. The promise of marriage, if it occurred at all, appears to have been but a slight inducement to the act of copulation. Prosecutrix does not say that she loved appellant, or that she reposed confidence in him on account of the affection existing between them, but almost as soon as the proposition is made to have carnal intercourse she consented. There is no testimony whatever on her part that she experienced any pain or suffered any injury, such as a maiden would from an act of copulation. On the contrary, she makes no complaint whatever. Appellant himself, while admitting the two acts of copulation, states that he had no difficulty in penetrating her; that he knew she had been penetrated by some man before. If the testimony here presented would authorize a conviction, it occurs to us that any person with a formal promise to marry could be convicted for copulating with a mere bawd. The facts here come within the rule laid down by this court in *Spenrath v. State* (Tex. Cr. App.) 48 S. W. 192; *Peter Gorzell v. State*, 63 S. W. 126, 2 Tex. Ct. Rep. 670.

Because, in our opinion, the charge of the court was incorrect, and the evidence does not sustain the verdict, the judgment is reversed, and the cause remanded.

Ex parte ELMORE et al.

(Court of Criminal Appeals of Texas. June 14, 1905.)

CRIMINAL LAW—APPEAL—DISMISSAL.

Where, after an appeal from a judgment in habeas corpus admitting appellant to bail, he gives bond and is liberated, the appeal will be dismissed.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 112.]

Appeal from District Court, Orange County; W. P. Nicks, Judge.

Habeas corpus on the relation of John Elmore and others, and, from a judgment admitting them to bail, Elmore and Tom Delano appeal. Appeal of Tom Delano dismissed, and judgment as to Elmore affirmed.

Adams & Huggins, Brockman & Kahn, and E. T. Branch, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Tom Delano, Bill Delano, and John Elmore were charged by indictment with the murder of William J. Watson. Tom Delano and John Elmore sued out a writ of habeas corpus in the court be-

low, and upon the hearing they were admitted to bail in the sum of \$1,500 each, and from this judgment this appeal is prosecuted. The Assistant Attorney General has filed a motion to dismiss the appeal of Tom Delano on the ground that since notice of appeal has been given he has made bond in the sum of \$1,500, and is not now in custody. This is made to appear by proper affidavit of the deputy sheriff. Accordingly the appeal of Tom Delano is dismissed. We have examined the record carefully with reference to John Elmore, and see no reason to disturb the finding of the court in fixing the amount of the bail at \$1,500, and the judgment of the lower court as to John Elmore is accordingly affirmed.

Ex parte BILLUPS.

(Court of Criminal Appeals of Texas. June 23, 1905.)

HABEAS CORPUS—DISMISSAL OF PETITION—REMEDY.

Where, on motion, a petition for habeas corpus is dismissed, it is equivalent to a refusal to grant the writ, and the remedy is not appeal, but an application to another judge.

Appeal from Bosque County Court; P. S. Hale, Judge.

Habeas corpus, on the relation of Clark Billups. From a judgment dismissing the petition, relator appeals. Appeal dismissed.

Dillard & Word, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The Assistant Attorney General has filed the following motion, to wit: "Now comes the state and moves the court to dismiss this appeal, for the reason that this court has no jurisdiction of this case, because the county judge dismissed the petition for the writ of habeas corpus, and refused to try the same upon its merits. His dismissal of the petition is equivalent to a refusal to grant the writ. Ex parte Martinez (Tex. Cr. App.) 81 S. W. 728."

The motion is well taken, and the appeal is accordingly dismissed.

CRADDICK v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

1. INTOXICATING LIQUOR — ILLEGAL SALE—EVIDENCE—HEARSAY.

In a prosecution for violation of the local option law, testimony that prosecutor drew 50 cents of his wages, and went away and returned with a bottle of whisky, and stated to witness, in answer to a question, that he got the whisky from defendant, who was not present at the time of the conversation, was hearsay, and inadmissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 950, 955.]

2. TRIAL—LEADING QUESTIONS.

Leading questions should not be permitted on the ground that the witness is not thor-

oughly familiar with the English language where it appears from his manner of testifying that he understands English sufficiently to answer questions intelligently.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 847.]

8. EVIDENCE—JUDICIAL KNOWLEDGE.

The court has no judicial knowledge as to when local option laws are put into operation.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 706-708.]

Appeal from Matagorda County Court; Jesse Matthews, Judge.

Jack Craddick was convicted of violating the local option law, and appeals. Reversed.

W. S. Holman, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, C. J. Conviction of violating the local option law. The state, over the objections of appellant, was permitted to prove by the witness Steger that prosecutor drew 50 cents of his wages, went away, and subsequently returned, showing said witness a bottle of whisky. Witness asked prosecutor where he got the whisky, who replied that he got it from appellant. This was objected to, among other reasons, because it was hearsay. Error is conceded by the state unless appellant was present and heard the conversation. We think the bill is sufficient to show that he was not present.

There are several bills reserved to the manner of interrogating the prosecuting witness by the county attorney. Certainly his manner of asking leading questions was not proper, and upon another trial the court should require that the witness be examined in a proper and legitimate way. The court undertakes to explain this by stating that the witness was a Swede, and was not thoroughly familiar with the English language. Without going into a detailed statement of this matter, we think that the witness having lived in America for 26 years, as the witness stated, and his manner of testifying, show that he sufficiently understands the English language to answer questions intelligently.

Another question presented should be noticed. The record fails to show that the local option law alleged to have been violated had been put into operation in said county. There is a loose expression or so by the witnesses that certain things occurred before local option took effect, and some statements in regard to closing saloons, but the fact that an election was held in that county is not shown, nor the result of such election, nor when it went into operation. These local option laws are special laws, and must be put into operation in the territory in the manner specified by the statute, and the court does not judicially know when these laws are put into operation. These are matters of fact to be proved.

The judgment is reversed, and the cause remanded.

SEXTON v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1905.)

1. CRIMINAL LAW—WITNESSES—SHOWING INTEREST OF WITNESS—COMPETENCY OF EVIDENCE.

On a prosecution for disposing of property fraudulently after obtaining it under a contract of hiring, a witness for defendant was permitted to testify on cross-examination that she had lived with defendant in adultery for several years, and that she had visited him in jail. *Held*, that the testimony was admissible to show the bias, friendship, and close relationship of witness to defendant.

2. SAME—CROSS-EXAMINATION—BUSINESS OF WITNESS.

In a criminal case there was no error in requiring a witness for defendant to detail all the occupations and businesses which he had been following for several years.

3. SAME — CROSS-EXAMINATION OF DEFENDANT—CONVICTION OF CRIME.

It was not error to permit accused to be asked on cross-examination if he had not been indicted for adultery two or three times in the county of the trial, to which he answered in the affirmative.

4. SAME—EVIDENCE — ADMISSIBILITY—TESTING MEMORY OF WITNESS.

On a prosecution for disposing of mules, with intent to defraud, after obtaining them under a contract of hiring, it was not error to permit a witness for the state to testify that defendant was drinking on the night he was at witness' house, the evidence being admitted to identify the particular time, and to show why witness remembered that on that occasion nothing was said about selling the mules, and defendant having already testified that he got whisky that day and got drunk.

5. SAME—NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

On a prosecution for disposing of mules, with intent to defraud, after having obtained them under a contract of hiring, a new trial was moved for on the ground of newly discovered testimony of a witness, who would testify that prosecutor said in his presence that he had sold defendant a mule, defendant at the time being present. *Held*, that the evidence was not newly discovered, because, if defendant was present, he had previously known of the statement.

6. SAME—CUMULATIVE EVIDENCE.

On a prosecution for disposing of a mule, with intent to defraud, after obtaining it under a contract of hiring, the testimony being conflicting as to whether prosecutor had sold the mule, and authorizing a finding either way, testimony of a witness that he had heard prosecutor say that he had sold a mule to defendant was no ground for a new trial for newly discovered evidence.

Appeal from District Court, Comanche County; N. R. Lindsey, Judge.

Thurman Sexton was convicted of disposing of mules with intent to defraud, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for disposing of two mules, with the intent to defraud, after he had obtained them under a contract of hiring. Nellie Carnes

was a witness for appellant. On cross-examination she was permitted to testify "that she had lived in adultery with defendant for five or six years." Exception was reserved. The bill is signed with the qualification "that the testimony was offered to show the relation witness bore to defendant, to show her motive and bias in his favor." While the same witness was further testifying on cross-examination, she was asked if she did not know defendant had a living wife and child while she was living with him in adultery. She answered, "Yes; I did not exactly know it, but I heard it and believed it." Exception was reserved to this testimony. The bill is explained by the court: "That the evidence was offered and admitted for the purpose of showing the close and intimate relationship between defendant and witness, and to show her natural bias as a witness, and her close attachment to and affection for defendant, as touching her credibility as a witness." The same witness was also asked if she had not visited defendant in jail. This was admitted, as stated by the court, to show her motive and bias in the case, her attachment for the defendant, and as touching her credibility as a witness. We are of opinion that, as explained by the court, this testimony was all admissible; and we think it was relevant for the purpose of showing her bias and friendship and close relationship to appellant, and her interest in testifying in his behalf, and consequently as touching her credibility.

The district attorney asked Chapman (witness for defendant) what he had been doing three or four years prior to this time. The bill recites: "That the witness was required to detail on the witness stand all the occupations and businesses which he had been following for the past three or four years. All of which was admitted, over the objection of defendant on the ground that it was immaterial, and not pertinent to any issue, and the answers were calculated to prejudice the minds of the jury." As the matter is presented in this bill, there is no error. What occupations or business callings the witness pursued is not stated, nor is it perceived from the recitation how it could have in any way injured him.

Appellant testified in his own behalf, and on cross-examination was asked if he had not been indicted for adultery two or three times in the county of the trial, to which he answered, "Yes." Exception was reserved to this on several grounds, stated in the bill. This was admitted, as stated by the court in his qualification to the bill, "because it showed the offense involved moral turpitude, and for the purpose only of affecting his credibility as a witness, and was so limited in the charge." This character of evidence has been held admissible.

Green was permitted to testify for the state that defendant was drinking the night he was at his (witness') house. Objection was urged because it was immaterial, did not sustain any allegation in the indictment, and was asked for the purpose of prejudicing the mind of the jury against appellant. The court says: "This evidence was admitted to identify the particular time that witness referred to, and to show why he remembered that on that occasion nothing was said about selling the mules to Sexton by Carnes; defendant having already testified that he had gotten whisky in Dublin on the day he went to Green's, and that he had gotten drunk, and spent Lee's money. Witness identifying that occasion as being the time defendant was at his house, and that on that occasion he did not hear anything said about the mule trade." With this explanation, this testimony, we think, was admissible.

Attached to the motion for new trial is the affidavit of Cal Williams, which appellant alleges is newly discovered testimony. That affidavit is as follows: "That on or about the month of last June, 1904, Dow Carnes said in my presence that he had sold to Thurman Sexton one mule, and the time Dow Carnes told me he had sold one mule to Thurman Sexton he (Thurman Sexton) was then present, working two old mules. At that time Dave Carnes was trying to trade a horse to Sexton for one of his mules. Myself and Dave Carnes came to where Dow Carnes was at work, and Dave Carnes told Dow Carnes that he could not trade the horse to Thurman Sexton for the mule." This is not newly discovered evidence, because it shows appellant was present at the time the alleged owner should have made the remarks imputed to him; that is, that he sold the mule to Thurman Sexton. If Sexton was present, and heard this, it was not newly discovered. But, even if it was newly discovered, we do not believe it is of sufficient importance to require a reversal. The question as to whether or not Dow Carnes had sold the mules to Sexton, or had hired them to him, constituted the main issues upon which the whole case was fought, and was thoroughly ventilated on both sides, there being quite a mass of testimony introduced on both sides. This was a case in which the jury could take either side, and the testimony would justify them in coming to the conclusion that the mules were hired to appellant, and subsequently converted by him; or that he bought them from Dow Carnes, as he claims he did. The testimony is in direct contradiction. The jury have settled the issue adversely to appellant, and there is sufficient evidence to justify them in finding the verdict they did.

Finding no error in the record, the judgment is affirmed.

LOCKHART v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

CRIMINAL LAW—APPEAL—SUFFICIENCY OF EVIDENCE—DEFECTIVE RECORD.

The sufficiency of the evidence to support a conviction for crime cannot be reviewed on appeal where the record contains no statement of facts.

Appeal from District Court, Ft. Bend County; Wells Thompson, Judge.

Gary Lockhart was convicted of burglary, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction of burglary. Without a statement of facts or bill of exceptions this record is before us. The main contention in the motion for new trial is that the charge in regard to an account given of the possession of property recently after it was stolen, is not a sufficient statement of the law. The charge is in exact accord with that indorsed by this court in *Wheeler v. State*, 84 Tex. Cr. R. 350, 30 S. W. 913. Of course, those questions suggested for revision in regard to the sufficiency of the evidence cannot be reviewed for want of a statement of facts.

The judgment is affirmed.

POOL v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1905.)

1. EVIDENCE—HEARSAY.

In a prosecution for horse theft, testimony that stolen property had recently been taken from witness' house by search warrant, and that witness told the officers that defendant brought the property to witness' house, was hearsay, and prejudicial to defendant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 950, 952, 973.]

2. SAME—OPINION EVIDENCE—PERSONAL IDENTITY.

In a prosecution for horse theft, testimony that witness had seen a horse and man near the place where he had seen the horse in question a few hours previous; that it was dark, and he could not distinguish the man or the horse, but that, from their size, shape, and build, he believed that it was the same horse which he had previously seen, and that the man was defendant—was incompetent.

3. LACERTY—EVIDENCE—EXPLANATION OF POSSESSION.

In a prosecution for theft, testimony as to an explanation made by defendant to the deputy sheriff as to how he came into possession of the property was incompetent, where defendant had evaded arrest and had been in jail, charged with the theft, for some days prior to making the statement in question, without having made any statement to the officers.

4. BILL OF EXCEPTIONS—QUALIFYING EXPLANATION.

Where the district judge appends a qualifying explanation to a bill of exceptions, appellant cannot accept the bill with the explanation, and then procure the appellate court to strike out the explanation.

5. CRIMINAL LAW—ARGUMENT OF COUNSEL—CONFINEMENT TO TESTIMONY.

Argument of counsel in a criminal case should be kept strictly within the testimony adduced upon the trial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1663, 1669.]

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Will Pool, alias Wash George, was convicted of horse theft, and appeals. Reversed.

J. T. Spencer and E. P. Anderson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of a horse, and his punishment fixed at confinement in the penitentiary for a term of five years.

Appellant's first bill of exceptions shows that the state's witness S. H. Hall was asked by state's counsel if stolen property had not recently been taken from his house by search warrant. He answered "Yes." Then the attorney for the state asked him if it was not a fact that he told the officers that Pool (defendant) brought said stolen property to his house, and witness answered "Yes." And further if he had not been subpoenaed as a witness in other cases against defendant, and he answered he had only been subpoenaed as a witness against defendant in the examining trial in this case. This testimony was purely hearsay, and prejudicial to the rights of the defendant. If the witness knew that appellant brought certain property for which he was being then prosecuted to witness' house, he could testify to this fact, but what he told the officers about the same was hearsay and criminative evidence of the most damaging character against defendant. The court erred in admitting this evidence.

Appellant's fourth bill shows that the state's witness Ray Thomas testified that he went up the pike in Oak Cliff, Tex., to a point a few hundred yards distant from where they had seen the horse and buggy a few hours previous thereto, and saw standing in the pike an animal, and a man standing in front and near the animal; that he did not go nearer the animal than 15 or 20 yards, when they turned their buggy around and went back home; that the moon was not shining, and the night was dark; that they could not tell the color of the animal, nor whether a mare or horse, nor whether it had a rope or anything on it; that he could not tell what kind or color of hat or clothing the man had on, nor whether he was a white man or a negro; and that he had seen thousands of men the size of defendant. After witness had stated that he could not swear that the man he saw was defendant, state's counsel asked witness whom he thought it was; and he stated that "from the size, shape, build, and height, I believe it was the same mare I had seen that evening, and that the man was the defendant." The evidence shows that

appellant stole the animal in Milford, Ellis county, and carried it to the city of Dallas, and that defendant was seen in Dallas with the property, and afterwards arrested. This testimony was hearsay. The witness could describe the man and animal he saw as best he could, but could not give his opinion or belief that the man was appellant. The same character of testimony was introduced through the witness Gilliam. In each instance the court committed error in admitting the testimony.

The seventh bill shows appellant asked the witness Kennedy on cross-examination: "If defendant made any statement to him with reference to the property alleged to have been stolen, as he was bringing defendant from Dallas to Ellis county?" The court sustained the exception to this question. The witness would have stated "that defendant said he had bought the buggy from a party over in the city of Dallas, and that he did not know anything about the mare." Appellant insists that the court ought to have permitted this testimony, because it was a reasonable explanation by defendant as to how he came in possession of the buggy, and that it was the first opportunity defendant had had to make an explanation. This explanation is appended to this bill: "It was shown in evidence that defendant was arrested for the theft of the mare, and placed in the Dallas county jail by the sheriff of Dallas county, and remained in said jail four or five days before he was brought to Ellis county by Deputy Sheriff Kennedy, and made no statement to the sheriff of Dallas county in regard to his possession of said mare or buggy. It is also shown that defendant evaded arrest by officers of Dallas county at the house of S. H. Hall, when he knew his rights to said horse and buggy were challenged, and did not go out to meet said officers, and state to them the character of his possession." Under the court's explanation, this testimony was clearly self-serving and inadmissible, under the rule authorizing the introduction of explanation made of recently stolen property. Following the above qualification, this statement is appended to the bill: "As Judge Dillard was not sworn as a witness in this case, we respectfully ask that it be stricken out—all except his approval and signature. J. T. Spencer. E. P. Anderson." It is a well-known rule that it is the duty and province of the district judge, as in this instance, to place such explanation to the bill of exceptions as the facts and testimony warrant. However, this must be done with the consent of appellant's counsel. If counsel do not consent that this be done, then the judge can prepare a bill stating the facts, leaving the appellant the right to prove up his bill, as he understands it, by bystanders. However, here it appears appellant's counsel took the bill with the judge's explanation, and ask this court to strike out

the explanation. There is no law authorizing this to be done.

Appellant also complains of the argument of counsel. We do not deem it necessary to review the bills presenting this matter, but restate, as we have many times done, that the argument should be strictly within the testimony adduced upon the trial.

For the errors discussed, the judgment is reversed, and the cause remanded.

SAVAGE v. STATE.

(Court of Criminal Appeals of Texas, June 14, 1905. On Rehearing, June 23, 1905.)

1. INTOXICATING LIQUORS—SALE—QUESTION FOR JURY.

On a prosecution for the sale of intoxicating liquor on Sunday, in violation of Pen. Code 1895, art. 199, evidence examined, and held that whether the sale of a lunch in connection with a purported gift of the liquor was in fact a sale of the liquor was a question for the jury.

2. SAME—SALES ON SUNDAY BY RESTAURANT KEEPERS.

Pen. Code 1895, art. 200, authorizing restaurants to keep open and do business on Sunday, does not exempt restaurant keepers from the penalty provided by article 199 for the sale of intoxicating liquors on Sunday.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 179.]

Brooks, J., dissenting.

Appeal from Navarro County Court; A. B. Graham, Judge.

J. C. Savage was convicted of selling intoxicating liquors on Sunday, and he appeals. Affirmed.

W. W. Ballew and J. W. Scott, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of selling beer on Sunday, under article 199, Pen. Code. Appellant, in his able brief, presents a number of interesting questions, but, in the view we take of the case, it is only necessary to consider one; that is, did appellant make a sale of the beer? The proof shows that he was a restaurant keeper in the city of Corsicana; and that he also had a saloon, both situated in the same building, and run in the same hall or room. The state's witnesses show that appellant, as a restaurant keeper, at the time and for some time before the alleged offense, was selling lunches, and serving beer therewith. The proof showed that the lunches furnished were worth 15 cents each, and with each lunch he served a pint bottle of beer, and the ordinary price of this pint bottle was 15 cents. We quote from some of the witnesses' testimony on this subject as follows: R. J. Roark, the party to whom it is alleged the sale was made, says: "I got two lunches on that day [Sunday], and two bottles of beer. I paid

fifteen cents each time for the lunch." Chapman (an employé of appellant) waited on him. "When I ordered my lunch, he asked me what I wanted to drink. I said, 'A bottle of beer.' I got the bottle of beer. I paid Savage, as I remember. George Chapman, who was waiting on the lunch counter, made me a ticket for the lunch—fifteen cents—and I went and paid it to Savage, I think, at the desk. I got the bottle of beer with the lunch; paid for what I got at the same time." This witness, on cross-examination, says: "I did not buy any beer. I bought the lunch. I ordered the lunch from the bill of fare. The beer was free with the lunch. The bill of fare said, 'Anything to drink free—coffee, milk, tea, beer, wine, etc.' When I ordered my lunch, George asked me what I wanted to drink, and I told him, 'Beer.' I got what I ordered for my lunch, and paid for it. The price of the lunch was given on the bill of fare. I have eaten in the restaurant during the week, and got a bottle of beer, if I wanted it, with my lunch, just as I did on Sunday." On re-examination he says: "I got a bottle of beer with each lunch. I drank the beer at the time I ate my lunch. Drank it with my lunch." Frank Holloway testified that he, with his brother and Jim Garrison, went into the restaurant together and got a lunch. "When we got our lunch the waiter asked us what we would have to drink, and we each ordered a bottle of beer. I got a cheese sandwich, radishes, pickles, and a bottle of beer. I saw Garrison, who paid for all, give Chapman fifty cents, and think he got back five cents. I think beer costs fifteen cents a bottle, two for a quarter, three for forty cents." On cross-examination he stated: "When they ordered their lunches they asked what they would have to drink, and each took a bottle of beer. The beer was free with the lunch. The beer was given to us by Chapman. The beer was served at the same time, but after we ordered the lunch." Elmore Holloway testified that he got a lunch at appellant's restaurant about May 29th; that he got a bottle of beer—ham, eggs, vegetables, and a bottle of beer; that he paid for the lunches—paid thirty cents for the two; that he was there on the 22d of May [Sunday], and got a lunch and bottle of beer, and paid 15 cents for it to appellant; that he paid for the lunch, and did not pay for anything else. Homer Baker, another witness, testified that he went into the restaurant on the 29th of May, which was Sunday, with Frank Boyle; that he got a lunch—ham, eggs, and onions—got as big a lunch for fifteen cents as he could anywhere; that a bottle of beer was served with each lunch; that when he went into the restaurant he ordered a lunch from the bill of fare, which was 15 cents, and the waiter then asked him what he would have to drink, and he ordered beer. Frank Boyle testified to the same effect—that he went there on one Sunday, got six lunches, and with each lunch he got a bottle of beer free; that

he bought the lunch, and the beer was free with the lunch; that he ordered from the bill of fare. The testimony of the other witnesses for the state is to the same effect. However, Richard Brown states: He got a lunch for five cents. He paid for the lunch, and got the beer. Chapman waited on him, and, when he was through, gave him the ticket, and witness put the money on the counter, where Savage was. That he saw on the bill of fare that beer was free with each order. That he wanted the beer, and ordered the lunch, and paid five cents for it. That he was there twice on the same day. That he paid five cents for the lunch each time, and got a glass of beer. That he ordered the lunch, and paid for the lunch. Savage would not sell the beer. He sold the lunch, and gave him the beer. It is not necessary to quote from other witnesses. All are to the same effect—that they bought a lunch, and appellant gave them the beer. There is no controversy in the proof that the lunch was worth the amount charged for it. The accusation in the information is that appellant was a dealer in merchandise, and, as such, sold to prosecutor, Roark, a bottle of beer on Sunday. The proof on the part of the state, to say nothing as to that offered by defendant, was, as heretofore shown, not a sale, but a gift. *Keller v. State*, 23 Tex. App. 239, 4 S. W. 886; *Holley v. State*, 14 Tex. App. 505; *Siegel v. Peo*, 106 Ill. 94. Under the information and under the law, appellant cannot be held, under this evidence, for a sale of the beer. We do not deem it necessary to discuss the exception contained in article 200, Pen. Code, with reference to restaurants, authorizing them to keep open and do business on Sundays; nor the question which appellant has presented, and cited authorities in support thereof—that such restaurant keeper, even if it be conceded that he sold the beer, had a right to dispense it as a part of the meal on Sunday, as on any other day. In the view we have heretofore taken of the case, the state failed to prove a sale.

The judgment is reversed, and the cause remanded.

BROOKS, J. (dissenting). The substance of the evidence shows that appellant owned a saloon and restaurant, both situated in the same building—the saloon counter on one side, and the restaurant counter on the other. At the back end of the lunch counter there was an ice box, in which beer was stored. Appellant had a bill of fare, and at the bottom was the following: "Anything to drink free—coffee, milk, tea, beer, wine, etc." The lunches served, the witnesses swear, were worth the price asked for each lunch. Some of the witnesses bought a 15-cent lunch, and some a 5-cent lunch, and with each lunch procured a bottle or glass of beer. The prosecution was for selling the beer on Sunday. On the Sunday alleged in the indictment, various parties went into the saloon or restau-

rant and made purchases, and with each lunch, as stated, a bottle or glass of beer was furnished free. The case was tried before a jury, and the court, among others, gave this instruction: That, if the beer was sold, to find defendant guilty. "On the other hand, you are charged that it is not an offense against the laws of the state of Texas for any person to give away beer to any one on Sunday; and if you believe from the evidence that defendant gave one bottle of beer to R. J. Roark on May 29, 1904, you will find the defendant not guilty." The majority of the court hold that the facts do not show a sale, but a gift. The mere fact that the witnesses swear and the bill of fare states that the beer was free would not render it any the less a part of the consideration for the purchase of the lunch, and hence I cannot agree that the facts stated do not constitute a sale. If the jury had believed appellant's testimony, under the charge above quoted, they could have found defendant not guilty. But for this court to say that the facts do not show a sale places it within the power of a restaurant keeper to sell whisky or beer under the guise of running a restaurant. In contemplation of law, the moment defendant offers on his bill of fare to give beer with each lunch purchased, this forms part and parcel of the consideration for the purchase of the lunch, and, being a part of the same, constitutes, in law, a sale of the beer. To say otherwise would be to hold that a party could make a direct sale, and call it a gift, and yet could not be prosecuted at all for the sale, simply because he called the sale a gift. If the opinion of the majority is the law, appellant can run a restaurant, and sell whisky or beer, under the facts stated, or give it away, as he contends, in a local option district, without prescription, since the majority hold that the facts above stated do not constitute a sale, but a gift. It is no offense, under the decisions of this court, to give away whisky or beer in a local option or nonlocal option district. Again, if appellant is not guilty of the sale of beer under the facts above, then he could continue running his restaurant under such circumstances without procuring any license to sell intoxicants, and, under the guise of a restaurant license, sell whisky, and the state would be impotent to enforce the license law upon him for retailing spirituous, vinous, and malt liquors. Since the court holds that the facts do not constitute a sale, and there is no license required for giving away intoxicants, the facts showing a gift, he would not be required to get a license to sell intoxicants. So, in the view I take of the facts, the decision abrogates not only the Sunday law, but the saloon license law and the local option law.

Article 9 of the Penal Code of 1895 provides: "Every law upon the subject of crime which may be enacted, shall be construed according to the plain import of the language

in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects. And no person shall be punished for an offense which is not made penal by the plain import of the words of a law." Article 200, Pen. Code 1895, exempts, among others, "keepers of drug-stores, hotels, boarding houses, restaurants, livery-stables, bath houses, ice dealers or telegraph or telephone offices," from the provisions of article 199, which inhibits the sale of commodities on Sunday. A restaurant is defined by Webster to be an eating house, and such it has always been construed under the law (Words and Phrases, vol. 7, p. 6181), and not where intoxicants, under a subterfuge, are dispensed under the guise of running a restaurant. A restaurant keeper, in contemplation of law, is not a saloon keeper. Nor is it in contemplation of law that a restaurant keeper shall sell beer and whisky. If so, there would evidently have been a tax placed upon running a restaurant, similar to the tax imposed by the Legislature upon a saloon. It follows that, when the Legislature authorized a restaurant keeper to sell food on Sunday, it was not within contemplation of the Legislature that such restaurant keeper should sell beer or whisky. The mere fact that he says he gave the beer away, when he offered the beer free to his customers if they bought a lunch, does not render it any the less a sale, because the beer becomes a part of the consideration for the purchase. Being such, it is a sale, and is directly inhibited by the Sunday law. No such construction has ever been placed upon this article before. No saloon has ever attempted, in Texas, so far as the writer knows, to evade the provisions of the Sunday law in the manner indicated by this record. I take it that the facts show a gross subterfuge; that the jury have properly found appellant guilty, and the facts, instead of presenting the issue of a gift, almost, if not quite, exclude such an issue as a question of fact. The jury were more than warranted in finding the verdict they did. However, the learned trial court did submit the question to the jury as to whether or not it was a sale, and the jury have decided it was. I do not think this court is warranted in holding that the above-stated facts do not constitute a sale. If the facts do not make out a sale, then all that is necessary, in order to dispense intoxicants on Sunday, would be for the restaurant keeper to sell certain viands, and then give, as he would term it, whisky or beer free. This character of transaction, under the opinion of the majority, would exempt him from a prosecution for the sale of the whisky; would exempt him from paying the license tax for the sale of intoxicants; would exempt him from a violation of the local option law; and all that he would be required to do would be to pay an occupation tax to run a restaurant, and then

he is exempt from any species of prosecution, by the subterfuge he has resorted to. Therefore I cannot agree to a reversal of this case, because it destroys each and every one of the statutes above referred to; and, so believing, I file this, my dissenting opinion.

On Rehearing.

HENDERSON, J. This case was reversed at a former day of this term (Judge BROOKS dissenting), and now comes before us on motion by the state for rehearing.

We notice in the dissenting opinion it is stated that the court charged in favor of appellant on the subject of gift, and told the jury that it is not an offense against the laws of the state of Texas for any person to give away beer to any one on Sunday, and, if they believed defendant gave the bottle of beer in question to R. J. Roark, to find him not guilty. Among other things, in the dissent, it is stated, if the jury had believed appellant's testimony, under the charge above quoted, they would have found defendant not guilty. It occurs to us that this concession is too broad, and in effect disposes of the state's case, as we can see no difference between appellant's testimony and that for the state. With one accord, all of the witnesses, both for the state and the defendant, appear to agree that the lunch in question was paid for—in fact, all lunches were paid for—and that the beer or other drink was furnished free.

We further note that the dissenting opinion brings the local option law into the case, and refers to the effect that the holding of the court will have in local option territory. We presume that no one knows better than our Brother BROOKS that on this record the sale of intoxicating liquor could not be maintained, inasmuch as nowhere is it shown that the beer alleged to have been sold was an intoxicant, and this court holds such proof must be made before the conviction can be had. *Enno Cassens v. State* (decided at present term) 88 S. W. 229, and cases there cited.

But to get away from local option, and to recur to the case, which is a prosecution brought under article 199, Pen. Code 1895, in which appellant is charged, as a dealer in goods, wares, and merchandise, with the sale of a bottle of beer to one Roark on a certain Sunday. Let us review the question, and see whether or not, on principle, and under the authorities, the evidence shows a sale of the beer in question. The Assistant Attorney General, lawyerlike, has postulated a case to us. Assume, he says, that H. & K., clothiers of the city of Austin, advertise that with every \$25 suit of clothes sold they will give a hat worth \$5. Seeing the advertisement, A. purchases of said firm a suit of clothes, for which he pays \$25. They do not deliver the hat, which he demands as a part of the consideration. Can he recover the hat or its value under such circumstances? He insists that the hat or its value can be recovered as

a part of the consideration for which the \$25 was paid. He not only makes this illustration, which is an exceedingly apt one, but he cites us to cases supporting his contention—among others, *Com. v. Thayer*, 8 Metc. (Mass.) 525; *State v. Simons*, 17 N. H. 83. In the first case there was a complaint against defendant for selling to Albert Hersey a glass of spirituous liquor on the 19th of February, 1844. It appeared that defendant was a keeper of a public house, in which was a bar and a barkeeper. State's witness Hersey testified that he never bought any spirituous liquor from defendant; that he bought a cake of him for six cents, and at the same time a decanter of spirituous liquor was set upon the bar, from which he helped himself; that he never bought a similar cake for less than six cents; that he did not know the value of the same. The court below instructed the jury that, if they believed that any part of the six cents was given by the witness and received by defendant to pay for the liquor, it constituted a sale, and the defendant was guilty. The jury returned a verdict finding defendant guilty, and he alleged exceptions to said instruction. The court, in passing on the question here presented, say: "The question whether the defendant sold the liquor, as alleged in the complaint, was submitted to the jury under proper instructions. The government alleged the sale to Albert Hersey of one glass of spirituous liquor, and was bound to establish the fact. To constitute such sale, there must be the assent of the two parties. There must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction with the view of evading the penalty of the law can avail them, if in truth such sale is found to have taken place. The ruling of the presiding judge as to the payment of any part of the money, and the receipt thereof, in payment for the liquor, constituting a sale, was correct." In the *Simons* Case, supra, "the indictment alleged that defendant, not being a licensed taverner or retailer, sold two glasses of spirituous liquors to one George Stevens on the 1st day of January, 1845. It appeared that about the 1st of January, 1845, said Stevens and one James Collins came into defendant's cellar, in Manchester, where he kept fruits and confectionery, and Stevens called for some spirit, but the defendant replied that he did not sell spirit, and refused to sell them any; that Stevens then bought a pound of walnuts, and paid him sixteen cents for them, and the defendant said he had opened a new cellar, and wished Stevens to look about it, and said further that he could afford to treat, and then took Stevens and Collins into a back cellar, under the tenement which he occupied, and asked them what they would take; naming over the kinds of liquor contained in

the casks which stood in the cellar. Stevens answered, 'Rum,' and he let each of them have a glass of it. Both cellars were under the same building, but separated by a reading room. * * * Defendant's counsel requested the court to instruct the jury that 'there was a sale of the nuts, and the purchase money paid, and a delivery; that the sale was therefore complete, and that no article delivered afterwards could be included in that sale; and also that the spirituous liquor alleged in the indictment to have been sold was a gift.' But the court declined, and instructed the jury that if they found that the sale of the nuts was a bona fide sale of the nuts only, and the delivery of the spirit was in no way consequent upon the sale of the nuts, but was a gift, the defendant was not chargeable, but if they found that the sale of the nuts was made with the intention of including also the price of the liquor, and that the price of the liquor was taken and included in the money paid ostensibly for the nuts, it was the same as if the liquor had been sold directly, and without any such subterfuge; that in the latter case it would make no difference whether the spirit was delivered before or after the payment of the money." The court say upon this branch of the case: "As to the evidence of the sale of the liquors, it was a question of fact for the jury, and the evidence was properly submitted to them. They were instructed to inquire whether the language used by the parties to the alleged sale, and their accompanying acts, were used by them to effect a sale of the liquor under such disguises as would render the detection of the crime difficult, or whether, on the other hand, it was the purpose of the defendant to bestow, and of the other parties to receive, the liquors as a gift. Offenses against the law are commonly committed under the protection of some false pretenses designed to avert or baffle the vigilance of the police, and other evidence than the plain admissions of the parties charged is commonly found necessary for their conviction. The question was, did the prisoner sell the liquor as charged? and not, did he use language while he sold it that admitted the criminal nature of the act? The jury were authorized to find a sale, from the call which was made for the article, and its subsequent delivery, and to attach such weight to the words of the prisoner while committing the act as they thought the words deserved." These cases are very much in point, and, had they been called to our attention originally, we undoubtedly would have held that the transaction narrated by the witnesses in dispensing the beer amounted to a sale, and under proper instructions the jury would be authorized to so find. We do not think the instructions given by the court below on this point are full enough, or in accord with the authorities before referred to. However, no exception was reserved to the charge on that

account. In accord with the principle announced in the cases cited, we hold that it was competent for the jury to find that the beer constituted a part of the consideration for the 15 cents given for the lunch. Ordinarily it would appear that a party might sell one article, and make a gift of another. The testimony of the witnesses both for the state and defendant was to this effect; that is, that the beer was not sold; the lunch was the article bought, and the beer was a mere gift. It occurred to us in the original opinion that this character of testimony settled the case in favor of defendant, inasmuch as no effort was made on the part of the state to show that the lunch was of less value than was charged. In fact, the lunch was shown to be of equivalent value. It occurred to us that, under similar circumstances, if the saloon keeper set up free lunch to the customer, should he come in and purchase a glass of beer, and, at his option, partake of the free lunch, this would not amount to a sale of the lunch, but merely a gift; and such seems to be the common understanding. However, as stated, the authorities cited establish the contrary doctrine, and leave the sale or gift a matter to be determined by the jury under proper instructions; and, on a more deliberate investigation of this question, in connection with the authorities furnished by the Assistant Attorney General, we believe that this is the correct doctrine.

There is another question urged by appellant, why the case should be reversed, which was not noticed in the original opinion, because it was not necessary, as the case was reversed before we reached the second question; that is, whether a restaurant keeper or a hotel keeper is authorized, in this state, to furnish malt liquors and wines with meals to his guests. On this branch of the case, appellant refers us to the following authorities: *Atkinson v. Sellers*, 94 E. O. L. 447; *Fisher v. Howard*, 10 Cox, O. B. 144; *Taylor v. Humphrey*, 100 E. O. L. 429; *In re Breslin*, 45 Hun (N. Y.) 210; *Com. v. Molter*, 142 Mass. 583, 8 N. E. 428. The first three cases are from English courts, and were decided under statutes of Queen Victoria authorizing hotel keepers to furnish liquors to guests. And so the New York case and the Massachusetts case were both under statutes to the same effect. In this state we have no such statute. The mere fact that the hotel keeper or restaurant keeper can pursue their occupations on Sunday would not authorize them to violate any other prohibitory law. In the absence of some statutory enactment in this state authorizing hotel keepers or restaurant keepers to furnish liquors with meals on Sunday, we hold that it is not lawful for them to do so.

There are some other questions raised in appellant's assignments of error, but we do not deem them of sufficient importance to review. The motion for rehearing is granted, and the judgment is affirmed.

BROOKS, J. I did not agree to the original opinion, as shown by my dissent; nor do I agree to anything in the opinion on rehearing, except the conclusion reached. In illustrating the effect of the original opinion upon the local option law, I stated that, if appellant could give away whisky or lager beer under the subterfuge resorted to in this case, then it would destroy the local option law. At least, this is the substance of what I stated. Predicated upon that statement in my dissent, I find the opinion of the majority on motion for rehearing contains this very sage suggestion: "We presume that no one knows better than our Brother BROOKS that on this record the sale of intoxicating liquor could not be maintained, inasmuch as nowhere is it shown that the beer alleged to have been sold was an intoxicant, and this court holds such proof must be made before the conviction can be had." It is quite charitable for the majority to presume that I know this decision, since I participated in its rendition. I did not apprehend any one would be so obtuse as to place such construction upon my dissent as to infer that I did not know it. I ascertain that the state would have had no trouble, if the issue had been joined, to have proven that the beer sold was lager beer, and an intoxicant.

The opinion on rehearing seems to be predicated in part upon a postulate of the Assistant Attorney General, made "lawyerlike," which the writer hereof understands to be an axiomatic statement of the law of sales laid down in all the books. But the majority opinion, in addition to the Assistant Attorney General's postulate, cites two decisions of courts of last resort rendered about the year 1845, and then states "that these cases are very much in point, and, had they been called to our attention originally, we undoubtedly would have held that the transaction narrated by the witnesses in dispensing the beer amounted to a sale, and under proper instructions the jury would be authorized to so find." It is certainly fortunate for the laws of this state that the Assistant Attorney General found these two antique decisions, which very aptly announce a principle of the law of sales that is as old as the law itself. But since the majority seem to base their conclusion upon the postulate of the Assistant Attorney General and the two decisions cited, I have no cause to disagree with the conclusion they reach.

I also note that the majority hold that a restaurant or hotel keeper is not authorized, in this state, to furnish malt liquor or wines with meals to his guests. I concur in this conclusion. As stated in my dissenting opinion, a restaurant is what the word imports—a place where viands are sold, and not where intoxicants are dispensed. This being true, it follows, as night the day, that the restaurant keeper cannot sell whisky or beer—being intoxicants—unless he has a license to do so, nor can he sell it on Sunday. This has

been the law ever since this was a government, and, so understanding it, I concur in the conclusion reached.

TREVINIO v. STATE.*

(Court of Criminal Appeals of Texas. June 7, 1905.)

1. PERJURY — FALSE TESTIMONY—DUPLICITY.

In a prosecution for carrying a pistol, testimony by defendant that he did not have in his possession or on his person any pistol at the time alleged in the indictment is a sufficient basis for an indictment for perjury; the use of the disjunctive not rendering the statement duplicitous.

2. CRIMINAL LAW—TRIAL—ORDER OF PROOF.

Under the provision of the Code of Criminal Procedure that the court shall hear evidence before the argument is closed, if that course is necessary to the due administration of justice, the hearing of testimony after the state's counsel has finished his opening argument, and while defendant's counsel is addressing the jury, is a matter within the discretion of the court.

3. SAME — EVIDENCE — INTERPRETATION OF OATH.

Where, in a prosecution for perjury, it was alleged that a justice of the peace administered the oath to defendant at the time the perjury was alleged to have been committed, it was proper to prove by an interpreter who acted at that time that he had interpreted the oath to defendant.

4. CARRYING WEAPONS—CHARGE—JURISDICTION OF JUSTICE.

Where, in a prosecution before a justice of the peace, defendant is charged merely with the offense of carrying a pistol, the fact that he carried it at a public assembly did not alter the nature of the charge, so as to deprive the justice of jurisdiction.

Appeal from District Court, Kerr County; Ed. Haltom, Special Judge.

Candelario Trevinio was convicted of perjury, and appeals. Affirmed.

Lee Wallace and H. C. Geddie, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of perjury, and his punishment fixed at two years' confinement in the penitentiary.

Appellant filed a motion to quash the indictment, in which he alleges that the same is vague, indefinite, and uncertain, and charges no offense against the law. The perjury was predicated upon the following fact: Appellant was tried in the justice court of precinct No. 1 of Kerr county, Tex., for carrying on and about his person a certain pistol. On the trial appellant swore he did not have in his possession or on his person a pistol on the 12th day of March, 1905, the date alleged in the complaint. Upon this last statement the perjury was based. There is no duplicity in the statement. If appellant swore he did not have in his possession a pistol, or on his person a pistol, either would be a material inquiry on the trial of appel-

*Rehearing denied June 23, 1905.

lant for carrying a pistol, and the mere fact that the same is stated with the disjunctive "or" would not make the statement duplicitous. Of course, an indictment must allege that the accused carry on and about his person a pistol. If the allegation was that he carried the pistol on or about his person there would be no positive declaration as to which he did. But the statement here sworn to by appellant is not of that character required in the indictment, but the mere fact that he stated the same in the disjunctive would not make it any the less the subject of perjury.

Bill No. 2 complains that the court permitted the state to introduce evidence after the state's counsel had finished his opening argument, and while appellant's counsel was addressing the jury. The Code of Criminal Procedure provides that the court shall hear evidence before the argument is closed, if, in the opinion of the court, it is necessary to the due administration of justice. Being a matter within the sound discretion of the court, we see no reason to disturb the verdict on this line. Bill No. 3 complains that the state placed Manuel Rubio upon the stand, and asked him if he, as an interpreter in justice court, swore defendant upon the trial of the cause wherein defendant was charged with carrying a pistol, to which appellant objected because the same sought to elicit an answer from the witness that was immaterial to any issue in the case, and because the indictment does not show or charge that Manuel Rubio was the officer who swore defendant upon the trial, wherein it was charged he committed the offense herein charged, and does not show and charge that said witness had any authority to swear defendant upon said occasion. The bill is approved with this explanation: "That said Rubio testified he was sworn as interpreter for the justice court, and that he interpreted the oath to defendant upon said trial." This clearly was permissible. The indictment having charged that the justice of the peace swore appellant, it was proper to put the interpreter upon the stand to prove by him that he interpreted the said oath to the said witness.

The sixth ground of his motion for new trial complains that the evidence failed to show that appellant was in possession of the pistol in Kerr county. The statement of facts shows that venue was proven.

Appellant also complains in his motion for new trial that the justice court had no jurisdiction to try him for the offense of carrying the pistol, because the evidence shows that the carrying was at a public assembly where 30 or 40 people had assembled for public amusement, and that the justice court could not try appellant for carrying a pistol under such circumstances. The facts show here that appellant was not on trial for such an offense, but merely for carrying on and about his person a pistol. The fact

that he may have carried the pistol in a public assembly would not change the allegations of the indictment or preclude a prosecution.

The evidence being sufficient, the judgment is affirmed.

FRANKLIN v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

1. MURDER—EVIDENCE—RES GESTÆ.

In a prosecution for murder, evidence that, while deceased was lying on the ground where he fell when he was shot, he told witness that defendant shot him, was admissible as *res gestæ*.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 819, 820.]

2. WITNESSES — IMPEACHMENT — CORROBORATION.

Where defendant introduced evidence that a witness for the state had made statements out of court inconsistent with his testimony, it was competent for the state to show that the witness had made, out of court, statements similar to those at trial.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1260.]

3. SAME — IMPEACHMENT OF PARTY'S OWN WITNESS.

Where a defendant is not surprised with the testimony of his own witness, he cannot impeach him.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1094-1100.]

4. SAME—COMPETENCY OF IMPEACHING EVIDENCE.

In a prosecution for murder, defendant could not introduce the evidence given by one of his own witnesses upon the examining trial for the alleged purpose of impeaching the witness, where the evidence at the examining trial was substantially the same as the verbal evidence of the witness.

5. CRIMINAL LAW—LIMITATION OF IMPEACHING EVIDENCE.

Where evidence is introduced for the purpose of contradicting a witness, it is proper to instruct that it can be considered only for that purpose, and not as original evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1875.]

6. SAME—EVIDENCE OF BAD CHARACTER.

In a prosecution for crime, in which one of defendant's witnesses testified on cross-examination that he had been indicted for murder and tried for hog theft, it was not error to fail to limit the effect of this evidence by instruction.

7. HOMICIDE — EVIDENCE — SELF-DEFENSE — MANSLAUGHTER.

In a prosecution for homicide, evidence held not sufficient to require submission to the jury of the issues of manslaughter and self-defense.

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Sonnie Franklin was convicted of murder, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for murder in the second degree, the penalty

being fixed at confinement in the penitentiary for a term of 30 years.

The first bill of exceptions recites that the state offered to prove the following facts, to wit: "That and by Thad Hill that he had a conversation with deceased as to who shot him, and he stated that it was the defendant; and this statement was made to him by deceased while lying on the ground, and immediately after he was shot, and while lying on the ground where he fell when he was shot. Witness knelt down over the deceased immediately after he was shot, and deceased told him that defendant shot him." Exception reserved is as follows: "That the parties having had such conversation relative to other matters, the statement as to who shot him was inadmissible as a part of the *res gestæ*, and the court overruled the objection." This bill is approved in this condition. It will be observed that the bill does not make it apparent that this testimony went to the jury. It was offered, and exception overruled. *Burke v. State*, 25 Tex. App. 172, 7 S. W. 873. If it was definitely stated that the evidence went to the jury, it was clearly *res gestæ*.

Several bills of exception were reserved to the court permitting the state to sustain the witness Steve Hill, by showing he had made statements out of court similar to those testified during the trial. This action of the court was correct, in view of the fact that appellant introduced witnesses who stated appellant made other statements contradictory of those testified by him on the trial. Such corroborating statements introduced come strictly within the rule permitting the sustaining of a witness in that character of impeachment or attempted impeachment. Witnesses were introduced who testified that Steve Hill stated he did not know who shot deceased. Some of these statements were made on the following day. One of the officers and other witnesses were introduced, who stated that appellant made statements to them, corresponding with his testimony, to the effect that he saw appellant shoot deceased. Impeachment of these witnesses by appellant made this sustaining testimony admissible.

Bill No. 6 recites that John Hawkins, who had been summoned by the state, was introduced by defendant, and, in answer to question by defendant's counsel, stated that he did not see Steve Hill on the night of the shooting and at the place of the shooting with the pistol, and did not hear Steve Hill make any reference as to who shot his brother. Then defendant offered in evidence the written testimony of said John Hawkins, taken at the examining trial in the justice court, to contradict and impeach said witness; to which counsel for the state objected, for the reason that defendant could not impeach his own witness, and the court sustained the objection. This bill is qualified by the court as follows: "This was an

extremely ignorant negro. Defendant's attorney knew what he would swear before he put him on the stand. He was not surprised. He testified exactly what the defendant's attorney expected him to do. The written evidence was substantially the same as his verbal evidence before the jury. I don't know why the defendant's attorney put him on the stand, except to try to get an opportunity to read his written evidence to the jury." When defendant placed this witness on the stand he was bound by the evidence of the witness, unless the witness had testified something unexpected by him or injurious to him. If defendant knew his testimony would be as he testified on the stand, he could not make this excuse for introducing his testimony on the examining trial. This evidence certainly did not injure appellant, and if he had been injured, and knew, at the time he placed witness upon the stand, the injurious character of the testimony, he could not make this an excuse or reason for introducing the evidence of the witness upon another trial. The bill does not recite what the written evidence on the examining trial was; it simply states that it was offered for the purpose of impeaching the witness. The court, qualifying the bill, said it was substantially the same as his verbal evidence before the jury. So from either standpoint the appellant's exception is not well taken.

In charging the jury, the court instructed them that the evidence of Morris, which tended to contradict the witness Ware, could only be considered by them in passing on the credibility of the witness Ware and in weighing her evidence, and could be considered for no other purpose; that the evidence of Morris was not original evidence against defendant. This was correct. The evidence was introduced for the purpose of contradiction, and, in view of the facts introduced, this charge was not only proper, but, we think, necessary.

Fort was introduced as a witness for the defendant, who on cross-examination stated that he had been indicted for murder, and tried also for hog theft. Exception is reserved in the motion for new trial to the failure of the court to limit this in his charge. As Fort was only a witness, the fact that he had been indicted for these offenses could be used for no other purpose than impeachment. There was no probability that the jury might give this testimony the effect of enhancing the punishment of defendant, or of convicting him. It does not come within the rule requiring the court to limit impeaching testimony where the statements are from the accused and might be used for an injurious purpose, to wit, a conviction on the extraneous matter or statements, or bring about an enhancement of the punishment.

It is also insisted that the court erred in not submitting manslaughter and self-de-

fense. Neither of these issues is suggested by the evidence. The state's testimony shows that there had been a fist fight—perhaps a bludgeon was used in the fight—between Steve Hill and another party, with which the defendant had no connection; that deceased was a brother of Steve Hill; that this difficulty seemed to have terminated on the gallery of a house where a dance had been held. About the time these parties were separated, or perhaps, from another standpoint of the testimony, while they were engaged in the difficulty, defendant, standing just outside the door, fired two shots, one of which proved fatal to deceased. There had been some previous ill will on the part of appellant towards the deceased in regard to a woman present that night, and one of the witnesses testified to an occurrence on the night of the homicide that intensified the ill will of appellant towards deceased. This is practically the state's case. The theory of the defense seems to have been that he did not fire the shot, and offered no testimony explanatory of the shots. In fact, the record from his standpoint indicates a theory to the effect that he did not fire the shots, and relied mainly upon the contradiction and impeachment of the state's witness Steve Hill, as well as the dying declaration of the deceased, and other matters tending to corroborate these statements. If the state's theory was right, the offense is not less than murder in the second degree. No evidence was introduced showing any provocation, adequate cause, or sudden passion. Deceased was shot in the back of the head, while standing on the gallery.

We are of opinion that appellant has had a fair trial, and that there are no errors in the record which require a reversal. The judgment is therefore affirmed.

PORTER v. STATE.

(Court of Criminal Appeals of Texas, May 24, 1905. On Rehearing, June 21, 1905.)

FALSE SWEARING—DEFENSES—IGNORANCE OF CONTENTS OF FALSE STATEMENT—INSTRUCTIONS.

In a prosecution for false swearing in obtaining a marriage license it was alleged that defendant executed an affidavit in which he swore that an order for a license, purporting to be signed by the girl's father, was in fact signed by him, and in defendant's presence. There was evidence that when the license was issued and the affidavit made defendant did not say that the order was signed by the father, or that defendant saw him sign it, but that the officer who issued the license merely asked defendant if he saw the order signed, and the latter said he did. The order was in fact signed in defendant's presence by the prospective bride. Held, that defendant was entitled to an instruction specifically calling attention to the claim that defendant did not know that the affidavit contained anything in reference to the order, and charging that, if the jury found that defendant did not know the contents of the statement, or had a reasonable doubt as to this, they should acquit; and an instruction

that if the defendant did not know that the alleged false statements in the affidavit were contained therein, or if the jury had a reasonable doubt on this point, they should acquit, was not sufficient.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

N. W. Porter was convicted of false swearing, and appeals. Reversed.

Nugent & Carter, for appellant. F. H. Chandler, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a charge of false swearing for obtaining a marriage license. The document described in the indictment upon which the marriage license is issued, and to which appellant is said to have sworn, is in the following language:

"The State of Texas, County of Erath. I, N. W. Porter, do solemnly swear that I am twenty one years old, and that Miss Nora Richardson is not eighteen years of age, and that there are no legal objections to our marriage, and that the order hereto attached, signed A. J. Richardson, is genuine & written & signed by him in my presence & that he is the father of Miss Nora Richardson.

"[Signed]

N. W. Porter.

"Subscribed and sworn to before me this 22 day of Aug. 1904. Jno. W. Frey, Clerk County Court Erath County, by Geo. P. Knight, Deputy."

The order referred to in said affidavit as genuine was attached to said affidavit, and is as follows: "Mr. Clerk. Please issue license for our daughter aged sixteen. A. J. Richardson."

The first bill of exceptions was reserved to the failure of the court to give the following instruction: "You are instructed, gentlemen of the jury, that the defendant pleads an affirmative defense—that is, a mistake of fact; that at the time he made the affidavit in question, if any, he did not know it contained the matters and things in reference to the order, if any, and did not know said affidavit, if any, contained any statements in reference to objections to the contemplated marriage, if any. Therefore, if you find and believe from the evidence, if any, that defendant did make said alleged false statement, and the same was false, but if you further find that defendant did not know the contents of said statement, if any, or if you have a reasonable doubt as to whether or not defendant knew the contents of the same, you will acquit the defendant." We believe this charge should have been given. The facts in this connection show by the witness Will Porter that he was present when defendant secured the marriage license about which the affidavit was made; that Mr. Knight had, in substance, the following conversation with defendant: "Knight asked defendant what he wanted. Defendant replied he wanted a marriage license. Knight then asked him, 'Who for?' He said, 'My-

self and Nora Richardson.' He then asked him how old he and the girl were. Defendant told him he was 21 and that she was not 18. Defendant then handed the clerk the order. The clerk then asked if he would swear that he was 21 and the girl was under 18, and defendant replied that he would. The clerk then asked if he saw the order signed, and he said he did. The clerk did not have defendant hold up his hands and swear him at all. The clerk did not ask defendant if old man Richardson signed it, or that he saw Mr. Richardson sign it." Defendant testified to the same state of facts. Both defendant and witness Will Porter further testified that the affidavit was not read over to defendant at the time he signed it. This charge is largely hinged upon the language used by the parties during the conversation just preceding the issuance of the license and the alleged execution or signing of the affidavit. If the conversation occurred as detailed by defendant and his witness Porter, and such was his understanding at the time, it suggested a mistake of fact so far as the defendant was concerned. The affidavit has him in the attitude of swearing that he saw A. J. Richardson sign the order, when, under these facts, the clerk asked no such question, and it was not a matter of investigation at the time of the issuance of the license, under appellant's theory. Everything detailed by the two witnesses could have been literally true in regard to his seeing the order signed, and he could have sworn to it without being guilty of false swearing. This was a very important issue under his theory. He in fact did see Miss Nora Richardson sign the order, and, if that was the extent of the information which he conveyed to the clerk in answer to inquiries, and the clerk inserted the contents of the affidavit, and appellant was not aware of it, and signed it without its being read over to him, he was entitled to this charge, and under that phase of the case would have been entitled to an acquittal.

The judgment is reversed, and the cause remanded.

On Rehearing.

The state has filed a motion for rehearing upon the ground that this court erred in holding that the trial court erred in failing to give special instruction No. 1 asked by appellant. Only the criticised portion of the requested instruction is copied in the motion for new trial: "If you further find that the defendant did not know the contents of said statement, if any, or if you have a reasonable doubt as to whether defendant knew the contents of the same, you should acquit the defendant." The state contends that that portion of the requested instruction is practically the same as that given by the court, which was in the following language: "If the defendant did not know that the alleged false statements in said affidavit were con-

tained in the same, or if you have a reasonable doubt as to whether he did, you will acquit him." The contention is that the two charges are practically similar. This did not state the question contended for by appellant. The requested instruction is given in full in the original opinion, and we deem it unnecessary here to repeat it. An inspection of the charge, compared with that given by the court, in our judgment manifests the fact that the two charges are not the same. The court's charge was very general in regard to a mistake of fact, inadvertence, etc., if that is the ground upon which it is sought to place it. As before stated, the court's charge is very general, indeed, on the question of mistake and want of knowledge as to the contents of the affidavit alleged to be false. The requested instruction, in our judgment, pertinently called the matter to the attention of the court, and, even if that charge was not sufficient, it did call the attention of the court to the weakness of the general charge, and exception was reserved both to the general charge and the refusal to give the special instruction. The original opinion collates the facts in regard to this matter. Defendant testified, as did Will Porter, that the affidavit was not read over to defendant at the time he signed it. The issue was sharply drawn at this point between the state's testimony and that for the defendant, there being the clerk as a witness for the state and the defendant and Will Porter for the defense on this crucial issue in the case. The affidavit, as before stated, had appellant in the attitude of swearing that A. J. Richardson signed this order, when, under the testimony of defendant and Will Porter, the clerk asked no such question, and that it was not a matter of investigation at the time the license was obtained. We repeat that everything said by witness could have been true in regard to appellant seeing the order signed, and he could have sworn to that without being guilty of false swearing, for he did see Miss Richardson sign it. The order, as set out in the affidavit and made a part of the original opinion, has appellant in the attitude of swearing that he saw A. J. Richardson sign it. If appellant swore that he saw the order signed, and did not say that he saw A. J. Richardson sign it, and was not aware of the fact that the affidavit contained the statement that he saw A. J. Richardson sign it, unquestionably the jury should have had this matter pointed out to them clearly in the charge, because, under that condition of things, he would not be guilty of having sworn that he saw A. J. Richardson sign it; and that seems to be the crucial test of the case, and was evidently so regarded in the trial. The general charge of mistake of fact under this character of testimony is not sufficient, especially when exception was reserved to the charge given and the refusal to give special instructions. Certainly, a party on trial for felony has the

right to have the law applied fairly, correctly, and pertinently to the issues made by the testimony. Because a portion of the special charge corresponded in part with the charge given by the court would not deprive defendant of the right to have that portion of the charge which brought pertinently to the jury the issue involved. Whether or not this special charge was sufficiently accurate, it does point out the matter to the attention of the court, and the law should have been applied to that condition of fact.

We see no reason for changing our views upon the question, and the motion for rehearing is accordingly overruled.

HOLLAND v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

APPEAL BONDS—SUFFICIENCY OF.

Under Act 27th Leg. (Gen. Laws 1901, p. 291, c. 124), providing that an appeal bond "shall recite that in said cause defendant was convicted on a complaint or information charging him with a misdemeanor, and has appealed to the county court," a bond reciting that defendant "has given notice of appeal to the county court" is sufficient.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2711, 2712.]

Appeal from Falls County Court; D. H. Boyles, Judge.

Wash Holland was convicted of a misdemeanor. From a judgment of the county court dismissing his appeal, he appeals. Reversed.

Bounds & Lewellyn and Rice & Bartlett, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This case arose in the justice court. After conviction, appeal was taken to the county court, where, upon motion of the county attorney, the appeal was dismissed on the ground that the appeal bond was not sufficient. This is the question suggested for revision.

A sufficient extract from that bond may be necessary, to wit: "Whereas, on the 3d day of February, 1905, in the above styled and numbered cause, pending in said justice court of precinct No. 1 of Falls county, Texas, the said defendant, Wash Holland, was convicted on a complaint charging him with a misdemeanor, and a judgment was at said time rendered and entered against said defendant, Wash Holland, that the state of Texas have and recover of said defendant the sum of two hundred dollars fine, and all costs of said prosecution, and from which judgment said defendant has given notice of appeal to the county court of said Falls county, Texas." The motion to dismiss is based upon the alleged insufficiency of this expression, occurring in the above quotation: "has given notice of appeal to the coun-

ty court." By the act of the Twenty-Seventh Legislature (Gen. Laws 1901, p. 291, c. 124) it is provided, among other things, as to appeal bonds, "It shall recite that in said cause defendant was convicted on a complaint or information charging him with a misdemeanor, and has appealed to the county court, and shall be conditioned," etc. The difference between the stipulation in the bond given and that set out in the act of the Legislature is found in the fact that the law states "that defendant has appealed to the county court," whereas the bond recites "that said defendant has given notice of appeal to the county court." The contention here is that this is a sufficient compliance with the law. This is correct. There can be no difference substantially between the two expressions when used in the appeal bond, the bond being the requisite in order to consummate appeals. The county court erred in dismissing the appeal.

The judgment is reversed, and the cause remanded for trial de novo in the county court.

ELLINGTON v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

1. CRIMINAL LAW—TRIAL—APPEAL—HARMLESS ERROR.

In a criminal prosecution the exclusion of evidence of a conversation cannot be regarded as injurious to defendant, where it is not shown what the conversation was.

2. SAME—SELF-SERVING DECLARATIONS.

Where, in a prosecution for aggravated assault, the state introduced evidence that shortly after the offense defendant stated to prosecutor in the presence of others that he had shot at prosecutor and nearly hit him, and intended to kill him, evidence that shortly after the shooting defendant went to the house of a certain person and gave an account of the difficulty, in which he stated that the prosecutor shot at him first, related to a self-serving declaration, and was not admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 928-933; vol. 50, Cent. Dig. Witnesses, §§ 1287, 1288.]

3. SAME—VERDICT.

A verdict, stating that the jury "assesses his punishment to fine of \$300," is not vitiated by the use of the word "to" instead of "at a."

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2090, 2107.]

Appeal from District Court, Bell County; Jno. M. Furman, Judge.

Frank Ellington was convicted of aggravated assault, and appeals. Affirmed.

McMahon & Curtis, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$300, and he appeals.

The facts of this case, for the state, briefly stated, show that prosecutor, Frank Bauman, and appellant, Frank Ellington, were

neighbors, both engaged in farming, their farms situated on Nolan's creek, in Bell county. Prosecutor on the day in question was hunting, and passed up the creek through the farm of Adams, which adjoined appellant's farm. There he witnessed a wordy altercation between Mrs. Adams and appellant, in which he interfered, and told appellant, substantially, that he knew if Mr. Adams was at home he would not talk that way to Mrs. Adams. Appellant then turned his attention to him. Prosecutor started towards him, and, as he was coming, appellant drew his hammer first, and then his six-shooter. Prosecutor then ran to a tree, and, when he got about two steps from the tree, appellant shot at him first, and then he shot at prosecutor.

Appellant reserved two bills of exceptions to the introduction of evidence offered by him. The first bill shows that while defendant was on the stand and testified in his own behalf, counsel for defendant asked him to state the conversation had between him and Mrs. Adams and Frank Bauman just immediately before and at the time of the shooting, for the purpose of explaining just what was said between Mrs. Adams, defendant, and Bauman, and for the purpose of showing that appellant had not provoked any trouble with Bauman, and had not cursed and abused Mrs. Adams for dogging his cows. The county attorney objected to this testimony—that is, the portion showing a conversation between Mrs. Adams and defendant, which did not relate or refer to Bauman—and the court sustained the objection to this portion of the conversation. Appellant insists that this part of the conversation should be admitted, as it was a part of the *res gestæ* of the difficulty. He says that if defendant had been permitted to testify in regard to what had been said between himself and Mrs. Adams at the time of the shooting he would have shown that the shooting was not provoked by anything said or done by him immediately before or at the time of the shooting, but, on the contrary, would have shown the relations between Mrs. Adams and Frank Bauman were of the very friendliest and intimate nature, and that Bauman shot at defendant without any provocation, and without defendant knowing that he was present, because of the threatening words and conduct of Mrs. Adams towards defendant. If appellant had stated that portion of the conversation which he desired to prove, so that we might determine its relevancy and meaning, it would seem, then, we could consider the question presented in the light of the facts. As it is, he merely states that he wanted to prove the balance of the conversation, and he says that this would have shown that the shot was not provoked by anything said or done by him immediately before or at the time of the shooting, etc. This is a mere conclusion of appellant, and

not the statement of facts he was not permitted to prove. Unquestionably, if the state proved a part of the conversation, appellant was entitled to the balance referring to the same subject. So far as we are advised, there is no statement of what this conversation was about. If appellant had set it out in the bill, it might appear to be very material. On the other hand, it might appear to be absolutely frivolous and of no import. In the absence of a statement as to what this conversation was, we are not able to say that its exclusion operated to the injury of appellant.

In the next bill, appellant shows the testimony of Frank Bauman and the prosecutor and Mrs. Adams as to how the difficulty began, and who fired the first shot. The bill shows farther that appellant denied that he fired the first shot, and, as stated in his testimony, the first shot was fired by prosecutor. Then it is shown that G. B. Adams testified that on the same evening, a little while after the difficulty, he came home from Belton, and Frank Bauman, the prosecutor, was at his house, and defendant came up to the house, some 30 or 40 minutes after the shooting, and then made the statement to Frank Bauman: "I shot at you down at the creek, and you shot back at me, and I am going to kill you. I knocked the bark off the tree next to your head. You are one Dutchman, I am going to kill. You shot back at me." That this was repeated a number of times by appellant, who continuously cursed, abused, and threatened Bauman, and told him he was going to kill him. Afterwards, while defendant was on the stand on his own behalf, he testified that he was at Adams' at the time stated; that he came by there on his way from Smith's, where he went immediately after the shooting, not knowing that Bauman would be there, but he met Adams, Frank Bauman, and Mrs. Bauman all there; that he did not use any such language or make any such statements there about how the difficulty occurred, as testified to by Adams. After this, appellant proposed to prove that shortly after the shooting, some 15 or 20 minutes thereafter, he went to the house of J. M. Smith, and told Smith how the difficulty occurred; that prosecutor shot at him first; that he was having a conversation with Mrs. Adams, and he heard Frank Bauman say something, and, as he looked around towards him, Frank Bauman was shooting at him, and was in the act of reloading his gun; when defendant shot at him, Bauman was getting ready to shoot again. That this was what he had told him. That the next morning he also told one John Knowles the same thing. He proposed to prove by Smith and Knowles what he had told them. He insisted on his right to do this, in order to corroborate his own testimony, and to rebut the testimony of George Adams and Mrs. Adams. This was objected to on the part of the state, on

the ground that the same was self-serving, and the court sustained the objection. Appellant cites us to a number of authorities, among others, *Campbell v. State*, 35 Tex. Cr. R. 160, 32 S. W. 774; *Goode v. State*, 32 Tex. Cr. R. 505, 24 S. W. 102; *Kimball v. State*, 37 Tex. Cr. R. 231, 39 S. W. 297, 66 Am. St. Rep. 799. All of these cases are authority for the proposition that where appellant is put on the witness stand, and the state has impeached such witness by showing that he made a different statement to that testified to by him upon the point in issue, it is competent for appellant in rebuttal to show that he made a similar statement to that testified to by him about the time of the transaction, in order to corroborate the witness. We do not understand in this particular case that the testimony offered by the state was for the purpose of impeachment; that is, it was original testimony showing a statement or confession coming from appellant himself as to how the difficulty occurred. It was not only a confession of appellant, but it appears to have been in the course of a conversation or altercation between prosecutor and appellant subsequent to the alleged offense that these witnesses testified about. We do not believe the rule of impeachment extends to this character of case. If so, whenever the state proves a confession or statement of appellant as to how a difficulty occurred, as original evidence against him, appellant would be authorized to introduce any number of witnesses to whom at other times he made different statements. We do not believe the court erred in rejecting this testimony.

Appellant also objects to the verdict of the jury, because the same is not clear. We have examined the verdict, and it seems to us that the objection is not well taken. The verdict reads as follows: "We, the jury, find the defendant guilty of an aggravated assault on the person of Frank Bauman, and assess his punishment 'to' fine of three hundred dollars." The use of the preposition "to" instead of "at a" does not vitiate the verdict.

There being no errors in the record, the judgment is affirmed.

KEARSE v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

1. RAPE—ASSAULT WITH INTENT—EVIDENCE—MENTAL CONDITION OF PROSECUTRIX.

On a prosecution for assault with intent to rape, evidence as to the mental condition of prosecutrix on her return home from the drive during which the offense was alleged to have been committed was admissible.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 65.]

2. SAME—CONVERSATIONS.

A conversation of prosecutrix, relative to the offense, with her grandmother, after her return home, not in the presence of defendant,

and after prosecutrix and defendant had driven five miles from the scene of the offense, was not admissible.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 67.]

3. SAME—INSTRUCTIONS.

Where, on a prosecution for assault with intent to rape, there was evidence of intimacy between the parties such as might lead defendant to believe his advances would not be objectionable, it was error to refuse an instruction that if defendant kissed and hugged prosecutrix, thinking it would not be objectionable, there was no assault.

4. SAME—INDICTMENT—CONVICTION—AGGRAVATED ASSAULT.

Under an indictment for an assault with intent to rape, which does not charge defendant as being an adult male and the assaulted party a female, a conviction for aggravated assault may be had.

5. SAME—EVIDENCE.

On a prosecution for assault with intent to rape, there was no error in refusing to permit a witness to testify to having kissed prosecutrix.

Appeal from District Court, Scurry County; H. R. Jones, Judge.

Knox Kearse was indicted for an assault with intent to rape, and convicted of an aggravated assault, and he appeals. Reversed.

Beall & Beall and A. M. Craig, for appellant. Cullen O. Higgins, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was indicted for an assault with intent to commit rape, and his punishment assessed at confinement in the county jail for a term of 30 days and a fine of \$500.

The record before us shows that appellant carried prosecutrix to a party about eight or nine miles from her home, the alleged assault taking place on the road while returning from the party to town. Upon the trial, among other things objected to by appellant, was the following, as shown by the fifth bill of exceptions: After it had been shown by the testimony that defendant and Mr. Gunn had brought prosecutrix in a buggy some four or five miles from the country, after the assault charged against defendant occurred, and had returned her to the house of A. J. Scarborough, where prosecutrix lived, and told them that prosecutrix had fallen out of the buggy, and after he had started away, and Mrs. Scarborough had gone into the room where prosecutrix was, the state proved, over the objection of appellant, by Mrs. Scarborough, that when she got into the room where prosecutrix was, she seemed very much excited, and that witness tried to quiet her, and really scolded her; and, by bill No. 7, that after defendant told Scarborough that prosecutrix had fainted on the way, and tendered his services to go for a doctor if they wanted one, and had gone around the house and outside the room where prosecutrix was, and was going towards the yard gate, Mrs. Scarborough opened the door of the room occupied by prosecutrix, and that prosecutrix advanced

towards her and began saying something about defendant trying to take her out of the buggy, and that witness replied to prosecutrix, "Hush! he will hear you," and that prosecutrix then ceased to explain to her. Defendant objected to said testimony, because it was not *res gestæ*, it having been shown that prosecutrix was brought in by defendant and Mr. Gunn some four or five miles in the country after the assault happened, and because same was a conversation not in the presence and hearing of the defendant, was highly prejudicial, etc. We do not understand that the law would exclude the mental and physical condition of prosecutrix upon her return home, but we do understand that it would not be proper to prove the conversation had between prosecutrix and her grandmother, out of the presence of defendant and long after the alleged assault was committed, as the record here shows. *Carter v. State* (Tex. Cr. App.) 70 S. W. 971; *Reddick v. State*, 35 Tex. Cr. R. 466, 34 S. W. 274, 60 Am. St. Rep. 56; *Pefferling v. State*, 40 Tex. 492; *McClure v. State* (Tex. Cr. App.) 53 S. W. 111; *Meredith v. State*, 40 Tex. 488.

The appellant requested the court to give the jury the following special charge: "If you believe from the evidence that defendant tried to hug and kiss Bell Austin [prosecutrix] at the time alleged in the indictment, or if you believe that he did hug and kiss her at the time, but did so with no intention to injure her or her feelings, and at said time had probable grounds to believe, and did believe, that such trying to kiss her or hug and kiss her would not be objectionable to her or would not be offensive to her feelings, then he would not be guilty of an assault or aggravated assault." The record before us shows, according to the testimony of appellant and his witnesses, various acts of intimacy on the part of appellant towards prosecutrix, and that said acts were of such a character as to be a predicate for appellant to believe that his advances would not be objectionable to prosecutrix. Of course, in making this statement, we are merely passing upon the testimony of appellant and his witnesses. Under his testimony, under the circumstances, the issue as stated in said charge was raised, and the court erred in not giving the same. The charge of the court does not submit any such defensive matter to the jury. There can be no assault without intent to injure. Where a party believes or has reason to believe his advances will not be objectionable, and, so believing, he makes advances, the intent to injure being lacking, he would not be guilty of an assault. *Mart Shields v. State*, 39 Tex. Cr. R. 13, 44 S. W. 844; *Chambless v. State*, 79 S. W. 577, 10 Tex. Ct. Rep. 206; *Stripling v. State*, 80 S. W. 376, 10 Tex. Ct. Rep. 322.

Appellant insists in his brief that, under an indictment for assault with intent to rape which does not charge defendant as being an

adult male and the assaulted party as a female, conviction for aggravated assault could not be had. This is incorrect. Under an indictment for assault with intent to rape, any character of an assault upon a female by a man could be proven.

By bill No. 9 appellant complains that the court erred in refusing to permit Earnest Lockhart to testify to having kissed prosecutrix. In this there was no error. The proof does not show that appellant was present, or was cognizant of such improper conduct, if it occurred. Furthermore, the fact that prosecutrix may have kissed witness Lockhart would be no argument that she would kiss appellant.

Appellant has several bills of exception to the argument of the prosecuting attorney. The court qualifies these bills by showing that appellant's counsel provoked much of this illegal argument. Without passing *seriatim* upon the various questions raised along this line, we will say that in cases of this character the court should be especially careful to see that appellant's counsel, as well as state's counsel, confine their argument to the evidence introduced upon the trial. The character of the offense alleged in the indictment of itself sufficiently arouses the passions of the jury, and is therefore calculated to lead them away from a legitimate consideration of the testimony, without either counsel bringing in review questions and matters dehors the record. This being true, as stated, the argument should be strictly confined to the evidence adduced.

For the errors discussed, the judgment is reversed, and the cause remanded.

LOGAN v. LENNIX.*

(Court of Civil Appeals of Texas. June 7, 1905.)

1. ADOPTION — DISINHERITANCE OF ADOPTED CHILD—STATUTES.

Under Sayles' Ann. Civ. St. 1897, art. 1, providing that any person wishing to adopt another as his legal heir may do so by filing a statement in writing reciting that he adopts the person named therein as his legal heir, and article 2, providing that the statement entitles the person adopted to all the rights and privileges, both in law and equity, of a legal heir of the party so adopting him, an instrument adopting a child, reciting that it was executed in consideration of love and affection for the child, and the further consideration of the relinquishment of his possession and control by his parents, and that the adopted child should be entitled to all the privileges of a legal heir of the adopting parent during the child's infancy and majority, creates no more responsibility for the adopting parent, and grants no more rights to the adopted child, than are fixed by the statutes; and the execution of a will disinheriting the adopted child is binding on him.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adoption, §§ 85-40.]

2. SAME.

In the absence of an agreement on the part of an adopting parent to leave property to his

*Application for writ of error dismissed by Supreme Court.

adopted child, the adoption does not support a claim beyond the statutory provisions.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adoption, §§ 35-40.]

3. FINDINGS OF FACT—APPEAL—CONCLUSIVENESS.

Where no exception is taken to the findings of fact, and no request made for other findings, and there is a statement of facts in the record, assignments of error attacking the findings of fact on the ground of omissions therefrom are without merit.

4. ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error that the court erred in refusing to allow plaintiff to take a nonsuit, and that the court erred in giving plaintiff a nonsuit and then entering judgment against plaintiff, are too general to be considered.

5. SAME—STATEMENT—SUFFICIENCY.

A statement, in connection with an assignment of error, consisting of an opinion as to the effect of the pleadings, and making reference to the transcript for the pleadings, is insufficient, under rule 31 for the Courts of Civil Appeals (87 S. W. xvi), providing that the statement must be made faithfully in reference to the whole of that which is in the record bearing on the proposition to which it is subjoined, and the professional responsibility of counsel who makes it, and without intermixing with it arguments, reasons, conclusions, or inferences.

Appeal from District Court, Bexar County; A. W. Seeligson, Judge.

Action by Robert Logan against Mollie Lennix. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

D. A. McAskill and H. B. Sallaway, for appellant. C. S. Robinson, for appellee.

FLY, J. This is a suit instituted by appellant to recover of appellee a one-half undivided interest in a certain tract of land, containing 214 acres in Bexar county. Appellee pleaded not guilty and limitations. She afterwards asked for and obtained an injunction restraining appellant from interfering with the property. In an amended petition, appellant alleged that in August, 1864, R. J. Lennix and Susan Lennix agreed with his parents, in consideration of their relinquishment of the care, custody, and control of appellant, that they would adopt him and leave him all their property at their death; that he at once went to live with said H. J. and Susan Lennix, and continued to live with them until the death of Susan Lennix, in 1866, and thereafter continued to live with R. J. Lennix and his wife, the appellee herein; that the contract between his parents and the parties adopting him was in writing, and was subscribed by them, and was duly and regularly witnessed by Marion Parke and Becky Tinkle, but that the same was not recorded, through the carelessness of Lennix and wife, and was lost or destroyed, or is now in the possession of appellee; that afterwards R. J. Lennix, by his certain contract in writing, which was duly executed and recorded as required by law, agreed with the parents of appellant that he should have all the property of which said Lennix should die possessed; that Susan Lennix died intestate in 1866,

seised and possessed of a community interest in \$5,000 worth of personal property; that, a few weeks after the death of Susan, R. J. Lennix married appellee; and that no offspring resulted from either marriage. It was further alleged that the land in controversy was bought and paid for with the community property of R. J. Lennix and Susan Lennix, and that said R. J. Lennix died on February 27, 1903, leaving a will in which he had bequeathed the whole of his estate to appellee, which will had been duly admitted to probate on March 2, 1903. The cause was tried, without the intervention of a jury, and judgment was rendered in favor of appellee.

It was shown by the evidence that in 1864, when appellant was four years of age, he was legally adopted by R. J. Lennix by a statement in writing as follows:

"State of Texas, County of Bexar. Know all men by these presents, that R. J. Lennix of the County and State aforesaid, in consideration of the love and affection that I have for Robert Logan, aged four years, the child of John B. Logan and Sarah B. Logan, and the further consideration of the relinquishment of the possession and control by the said parents of the said infant unto me until he becomes twenty-one years of age, have adopted, and by these presents do adopt the said Robert Logan as my legal heir, and as such shall be entitled to all the privileges as such during his infancy and majority as fully as if he were a child legally begotten by me."

That statement was signed and acknowledged by R. J. Lennix and duly recorded. Susan Lennix did not adopt appellant as her child, and executed no papers in connection with such adoption. There was evidence of the execution of a paper by the parents of appellants in which they relinquished his possession and control to R. J. Lennix. Susan Lennix died intestate and childless in 1866, leaving no property except her community interest in an estate consisting of about 75 horses and 200 cattle. Shortly after her death R. J. Lennix married appellee, and in 1867 they rented the land in controversy, which was then wild and unimproved, and built a small house and settled on the same. In 1871 the land was conveyed to R. J. Lennix for \$500. The cattle were sold about the time of the purchase. From 1867 to 1903, when R. J. Lennix died, he and appellee, his wife, lived on the land, and continued to improve it. They had no children. Appellant remained with R. J. Lennix and appellee until he was about 17 years of age, when he went off, but returned at different times and stayed with them. Before appellant reached his majority he got into trouble, and R. J. Lennix spent about \$1,500 in helping him out of it. For many years prior to his death, R. J. Lennix was not on good terms with appellant. R. J. Lennix died in 1903, leaving a will in which

he bequeathed all of his property to his wife, Mollie Lennix. He owned no property except the land in controversy and one horse and one cow. The will was duly probated, and appellee remained in possession of the land in controversy.

The writing executed by R. J. Lennix created no more responsibility for him, and granted no more rights to the party adopted, than are fixed and granted by the statute which provides for the adoption of heirs (articles 1, 2, Sayles' Ann. Civ. St. 1897). In the first article it is provided that "any person wishing to adopt another as his legal heir, may do so by filing in the office of the clerk of the county court of the county in which he may reside, a statement in writing by him signed and duly authenticated or acknowledged as deeds are required to be, which statement shall recite in substance that he adopts the person named therein as his legal heir, and the same shall be admitted to record in said office." In article 2 it is provided that the statement in writing, executed as required, entitles the person adopted "to all the rights and privileges, both in law and in equity, of a legal heir of the party so adopting him." In the statement of R. J. Lennix, he assumed no more burdens and granted no more rights and privileges to appellant than the statute itself imposed and granted. Through that statement appellant was placed in the same position as that which a legal heir of R. J. Lennix would have occupied towards him in connection with his property. As, under the statute, appellant could be disinherited as any lawfully begotten heir might be disinherited, so he could be disinherited under the terms of the statement filed by Lennix in the county court. The recitation of love for the person adopted, and the relinquishment by the parents of control and possession of him, did not place appellant in any more advantageous position as to the property than that occupied by a legal heir. The statute placed him, so far as the property of R. J. Lennix was concerned, in the same position as that occupied by a child of his body. *Eckford v. Knox*, 67 Tex. 200, 2 S. W. 372. Nothing was added to the strength of his position by the statement in writing.

It has been held in this state that the adoption of a child does not give the person adopting him the right to his services or custody, the only effect of such adoption being to make the child the heir at law of the person adopting him. *Taylor v. Deseve*, 81 Tex. 246, 16 S. W. 1008. It is intimated in that decision that no relinquishment upon the part of the parents would preclude them from resuming possession of their child. It would seem, therefore, that the relinquishment upon the part of the parents of appellant amounted to nothing, except that, in a contest for the custody of the child, a court might place the child in the care of those

where he would be best cared for. As said by the Supreme Court in *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281: "The attempted transfer is not a contract, and cannot be enforced as such, because neither the child nor its custody was a subject-matter of contract." Such a transfer would merely render the possession of the child lawful in the person to whom it had been released, and would place a court in a position to adjudicate possession of the child to that person from whose custody it would gain the greatest advantage. In the case of *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486, it is held "that a contract between two persons, upon valuable consideration, that one will, at his death, leave property to the other, is enforceable, where no statute is contravened, is held by an almost unbroken current of authority, English and American." In that case demurrers were sustained to a petition in which it was alleged that the father of the plaintiff, in consideration of J. C. Ogle and wife, Harriet Ogle, agreeing to leave her their property at their death, had relinquished the custody of her to them. The husband had died, and by his will had bequeathed his property to his wife. It was also alleged that the wife had, after the death of the husband, agreed, in consideration of plaintiff performing certain household duties, that the plaintiff should have all her property at her death. The court held, in terms, that the contract of Mrs. Ogle was binding upon her property, but did not pass directly upon the validity of the relinquishment of the custody of the child as a consideration. It would seem clear, if the doctrine of *Legate v. Legate* is correct, that a mere relinquishment of the custody of a child would not be a sufficient consideration for a contract to leave property of the contracting party at his death to another. It will be noted that in the proposition quoted above from *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486, as to a contract between two persons that one will at his death leave property to the other, could not be held to have reference to a contract between two persons for one to leave property to a third person, and the court must have had in view only the contract between Mrs. Ogle and the plaintiff in that case. We conclude that the Supreme Court did not intend to hold that the relinquishment of custody of a child by the parents would alone be a sufficient consideration for a contract to leave property to the child. However, if such was the intention of the Supreme Court, the trial court in effect concluded, upon sufficient evidence, that there was no agreement to leave the property to appellant upon the part of Lennix and wife, but that Lennix only agreed to adopt the child according to the provisions of the statute, and did so adopt him. As said in *Clark v. West*, 96 Tex. 437, 73 S. W. 797: "In the absence of an agreement to leave their

property to the adopted child, the promise to adopt would not support a claim beyond the statutory provisions."

The assignments of error attacking the findings of fact on the ground of omissions therein have no merit, because no exception was taken to the findings, and no request was made for other findings, and there is also a statement of facts in the record. *Oattie Company v. Burns*, 82 Tex. 50, 17 S. W. 1043; *Spencer v. James* (Tex. Civ. App.) 43 S. W. 556.

The eighteenth and nineteenth assignments are considered together in the brief. The first is: "The court erred in refusing to allow plaintiff to take a nonsuit." The latter is: "The court erred in giving plaintiff a nonsuit, and then entering judgment against plaintiff." The assignments are too general to be considered. They would require a search of the record to ascertain the error, if any, in connection with them. They are not followed by a statement that throws any light upon the errors desired to be reached. The attempted statement consists of an opinion that the pleadings of appellee would not sustain an action of trespass to try title, and reference is made to the transcript for the pleadings. *Douglas v. Duncan*, 66 Tex. 123, 18 S. W. 343; *Mynners v. Ralston*, 68 Tex. 499, 4 S. W. 854; *Falls L. & O. Co. v. Chisholm*, 71 Tex. 528, 9 S. W. 479; *Am. Legion of Honor v. Rowell*, 78 Tex. 677, 15 S. W. 217; *Hayley v. Davidson*, 48 Tex. 615, rule 31 for Courts of Civil Appeals, 67 S. W. xvi.

The cause having been tried without a jury, and the facts necessary to a recovery by appellee having been proved by competent evidence, the admission of incompetent or irrelevant evidence is not ground for reversal. The conclusions filed by the trial judge do not indicate that he was influenced by the admission of the evidence of which complaint is made.

The judgment is affirmed.

GULF, C. & S. F. RY. CO. et al. v. BEATTIE et al.*

(Court of Civil Appeals of Texas. June 14, 1905.)

1. CARRIERS OF LIVE STOCK—DILIGENCE IN MAKING TRIP.

It is the duty of a common carrier receiving live stock for transportation to use reasonable diligence to transport the same within a reasonable time.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 922.]

2. SAME—DELAY IN TRANSPORTATION—MEASURE OF DAMAGES—INSTRUCTIONS.

Where the court, in an action against a carrier, allowed a recovery only for damages resulting from delay in the transportation of cattle, an instruction fixing the measure of damages as the difference between the market value of the cattle in the condition they were when

they reached their destination, and what their market value would have been on their reaching their destination, had the carrier used reasonable diligence to transport them within a reasonable time, was proper.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 964.]

3. SAME—REASONABLE TIME TO MAKE TRIP—INSTRUCTIONS.

Where, in an action against a carrier for delay in transporting a shipment of cattle, it was shown that the cattle were unloaded at an intermediate point after a run of 17 hours, and there fed and watered and detained for about 23 hours, an instruction that the shipper was not entitled to damages on account of unloading the cattle was properly refused, because eliminating the period they were detained, in determining the reasonableness of the time consumed in making the entire trip.

4. APPEAL—ASSIGNMENT OF ERROR—REFERENCE TO EVIDENCE—SUFFICIENCY.

Where the correctness of a requested instruction depends on the evidence, the appellant must, in connection with his assignment of error complaining of the refusal to give it, refer to the evidence making it applicable, and reference to all the testimony is insufficient to require the court to review the assignment.

Appeal from District Court, Cooke County; D. E. Barrett, Judge.

Action by James Beattie and another against the Gulf, Colorado & Santa Fé Railway Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. W. Terry and A. H. Culwell, for appellants. Davis & Garnett, for appellees.

JAMES, C. J. This action was for damages for delay in the transportation of a shipment of cattle from Gainesville, Tex., to Kansas City, Mo. The court submitted the case solely on the issue of unreasonable delay. Verdict for \$876.03.

There was testimony to show a considerable delay over the reasonable time in the run from Gainesville to Purcell; that on reaching Arkansas City, after a run of 17 hours, the cattle were unloaded for food, water, and rest, and kept there 24 hours; and we may say generally that there was evidence amply sustaining the conclusion that the cattle should, in ordinary and reasonable course of transportation, have reached Kansas City on the morning of March 4th, in time for the market of that day, but did not reach there until the next day; also that this had the effect of materially reducing the weight and appearance of the cattle, and affected the price, as compared with that they would have sold for the day before, by the amount of the recovery. We therefore overrule the first assignment of error; also the second and third assignments, which rest upon the same foundation, viz., the sufficiency of the evidence to warrant the foregoing facts.

The fourth, fifth, and sixth assignments we overrule. The court charged that it was the duty of defendants to use reasonable diligence to transport the cattle to Kansas City

*Rehearing denied June 23, 1905.

within a reasonable time, and made this the standard of defendants' duty. The assignments complain of this as imposing a greater duty than rested upon defendants. Appellants do not dignify the proposition with any discussion, and we have failed to discover anything wrong in said rule. In connection with the fifth assignment, the charge upon the measure of damages is questioned. The charge was that if, by reason of the delay, "the cattle were injured, and their market value at Kansas City when they arrived there in the condition they were in when they arrived there was less than their market value would have been when said cattle would have arrived at Kansas City in the condition they would have been in, had the defendants used reasonable diligence to get them there within a reasonable time, then you will find for plaintiffs the difference between the market value of said cattle in the condition they were when they reached Kansas City and what their market value would have been in the condition they would have been in when they would have reached Kansas City, had the defendants used reasonable diligence to transport them within a reasonable time." Appellants complain of this, and say that the true measure was simply the difference between the market value of the cattle in the condition and at the time they arrived at destination, and what would have been their market value, had they been handled with ordinary care and arrived at destination at the time they should have arrived. The court allowed plaintiffs to recover only for damages resulting from delay, and, with this explanation, we see no difference in the measure contended for and the one charged.

The seventh assignment complains of the refusal of the following instruction: "It was the duty of defendants to unload said cattle for feed, water, and rest at the expiration of twenty-eight hours, and not to permit said cattle to remain on the cars for a period of more than twenty-eight hours without unloading them for feed, water, and rest; and you will not allow plaintiffs anything as damages on account of defendants unloading said cattle at Arkansas City for feed, water, and rest." This charge would have been an assumption that the period of about 23 hours during which the cattle were held at Arkansas City was to be eliminated from the jury's consideration in passing on the reasonableness of the time consumed in making the trip. The ninth, tenth, eleventh, twelfth, and thirteenth assignments are overruled. The testimony complained of in each instance was proper.

The eighth assignment complains of the refusal of the following charge: "You are instructed that defendants, if negligent in the transportation of said cattle, are only liable for depreciation in the flesh of said cattle over and above the natural depreciation in flesh, if any; but you cannot allow damages for depreciation in weight caused by said cat-

tles failing to eat food and drink water, as such damages are too uncertain and remote to permit a recovery for same." The correctness of this instruction would depend on the state of the testimony. Appellants should, in their brief, in connection with this assignment, refer to the evidence making such charge applicable. The brief says: "See statement under first assignment." When we look there, we find what is supposed to be a copy of all the testimony in the case, covering 33 pages of printed matter. We think, under the rules, we ought not to give this assignment any further notice.

Affirmed.

SAN ANTONIO BREWING ASS'N v. BRENTS.*

(Court of Civil Appeals of Texas. May 17, 1905.)

LEASES—CONSTRUCTION—USE OF PROPERTY—SALOONS—UNLAWFUL BUSINESS—SURRENDER.

Where a lease provided that it was understood that the building was leased to the lessee for the purpose of conducting a first-class saloon, etc., such provision did not prevent the lessee from conducting any legitimate business therein; and hence the fact that, by the subsequent passage of a local option law during the term, it became unlawful to longer maintain the saloon, did not authorize the lessee to abandon the lease.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 484.]

Appeal from District Court, Grayson County; J. M. Pearson, Judge.

Action by W. R. Brents against the San Antonio Brewing Association. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Don A. Bliss, for appellant. Wolfe, Hare & Maxey, for appellees.

KEY, J. October 17, 1901, Martin Gauldin, as owner and lessor, entered into a written contract with the San Antonio Brewing Association, as lessee, by the terms of which a certain house and lot in the city of Sherman, in Grayson county, Tex., were leased for a term of five years, beginning October 21, 1901, for a consideration of \$4,500, payable in monthly installments of \$75 each. Thereafter Gauldin sold the property to W. R. Brents, and on February 26, 1902, a supplemental contract was made, which, in effect, substituted Brents for Gauldin as owner and lessor in the original contract. It was the understanding of the parties that the property would be used as a retail liquor saloon, and the Brewing Association subleased it, and it was used for that purpose until it became unlawful to do so. As the result of an election previously held, what is known as the "Local Option Law" went into effect in Grayson county on the 20th day of Janu-

*Rehearing denied June 22, 1905, and writ of error denied by Supreme Court.

ary, 1904, by which it became, and still is, unlawful to sell intoxicating liquors in that county. The brewing association paid the rent up to March 21, 1904, and refused to pay for any other portion of the term of the lease. In fact, soon after the local option law went into effect the brewing association announced its intention to abandon the rented premises, and remove therefrom certain property placed there by it. On the 4th day of February, 1904, Brents sued out a distress warrant upon the ground that the brewing association "was about to remove its property from said rented premises." The distress warrant was returned to the district court, where Brents, as plaintiff, filed a voluminous petition, and the San Antonio Brewing Association, as defendant, filed a voluminous answer. The case went to trial, resulting in a judgment for the plaintiff for \$922.65, and the defendant has appealed.

The trial judge filed findings of fact, some of which are assailed in this court. We have examined the record, and find testimony supporting the findings complained of. The main defense relied on, which was overruled in the court below, and is urged with zeal in this court, is the contention that the adoption of the local option law released appellant from the lease contract. The contention is that the contract restricted the use of the leased premises to a saloon for the sale of intoxicating liquors, and that, when such use became unlawful by the adoption of the local option law, appellant could not lawfully perform all the terms of the contract, and for that reason should not be held bound thereby. As originally written dated, and signed by the lessor, the contract contained this paragraph:

"(6) It is understood that the building is leased to the lessee for the purpose of conducting a first-class saloon and shall not be used for any disreputable purpose, nor shall any nuisance be permitted on the premises, and in case the lessee shall violate this provision, the owner may cancel the lease and take possession in the manner specified in paragraph three of this contract. It is further understood that the lessee shall have the privilege of subletting the premises, provided that no part of same shall be sublet for any disreputable or illegal purpose or to any disreputable parties; nor shall said building be sublet for any purpose other than for conducting a saloon without the consent of the landlord in writing."

However, before the contract was signed by appellant as lessee, the following was added:

"(6) It is understood that the building is leased to the lessee for the purpose of conducting a first-class saloon, and shall not be used for any disreputable purpose, nor shall any nuisance be permitted on the premises, and in case the lessee shall violate this provision, the owner may cancel the lease and take possession in the manner specified in

paragraph three of this contract. It is further understood that the lessee shall have the privilege of subletting the premises, provided that no part of same shall be sublet for any disreputable or illegal purpose other than for conducting a saloon, without the consent of the landlord in writing."

This latter paragraph of the contract is treated in appellant's brief as a repetition of the sixth paragraph, but, if correctly transcribed in the record, the provisions in the two are essentially different. In the first it is stipulated that the premises shall not be sublet for any disreputable or illegal purpose, or to any disreputable parties, nor for any purpose other than conducting a saloon, without the written consent of the lessor, while, in the second, subletting is expressly authorized for any legal and reputable business, without the consent of the lessor. This latter, having been added to and constituting the last stipulation in the contract, should perhaps be held to control the former paragraph, requiring written consent of the appellee in order for appellant to sublet the premises for other use than conducting a saloon. At any rate, the latter is in conflict with the former, and leaves it in doubt as to what restrictions were intended to be placed upon the power to sublet which the contract expressly confers upon the lessee.

But, aside from the conflict between the two paragraphs, and testing the defense referred to by the construction that should be given to the former paragraph considered by itself, we are of the opinion that the adoption of the local option law did not release appellant from the obligations imposed by the lease contract. The language, "It is understood that the building is leased to the lessee for the purpose of conducting a first-class saloon," etc., was not, in our opinion, placed in the contract for the purpose of creating a limitation which would deny to the lessee the right to use the property for any other purpose. The business to which the lessee intended to devote the premises was known to the lessor, and, no doubt, the latter, for his own benefit, desired to obligate the lessee to so conduct the business as to cause the least detriment to the premises, and not otherwise injure the lessor. A restriction was intended not as to any legitimate business, but only as to the manner of conducting the contemplated business. Hence we conclude that the adoption of the local option law did not deprive appellant of the beneficial use of the premises, nor release it from the lease contract. If the contract was as restrictive as contended, and denied appellant the right to use the premises for any other purpose, then a different question would be presented; but such is not the case, and we express no opinion on that subject. Our views on the question presented and decided are supported by authority. *Kerley v. Mayer* (Com. Pl.) 31 N. Y. Supp. 819.

Appellant alleged that the distress warrant

was wrongfully and maliciously sued out, and, by plea in reconvention, sought to recover damages therefor. The court below held that the warrant was properly sued out, and decided against appellant on its plea in reconvention. Several questions are presented bearing on that phase of the case, but we believe the trial court ruled correctly, and overrule all assignments of error relating to that subject.

The trial court rendered judgment for the plaintiff for \$55, the value of certain fixtures belonging to him and removed by the defendant, and for \$867.65 for the breach of rental contract, and it is insisted that the correct measure of damage was not applied for the breach of the contract. In appellant's brief it is contended that "the difference between the cash value of the rental stipulated in the contract and the cash rental value of the leased premises for the unexpired portion of the term at the time of the breach is the correct measure of damages." We think the rule contended for by appellant supports the judgment. The findings of fact show that the contract was breached March 21, 1904; that the reasonable rental value of the premises during the remainder of the term (from March 21, 1904, to October 21, 1906) was \$45 per month, or \$30 per month less than the contract price; and the trial judge also found as a fact that "the difference between the present worth of the contract price of said premises for the unexpired term of said lease and the present worth of the reasonable rental of said premises for the unexpired part of said lease is \$867.65, and that plaintiff, by reason of a breach of the lease contract, has been damaged in this sum." Conceding the correctness of appellant's proposition of law, it seems to us that the findings referred to support the judgment.

Some other questions are presented in appellant's brief, which we deem it unnecessary to discuss in this opinion. They have all been considered, but our conclusion is that no reversible error has been shown, and the judgment will be affirmed.

Affirmed.

FT. WORTH & D. C. RY. CO. et al. v.
STATE.

(Court of Civil Appeals of Texas. June 7,
1905.)

1. MONOPOLIES — ANTI-TRUST STATUTES — CONSTRUCTION.

Since the anti-trust act of 1899 (Laws 1899, p. 246, c. 146) is not as broad in its effect or scope as the anti-trust act of 1903 (Laws 1903, p. 119, c. 94), the ruling of the Supreme Court that a certain contract is not in violation of the act of 1903 is conclusive that the contract is not in violation of the act of 1899.

2. SAME—ACTION FOR PENALTIES—THEORY OF CASE.

Where an action is brought to recover a penalty allowed by the anti-trust statutes of Texas, no right of the state to the penalties can be based on the ground that the contract, which was alleged to be in violation of the Texas statutes, also created a monopoly at common law, or was in violation of the terms of the anti-trust statutes of the United States.

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Action by the state against the Ft. Worth & Denver City Railway Company and others. From a judgment in favor of the state, defendants appeal. Reversed.

Stanley, Spoonst & Thompson, Andrews, Ball & Streetman, and J. D. Gulin, for appellants. C. K. Bell, Atty. Gen., John W. Brady, Co. Atty., Allen & Hart, and D. A. McFall, for the State.

FISHER, C. J. The certificate of this court to the Supreme Court, embracing certified questions, together with the opinion of the Supreme Court (87 S. W. 386) in answering the questions certified, fully state the nature and result of this case, together with the facts found by the trial court. The opinion of the Supreme Court is a final disposition of the case. The suit is for penalties, predicated upon the anti-trust statutes of 1899 (Laws 1899, p. 246, c. 146), and 1903 (Laws 1903, p. 119, c. 94). The Supreme Court holds that the contract in question is not in violation of any of the terms of the act of 1903; and so much of the case as is predicated upon the act of 1899 may be disposed of with the statement that, if the Supreme Court is correct in the conclusion reached that the contract is not governed by any of the terms of the act of 1903, it must follow that it is not violative of any provision of the act of 1899, for that act is not as broad in its effect and scope as the act of 1903.

Some intimations were made in argument, in the submission of the case to this court, that the contract in question created or had the effect of creating a common-law monopoly, and was in part violative of the terms of the anti-trust statute of Congress known as the "Sherman Act." With these two questions we have no concern, and about which we express no opinion, because the suit here being merely to recover a penalty, which is allowed only by the anti-trust statutes of the state of Texas, no right of the state for the penalties sought to be recovered could be predicated whatever upon the ground that the contract created a monopoly at common law, or was violative of the terms of the anti-trust statute of the United States.

The judgment of the trial court is reversed, and here rendered in favor of appellants.

M. L. CHAMBERS & CO. v. HERRING.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. APPEAL—MOTION FOR NEW TRIAL—RECORD—REVIEW.

An allegation in a motion for a new trial that the court ruled on a particular matter brought before it does not dispense with the necessity of showing in the record that the court acted thereon before the ruling will be reviewed on appeal.

2. BROKERS—RECOVERY OF FORFEIT MONEY PAID BY INTENDING PURCHASER—PARTIES.

In an action by an owner of land to recover the forfeit money paid to his broker, employed to procure a purchaser, by an intended purchaser who failed to complete the purchase, the purchaser is not a proper party.

3. SAME—CUSTOM—EFFECT.

The right of one employing a broker to procure a purchaser for his land to recover from the broker the forfeit money paid by an intending purchaser failing to complete the purchase is not affected by a custom that forfeit money paid belongs to the broker, the owner not contracting with reference thereto.

4. SAME—TIME TO SUE.

Where an intending purchaser of land, who had paid a sum as forfeit money to the broker employed to sell it, refused to complete his contract of purchase, and waived the time within which he could complete it, and the broker converted the sum paid, the right of the owner of the land to sue the broker for such sum accrued, though the time for the purchaser's completion of the purchase had not expired.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Action by T. B. Herring against M. L. Chambers & Co. From a judgment for plaintiff, defendants appeal. Affirmed.

Essex & Mothershead, for appellants. S. W. Stewart, for appellee.

FLY, J. This is a suit instituted by appellee in the justice's court, and thence appealed to the county court. Appellee, on a trial in the last-named court before a jury, obtained a verdict and judgment for \$100, with interest at 6 per cent. per annum from date of judgment. Appellants pleaded a counterclaim of \$120 in the justice's and county courts.

The facts disclose that appellee placed a tract of 80 acres of land in the hands of appellants, who were land agents, for sale. They contracted to sell the land to J. B. Dean for \$2,400, and he deposited a note for \$100 with them as a guaranty that he would take the property if the title was good, and in case the title to the land was defective the note was to be returned to Dean. The contract was in writing. Dean failed to take the land, and paid the amount of the note to appellants. Appellee requested payment of that sum to him, but it was refused by appellants. Appellee had agreed to pay appellants 5 per cent. of the purchase price of the land if they sold it.

The first, second, and third assignments of error complain of the action of the trial

courts in refusing to make J. B. Dean a party to the suit. The record fails to disclose that any effort was made by appellants to have Dean made a party to the suit in either court. Allegations to that effect in the motion for new trial cannot dispense with a showing in the record that the court acted on the matters desired to be reviewed. It may be said, however, that there is nothing in the record in any manner indicating that Dean was a necessary or even proper party. Dean paid the money to appellants, as agents of appellee, after he had determined not to take the land. There was no question to be settled as to him. He had determined that he had forfeited the money due on the note, and voluntarily paid the money. He had no interest in it to be adjudicated. It was merely a question of whether appellants or appellee should have it, and the jury properly determined that it belonged to appellee. No custom prevailing in Ft. Worth among real estate agents could determine the rights of the parties to this suit. The matter was properly determined by the contract between the parties. Appellants had no right to any fees or commissions, because they were contingent on a sale, and a sale was not consummated. It may have been a custom to take forfeit money to protect agents in their fees, but appellee's rights cannot be determined by that custom, but must rest upon the law applicable in such cases. Appellee was not shown to have contracted with any view to any such custom.

The contention that this suit was brought before the time named in the contract up to which Dean could determine whether or not he would take the land cannot aid appellants. Dean had waived the time, had paid the money, and it had been converted by appellants, and appellee's cause of action had arisen.

None of the assignments of error is well taken, and the judgment will therefore be affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SISSON,

(Court of Civil Appeals of Texas. June 7, 1905.)

RAILROADS—ACTION FOR PERSONAL INJURIES—INSTRUCTIONS.

In an action against a railroad for injuries to plaintiff in attempting to cross the defendant's track, where one of the grounds of negligence relied on was the failure of defendant's servants to keep a lookout for persons about to cross the track, the refusal of a special charge that, if the jury believe from the evidence that the servants in charge of the engine by which plaintiff claimed to have been injured were exercising ordinary care to keep a lookout for persons undertaking to cross the track, then, without further inquiry, they should find for the defendant on that issue, was erroneous, though the court had charged the converse.

Appeal from District Court, Hill County; Nelson Phillips, Judge.

Action by Wiley Sisson against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Reversed.

T. S. Miller and Ramsey & Odell, for appellant. Wear, Morrow & Smithdeal, for appellee.

FISHER, C. J. We overrule all of appellant's assignments of error, except the fifth, which complains of the refusal of the court to give appellant's special charge No. 7, which is as follows: "If you believe from the evidence in this case that the servants of defendant in charge of the engine by which the plaintiff claims to have been hurt were exercising ordinary care (that is, such care as a person of ordinary prudence would have used under the same or similar circumstances) to keep a lookout for persons undertaking to cross its track, then, in such event, you will, without further inquiry, and for the defendant on this issue." This charge was refused. One of the grounds of negligence relied upon was the failure of the engineer and fireman to keep a lookout for persons about to cross the railway track. The appellee was injured in undertaking to cross the track on one of the public streets of the city of Hillsboro. The court instructed the jury that if those operating the engine in approaching the crossing in question failed to keep a reasonable lookout for persons who might be approaching the track upon the crossing, and such failure constituted negligence, etc., and the plaintiff was thereby injured, to find for plaintiff. The charge requested and refused stated the converse of the charge given, and the peculiar facts in the record required its submission.

For the error in refusing to give this charge, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SOVEREIGN CAMP WOODMEN OF THE WORLD v. BROWN et al.*

(Court of Civil Appeals of Texas. May 24, 1905.)

MUTUAL BENEFIT INSURANCE—CERTIFICATES—ACCEPTANCE.

Where the by-laws of a mutual benefit society provided that the first assessment and dues must be paid by the applicant, and forwarded, together with the acceptance of the certificate, to the sovereign clerk, immediately after the delivery of the certificate, it was not necessary to the validity of the certificate that the member should have executed a written acceptance.

Appeal from District Court, Johnson County; Nelson Phillips, Judge.

Action by Mrs. Sallie Brown and others against the Sovereign Camp Woodmen of the World. From a judgment for plaintiffs, defendant appeals. Affirmed.

Brome & Burnett and S. C. Paddelford, for appellant. Odell, Phillips & Johnson and Ramsey & Odell, for appellees.

KEY, J. Appellees brought this suit against appellant on a benefit certificate alleged to have been issued and delivered to J. R. Brown, the husband and father of the plaintiffs. The defendant filed an answer, embracing a general denial, a plea of non est factum, and a special plea alleging that the certificate sued on had never been delivered to Brown, and that he had failed to comply with certain provisions of the contract. There was a jury trial, resulting in a verdict and judgment for the plaintiffs, and the defendants have appealed.

The first assignment of error assails the verdict of the jury. Under this assignment it is urgently insisted that the judgment should be reversed, among other reasons, because of the insufficiency of the testimony to show that J. R. Brown had made certain payments in advance, and that the certificate sued on had been delivered to him in person. That it was necessary, in order for the plaintiffs to recover, that the facts referred to should be established by testimony, cannot be denied. By the terms of the constitution and by-laws of appellant, the payments and delivery referred to were made conditions precedent to liability. This is not disputed by appellees, and the case was tried in the court below upon that theory, but it is insisted on their behalf that there was testimony before the jury which warranted the verdict in appellees' favor on the issues referred to. After a careful reading of the statement of facts, we have reached the same conclusion. It is not necessary, nor do we consider it advisable, to consume the time that would be required to set out the facts and circumstances which have led us to the conclusion reached. We frankly concede that this is a close case on the facts, and, if the verdict had been in favor of the appellant, it may be that it would not have been disturbed on appeal, but we are unable to say that there was no testimony warranting a finding for the appellees.

There are several assignments of error addressed to the charge of the court and to the refusal of requested instructions. We think the court's charge, supplemented by requested instructions that were given, presented the law of the case fully and fairly to the jury, and that no error was committed in refusing requested instructions.

We do not agree with appellant in the contention that the failure of J. R. Brown to sign the certificate, or execute a written acceptance thereof, could defeat the right of appellees to recover. The only reference in appellant's constitution and by-laws to an acceptance is contained in section 55, which reads as follows: "The first assessment and dues which must be paid by the applicant as provided in these laws shall pay the liability

*Rehearing denied June 28, 1905, and writ of error dismissed by Supreme Court for want of jurisdiction.

of a member for the current assessment for the month in which his certificate is issued and shall be forwarded, together with the acceptance of the certificate to the sovereign clerk immediately after the delivery of the certificate, and thereafter he shall be liable for all assessments and dues the same as other members." The other members of the court hold that this provision leaves it uncertain as to how the acceptance is to be made—whether in writing or otherwise—and that on account of such ambiguity the trial court ruled correctly when it instructed the jury that it was not necessary to the validity of the certificate sued on for J. R. Brown to execute a written acceptance therefor. In the writer's opinion, if section 55, as set out above, contemplated a written acceptance, such acceptance was not a condition precedent to appellant's liability, nor a ground for forfeiture as against Brown or the beneficiaries named in the certificate. It is true that the by-laws and constitution were part of the contract between the parties, but a written acceptance was not made a condition precedent to appellant's liability, nor specified as a ground for forfeiture.

There are some other assignments of error which complain of rulings made as to the admissibility of testimony. We think the court ruled correctly, and overrule the assignments referred to.

No reversible error has been pointed out, and the judgment is affirmed.

Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. CRISWELL.

(Court of Civil Appeals of Texas, April 12, 1905. On Rehearing, June 14, 1905.)

1. TRIAL—INSTRUCTIONS.

A charge must be read as a whole to determine whether it is on the weight of the evidence or confusing.

On Rehearing.

2. CARRIERS—INJURY TO PASSENGER—INSTRUCTION.

In an action for injuries to a passenger, where there was evidence tending to sustain defendant's plea of contributory negligence, and the general charge of the court submitted the issue of contributory negligence without directly covering the point, presented in a special charge requested, that if the jury believed the incline on which the accident occurred was wet and slippery, and its being so was obvious to a person intending to walk down it, and that, if they further believed that the injured person had a child in her arms, and attempted hurriedly to descend the incline, without noticing how or where she was stepping, and that her intention to walk down in the manner which she did was a failure to use ordinary care, and that if such failure caused or contributed to cause the accident, they should find for the defendant, the refusal of the special charge was error.

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Action by S. L. Criswell against the Missouri, Kansas & Texas Railway Company of

Texas. From a judgment in favor of plaintiff, defendant appeals. Reversed.

T. S. Miller and Perkins, Craddock & Wall, for appellant. Evans & Elder, for appellee.

FISHER, C. J. This is a suit by appellee to recover for personal injuries to his wife, alleged to have been sustained and caused by a fall on the depot platform of appellant's road at the town of Floyd. Verdict and judgment were in appellee's favor for \$1,500.

The averments of appellee's petition are substantially as follows: That on the 13th of November, 1900, he and his wife were passengers on the passenger train of the Sherman, Shreveport & Southern Railway from Greenville to Floyd, Tex. That the company had constructed and used a platform in connection with its passenger depot at Floyd, immediately east of and adjoining the passenger depot. It was elevated three or four feet from the ground and above the level of the floor of the waiting room. That it had constructed an inclined way at the northeast corner of the depot, extending from the top of the platform to the ground by the side of the depot, for the accommodation of passengers, and to furnish a means of access from the platform to the waiting room. That it had neglected to construct or place any handholds or railing on either side of the incline, or to place any cleats or steps on the face of the incline; and that it negligently and carelessly permitted mud, water, and slippery earth to accumulate and remain on the surface of the incline, rendering it slippery, dangerous, and hazardous to passengers descending from the platform to the waiting room. That he and his wife alighted from the train they were passengers upon to the platform, and by the means provided by the company for that purpose, opposite or near the place where they were discharged from the train, and where passengers usually went after alighting therefrom; and when they reached the incline, and attempted to pass down the same, his wife stepped thereon, her feet slipped from under her, caused by the wet, muddy, and slippery condition and the absence of any cleats or steps thereon, and fell violently with great force on and against the edge of the platform and incline, and sustained certain injuries, a part of which, as alleged, was submitted by the court in its charge to the jury, for which injuries, and upon which negligence alleged, the verdict of the jury is based.

The appellant answered by general denial; that the injuries sustained to the wife of plaintiff were the result of her contributory negligence; that, if the incline was wet and slippery, its condition was open, and could have been discovered; that she voluntarily went upon the same, carrying in her arms at the time a large child, and negligently

went upon the same; that it had provided a safe and convenient way for disembarking passengers from its trains to enter its passenger depot, and that such walk or safe way was apparent and obvious, and could have been discovered by any one exercising reasonable care; and that going the way they did the plaintiff and his wife were guilty of contributory negligence.

The issues of negligence, and the defenses of contributory negligence were fully submitted by the charge of the court, and we find that there is evidence in the record which supports the averments of the plaintiff's petition that entitle her to recover; and we further find that there is evidence which justifies the conclusion that the inclined plane was, with the consent and knowledge of the railway company, used by passengers as a way of going from the platform to the waiting room of the depot. We also find that there is evidence in the record which justifies the conclusion that the plaintiff's wife was not guilty of contributory negligence, as alleged in the appellant's answer.

The first assignment of error complains of the charge of the court from subdivision 1 to subdivision 11, inclusive. It is contended in the proposition submitted under this assignment that the charge is misleading and confusing and upon the weight of evidence, and assumes that the plaintiff and his wife were exercising ordinary care in selecting the route they did in going to the waiting room, in that it justifies their selection in going such route, if they were following the route that passengers would naturally or ordinarily be likely to go, whether such passengers were exercising ordinary care or not. It is apparent from reading the entire charge that it is not upon the weight of evidence, or confusing, as contended for by the appellant.

The third subdivision of the charge requires, as one of the conditions necessary to be found in order for the plaintiff to recover, that the railway company constructed the inclined way for the use and accommodation of passengers, and required the jury to find that the plaintiff, in getting off the train, alighted upon the platform that was used for the accommodation and reception of passengers; and further instructs them that the plaintiff and his wife were going the way that passengers would naturally and ordinarily go, and, if the plaintiff was in the exercise of proper care, and could not have discovered and did not discover the defects alleged and the slippery condition of the platform, and that the railway company was guilty of the negligence as charged, then to find for the plaintiff; and the charge further instructed the jury fully on the issue of contributory negligence. The court, in effect, having instructed the jury that, in order to entitle plaintiff to recover, they must find that the inclined way was

constructed by the railway company for the use and accommodation of passengers, the plaintiff and his wife had the right to select that route, although other passengers usually and ordinarily went some other way after alighting from the train, unless the circumstances were such as to indicate to the appellee and his wife that the use of such route would be attended with danger. There was evidence tending to show that passengers usually and ordinarily went the way of the inclined route, and did so upon this occasion; and if it was a way provided by the railway company for the accommodation of passengers, it was harmless error to instruct the jury that the plaintiff would have the right to go that route, if passengers usually and ordinarily went that way after alighting from the train.

The second assignment of error complains of the tenth paragraph of the charge of the court as being on the weight of evidence, in that it assumed that the inclined way was in a slippery condition, and that the failure to have cleats and steps thereon and hand-holds and bannisters on either side, was negligence. This charge, construed in connection with the other paragraphs, is not subject to the objections urged against it.

The eleventh paragraph of the charge is not subject to the objections urged against it, when considered in connection with the balance of the charges given by the trial court.

The question of contributory negligence and the want of the exercise of ordinary care upon the part of the wife of the plaintiff was fully covered by the charge of the court. Therefore there was no error in refusing the charge requested as set out under the fourth assignment of error.

The question raised in the charge set out under the fifth assignment of error, which charge was refused, is practically covered by the thirteenth subdivision of the charge given by the trial court.

What we have just said also applies to the sixth assignment of error. We overrule the seventh assignment of error. The questions there raised have been practically passed upon.

We find no error in the record, and the judgment is affirmed.

Affirmed.

Opinion on Rehearing.

As one of the grounds of contributory negligence, the appellant specially pleaded "that, if the incline upon which Mrs. Criswell fell was wet and slippery and without railings or cleats, then that its said condition was plain, open, and obvious to common observation, and the plaintiff's wife, at the time she used said incline, knew that it was slippery, or ought, in the exercise of reasonable care, to have known it, and she voluntarily and negligently went upon the same, carrying in her arms at the time and

incumbered with a large child, and assumed the risk of using the same in the condition it was in, and was negligent in going thereon in its wet and slippery condition, incumbered, as aforesaid, with a child in her arms." There is evidence in the record which has a tendency to support this plea. There is evidence which shows that the incline was without railings or cleats, and was wet and slippery at the time that Mrs. Criswell went upon it, and that such condition could have been observed by one exercising ordinary care; and that she went upon the same with a child in her arms, without looking where she was stepping. Appellant's special charge No. 1, which is set out under its tenth assignment of error, and which was refused by the trial court, is as follows: "If you believe from the evidence that the inclined portion was wet and slippery, and its being so was open and obvious to a person intending to walk down the same, and if your further believe from the evidence that Mrs. Criswell had a child in her arms, and attempted hurriedly to descend the same, without noticing how or where she was stepping, and that her attempting to walk down the same in the manner she did was a failure to use such care as a person of ordinary prudence would under the circumstances have used, and if you believe that such failure, if any, caused or contributed to cause the accident, you will find for the defendant." As stated, this charge was refused. While the general charge of the court submitted the issue of contributory negligence, it did not directly cover the point presented in the special instruction. Upon a re-examination and consideration of the questions presented in the assignments of errors in appellant's brief, we have concluded that this assignment is well taken, and under the doctrine announced in *Ry. Co. v. Hall* (Tex. Sup.) 85 S. W. 787, we are of the opinion that the court erred in refusing to give the special charge set out. We find no other error in the record except in this particular.

Motion for rehearing granted, and the judgment is reversed, and the cause remanded.

N. NIGRO & CO. v. SECURITY BANK OF MINNESOTA.

(Court of Civil Appeals of Texas. May 10, 1905.)

PROMISSORY NOTES—ACTION BY INDORSEE—TIME OF INDORSEMENT—ISSUE—EVIDENCE—INSTRUCTIONS.

In an action on a note, the evidence on the issue whether plaintiff acquired the note before or after maturity was conflicting. A witness for defendant testified that a third person claiming to represent the original payee had possession of the note after its maturity, and made statements with respect to its collection for the payee, though without stating that it belonged to him. The agency of the third person to represent the payee for the purpose of requiring

the maker to receive the goods for which the note was given, and to pay therefor, was shown. The testimony of the witness was denied by the third person and the payee. *Held*, that the jury were authorized to consider the possession of the note by the third person and his statements with respect thereto on the issue involved, for, if the third person had possession, he had possession as agent of the payee, and such possession should be given the same effect as if possession had been held by the payee, and hence it was error to charge that the statement made by the third person could not be taken as true, as that destroyed, in effect, the value of his statement as evidence.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by the Security Bank of Minnesota against N. Nigro & Co. From a judgment for plaintiff, defendant appeals. Reversed.

Hall, Flippen & McCormick and Chas. A. Rasbury, for appellant. Coke & Coke, for appellee.

FISHER, C. J. This is a suit by the appellee bank against appellants on a promissory note of date December 2, 1901, for the sum of \$1,500, payable to the order of S. H. Hall & Co., of Minneapolis, Minn. The note was due 50 days after date, and was executed and signed by N. Nigro & Co. The note was indorsed by S. H. Hall & Co. to the Security Bank of Minnesota. The appellants, in their answer, pleaded that the note was given as the purchase price of a lot of potatoes bought by them from S. H. Hall & Co.; that Nigro & Co. were wholesale produce dealers in Dallas, Tex.; that the contract under which the potatoes were bought, and which was the basis for the note, provided that the potatoes were to be of a certain quality and merchantable; that the potatoes were not of the quality contracted for, and were not merchantable; and that after they were received by Nigro & Co. at Dallas they notified Hall & Co. of the breach of the contract, and that in the latter part of February or first of March, 1902, the potatoes were delivered to the agent of Hall & Co.; therefore, that the consideration for the note had failed. They further pleaded substantially that the Security Bank of Minnesota was not the true owner of the note, but that the note was in fact owned by Hall & Co., and that the transfer to the bank was a pretended scheme between Hall & Co. and the bank for the purpose of defrauding the appellants and cutting off their defense on the plea of failure of consideration, and that, if there was a transfer to appellee of the note by Hall, it was after its maturity.

The court, in submitting the case to the jury, charged them as follows: "The plaintiff is entitled to a verdict, unless you find from a preponderance of the testimony before you that said note was not transferred to the plaintiff by S. H. Hall & Co. until after its maturity. The law presumes that said note was so transferred before its maturity, unless the defendants can show the contrary by evidence; and, if there is conflicting

evidence on this point, then the burden is on the defendants to show by a preponderance of the testimony that said note was not transferred to the plaintiff until after the maturity. If you so find that the note was not transferred to plaintiff until after its maturity, then the defendants are entitled to a verdict." Verdict and judgment in the court below were in favor of appellee, from which judgment the appellants prosecute this appeal.

Appellants' first and third assignments of error, the only two contained in their brief, complain of the action of the trial court by instruction to the jury in limiting the effect of the testimony of the witness Rasbury as to the statement made by one Hay as to the alleged ownership of the note, which action of the court is fully explained and set out, as appears by the following bill of exceptions:

"Be It remembered that upon the trial of the above numbered and entitled cause, C. A. Rasbury, a witness for the defendant, had testified to the following facts, to wit: That he resides in the city of Dallas, Texas; is a lawyer by profession; knows George S. Leachman, and has known him for a long time; that about March 1, 1902, a gentleman came to his office representing S. H. Hall & Co.; that his name was S. L. Hay; that he gave witness his card, and said he was representing S. H. Hall & Co., of Minneapolis, Minnesota, or claimed to be; that witness knows the handwriting of Mr. Leachman; that Hay presented witness a card with the name of witness written on it in the handwriting of Leachman. Witness was then asked the following questions, and made the following answers thereto, to wit: 'Q. Now, state to the jury just what this man did after coming to your office.' To this question plaintiff objected on the ground that the defendant had not connected said Hay with plaintiff, and was trying to prove the acts and declarations of a third party. 'The Court: I think the objection is well taken.' Upon further examination, the witness stated that he 'saw the note sued on in my office. The nearest I can fix the date is just about the last primary election preceding this. It was in March, I think, just preceding the primary election. I think that was in March. It was in the hands of this man Hay. Q. When Hay presented that note to you, just relate to the jury what occurred between you and him. Plaintiff's Attorney: We object to what occurred between him and Hay, and certainly to anything Hay may have said. We ain't bound by anything he may have said, and we ain't bound for anything which Rasbury may have said.' At this juncture, under instructions from the court, the jury was withdrawn, and after a presentation by plaintiff's attorney of his objections, the jury returned and the following instruction was given by the court to the jury, to wit: 'Gentlemen of the Jury: You

have heard the questions asked the witness, and you heard the objection that was made. The objection was as to any statement that may have been made by this man Hay as to the alleged ownership of the note. Now, I have concluded to admit the testimony, but the testimony as to any alleged statements alleged to have been made by Hay as to the ownership of the note sued on are admitted with this qualification: This testimony may be considered by you simply as bearing upon the issue, and as to whether or not Hay made any such statements. If he made any such statements, you may consider the fact that he made the statements just as you would consider any other fact or circumstance; but whether any such statements which he may have made, if he made any, were true or not, must be shown by other testimony.' To which charge by the court defendant excepted, as being on the weight of evidence. Continuing the witness testified as follows: 'Well, as I stated a while ago, some time—I think in March, 1902—this Mr. Hay came into my office, and handed me a card, and said he was looking for Mr. Rasbury, and handed me a card with my name written upon it by Mr. Leachman over there, and said he was seeking the services of a lawyer; that he had sold to Nigro & Co. some potatoes for S. H. Hall & Co., and that a note was given in the sum of \$1,500, and that N. Nigro & Co. had refused to pay it; that his firm had sent him there to try to adjust the matter with Nigro & Co., and that he had failed to do it, and that now he desired the services of an attorney to sue upon the note. He had some papers, and pulled out of his pocket something like this [here the witness indicates], and separated them like a man ordinarily would, and he had this note in about this shape [indicates], when he said, "By the way, do you represent Nigro & Co.?" and I said, "Yes, sir; I represent Nigro & Co.," and he said, "Of course, I cannot do any further business with you," and got up and left the office. That is, in effect, what took place at the time; but, of course, there might have been some other little circumstances that I have not detailed. The point is, he wanted to sue on the note, and that it was the result of a disagreement about a potato shipment. Hay did not at that time connect the plaintiff in this suit with that note. He said he was the traveling man for Hall & Co. I think perhaps he had Hall & Co.'s name on his card. The Security Bank of Minnesota was never mentioned, and nothing was said by them. The thing was that Hall & Co. had sold these potatoes to Nigro & Co., and his theory was that they were Nigro's, and he was going to sue on the note.' Here plaintiff's attorney moved to exclude all of the witness' testimony with reference to what this man told him with reference to the conversation between him and Mr. Hay on the ground that it was irrelevant, hearsay, and not binding upon the plaintiff,

as there was no connection between the plaintiff and Hay. 'The Court: Well, the testimony has been admitted with qualifying instructions, and the motion is overruled.'

"Upon cross-examination the witness testified as follows: 'Hay took the note out of his pocket like I illustrated a while ago. He might have had a wallet, but he took it out like a man ordinarily would, and the note was on the top. I know Mr. Nigro, of Nigro & Co., very well. As he turned the papers over, I said, "By the way, do you represent Nigro & Co.?" and he said, "Yes, sir." It is my recollection that he had the note in his hand. I knew the note. I had seen it before. It was at the bank. I think it was at the bank that Mr. Nigro and I saw it. They sent the note down here for collection before it was due, and we went over and instructed the bank to send it back with the statement that it was not due. I can't say when with reference to dates. I know it was in the month of March, for the campaign was going on here then, and I think Mr. Leachman perhaps wrote my name on one of Mr. Vince Pace's cards, who was a candidate. I am attorney for Mr. Nigro, and was at that time.'

"To which action of the court in so limiting the testimony of said witness in its application to the issues the defendants in open court excepted, and here tender their bill of exceptions to the action of the court, and request that the same be allowed and filed, which is accordingly done."

To fully understand the questions raised and presented in the bill of exceptions, it is necessary to state substantially the evidence of certain witnesses as appears in the record, in proof of the issues involved in this case. The appellee bank contends that it acquired the note as collateral security for money loaned Hall & Co. prior to the maturity of the note, without any notice of any breach of the contract upon which the note was based, or any failure of its consideration. As stated before, the appellants contend that the bank acquired the note after maturity; and further that the transfer was pretended to be made before maturity, in order to deprive the appellants of their right to urge breach of contract and the failure of consideration of the note. There is some evidence bearing on the question as to whether the note was transferred to the appellee by Hall & Co. prior or subsequent to its maturity. The vice president of the bank, and the official who had charge of the affairs of the bank of this character, testified that the note was indorsed to the bank by Hall & Co. on the 16th of December, 1901, and it was accepted by the bank as collateral security for money then loaned to Hall, without any notice or knowledge upon the part of the bank of any defect in the paper, or of any breach of the contract upon which it was based. Hall & Co. testified to the same effect as to the transfer to the bank and as to the time it was indorsed. The note has an indorsement by Hall

& Co. to the bank. These two witnesses agree as to the time the indorsement was executed; that is, the 16th of December, 1901. In January, 1902, the note was sent to a bank in Dallas by the Security Bank of Minnesota for collection, and the evidence tends to show that at that time it had this indorsement upon it: "Pay to the order of any bank or banker." This was signed by the Security Bank of Minnesota. After the note was received by the Dallas bank, it was presented to Nigro & Co., who declined to pay it, because it was not due, as evidenced by the terms of the written contract entered into between Nigro & Co. and Hall & Co.; and the inference from the record is that at the time of such refusal of appellants the potatoes had not arrived at Dallas. Nigro testified that he had examined the note sued on in evidence. That the first time that he saw the note after he signed it was some time in January, the first time it was presented. At that time it was at the American National Bank. (This refers to the American National Bank of Dallas, who held the note for collection.) It was there for collection. He examined the note at the time. "It may have had one indorsement on it. I did not examine the indorsements closely, but I knew it did not have all the indorsements it has now. The bank presented it to me for collection. I refused to pay it. The reason I refused at the time is that it was not due. The contract which was executed December 24, 1901, provided that the note would become due 50 days after that date." He further states: "I never received any notice from anybody concerning this note, other than the notices received from the bank here. It was sent here for collection. I never received any notice from the plaintiff in this case that it owned the note. I saw the note in the American National Bank, as above stated. It had one indorsement on it, but not all the indorsements that it has at the present time. I think that indorsement was from one bank to another." He further testified that he notified Hall & Co. that the potatoes were not of the quality contracted for, and that in the latter part of February or first of March, 1902, Hall & Co. sent their agent Hay to Dallas (the same man mentioned in the bill of exceptions), to whom appellant turned over the potatoes, and they were received by Hay. The note at the time of trial had two other indorsements upon it, signed by the Security Bank of Minnesota, similar to the first indorsement made by that bank, to the effect, "Pay to the order of any bank or banker." Witness Pondrom, one of the officials of the American National Bank of Dallas, testified that the indorsements that appear on the note were on the same as it was received by the bank from time to time for collection; that he was acquainted with the customs generally obtaining among banks, and that there is a difference in the method of sending out paper for collection for their own account and that of their customers.

Ordinarily, paper sent out on account of customers is sent "No protest," while paper that represents cash to the bank would ordinarily be sent subject to protest. The instructions accompanying this paper were not to protest. Witness Harrison, an official of appellee Bank of Minnesota, contradicts the testimony of witness Pondrom as to the custom with reference to instructions to protest or not to protest. Witness Hall, the party from whom the appellant purchased potatoes, and who is mentioned as the payee in the note, testified that on the 16th of December, 1901, he indorsed the note to the appellee bank, and that the note since that time has never been in his possession or in his control, nor been in possession of any person for him since that date; that he did not deliver the note to Hay or any other person except the bank; that S. L. Hay was once in his employ; that he quit working for him in May, 1903; that in the latter part of February, 1902, he sent Hay to Dallas, Tex., to examine the potatoes shipped Nigro & Co., and ascertain why they would not accept them. Hay testified that he never had possession of the note, and did not have possession at the time testified to by the witness Rasbury, as shown by the bill of exceptions; that he was sent to Dallas by Hall & Co. to try and get Nigro to accept the potatoes, and that he was instructed by Hall & Co. to select a lawyer that could be recommended to the appellee bank. He admits going into Rasbury's office, and said he told him who he was and what he wanted, and asked him the question if he was Nigro's attorney. Rasbury answered that he was, and nothing further was said about the case. He testified that this conversation occurred some time between February 12 and March 10, 1902. The witness Harrison, the officer of the appellee bank, testified that Hall & Co. never had the note since December 16, 1901; that the note was in possession of the bank, except when sent to the Dallas bank for collection. The note, as offered in evidence, also had this indorsement: "Pay to the Security Bank of Minnesota, Minneapolis, Minnesota, or order," signed, "S. H. Hall & Company."

This is a sufficient statement of the evidence to indicate that, in our opinion, the trial court erred in limiting the effect of the statements made by the witness Hay to Rasbury, as shown in the testimony of Rasbury as set out in the bill of exceptions. Hay's statement would not be admissible to establish the fact that he was the agent of Hall & Co.; but his agency, so far as investigating the condition of the potatoes and requiring Nigro & Co. to receive them and pay for the same, is abundantly established by other evidence. He was there for this purpose as the agent of Hall & Co., and if, at the time, he had possession of the note, which Rasbury testifies to be the case, notwithstanding the denial of Hall & Co. and of Hay, the jury would be authorized to consider such possession as evidence bearing upon the question

that he held possession as the agent of Hall & Co. Although the bank may claim that it received the note, and that the same was indorsed to it prior to its maturity, the jury were not absolutely required to believe its testimony upon this subject; and, if Hall & Co. had possession of the note in January, after the same had matured, such possession could have been considered for what it was worth, tending to establish the fact that it was not, on the 16th of December, 1901, delivered to the bank and indorsed by Hall & Co. Now, if Hay had possession as agent for Hall & Co., his possession should be given the same effect as if possession had been held by Hall & Co. in person. Such possession is consistent with the theory advanced by the witness Nigro, wherein he testified to the fact substantially that the note did not have an indorsement upon it by Hall & Co. to the appellee bank when he saw it in Dallas in January, 1902. It is true that Hay made no express statement in his interview with Rasbury as to an ownership of the note in Hall & Co.; but his possession of the note, together with the statement to the effect that he desired suit brought thereon by Hall & Co. against the appellants, was some evidence, if admissible, tending to show that Hall & Co. were the claimants of the note, and were asserting ownership in the same. And such evidence of possession was further admissible in contradiction of the evidence of the bank tending to show that the bank had never, since the 16th day of December, 1901, parted with possession of the note, except when it was sent to the bank at Dallas for collection. Now, instructions to the jury that the statements made by Hay when he had actual possession of the note might be considered merely that the statements were made, but that the statements could not be taken as true, had practically the effect of destroying the value of Hay's statements as evidence. His statements accompanying the exhibition of the note to Rasbury were a part of the same transaction, the tendency of which was to establish the fact that his possession of the note was for the benefit of Hall, and that he desired action thereon for his principal. The limiting and qualifying effect upon the conduct and statements of Hay, as testified to by Rasbury, was certainly calculated to influence the jury to believe that slight weight, if any, should be given to the evidence of Rasbury in detailing what occurred in his interview with Hay. This evidence, it is true, might be slight, but we are of the opinion that the jury were authorized to consider it in connection with the other evidence in the record bearing upon the question whether or not the indorsement or transfer to the bank was truly made at the time claimed by the appellee, or that it came into possession of the same after maturity of the note. For the error stated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. RUSSELL.*

(Court of Civil Appeals of Texas. June 14, 1905.)

1. CARRIERS—INJURIES TO CATTLE—NEGLIGENCE—EVIDENCE.

In an action for injuries to cattle in transit, evidence held to support a verdict finding defendant carrier guilty of negligence.

2. SAME—STATEMENTS OF AGENT—ADMISSION AGAINST INTEREST.

In an action against a carrier for injuries to cattle in transit, a statement made by defendant's conductor to plaintiff during the transportation, in reply to a question why he started out with the engine drawing the train, that they had to go with whatever they started out with, and admitting that he knew that he could not get far with such engine, was admissible as a statement against interest.

3. SAME—PREJUDICE.

Where, in an action for injuries to cattle in transit, the undisputed evidence showed that the engine drawing the train was defective, and unable, from the time it started until it was relieved by another engine, to efficiently draw the train, and that by reason of its defective condition the cars were so jerked about as to cause the injuries to the cattle, defendant was not prejudiced by the admission of a statement by its conductor to plaintiff during the transportation that he knew he could not get far with the engine drawing the train.

4. SAME—EVIDENCE—OBJECTIONS—SCOPE—APPEAL.

Where, in an action for damages to cattle, evidence of a witness on the issue of damages was objected to on the ground that the witness was testifying to his opinion and not as to facts, such objection did not sustain the contention, first made on appeal, that it was error for the court to permit the witness to testify what the market value of the cattle would be if in good condition, for the reason that defendant was not responsible for the depreciation in weight and appearance of the cattle naturally resulting from being transported.

Appeal from District Court, Cooke County; D. El. Barrett, Judge.

Action by George H. Russell against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Eldridge & Midkiff, for appellant. Culp & Giddings, for appellee.

NEILL, J. This suit was brought by appellee against appellant to recover damages to a shipment of cattle. The plaintiff alleged that the cattle were injured, while being transported by defendant from Gainesville to Wichita Falls, by being "subjected to great, unnecessary, and unusual violence or rough treatment, occasioned by defendant's agent in operating its train, and to the defective and worn-out condition of its engine, cars, and machinery, and other causes unknown to plaintiff and peculiarly within the knowledge of defendant." The defendant, after a general denial, answered that the alleged injuries to the cattle were caused by the negligence of plaintiff and those rep-

resenting him in carelessly handling said cattle, and bad treatment of same by plaintiff; that, if the cattle were injured, such injuries resulted from their inherent vice, and from their hooking and injuring one another; that the injuries to the cattle, and the death of some, were caused by plaintiff negligently treating them to an application of Beaumont oil at Gainesville, and by cold weather and starvation. The trial of the case, which was before a jury, resulted in a judgment in favor of plaintiff for \$1,449.75.

Conclusions of Fact.

In the latter part of October, 1902, the plaintiff shipped 181 head of high-grade Durham cattle from Taylor to Washburn, Tex. En route to their destination they were to be transported over defendant's road from Taylor to Wichita Falls, Tex., and, from there on, by the Ft. Worth & Denver Railway Company. They were delivered by plaintiff to defendant at Taylor in good condition, and defendant railway company entered into a written contract with him to carry them from there over its line of road to Wichita Falls. The contract limited its liability to damages occurring on its own line of railway.

When the cattle reached Gainesville, Tex., they were dipped in Beaumont oil for the purpose of cleaning them from ticks, a method recommended and approved by United States authorities. The evidence shows that in dipping, or in making the application of oil, they were carefully handled, and in no way injured. The cattle remained at Gainesville 10 or 12 days, and were in good flesh and first-class condition, with the exception of a calf, worth \$25, which had been killed before they arrived there. The cattle were reloaded on defendant's train at Gainesville about 9 or 10 o'clock at night, and reached Muenster, a distance of about 14 miles, next morning about 3:30 o'clock.

The evidence shows that the engine which pulled the train there from Gainesville was in a bad condition, and leaked so as to render it so weak that it could hardly draw the train. For this reason it was continually backing so as to get a start, and suddenly pulling ahead, causing a jerking of the cars which frequently threw a great many of the cattle down, bruising and injuring them and crippling some. This was continually occurring between Gainesville and Muenster. When the train reached that place it had to wait there two or three hours for another engine to carry it to Wichita Falls. When it reached there a great many of the cattle were down. They were carried from there over the Ft. Worth & Denver to Washburn, their destination. While being transported by that road from Wichita Falls there was no unusual jerking the cars, or rough handling of the cattle, nor any delay, or anything reasonably calculated to injure them. When they arrived at their des-

*Rehearing denied July 1, 1905, and writ of error denied by Supreme Court.

tionation they were in a very bad condition, many of them being badly bruised, some with their hips knocked down and eyes knocked out; and on account of their injuries a very valuable Durham bull died next day, and 8 cows and 15 yearlings died in consequences of the injuries occasioned them by defendant's negligence, within 15 days afterwards. A large per cent. of those that did not die were more or less injured.

The evidence is sufficient to show that the damages caused plaintiff by the negligence of defendant in transporting his cattle over its line of road amounted to \$1,449.75, and that none of this damage was caused or resulted in any way from any of the acts or things pleaded by defendant in its answer.

Conclusions of Law.

1. Our conclusions of fact dispose of the first, second, and third assignments of error, which complain of the insufficiency of the evidence to support the verdict. If the testimony of the plaintiff and his witnesses is true (and this was a matter for the jury, and not for us, to determine), the evidence is amply sufficient to show that the injuries inflicted upon the cattle were caused by the negligence of the defendant on its line of road, and that the amount of damages found by the jury accruing to plaintiff by reason of such negligence is not excessive.

2. The plaintiff testified that at Muenster he asked the conductor why he started out with that engine, and that he replied they had to go with whatever they started out with, and admitted that he knew that he could not get far with it. This was objected to by defendant "on the ground that the conversation with the conductor was hearsay." The court overruled the objection, and, to its action in doing so and in admitting the testimony, the defendant excepted and has assigned error. We are inclined to think that this assignment is not well taken. The conductor was the agent of defendant in charge of the train when he made the statement, and his knowledge of the condition of the engine when it started out, it seems to us, was the knowledge of his principal, and his admission that he knew the condition of the engine was admissible in evidence as an admission against interest. *Telephone Co. v. Prince* (Tex. Civ. App.) 82 S. W. 327; *Stand-efer v. Aultman* (Tex. Civ. App.) 78 S. W. 552; *Cooper v. Brittain* (Tex. Civ. App.) 74 S. W. 91; *Plotz v. Miller* (Ky.) 51 S. W. 176. But if it should be conceded that the court should have excluded such testimony upon the ground that it was hearsay, we are unable to see how the defendant was injured by it. The undisputed evidence shows that the engine was defective, and unable, from the time it started from Gainesville until it was relieved by another engine at Muenster, to ef-

ficiently draw the train, and that by reason of its defective condition the cars in which the cattle were loaded were so jerked about as to cause their injuries. The defendant was a common carrier, and, as such, is regarded by the law as a practical insurer of the safe carriage of the goods against all loss of whatever kind, with certain exceptions; the only one of which having any application to this case is such losses as might arise from the inherent nature of live stock. It not being shown that the injury to the cattle arose from their nature, and it appearing that defendant, in furnishing a defective engine, failed to provide all suitable means for their transportation, and that such failure was the cause of the damage, the testimony which is made the subject of this assignment could in no way have prejudiced appellant. *Hutchinson on Carriers*, §§ 170a-218; *Tex. & P. Ry. Co. v. Snyder* (Tex. Civ. App.) 86 S. W. 1041.

3. The witness F. L. Hill, having testified that he was acquainted to a certain extent with the market value of plaintiff's class of cattle at Washburn at the time they arrived there, was then asked by plaintiff's counsel to state what in his opinion was the fair market value of the cattle in question at that place in good condition, and answered, "I think \$75 for those cows would have been very reasonable." The question and answer of the witness were objected to by defendant on the ground "that the witness was testifying to his opinion, and not as to facts." The admission of the testimony is assigned as error, and the proposition asserted is that "it was error for the court to permit the witness to testify what the market value of said cattle would be if in good condition, for the reason that defendant is not responsible for the depreciation in weight and appearance of cattle naturally resulting from being transported." It will be observed that the objection here urged to the admission of the testimony is different from that made in the trial court. The rule is, when, on appeal, an assignment of error is predicated upon the admission of testimony, only such objections as were presented in the trial court and stated in the bill of exceptions will be considered. *City of Austin v. Forbis* (Tex. Civ. App.) 86 S. W. 31; *T. & P. Ry. Co. v. Birdwell* (Tex. Civ. App.) 86 S. W. 1068. As, therefore, the proposition cannot be considered, and as it is the only one advanced under the assignments of error, it will be overruled.

This also disposes of appellant's fifth, sixth, and seventh assignments of error, which, like this one, interpose for the first time on appeal objections to the admission of testimony different from what the bills of exception show were made in the court below.

There is no error requiring the reversal of the judgment, and it is affirmed.

DIFFIE v. THOMPSON et al.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. VENDOR AND PURCHASER—RESERVATION OF VENDOR'S LIEN—EFFECT ON TITLE.

Where a deed expresses as a part of the consideration thereof the assumption by the grantee of vendors' lien notes owed by, and described in the deed to, the grantor, and reserves a lien on the land to secure their payment, the superior title to the land remains in the grantor until the notes thus assumed are paid.

2. SAME—FAILURE TO PAY NOTES—CONVEYANCE TO HOLDER—RIGHTS OF HOLDER.

Where a grantee fails to comply with his promise to pay past-due notes of the grantor which he assumed, and to secure the payment of which a lien was reserved on the land, the vendor may convey the land to the holder of the notes; and the latter thus acquires all the rights of the vendor, together with the right to have the notes paid before the superior right to the land can vest in the grantee, who assumed the same.

3. SAME—RIGHT TO POSSESSION—FAILURE TO DISCHARGE NOTES.

A grantee of land, who has assumed the payment of vendor's lien notes, has no right, unless he pays the notes, to a judgment for the land or the possession thereof, in trespass to try title against the holder of the notes, to whom the grantor has conveyed the land.

Error from District Court, Red River County; Ben H. Denton, Judge.

Action by W. O. Diffie against W. H. Thompson and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

W. S. Thomas, for plaintiff in error. Chambers, Doak & Kennedy, for defendants in error.

EIDSON, J. This suit was brought in the court below by the plaintiff in error against the defendants in error in the form of an action of trespass to try title to a tract of land described in his petition. Defendants in error Hearn and Thompson answered by general exception, general denial, plea of not guilty, and a special answer setting up that on August 28, 1900, J. B. Whitfield purchased the land in controversy from J. Long and wife, M. J. Long, and received a general warranty deed therefor; that afterwards, on December 31st, Whitfield and wife, M. J. Whitfield, conveyed to said Hearn, who acted for himself and the said Thompson, by a general warranty deed, the land in controversy—and prayed that said Whitfield and wife and J. Long and wife be made parties to the suit, and, in the event plaintiff recovered judgment against them, that they have judgment over against said Whitfield and Long upon their respective warranties. Long and wife answered by general denial, plea of not guilty, and by a special answer, alleging in substance as follows: "And further answering herein, these defendants say that they are husband and wife, and were such husband and wife on the 5th day of December, 1898, and that they were living on the land

described in plaintiff's petition as their homestead, with their family, at that time, and had no other homestead; that they were citizens of Red River county at that time, and that said land was their homestead at that time they lived upon it and then occupied it as their homestead; that they desired to sell the same, and that they were ignorant people, and did not understand the legal purport of legal instruments, and that the plaintiff W. O. Diffie came to them, and told them, if they would execute and deliver to him a power of attorney, he would sell said land for them, and that they agreed to do so; that he then made or caused to be made the instrument described in plaintiff's petition as of date December 5, 1898, which he fraudulently represented to them to be a power of attorney, so that he could sell said land for them; that they relied on the statements so made by the said W. O. Diffie, and, believing them to be true, and that he was acting in good faith and with an honest intent, and not knowing that the said Diffie was setting up any claim to said land, they did on the 28th day of August, 1900, sell and convey by general warranty deed to J. B. Whitfield said land, not knowing that the instrument held by said Diffie showed on its face that it was a deed, but, believing it to be only a power of attorney, as it was understood to be, they conveyed said land to the said Whitfield; and that the said Diffie, in order to carry out his nefarious plans, and to cheat, swindle, and defraud these defendants and others who might buy said land, did not put said purported deed on record until after the deed was made by these defendants to the said Whitfield and placed on record in the county clerk's office, and then for the first time he claimed that said instrument was a deed, and endeavored by such means to extort money from these defendants and the purchasers of said land; and these defendants say that no consideration whatever was paid by said Diffie for said land, and the same was without consideration, and that purported deed casts a cloud upon the title to said land, and pray that said deed may be canceled, and all clouds removed, and for costs," etc. The case was tried by the court without a jury, and judgment rendered for all the defendants and against the plaintiff for costs.

The court below filed findings of fact and conclusions of law. Its second finding of fact is as follows: "(2) I find that on December 5, 1898, J. Long and wife deeded the land in question to plaintiff, W. O. Diffie, and that the consideration paid and agreed to be paid for the same was as follows, to wit: The assumption of two promissory notes described in a deed from J. W. Bailey et al. to J. Long, which were a vendor's lien on the land in question, and which notes were then owned by J. B. Whitfield, and the assumption of a debt of \$35 due by Long to one Upchurch, and \$5 paid Mrs. Long, wife of J. Long, and

\$100 due plaintiff as attorney's fees. I find that, as a matter of fact, the plaintiff, W. O. Diddle, never paid the notes given by Long to Bailey for the land, and assumed by him, nor any part thereof, and that his deed was not filed for record until the 19th day of July, 1902." This finding is not assailed by plaintiff in error, and it must be assumed by us that it is supported by the evidence. It implies that plaintiff in error's deed from Long and wife expressed as a part of the consideration therefor the assumption of the payment of two promissory notes described in the deed from Bailey and others to J. Long, and expressly reserved a lien on the land in controversy to secure their payment, and that said notes were then owned by J. B. Whitfield. This being true, the superior title to the land remained in Long and wife until the purchase money was paid. *Peters v. Clements*, 46 Tex. 122; *Roosevelt v. Davis*, 49 Tex. 472; *Baker v. Compton*, 52 Tex. 261; *Hamblen v. Folts*, 70 Tex. 135, 7 S. W. 834; *Minter v. Burnett*, 90 Tex. 249, 38 S. W. 350; *Carey v. Starr*, 93 Tex. 515, 56 S. W. 324.

The court's fourth finding of fact is as follows: "(4) I find that on the 28th day of August, 1900, J. Long and wife, M. J. Long, deeded the land in question to J. B. Whitfield, and that the consideration was the surrender and cancellation of the two notes given by Long and wife to J. W. Bailey, and described in the deed from Bailey et al. to Long, which were a vendor's lien on the land in question, and paid the said Long \$35, and that the said deed was filed for record August 28, 1900." And its second additional finding of fact is as follows: "(2) The amount of the notes given by J. Long to J. W. Bailey as a part of the purchase money for said land was \$50 and \$160, respectively. The said notes were dated September 21, 1895, and were due December, 1895, and November, 1896, and bore interest at the rate of ten per cent. per annum from date." Plaintiff in error not having complied with his promise and obligation to pay the Bailey notes, which were due at the time he made the promise for nearly two years, Long and wife, his vendors, had the legal right to convey the land to Whitfield. *Morrison v. Barry*, 10 Tex. Civ. App. 25, 30 S. W. 376; *Efron v. Burgower* (Tex. Civ. App.) 57 S. W. 306. And Whitfield thus acquired all the legal rights his vendors had; and, holding the purchase-money notes, which plaintiff in error had assumed the payment of, he had the same right to have them paid as his vendors, before the superior right to the land could vest in plaintiff in error. *Crafts v. Daugherty*, 69 Tex. 480, 6 S. W. 850; *Harris v. Catlin*, 53 Tex. 8; *Jackson v. Palmer*, 52 Tex. 434; *Masterson v. Cohen*, 46 Tex. 520; *Hale v. Baker*, 60 Tex. 217.

The court's fifth finding of fact is as follows: "(5) I find that on the 31st day of December, 1900, J. B. Whitfield and wife deeded the land in question to M. C. Hearn

for himself and his codefendant W. M. Thompson, and that the consideration paid therefor was \$300 cash paid at the time and the execution of two notes, payable to J. B. Whitfield or order, for \$100 each, both of which have been paid, and that the amount was the full value of the land at that time, and that the deed from Whitfield and wife to Hearn was filed for record January 4, 1901."

The conveyance by Whitfield to defendants in error vested in them all the rights acquired by the former from Long and wife by their deed to him, and they are now in possession of the land in controversy under said deed.

Plaintiff in error's fourth assignment of error assails the conclusion of law of the court below to the effect that defendants in error were entitled to judgment upon the ground that plaintiff in error had failed to comply with his contract as to the purchase of said land, and pay the amounts assumed by him, which constituted a lien upon the land in controversy. We do not agree with this contention of the plaintiff in error. As stated in the case of *Crafts v. Daugherty*, supra, the facts of which are very similar to those found by the court in this case, the plaintiff in error was not entitled to a judgment for the land, nor to disturb the possession which defendants in error took under their deed, without payment of the amounts he had assumed, which constituted a lien upon the land.

The view we have taken of the case, and upon which same is disposed of, renders it unnecessary for us to consider the other assignments of error presented in plaintiff in error's brief.

The judgment of the court below is affirmed.

BRADFORD v. WESTBROOK, Tax Collector.

(Court of Civil Appeals of Texas. June 3, 1905.)

1. BONDS — TAXES—PAYMENT—COLLECTION—INJUNCTION—NECESSARY PARTIES.

In a suit by a taxpayer to enjoin the collection of a tax levied to pay town bonds, the town and the holder of the bonds are necessary parties.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 2169.]

2. SAME—VALIDITY—DE FACTO CORPORATION.

Where a town was a de facto corporation at the time it issued certain bonds, and after reincorporation of the town the succeeding de jure corporation assumed the payment thereof as authorized by statute, the bonds became valid obligations of the succeeding corporation.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1948-1950.]

Appeal from District Court, Nolan County; Jos. L. Shepherd, Judge.

Suit by J. A. J. Bradford against E. Westbrook, tax collector of Sweetwater. From a

decree in favor of defendant, plaintiff appeals. Affirmed.

J. F. Eldson and Beall & Beall, for appellant, Ragland & Crane, for appellee.

STEPHENS, J. This suit was brought to enjoin the collection of a tax levied in the year 1902 by the town of Sweetwater for the payment of bonds issued in the year 1898 by the town of Sweetwater when it was a de facto corporation only. This acting corporation was dissolved by decree of court at the instance of the state, in a quo warranto proceeding, in the following year. The people of the same territory reincorporated in 1902, and assumed to pay the bonds, levying a tax for that purpose.

The petition for injunction, even with the aid of the supplemental petition, did not entitle appellant to any relief whatever. In the first place, neither the town of Sweetwater, nor the holder of the bonds sought to be invalidated, was made a party to the suit; and, in the second place, the facts stated utterly failed to impeach the validity of the bonds. Being issued by a de facto corporation in conformity with the law authorizing a de jure corporation to issue bonds, and being assumed by the succeeding de jure corporation in conformity with the statute authorizing such assumption, the bonds were valid obligations, notwithstanding the town may have had less than 1,000 inhabitants, as alleged, during the life of the de facto corporation. The cases sustaining this view are both numerous and familiar.

The judgment sustaining a general demurrer to the petition is therefore affirmed.

TEXAS & P. RY. CO. v. FRANK.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS.

Where a petition for injuries alleged that plaintiff was confined to his bed 10 days, at a per diem loss, and his testimony showed that he lost 15 whole days and parts of other days, a charge that the jury, in estimating plaintiff's damages, might consider "any loss of time by him," was erroneous and prejudicial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 441-445; vol. 46, Cent. Dig. Trial, § 595.]

2. SAME—CURE BY REMITTITUR—INDEFINITE EVIDENCE.

Where a charge on the measure of damages for personal injuries erroneously permits a greater recovery than is authorized by the pleadings for loss of time, and the evidence on the subject is too indefinite for the error to be cured by remittitur, a judgment for plaintiff must be reversed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4551.]

3. RAILROADS—ACCIDENTS—ACTIONS—EVIDENCE.

In an action against a railroad for injuries, testimony of the engineer and fireman that it was their habit or custom to ring the bell and

blow the whistle at the place where the accident occurred was properly excluded.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Railroads, §§ 913, 1125.]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by T. C. Frank against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

T. J. Freeman and Head, Dillard & Head, for appellant. M. M. McMahon and Thurmond & Steger, for appellee.

KEY, J. This is a personal injury suit, and from a judgment in favor of the plaintiff, the defendant prosecutes this appeal.

The plaintiff alleged in his petition that he was confined to his bed 10 days, at a loss of \$2.50 per day. That was the only averment in reference to loss of time. The plaintiff's testimony tends to show that he lost 15 whole days of time, and parts of an uncertain number of other days, on account of the injuries complained of, all of which time he testified was worth \$2.50 per day. As to the measure of damages, the court instructed the jury as follows: "If you find a verdict for plaintiff, you may, in estimating his damages, consider any injury to his buggy, any loss of time by him, any reasonable expense for physician, any reasonable expense for medicine, and any bodily and mental pain suffered by plaintiff which the evidence may show is the direct result to plaintiff of the injuries or damages, if any, caused by the negligence of defendant, and assess such amount as will, in your judgment, reasonably compensate him therefor." This instruction is assigned as error, because it authorized the jury to allow the plaintiff more compensation for loss of time than was authorized by his pleading. The assignment is well taken, and, as there was testimony tending to show greater damage resulting from loss of time than was set up in the plaintiff's petition, the error complained of was material, and, the evidence on the subject being too indefinite for the error to be cured by remittitur, a reversal must follow. *City of Dallas v. Jones*, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377; *Railway v. Taylor* (Tex. Civ. App.) 58 S. W. 844.

We also hold that appellant's requested instruction No. 11 should have been given. The court's charge on the subject of contributory negligence was general, while the requested instruction referred to was more specific, and, being correct in form, it was error to refuse to give it.

No error was committed in refusing to permit the engineer and fireman who were running the train on the occasion in question to testify that it was their habit or custom to ring the bell and blow the whistle at the place where the accident occurred. *Ry. Co. v. Johnson*, 92 Tex. 380, 48 S. W. 568.

Some other questions are presented, on all of which we rule against the appellant.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SWEET v. LYON et al.*

(Court of Civil Appeals of Texas. May 17, 1905.)

1. HOMESTEAD—LIEN.

Where land had become a homestead prior to the owner executing a note which did not include any of the purchase price of the land, the payee could acquire no lien on the land as security for the note.

2. APPEAL—ASSIGNMENT OF ERROR—PROPOSITION.

A proposition under an assignment of error which is not germane to the assignment will not be considered on appeal.

3. HOMESTEAD—PLEADING SETTING UP RIGHT—NECESSITY.

Where, in an action for the foreclosure of a lien, to secure a note, defendant claimed the land under a parol gift from plaintiff and others, former owners thereof, and alleged that the land was his homestead, plaintiff could not assert any right by virtue of the land being his homestead prior to and at the time of the parol gift without pleading such right.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 170, 390-394.]

4. APPEAL—COSTS—ERROR IN JUDGMENT.

Where plaintiff, suing on a note, failed to call the trial court's attention to an error in calculation whereby the judgment was rendered for a smaller sum than due, he is not entitled to costs on appeal.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by Clarence H. Sweet against Carry Lyon and another. From a judgment granting insufficient relief, plaintiff appeals. Modified.

J. M. Willis and H. G. Evans, for appellant.

EIDSON, J. Appellant brought this suit in the court below on a promissory note alleged to have been executed by appellee W. L. Lyon on the 7th day of February, 1902, in favor of appellant, for the sum of \$500, bearing interest at the rate of 10 per cent. per annum from the 1st day of January, 1902, interest payable annually, and stipulating for 10 per cent. additional on principal and interest for attorney's fees, and alleged that said note was given for part of the purchase money of a certain lot of land, and improvements thereon, situated in the town of Trenton, in Fannin county, Tex. Appellant also alleged that, at the date of the execution of the note, appellants O. Sweet and M. E. Sweet executed a deed of conveyance to appellees for said lot of land, and in said conveyance retained a lien to secure the payment of the said note. Appellant prayed for judgment for the amount of said note, principal, interest, and attorney's fees, and

for a foreclosure of his alleged lien upon the said lot of land, and improvements thereon.

The record does not show that appellee W. L. Lyon filed any answer in the case. Appellee Carry Lyon answered by general demurrer, general denial, and pleaded specially, in substance, that she is the wife of appellee W. L. Lyon, and that she and her husband had been living separate and apart since April 3, 1904, and are still living separate and apart, and that she and her husband occupied said lot continuously since November, 1901, and up to their separation, as their homestead, and that since their separation she and her children have occupied same as their homestead; that the lot in controversy was conveyed to her and her said husband by O. Sweet and M. E. Sweet, acting for themselves and appellant, with full authority from said appellant so to act, who were the owners of said lot or parcel of land, by parol gift, in November, 1901, by clear designation and description, and by marking and staking out said lot, and giving same into possession of her and her said husband, and that same was given to her and her said husband in fee-simple title, without any reservation; that she and her said husband, with full knowledge of said donors, took possession of said land upon the belief that it had been given to them, and in December, 1901, erected permanent improvements upon said land upon the faith of the gift to them; that the improvements erected by them consisted of a dwelling house, valued at \$1,200, and that the value of the original lot, independent of said improvements, was \$100, and that their possession of said lot had been continuous and uninterrupted since November, 1901. Said appellee further alleged that the note sued on was not a vendor's lien note, and was not given to secure any part of the purchase money of said lot, but that said note is an attempted lien on said homestead of said appellee, given by W. L. Lyon to secure the loan of money made by M. E. Sweet to him, the said W. L. Lyon, and appellee Carry Lyon; that said alleged lien was given in February, 1902, long after appellees had gone into possession of said lot as their homestead, and after they had erected permanent improvements thereon; that said lot was the homestead of appellees when said note here sued on was given; that said note is signed by W. L. Lyon, and is not signed by Carry Lyon; and that said Carry Lyon failed and refused to sign said note, and said note does not and cannot constitute a valid lien on her homestead, for the reason that it was not given as a part of the purchase price thereof. Appellee Carry Lyon further alleged that said note was given for money borrowed, and that a part of said money was used in the erection of improvements on her said homestead, but that said improvements were erected prior to the execution of said note. Appellee Carry Lyon prayed that the alleged

*Rehearing denied June 28, 1905, and writ of error denied by Supreme Court.

parol gift of said land to her and her husband be established, and that she have judgment for said land, and that she also have judgment establishing her homestead right in said premises, and declaring said note an invalid mortgage on said premises. Appellant, by supplemental petition, presented a general demurrer and general denial to appellee Carry Lyon's said answer. The case was submitted to the court without a jury, and judgment was rendered for the appellant against W. L. Lyon for the sum of \$670.04, without foreclosure of the lien prayed for.

There are no conclusions of fact or law embraced in the record. We find that the material allegations of the special answer of appellee Carry Lyon are supported by the evidence, and that the note sued on was not given for the purchase money of the land in controversy, and that the lot of land in controversy was the homestead of W. L. and Carry Lyon at and prior to the execution of the note sued on, and was such homestead up to the separation of the said W. L. and Carry Lyon, and thereafter and at the date of the trial was the homestead of appellee Carry Lyon. There was no controversy as to the execution of the note sued on by W. L. Lyon, nor as to his personal liability thereon.

Appellant's second assignment of error complains of the refusal of the court to foreclose the alleged lien upon the premises described in his petition, upon the ground that said lien is fully expressed and reserved in the deed executed by O. Sweet and his wife, M. E. Sweet, and Clarence Sweet, of date February 7, 1902, and that said lien is acknowledged and retained in the note sued on to secure the payment thereof, principal, interest, and attorney's fees.

Appellant's first proposition under this assignment of error is that, where a deed conveying land by its terms reserves a lien upon the property to secure the payment of a specific sum of money, no homestead right in the property can be acquired by the purchaser as against the lien; though the sum named constitute no part of the purchase money proper, the title only vests subject to the lien. We are of the opinion that appellant's contention as manifested by this proposition is not sound, especially when attempted to be applied to the pleadings and evidence in this case. Appellee Carry Lyon's special answer and the evidence adduced in support thereof show that the homestead character was impressed upon the lot in controversy prior to the execution of the note sued on, and that the note was not given for the purchase money of said lot. The property being a homestead, no valid lien could be given upon it. *Loan Co. v. Blalock*, 78 Tex. 88, 18 S. W. 12; *Freeman v. Hamblin*, 1 Tex. Civ. App. 163, 21 S. W. 1019; *Kempner v. Comer*, 73 Tex. 198, 11 S. W. 194. Appellees acquired title to the lot in controversy by virtue of the parol gift; taking possession in pursuance thereof, and making

86 S.W.—25

valuable permanent improvements thereon. *Wooldridge v. Hancock*, 70 Tex. 21, 6 S. W. 818; *Baker's Ex'rs v. De Freese* (Tex. Civ. App.) 21 S. W. 963; *Samuelson v. Bridges* (Tex. Civ. App.) 25 S. W. 636; *Doyle v. Bank* (Tex. Civ. App.) 50 S. W. 480.

Appellant's second proposition under his second assignment of error is not germane to the assignment of error, and therefore is not entitled to consideration. However, if appellant could assert any right to the lot by virtue of its being his homestead prior to and at the time of making the parol gift to appellees, he had no pleadings raising such issue in this case, and without such pleadings he could not avail himself of any such right.

By his first assignment of error, appellant contends that the court erred in rendering judgment in favor of appellant for \$670.04, when the undisputed evidence is that there is due and owing to appellant on the note sued upon the sum of \$709.22; being the principal, interest, and attorney's fees, as shown by said note. We think appellant is correct in this contention, and the judgment of the court below will be reformed so as to recite the amount recovered by appellant, including principal, interest, and attorney's fees, to be \$709.22, instead of \$670.04. But appellant is not entitled to the costs of appeal, on account of not having called the attention of the court below to the mistake in the amount of the judgment by motion for a new trial or otherwise, as evidently, if he had done so, that court would have made the proper correction.

The judgment of the court below is reformed as above indicated and affirmed.

Reformed and affirmed.

MORRISON v. HAZZARD et al.

(Court of Civil Appeals of Texas. June 21, 1905.)

1. STATUTE OF FRAUDS—CONTRACT FOR SALE OF REALTY—DESCRIPTION OF VENDOR.

A contract for the sale of realty describing the vendor as the "estate of F." did not sufficiently describe the vendor to comply with *Sayles' Rev. Civ. St. 1897, art. 2543* (Statute of Frauds).

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 212, 213.]

2. SAME—VARIATION BY PAROL.

Where a contract for the sale of land described the vendor as the "estate of F.," parol evidence that by the quoted words was meant, not the heirs, legatees, and devisees of F., but those of another person, would be inadmissible because varying the written instrument.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1846, 1906-1908; see vol. 23, Cent. Dig. Frauds, Statute of, § 375.]

3. SAME—DESCRIPTION OF LAND.

Where a contract for the sale of land showed on its face that a part of the land was owned by an individual and part by a certain estate, but did not describe the respective parts owned by each, the contract was insufficient to comply with *Sayles' Rev. Civ. St. 1897, art. 2543* (Statute of Frauds).

4. SAME — LIABILITY OF UNAUTHORIZED AGENT.

Where a contract made by an agent is void under the statute of frauds, the agent, thought not authorized by his alleged principal, is not liable thereon.

Error from District Court, Dallas County; Richard Morgan, Judge.

Action by R. H. Morrison against Elizabeth Hazzard and others. The action was dismissed, and plaintiff brings error. Affirmed.

Cobb & Avery, for plaintiff in error. Bryan T. Barry, Etheridge & Baker, and H. L. Bromberg, for defendants in error.

EIDSON, J. This suit was brought by plaintiff in error against defendants in error to enforce the specific performance of a written contract for the sale of two lots in the city of Dallas, and, in the alternative, for damages for its breach, if specific performance was refused. Defendants in error filed and presented in the court below general and special exceptions to plaintiff in error's amended petition and trial amendment, which were sustained by the court, and the suit dismissed.

Plaintiff in error's first assignment of error complains of the action of the court below in sustaining the general demurrers and general exceptions contained in defendants' answers to plaintiff's first amended petition and trial amendment; plaintiff in error's contention being that said petition and trial amendment showed a good cause of action, and therefore said general demurrers and exceptions should have been overruled. The written contract, specific performance of which plaintiff in error sought by this suit to enforce, and which is set out in his petition, is as follows:

"Dallas, Texas, May 20th, 1901. Received of R. H. Morrison through Murphy & Bolanz the sum of \$250 in part payment for lots 7 and 8 in block 79 1-4-136 according to Murphy & Bolanz' official map of the city of Dallas, Texas, said lots fronting together 100 feet on the north line of Jackson street and 90 feet on the west line of Prather street, this day sold by me as agent of the estate of F. Lawrence, 25 feet and E. Hazzard 75 feet to the said R. H. Morrison for the purchase price of \$5,000 upon the following terms: \$3,000 cash, and the balance in two notes of equal payments, and due and payable one and two years after date, with 6 per cent. interest, the interest payable semi-annually as it accrues with the privilege granted the maker of paying off any or all of said notes at any time before the maturity upon giving sixty days notice, said notes to be secured by the usual form of vendor's lien and deed of trust upon the property, conditioned upon a good and authentic abstract showing good and acceptable title to the property, and should the title to the property prove not good, and cannot be made good within a reasonable time, say not to exceed sixty days from the date here-

of, then I obligate myself to return the said Morrison the sum of \$250 now paid, upon the return and cancellation of this receipt, balance of cash payment to be made and notes and deed of trust to be executed at once upon delivery of special warranty deed properly conveying the hereinbefore described property. It being understood that the property is to be free and clear of all incumbrances of whatsoever nature, including taxes for the year 1901.

(Agent of) H. A. Kahler, by B. O. Weller.

"Accepted: R. H. Morrison.

"(10 cents revenue stamps on original.)"

It will be observed that said contract purports to bind E. Hazzard and the estate of F. Lawrence. The petition alleged that, by the terms in said contract, "estate of F. Lawrence" was meant and understood by all parties to mean the heirs, legatees, and devisees of Archilus Lawrence and Franklin Lawrence, deceased, said F. Lawrence being the executor and manager of said estates. We do not think the writing which constitutes the contract can be varied or added to by parol testimony, so as to give the names of parties selling the land, when the writing itself fails to do so. In other words, the writing must contain the names of the parties selling the land and to be bound thereby, or must properly describe them; otherwise it would be materially defective, and could not constitute a written contract for the sale of land. The names of the sellers of the land may be embraced in the body of the writing or subjoined or attached thereto in any manner showing an intention to be bound thereby; or such names may be embraced in some other properly signed paper to which reference is made in the principal writing or memoranda; or the persons selling may be described in such writing or memoranda, and it would be sufficient; but a writing without the names of the sellers of the land embraced therein or subjoined or attached thereto in some way, showing an intention to be bound thereby, or in some other paper properly signed and referred to in the original writing or memoranda, or which writing or memoranda does not properly describe the vendors, is fatally defective, and cannot be used as the basis of an action for specific performance. When the sellers are properly described in the writing, parol evidence is admissible to apply the description and identify the persons described. In the writing under consideration, the names of the sellers of the 25 feet of land mentioned are not given, nor are they in any manner described. The words "estate of F. Lawrence" clearly are not the name or names of any person or persons, and it is equally clear that they do not constitute the description of any person or persons. The word "estate," as generally used, means property of every character, and is ordinarily applied to property of a decedent, a ward, a lunatic, a bankrupt, etc.; that is, to property being administered in the courts.

Had the words "heirs of F. Lawrence" been used, it would have been different, as by parol evidence the names of the persons meant by "heirs of F. Lawrence" could be shown. Plaintiff in error, according to the allegations of his petition, seeks to show by parol evidence that by the words "estate of F. Lawrence" was meant, not the heirs, legatees, and devisees of F. Lawrence, but those of Archilus Lawrence and Franklin Lawrence, and, further, that "F. Lawrence," used in the writing, meant the executor and manager of said estates. We think it clear that this would be varying and adding to the written instrument, and in contravention of the established rules of evidence.

Further, the writing, while purporting to sell two certain lots in a certain block in the city of Dallas, shows on its face that the estate of F. Lawrence and E. Hazzard own separate and distinct parts of said lots, but fails in any manner to describe the respective parts owned by each. This is also a fatal defect or omission in the writing, and cannot be remedied by parol evidence. A contract for the purchase of real estate must contain within itself all of the necessary elements of such a contract, and such requisites cannot be supplied by parol proof. *Zanderson v. Sullivan*, 91 Tex. 490, 44 S. W. 484; *Jones v. Carver*, 59 Tex. 293; *Patton v. Rucker*, 29 Tex. 402; *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366; *Mentz v. Newitter*, 122 N. Y. 491, 25 N. E. 1044, 11 L. R. A. 97, 19 Am. St. Rep. 514; *Clampet v. Bells* (Minn.) 39 N. W. 495.

In *Grafton v. Cummings*, supra, the Supreme Court of the United States say: "The statute not only requires that the agreement on which it [the action] is brought, or some memoranda thereof, shall be signed by the party to be charged, but that the agreement or memoranda shall be in writing. In an agreement of sale, there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is therefore an essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. There is a defect in this memorandum in giving no indication of the party who sells. If *Grafton* was bound to purchase, it was because somebody was bound to sell. If he was bound to pay, somebody was bound to receive the money and to deliver the consideration for the price so paid. There can be no bargain without two parties. There can be no valid agreement in writing without these parties are named in such manner that some one whom he can reach is known to the other to be bound also."

We do not think the writing quoted above, and upon which this suit is based, is sufficient to satisfy the requirements of the stat-

ute of frauds (Article 2543, Sayles' Rev. Civ. St. 1897). Where the contract is void under the statute of frauds, the agent making it, though not authorized by his alleged principal, is not liable thereon. The alleged principal not being bound, the assumed agent would not be. *Dung v. Parker*, 52 N. Y. 496; *Baltzen v. Nicolay*, 53 N. Y. 467.

We are of opinion that the court below did not err in sustaining the general demurrers and general exceptions contained in defendants' answers, and in dismissing this suit. The judgment of the court below is therefore affirmed.

Affirmed.

McCABE v. SAN ANTONIO TRACTION CO.*

(Court of Civil Appeals of Texas. May 31, 1905.)

1. APPEAL—HARMLESS ERROR.

In an action against a street railroad for injury to a passenger, where the case was submitted to the jury only on the alleged negligent act of the conductor in releasing his hold on the injured person while she was on the running board, and on the issue of her contributory negligence, any error in the admission in evidence of a city ordinance inhibiting street cars from stopping on street crossings, and compelling them to stop after passing such crossings, to take on and let off passengers, was not prejudicial to plaintiff.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2275-2277.]

2. EVIDENCE — CONCLUSIONS — ADMISSIBILITY.

The admissibility of the testimony of an eyewitness as to the cause of the fall of the injured person was not affected merely because he stated that the only conclusion he could come to was that the injured person slipped and fell.

3. SAME.

The conclusions or opinions of common observers, testifying to the results of their observations made at the time as to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury, are admissible under an exception to the general rule excluding the conclusions of a witness.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2149-2152.]

Appeal from District Court, Bexar County; A. W. Seeligson, Judge.

Action by John McCabe against the San Antonio Traction Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Will A. Morriss, for appellant. Ogden & Brooks, W. H. Lipscomb, and Walter P. Napier, for appellee.

NEILL, J. This was a suit brought by appellant against the appellee to recover \$15,000 damages for personal injuries to his wife, alleged to have been occasioned by the negligence of defendant while she was a passenger upon one of its electric street cars. After alleging that the car upon which

*Rehearing denied June 28, 1905, and writ of error denied by Supreme Court.

his wife was a passenger was an open car, provided with a step known as a "running board," extending along its side from one end of the car to the other, plaintiff alleged as the grounds of negligence which caused her injuries: That defendant negligently failed to stop the car at a street crossing where there was a plank walk upon which she could alight from the car with safety, and that, after the car passed beyond the plank walk, it being dark, and his wife not being able to see the condition of the street where the car was stopped, in response to defendant's invitation to alight from the car at such point she stepped on the running board. She being an aged and delicate woman, the conductor, while guiding and assisting her, told her to walk back along the running board to the end of the car to the plank walk, suddenly turned her around, facing the back end of the car, and then, without warning her, suddenly turned loose her arm, whereby she, being unable to balance and prevent herself from falling, fell violently to the ground. That the act of the conductor in releasing his hold on her in such manner was negligence on the part of defendant, which, without fault or negligence of plaintiff's wife, independently and together with the negligence of defendant in failing to stop the car at a proper place for her to alight, was the direct and proximate cause of her injuries. The defendant, after denying the alleged acts of negligence, pleaded that plaintiff's wife was guilty of contributory negligence, in that after the car had stopped in obedience to her signal at a reasonable, safe, and proper place for her to alight therefrom, she, in undertaking to alight, was so negligent and careless that she slipped and fell from the running board, thereby causing her fall, and injuries, if any, resulting therefrom. The case was submitted to the jury only upon the alleged negligent act of the conductor in releasing his hold on plaintiff's wife while she was on the running board, and upon the issue of her contributory negligence. A general verdict was found for the defendant, and from the judgment entered upon it plaintiff has appealed.

Conclusion of Fact.

We find, in deference to the verdict, that plaintiff's wife's fall from the car and alleged injuries were not caused by the negligence of defendant.

Conclusions of Law.

As the case was not submitted to the jury upon the issue of the alleged negligent failure of defendant to stop the car so plaintiff's wife could alight therefrom on the plank walk, we fail to perceive how plaintiff could in any way have been prejudiced by the court's admitting in evidence the ordinance of the city inhibiting street cars from stopping on street crossings, and compelling them to stop after passing such crossings,

for the purpose of taking on and letting off passengers. If, however, the case had been submitted on the issue as to whether defendant was negligent in failing to stop the car opposite the plank walk, which was shown to be at a street crossing, the ordinance would have been admissible as evidence negating such negligence. For a defendant cannot ordinarily be held negligent in acting in obedience to a valid ordinance of the city prescribing its duties to the public.

The third assignment of error complains of the court's refusing on plaintiff's motion, to strike out the testimony of the witness F. W. Cook, to the effect that Mrs. McCabe slipped off the running board; the ground of such motion being that the witness, on cross-examination, showed that his statement that she slipped off was merely a conclusion, and that he did not know and could not testify as a fact that she slipped. The testimony of the witness which is made the subject of this assignment is as follows: "I was sitting several seats behind the two ladies, and one of them rang the bell. I think it was Beauregard street. The streets were muddy. The elder of the two ladies rose first to get off the car, and I think she walked along the running board some distance, because the car went beyond this cross-walk; that is, I mean the car didn't go beyond the cross-walk, but the seat upon which she was sitting went beyond the cross-walk. I mean across the walk. And as she was walking along the younger lady also started to leave the seat, and stepped on the running board, and, when the younger lady rose from her seat to get on the running board, the conductor got out and stood on the ground, wishing to assist the ladies to get off the car; and, when both ladies attempted to get off the car at the same time, the conductor was compelled to divide his attention, and he tried to help the old lady and the young lady at the same time, and the old lady slipped and fell in the mud in the street. * * * The car did not stop exactly at their seat. So they had to walk along the running board to get to the cross-walk." On cross-examination he testified: "I was sitting several seats behind the ladies. I was not paying particular attention to what occurred. There were no other persons between me and them to obstruct the view. Well, the lady must have slipped and fell, because she couldn't fall any other way. I testify that she fell, whether she slipped—That is the only conclusion I can come to. * * * It was simply a form of speech to illustrate the way she fell. * * * I said that she slipped, because that was the natural way for her to fall. * * * If a man falls on the street, it is presumed he slipped. * * * I will state positively that she did step along the running board." It is an exception to the general rule that witnesses cannot give conclusions or opinions that evidence of common observers, testifying to the results of their observation, made at the

time, in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury, is admissible. *Commonwealth v. Sturtivant*, 117 Mass. 133, 19 Am. Rep. 401; *Elliott on Evidence*, §§ 676-678. We believe the testimony complained of in this assignment comes within, and was admissible as evidence under, this exception to the general rule, and that the court for this reason did not err in excluding it from the consideration of the jury.

Our conclusion of fact disposes of the assignment which complains of the insufficiency of the evidence to support the verdict. The burden of proving negligence was upon the plaintiff, and, unless the evidence upon the issue was of such preponderating weight as to show the verdict is wrong, we are not authorized to disturb it.

The judgment of the district court is affirmed.

TEXAS & P. RY. CO. v. MALONE.

(Court of Civil Appeals of Texas. June 7, 1905.)

EVIDENCE—REBUTTAL.

Where, in an action for personal injuries, defendant introduced testimony as to what plaintiff had said immediately after the happening of a certain accident, it was not error to admit in rebuttal testimony as to an entirely different accident from that in which the injuries sued for were received, which testimony tended to show that the statements claimed to have been made by plaintiff were made on this other occasion.

Appeal from Van Zandt County Court; John W. Davidson, Judge.

Action by M. M. Malone against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Freeman, H. M. Cate, and J. A. Germany, for appellant. Leaston Davidson and W. A. Davidson, for appellee.

KEY, J. This is a personal injury suit, resulting in a verdict and judgment for the plaintiff for \$300, and the defendant has appealed.

The assignments of error complain of the action of the court in admitting testimony tending to show another and different accident than the one in which appellee claims to have been injured. This testimony was given in rebuttal, and after the defendant had introduced testimony relating to and tending to show what the plaintiff said immediately after the happening of a certain accident. The testimony complained of tended to show that that was on a different occasion and related to a different accident, and was admissible for that purpose. No error has been pointed out, and the judgment is affirmed.

Affirmed.

KALKLOSH v. BUNTING.

(Court of Civil Appeals of Texas. July 1, 1905.)

1. APPEAL—PROCEEDING IN FORMA PAUPERIS—DISQUALIFICATION OF JUDGE.

The affidavit of appellant attempting to appeal under Rev. St. 1895, art. 1401, authorizing an appellant to appeal, though unable to pay costs or give security therefor, on making proof of his inability before the trial court or the county judge by affidavit stating his inability, cannot be taken before the county judge who was counsel for appellant in the litigation, because the act of the judge in determining the matter is judicial, within Sayles' Ann. Civ. St. 1897, art. 1129, providing that no county judge shall sit in any case where he shall have been of counsel, though there was no actual contest before the judge as to appellant's inability.

2. SAME—JURISDICTION OF APPELLATE COURT—RAISING QUESTION BY AFFIDAVIT.

The question whether appellant, attempting to appeal under Rev. St. 1895, art. 1401, authorizing an appeal by one unable to pay the costs or give security therefor, furnished proof of his inability, may be raised in the appellate court by affidavits showing the facts.

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action between A. Kalklosh against J. Wiley Bunting. From a judgment for the latter, the former appeals. Appeal dismissed on memorandum opinion. Judgment of dismissal affirmed on rehearing.

R. L. Stennis, for appellant. McCall & McCall, for appellee.

SPEER, J. From an adverse judgment in the district court of Parker county, A. Kalklosh has attempted to appeal to this court, under the provisions of article 1401 of the Revised Statutes of 1895, which article reads as follows: "Where the appellant or plaintiff in error is unable to pay the costs of appeal, or give security therefor, he shall nevertheless be entitled to prosecute his appeal; but, in order to do so, he shall be required to make strict proof of his inability to pay the costs, or any part thereof. Such proof shall be made before the county judge of the county where such party resides, or before the court trying the case, and shall consist of the affidavit of said party, stating his inability to pay the costs; which affidavit may be contested by any officer of the court or party to the suit, whereupon it shall be the duty of the court trying the case, if in session, or the county judge of the county in which the suit is pending, to hear evidence and to determine the right of the party, under this article to his appeal."

The affidavit provided for in the foregoing article was subscribed and sworn to by Kalklosh before the county judge of Parker county after the adjournment of the district court trying the case. The county judge at the time was of counsel for Kalklosh in this litigation, and for this reason we dismissed his appeal on a former day, and the matter is again before us on motion for rehearing, the

insistence being that the fact that the county judge was of counsel for Kalklosh did not disqualify him in the particular referred to. But we see no reason to change our former holding. The article under which Kalklosh attempted to appeal, and which dispenses with the necessity of an appeal bond in certain contingencies, clearly requires that proof of the appellant's, or plaintiff in error's, inability to pay the costs of appeal or give security therefor, shall be made either before the county judge of the county where such party resides, or before the court trying the case. It is true that the affidavit of the party, in the absence of a contest, may be taken as sufficient proof by the officer trying the issue. It may be true that such affidavit is necessarily conclusive. Notwithstanding this, the act of the court in determining such matter is a judicial, and not a ministerial, act, and, being such, the proceeding in the present case was violative, generally, of the principle that a man should not act as judge in his own case, and specially of article 1129, Sayles' Ann. Civ. St. 1897, providing that "no judge of the county court shall sit in any case wherein he may be interested, or where he shall have been of counsel, or where either of the parties may be connected with him by affinity or consanguinity within the third degree." That there was in fact no actual contest instituted cannot, we think, affect the conclusion that the act of the county judge was a judicial, rather than a ministerial, one. It has been held that a disqualified judge cannot grant a certiorari to remove the cause from a justice to the county court (*Baldwin v. McMillan*, 1 White & W. Civ. Cas. Ct. App. § 515), or make an order dismissing a cause for want of prosecution (*Garrett v. Gaines*, 6 Tex. 435), or make an order allowing to be filed an information for a quo warranto (*State v. Burks*, 82 Tex. 584, 18 S. W. 662), or to render a judgment in the case even by confession (*Chambers v. Hodges*, 28 Tex. 105).

This question, arising as it does since the final determination of the cause in the district court, and being one which could not have been put in issue in that court, is properly raised here by affidavits showing the facts affecting our jurisdiction. *Nalle v. City of Austin* (Tex. Sup.) 22 S. W. 960.

For these reasons, our former ruling in dismissing the appeal is adhered to, and the motion for rehearing overruled.

ATCHISON, T. & S. F. RY. CO. v. WADDELL BROS. et al.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. CONNECTING CARRIERS—INJURIES TO CATTLE—ACTIONS—VENUE.

Where cattle were shipped over the lines of several connecting carriers under a bill of lading limiting the liability of each to its own line, and constituting a separate contract on be-

half of the shipper and each railroad company, plaintiff was not entitled to sue one of them for a separate default in a county where it had no agent or place of business, and through which its line of railroad did not run.

2. SAME—DAMAGES.

Where plaintiffs shipped certain cattle which they had sold, and received from the purchaser the entire price, less \$100, deducted for injuries to the cattle in transit, such sum, with interest, being the measure of plaintiffs' damages in an action against the carriers, the action was not within the jurisdiction of the county court, though plaintiffs alleged damages in the sum of \$450 for the purpose of conferring such jurisdiction.

Appeal from Midland County Court; L. M. Murphy, Judge.

Action by Waddell Bros. and others against the Atchison, Topeka & Santa Fé Railway Company and others. From a judgment in favor of plaintiffs, defendant Atchison, Topeka & Santa Fé Railway Company appeals. Reversed in part.

See 86 S. W. 655.

J. W. Terry and Ed. J. Hamner, for appellant.

NEILL, J. W. N. & T. N. Waddell, alleging they were partners, sued the Texas & Pacific Railway Company, the Gulf, Colorado & Santa Fé Railway Company, and the Atchison, Topeka & Santa Fé Railway Company in the county court of Midland county for damages to a shipment of cattle made from Odessa, Tex., to Ft. Worth, Tex., over the line of the Texas & Pacific Railway Company, and from Ft. Worth to Kansas City, Mo., over the lines of the Gulf, Colorado & Santa Fé Railway Company and appellant. Plaintiffs alleged that the Texas & Pacific Railway Company contracted with them for itself and its codefendants to deliver the shipment of cattle to the Missouri Pacific Railway Company at Kansas City, Mo., to be from thence transported by said company and delivered at Lexington, Mo.; that the cattle were injured by the negligence of defendants in transit, to plaintiffs' damage in the sum of \$450. The Texas & Pacific Railway Company answered by a general demurrer, a general denial, and specially denied that it contracted with plaintiffs and its codefendants to deliver the cattle to the Missouri Pacific Railway Company at Kansas City, but, on the contrary, alleged that it only contracted to transport the cattle over its own line of railroad, and that, by the terms of the contract, its liability was limited to its own line. The Gulf, Colorado & Santa Fé Railway Company pleaded its privilege of being sued in Galveston county, Tex., and afterwards, in the event such plea should not be sustained, plead matters in bar, not necessary to mention here. Appellant, the Atchison, Topeka & Santa Fé Railway Company, filed a plea in abatement to the jurisdiction of the court, claiming its privilege of being sued in El Paso county. In this plea appellant alleged that it is a

foreign corporation incorporated under the laws of Kansas, that it operates its own line of railway through the territory of Oklahoma and the states of Kansas and Missouri, but does not own nor operate any part of its railroad in the state of Texas, and that no part of its road extends into Texas or in any county thereof; that it does operate under a lease, approved by the Texas Railroad Commission, the railroad of the Rio Grande & El Paso Railway Company, extending from the boundary line of the state of Texas to El Paso in the state of Texas, a distance of 20.19 miles; that none of defendants, except the Texas & Pacific Railway Company, owned or operated any railroad or part of a railroad in Midland county, Tex., nor did they own or operate any railroad in said county when this suit was filed, nor have they ever owned or operated any railroad in said county; that the Atchison, Topeka & Santa Fé Railway Company is doing business in the state of Texas, and has a local agent in El Paso county, Tex. (whose name is given in the plea), and has a local office there for its freight, passenger, and traveling freight and passenger agents (whose names are set out in the plea); that it has no office, agency, officer, agent, or representative of any character whatsoever in Midland county, and never had; that its principal office is not in the state of Texas, but at Topeka, in the state of Kansas; that said defendant is not sued for any crime, trespass, or fraud committed in Midland county, Tex.; that defendant and the Texas & Pacific Railway Company are not partners nor agents, and no relation of partnership or agency of any character whatever exist between them, and none existed at the time of the shipment involved in this suit, and none has ever at any time existed; that the shipment involved was made over defendant's line of railroad under and by virtue of a written contract made with plaintiffs about November 8, 1903, at Ft. Worth, in Tarrant county, Tex., and defendant had no connection whatever with any contract made by the plaintiffs with the Texas & Pacific Railway Company, and, if the Texas & Pacific Railway Company or any one else made or executed any contract with plaintiffs for or on behalf of defendant, the same was executed without its authority; that this is not a suit for personal property or the recovery thereof, and no other ground exists under the laws to give jurisdiction to try this case as against this defendant in Midland county, Tex., and all allegations contained in the pleadings of this case which would have the effect of laying venue as against this defendant in Midland county, Tex., are untrue, and were falsely and fraudulently made for the sole purpose of giving jurisdiction, and that all the facts stated in this plea as now existing existed in all respects the same at the time of plaintiffs' shipment involved in this case, and

have so existed ever since; that it appears from the face of plaintiffs' petition, and it is a fact, that no part of the cause of action sued on, and no act of this defendant constituting any part of said cause of action, ever existed, occurred, happened, or transpired in Midland county, Tex., but the same entirely transpired outside the limits of the state of Texas; that plaintiffs have falsely and fraudulently joined in this suit the Texas & Pacific Railway Company as defendant with this defendant, for the sole and only purpose of endeavoring to secure jurisdiction of the person of defendant in the county of Midland and state of Texas; that it appears from plaintiffs' petition that their cause of action, in so far as it relates to the Texas & Pacific Railway Company, is not within the jurisdiction of this court, nor did this defendant or its codefendant, the Gulf, Colorado & Santa Fé Railway Company, have any connection or relation whatever with said contract out of which arose the cause of action against the Texas & Pacific Railway Company; and it further appears from said petition that the contract out of which arose the cause of action between plaintiffs and this defendant and the Gulf, Colorado & Santa Fé Railway Company was and is entirely independent of and disconnected with, having no relation to, the contract between plaintiffs and the Texas & Pacific Railway Company out of which arose the cause of action against this defendant. This plea was duly verified by affidavit. The plea of privilege, having been submitted to the court and evidence heard thereon, was overruled, as well as the plea of privilege of the Gulf, Colorado & Santa Fé Railway Company. After the pleas of privilege were heard and overruled by the court, the two last-named railway companies filed a plea, under oath, to the jurisdiction of the court, in which they alleged that the amount in controversy was less than \$200, and that the allegations laying the damages at a greater amount were falsely and fraudulently made for the purpose of giving the court jurisdiction. These two railway companies, then, answered by special exceptions and pleas in bar of plaintiffs' action. The case was tried before a jury, which returned a verdict in favor of plaintiffs against appellant for \$100, with interest at 6 per cent. from November 13, 1902. The jury also returned a verdict in favor of the Texas & Pacific Railway Company and the Gulf, Colorado & Santa Fé Railway Company. From the judgment entered against appellant on the verdict, this appeal is prosecuted.

The undisputed evidence, shown by the bill of exceptions taken to the action of the court in overruling appellant's plea of privilege, establishes beyond a doubt all the allegations in said plea. It is likewise shown by the uncontradicted evidence that the contract made between plaintiffs and the Texas & Pacific Railway Company was in writing,

and was made, as shown upon its face, by said railway company for itself alone, and in no way bound or affected appellant. This contract only bound the Texas & Pacific Railway Company to transport the cattle from Odessa to Ft. Worth, Tex., and there deliver them to its connecting carriers, and limited its liability for such damages as might occur on its own line of railway. No damages were shown, nor was there any evidence tending to show any, to have occurred on the line of the Texas & Pacific Railway Company. The cattle were safely transported by it to Ft. Worth without delay, and there delivered to the Gulf, Colorado & Santa Fé Railway Company. There was, however, evidence of a few hours' delay at Ft. Worth in transferring the shipment from the Texas & Pacific Railway Company to the Gulf, Colorado & Santa Fé, but there is no evidence tending to show that any damages were occasioned by it. The cattle were then transported, without delay, or any injury or damage, by the Gulf, Colorado & Santa Fé Railway Company, to Purcell, its terminus, in the Indian Territory, and there delivered to appellant railway company. From Purcell they were transported with reasonable dispatch, and without damage or injury, to Kansas City, Mo. But instead of delivering them there, as it should have done, to the Missouri Pacific Railway Company to be transported to Lexington, Mo., they were carried by appellant from Kansas City to Lexington Junction, which is on the opposite side of a large river from Lexington, where they were held for about two days, and then carried back by appellant to Kansas City, and afterwards delivered to the Missouri Pacific Railway Company, as should have been done at first, for transportation to Lexington. They were transported by the last-named company to Lexington, and there delivered to Walter B. Waddell, to whom plaintiffs had sold the cattle prior to the date of their shipment from Odessa at \$20 per head, and who paid plaintiffs the full purchase price, less \$100. The \$100 deducted from the purchase price was on account of damages occasioned by the negligence of appellant in failing to deliver them to the Missouri Pacific Railway Company when they arrived at Kansas City for transportation to Lexington. There was no testimony reasonably tending to show that the cattle were damaged while in possession of defendants in a greater sum, and this damage is shown by the undisputed testimony to have resulted from appellant's negligence in the state of Missouri, and that neither of its codefendants were in any way responsible or liable for it.

Conclusions of Law.

In view of the decision of the Supreme Court in *Texas & Pacific Railway Co. v. Lynch*, 75 S. W. 486, and of the opinion of the Court of Civil Appeals of the Second Dis-

trict in *Atchison, Topeka & Santa Fé Railway Co. v. Forbis*, 79 S. W. 1047, we are of the opinion that, upon the undisputed evidence, appellant's plea of privilege should have been sustained by the trial court, and the cause as to it dismissed. We will say, however, that we do not clearly perceive the distinction sought to be drawn by the Court of Civil Appeals of the Second District between the cases cited and the case of *Atchison, Topeka & Santa Fé Railway Co. v. Williams*, 86 S. W. 38. It certainly was never contemplated that a defendant could be deprived of the privilege, vouchsafed him by the law, of being sued in the county of his domicile, by reason of allegations by the plaintiff, known by him to have no foundation in fact, and fraudulently made for the sole purpose of conferring jurisdiction where none exists, and of depriving the defendant of a privilege guaranteed him by the law.

Appellant's plea to the jurisdiction of the subject-matter, also, should have been sustained. For appellees were only entitled to such compensation, as damages, as would make them whole. This could not exceed the \$100, and interest thereon, which they lost on the contract of sale. *St. Louis & S. F. R. R. Co. v. McDurmitt Grain Co.*, 87 S. W. 355, 13 Tex. Ct. Rep. 125.

Because, upon the undisputed evidence, the trial court should, under the law, have sustained appellant's pleas of privilege and to the jurisdiction of the subject-matter, its judgment against appellant is reversed, and the case as to it dismissed. The judgments in favor of the Texas & Pacific Railway Company and the Gulf, Colorado & Santa Fé Railway Company are affirmed.

PECOS RIVER R. CO. et al. v. LATHAM.*
(Court of Civil Appeals of Texas. June 10, 1905.)

1. CARRIERS—CATTLE SHIPMENT—CONTRACT—BREACH—EVIDENCE.

Where, in an action for breach of a carrier's contract to furnish cars for shipment of stock to P., all the witnesses who testified to the market at P. stated that such was a country market, and had not changed much during the entire spring, covering the time when the plaintiff's cattle should have reached P., the admission of evidence of an experienced cattle shipper, who had never actually transported cattle over the route in question, as to the length of time required to transport cattle to P. from the point of shipment, was harmless.

2. SAME—DAMAGES—EXTRA FREIGHT.

Where a carrier failed to perform a contract to furnish cars to transport certain cattle as agreed, the shipper was not bound to arrange with another railroad company to transport the cattle over defendant's route for a part of the distance in order to reduce the shipper's damages.

3. SAME—VARIANCE.

Where, in an action for breach of a carrier's contract to furnish cars in which to ship certain cattle, plaintiff alleged that defendants' agents who acted for them in negotiating the

*Rehearing denied July 1, 1906, and writ of error denied by Supreme Court.

contract, to wit, W. and S., were duly authorized to make such contract, proof that plaintiff negotiated the contract with S. through letters and telegrams, and consummated a verbal contract with M., did not constitute a fatal variance.

4. SAME—AUTHORITY OF AGENT—EVIDENCE.

In an action for breach of a carrier's contract to furnish certain cars for the shipment of cattle, evidence of a witness as to contracts made by him with C., the agent of the Texas & Pacific Railway Company, by which cars had been furnished at I., a station on the line of such company, was admissible to show that such agent's contract with plaintiff to furnish cars at I., instead of the place originally contemplated, was within the scope of the agent's authority.

5. SAME—INSTRUCTIONS.

Where defendants' negligence concurred in causing injuries to plaintiff's cattle with that of other railroads over which the cattle were actually transported, and the amount of damages occasioned by each could not be definitely ascertained, defendants were liable for the damages proximately resulting from the combined negligence.

6. SAME.

A requested instruction that if plaintiff's cattle were damaged and were poor and weak, and their poor and weak condition, independent of any other causes, "aided, assisted, or contributed to the damage," then defendants were not liable for any damage that might have been occasioned by the condition of the cattle, was properly refused as misleading.

Appeal from District Court, Reeves County; James R. Harper, Judge.

Action by T. M. Latham against the Pecos River Railroad Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. W. Terry and Ed. J. Hamner, for appellants. T. J. Hefner and Pruitt & Smith, for appellee.

SPEER, J. This suit was instituted by appellee against appellants to recover damages for breach of a contract to furnish him 35 stock cars for the shipment of cattle from Big Springs to Panhandle. He recovered a judgment for \$4,000, from which this appeal has been perfected.

Our conclusions of fact, where necessary, will appear in the discussion of the various assignments of error.

Under the facts of this case there was no reversible error in permitting the witness Tillar to testify as to the length of time required to transport cattle from Big Springs, by way of Pecos, to Panhandle City. It seems to be true that the witness, although an experienced cattle shipper, had never actually transported cattle over this route. But since the testimony of all those witnesses who testified to the market at Panhandle indicated that such market was a country market, and not subject to much, if any, change during the entire spring, covering the time when, under the terms of the alleged contract, appellee's cattle should have reached Panhandle, the testimony, if erroneous, cannot be harmful. The market being the same for weeks prior as well as weeks sub-

sequent to the time when, under his estimate, the cattle should have reached their destination, it is immaterial whether his estimate be right or wrong.

Appellants complain that they have been held liable for the additional freights paid by appellee in transporting his cattle to Panhandle over other railroads after their failure to furnish the cars agreed to be supplied. They invoke the principle that after their breach of contract, it was the appellee's duty to exercise reasonable diligence to avoid or lessen his damages. No one doubts the correctness of this principle, but its application cannot relieve appellants in this case. The evidence shows that after appellants' failure to furnish cars, and while appellee's cattle were being held and suffering injuries, he arranged with the Texas & Pacific and other railroad companies to transport his cattle by way of Ft. Worth, rather than by way of Pecos, over the appellants' lines; that while appellee did not, at the time he actually billed his cattle out, request them to be routed over appellants' lines, yet he had previously made such request, and the Texas & Pacific Railway Company refused to furnish the cars for that route. Appellee pleaded that by reason of appellants' breach of their contract, and total failure to furnish him cars, he was compelled to pay this extra freight; and we think the evidence sustains his plea, and the law authorizes his recovery. Moreover, we think this principle cannot be invoked by appellants, for the reason that in the exercise of ordinary care a shipper would not be required to make a new contract with a railroad company which had just broken an identical one, and again agree to pay it for services which it was already under legal obligation to perform. This is analogous to the question decided by us in *Sun Manufacturing Co. v. Egbert & Guthrie* (Tex. Civ. App.) 84 S. W. 667.

From what we have already said to the effect that the market at Panhandle was about the same during the entire spring in which the shipment in controversy took place, it follows that there was no error in permitting the various witnesses to testify as to what that market was on or about the 5th day of May, 1902—the time when the cattle should have reached their destination.

We do not think there was any fatal variance between appellee's allegation "that the agents of defendants who acted for them in negotiating and making said contract, to wit, E. W. Martindell and Don A. Sweet, were duly authorized by them to make said contract," etc., and his proof that he negotiated with Sweet through letters and telegrams, and consummated a verbal contract with Martindell.

The testimony of the witness Tillar as to contracts made by him with W. A. Crowder, the agent of the Texas & Pacific Railway at Colorado City, by which cars had been furnished to the witness at Iatan, another sta-

tion on the line of the Texas & Pacific, was admissible for the purpose of showing that this agent's contract with appellee to furnish the cars at Iatan, rather than at Big Springs, the place originally contemplated, was within the actual scope of Crowder's authority as agent of the Texas & Pacific Railway Company. Appellee testified that Crowder had made such a contract, and the latter not only denied that he had made the contract but also denied his authority to do so. Nor was there error in admitting the testimony of the witnesses Latham and Kendall as to the general custom among railroad live stock agents in regard to the subject of making contracts for shipping cattle. Such testimony certainly tended to show that the contract alleged to have been made with the live stock agent Martindell was at least within the apparent scope of that agent's authority, and the pleadings were amply broad to authorize the introduction of proof upon such issue.

We overrule that group of assignments embracing the thirteenth, fourteenth, fifteenth and sixteenth, because we think the evidence sufficient to justify a finding that appellee used all reasonable diligence to prevent damage to his cattle after appellants breached their contract.

The eighteenth assignment of error is predicated upon the court's refusal to give the following special instruction: "If you believe from the evidence that the plaintiff and defendants entered into a contract as alleged by plaintiff, and that defendants failed to comply with said contract, and in consequence thereof, and as the direct and proximate result of said breach of the contract, the plaintiff's cattle were damaged, and that afterward, after receiving said damage, if any, they were transported over the Texas & Pacific Railroad and the Ft. Worth & Denver City Railroad, and while in transit were further damaged by the negligence and improper handling and transportation, and the evidence fails to disclose to you the amount of such damages, and you are unable to determine the exact amount of damages caused before the cattle were received by the Texas & Pacific Railway Company, and the exact amount of damage occasioned to said cattle after being received by the Texas & Pacific Railway Company, then you are instructed to find a verdict for the defendants." In refusing this charge there was no error. It is certainly the law in this state that, if appellants' negligence concurred with the negligence of another in causing damages to appellee's cattle, it could not escape liability. See *Ft. Worth & Denver City Railway Company v. Byers* (Tex. Civ. App.) 35 S. W. 1082; *Texas & Pacific Railway Company v. Smith & White* (Tex. Civ. App.) 79 S. W. 614; *Texas Central Railroad Company v. O'Loughlin*, 84 S. W. 1104, 12 Tex. Ct. Rep. 102; *Texas & Pacific Railway Company v. Slaughter*, 84 S. W. 1085, 12 Tex. Ct. Rep. 99; *Butterick Publishing Company v. Gulf, Colorado & San-*

ta F& Railway Company (decided by this court June 3, 1905), 88 S. W. 299. While appellant would not be liable for damages resulting alone from the negligence of the Texas & Pacific Railway Company or Ft. Worth & Denver City Railway Company, it nevertheless would be liable for damages resulting proximately from their combined negligence. The rule goes even further, and, in personal injury cases, authorizes a recovery even though the negligence of the defendant concurs with the negligence of a fellow servant of the injured plaintiff (*Ray v. Pecos & Northern Texas Railway Company* [Tex. Civ. App.] 80 S. W. 112), or with an act of God (*Chicago, Rock Island & Texas Railway Company v. Bessie Cain* [Tex. Civ. App.] 84 S. W. 682). It is only where the concurrent cause is contributory negligence of the plaintiff that recovery is denied.

We think appellants' special charge No. 19 was properly refused, for two reasons: (1) The matter was sufficiently covered in the court's general charge; and (2) the requested charge itself was so worded as to be misleading. The charge reads: "If you find from the evidence that plaintiff's cattle were damaged and they were poor and weak, and that their poor and weak condition, independent of any other causes, aided, assisted, or contributed to the damage, then you are instructed that the defendants were not liable for any damage that might have been or were occasioned by reason of the condition of the cattle." It is difficult to understand how a condition independent of any other causes could aid, assist, or contribute to the damage, as this charge asserts. This is confusing, and for that reason alone could have been refused.

The evidence is sufficient to support the material allegations of appellee's petition, and the finding of the jury that appellants, by reason of the breach of their contract, damaged appellee in the amount of the verdict.

All assignments of error have been considered, and none is thought to present reversible error. The judgment is therefore affirmed.

MCBRIDE v. BURNS et al.*

(Court of Civil Appeals of Texas. May 24, 1905.)

1. DEED—AMBIGUITY—CONSTRUCTION.

When there are two descriptions in a deed, which are inconsistent with each other, the grantee is at liberty to select that which is most favorable to him.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 315.]

2. VENDOR AND PURCHASER — WARRANTY — FAILURE OF TITLE.

Where land is sold under a warranty of title at so much per acre, and the title to a part thereof fails, the vendee is entitled to recover from the vendor the value of the land to which title failed, and costs of suit.

*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Action by J. H. Burns against W. J. McBride and others. From a judgment in favor of the plaintiff, McBride appeals. Affirmed.

Thos. W. Thompson and Looney & Clark, for appellant. R. T. Shelton, for appellee bank.

FISHER, C. J. Appellee Burns brought this suit in trespass to try title against McBride to recover 25 acres of land out of the Madison Walker 320-acre survey. McBride answered, disclaiming as to all lands in said survey lying south of a line running from a point on the east boundary line of said survey, from which—and here follows a description which it is not necessary to repeat—and a plea of not guilty as to all land lying north of said line. By special plea McBride also alleged that he purchased the land north of said line from B. D. Sachse, who warranted the title thereto; that a part of the consideration was three promissory vendor's lien notes against the said land, aggregating \$3,800; that these notes were made payable to the Plano National Bank, and were given to it in the transaction as a substitute for a deed of trust then held against said land by the bank to secure a debt owing it by Sachse. Sachse was insolvent, and unable to protect his warranty; that the bank knew all of the facts when the land was purchased, and the notes given. He prayed that Sachse and the bank be made parties, and that, should the plaintiff recover any of the land, the purchase price of the part so recovered be deducted from the notes, and for general relief. The bank answered by general denial, and specially that it was not a warrantor of the land, and was an innocent purchaser of the notes, and certain other facts that were set up in the amended answer. The case was tried before the court without a jury, and judgment was rendered in favor of appellee Burns for the land, and in favor of the Plano National Bank and against Sachse on his warranty.

As the case was tried before the court without a jury, in view of all the evidence in the record bearing on the subject of boundary, we are of the opinion that if any error was committed in the ruling of the court as complained of in the first, second, and third assignments of error, if the ruling had been different and in accordance with the views of appellant the conclusion reached by the trial court would not have been different.

The remaining assignments are complaints directed against the conclusions of fact and law filed by the trial court. The conclusions of fact and law are here set out in full, which we approve as substantially correct, in accordance with the facts.

"Findings of Fact.

"(1) The court finds that the contest in this case is over the location of 25 acres of land

in the Madison Walker survey in Collin county; that the Madison Walker survey consisted of 320 acres of land, out of which 200 acres in the north part of said survey was sold, and the land in dispute was a part of the 200-acre subdivision of said survey; that both plaintiff and defendant claim under a common source, to wit, John Johnson and George A. Wilson.

"(2) That on the 22d day of November, 1872, John Johnson and George A. Wilson sold to Robert McRae 200 acres of land in the north part of the Madison Walker survey, described by the calls as follows, to wit: Beginning at the N. E. corner of the original survey; thence west 617 varas; thence south 1,825½ varas; thence east 617 varas; thence north 1,825½ varas to the place of beginning; containing 200 acres of land, more or less.

"(3) I find that the beginning corner of the above-described tract of land, to wit, the northeast corner of the original Madison Walker survey, is a well-recognized corner, and that the 200-acre tract described in the second finding of fact can, by following the calls for course and distance, be easily located upon the ground, and, in view of the fact that there are no calls for natural objects, except for the beginning corner of the Madison Walker survey, the 200-acre tract must be located only by commencing at the beginning corner as called for in the deed from Johnson & Wilson to McRae, and tracing the lines by course and distance; that, establishing the 200-acre tract in that way, there is barely 200 acres embraced within its calls.

"(4) That on the 24th day of April, 1874, Robert McRae executed a power of attorney to T. C. Goodner and James H. Jenkins, by the terms of which McRae authorized them to sell and convey the 200-acre tract of land described in the second finding of fact, which power of attorney was filed for record in the proper place on the 27th day of January, 1877; that this power of attorney recites that McRae lived in New Orleans, Louisiana.

"(5) That on the 27th day of January, 1877, Robert McRae, by his attorneys of record, T. C. Goodner and J. H. Jenkins, conveyed by general warranty deed to John H. Burns the following described tract of land, being 25 acres out of the 200-acre tract conveyed to Robert McRae by John Johnson and G. A. Wilson. The locate calls are as follows, to wit: 'Beginning at the S. W. corner of said 200 acre tract a stake, from which a Hackberry, 14 in. in dia. mkd. X brs. N. 20 W. 7 lks.; thence east with the S. line of said 200 acre tract 25 chains and 97 lks. to a stake the S. E. corner of said 200 acre tract, from which a bois d'arc 14 in. in dia. mkd. with an old X brs. S. 21 deg. W. 44 lks., and an Elm mkd. with an old X brs. N. 84½ W. 31 lks.; thence N. 9 chains and 62 lks. to a stake from which a triple bois d'arc 1½/14 in. in dia. is respectively one marked X brs. N. 27 W. 7 lks.; thence W. 25 chains

and 97 lks. to a stake from which a forked bois d'arc 24 in. in dia. marked X brs. S. 24 W., 12 lks.; thence S. 9 chains 62 lks. to the beginning and containing 25 acres of land.' That this deed was filed for record in the proper place June 14, 1887. The consideration recited in this deed was \$37.50 cash, and note for \$37.50.

"(6) I find that the controversy in this suit is over the location of the 25-acre tract of land described in finding No. 5; that, if the 25-acre tract be located in the 200-acre tract sold by Johnson and Wilson to McRae, then it would be located where plaintiff claims the same to be located, and plaintiff would be entitled to recover; but, if the 25-acre tract be located where defendant claims the same to be, then it would be entirely outside of the 200 acres sold by Johnson and Wilson to McRae, and, if the calls of the deeds should place the said land outside the said 200-acre tract, then the defendant would be entitled to recover the land in dispute.

"(7) I find that there is a conflict in the calls of the deed from Robert McRae to plaintiff, Burns, conveying the 25-acre tract, in this: If the calls for natural objects be ignored, and the calls for course and distance be allowed to control, then the land would be located where plaintiff claims the same to be. I find, however, that there is a call in the deed for a triple bois d'arc at the N. E. corner of the 25-acre tract, and a call for a forked bois d'arc at the N. W. corner of the 25-acre tract; that, if the land be located by a course and distance, there is no triple bois d'arc at the N. E. corner of said 25-acre tract, and no forked bois d'arc at the N. W. corner of said 25-acre tract, nor is there any hackberry at the S. W. corner of the 200-acre tract, as called for in the deed to the 25-acre tract, nor is there any bois d'arc or elm at the S. E. corner of the 200-acre tract, as called for in the deed to the 25-acre tract. But I find on the east boundary line of the Madison Walker survey, and at a distance of 13.77 chains south of where course and distance would locate the N. E. corner of the 25-acre tract of land in dispute, there is still standing a triple bois d'arc, which comports in marks and size, but not in distance, with the triple bois d'arc called for at the N. E. corner of said 25-acre tract; and I further find that there is a forked bois d'arc which has fallen upon the ground on the west line of the 200-acre tract of land, and situated 13.77 chains south of where course and distance would place the N. W. corner of the 25-acre tract of land, and that said fallen bois d'arc comports in marks and size with the one called for in the deed to plaintiff, but does not harmonize in any respect with course and distance, but, on the contrary, if the land should be located by assuming that the triple bois d'arc called for in the deed at the northeast corner of the 25-acre tract, as claimed by defendants, is the one originally marked by the surveyor who

ran the line, and by assuming that the fallen forked bois d'arc at the northwest corner of the 25-acre tract, and as claimed by defendants, was the original tree, marked by the original surveyor who ran the line as the northwest corner of the 25-acre tract, then the 25-acre tract would be located way south of the south boundary line of the 200-acre tract which formerly belonged to Robert McRae.

"(8) I further find that on the 2d day of February, 1877, Robert McRae conveyed by special warranty deed to Richard Buckner and Robert Buckner all the 200 acres, more or less, conveyed to him by John Johnson and G. A. Wilson, and described in finding No. 5, and that this deed was filed for record in the proper place on the 7th day of February, 1877. This deed recited a consideration of \$800 cash, but there was no proof of any payment of any consideration. This deed was filed for record and recorded several years prior to the time when the deed from Robert McRae to John Burns was recorded, as described in the fifth finding. I further find in this connection that the failure of plaintiff to have his deed to the 25-acre tract recorded before the deed from McRae to Richard and Robert Buckner was recorded did not inure to the benefit of the latter and those claiming under them, for the reason that Richard and Robert Buckner, when they afterwards sold the land purchased by them from McRae, recognized the validity of the sale of 25 acres by McRae to plaintiff, as will more fully appear from the next succeeding finding of fact.

"(9) I find that on the 22d day of July, 1878, R. T. Buckner and R. A. Buckner by warranty deed conveyed to L. A. Lollar 130 acres of land described in the 200-acre tract conveyed by Johnson and Wilson to McRae, and when Lollar's deed was executed it expressly excepted out of said deed the 10-acre tract sold by Robert McRae to W. R. Wallis January 27, 1877, and the 25-acre tract sold by McRae to J. H. Burns January 27, 1877, and the 35-acre tract sold by McRae January 27, 1877. The Lollar deed was filed for record in the proper place July 22, 1877.

"(10) I find that on the 6th day of August, 1885, F. M. Rogers and J. C. Lollar, as executors of L. A. Lollar, deceased, conveyed to Daniel B. Sachse the following described tract of land (being part of the Madison Walker survey of 320 acres, and being part of a 200-acre tract taken out of said survey): 'Beginning at the N. W. corner of a tract of 25 acres sold to John H. Burns from which a forked bois d'arc 24 in. in dia. mkd. X brs. S. 24 lks., W. 12 lks.; thence E. 25 chs. and 97 lks. to the N. W. corner of said Burns a stake from which a triple bois d'arc 18/24 & 14 in. one mkd. X brs. N. 27 W. 3 links; thence N. 5 chs. and 77 lks. with the E. B. line of said 200 acre tract to the S. E. corner of a 10 acre tract sold to W. R. Wallis; thence W. 25 chs. and 97 lks. to the S. W. cor. of said 10 acres; thence S. 5 chs. and

77 lks. to the beginning containing 15 acres of land.' In the same deed a second tract is described as follows (being part of the same survey and part of the said 200-acre tract above named): 'Beginning at the N. E. corner of a 35 acre tract sold to James Galliger at a stake on the W. B. line of the original survey; thence N. with the original E. B. line of said original survey to the N. E. corner thereof; thence W. with the N. B. line of said survey 25 chs. and 97 lks. to a stake in said N. line; thence S. to the N. W. corner of the Galliger 35 acre tract; thence E. with Galliger's N. B. line to the beginning containing 115 acres of land, more or less.' This deed was filed for record in the proper place August 12, 1885.

"(11) I further find that on the 27th day of January, 1877, Robert McRae, by his attorneys, T. C. Goodner and J. H. Jenkins, conveyed by general warranty deed to W. R. Wallis the following described tract of land, to wit (being part of the 200-acre tract owned by McRae in the Madison Walker survey): 'Beginning at a stake on the W. B. line of said 200 acre tract 5.77 chs. north of the N. W. cor. of a 25 acre tract sold by McRae to John H. Burns. Thence E. with the N. B. line of a 15 acre tract sold by McRae to James M. Graves to a stake in the E. B. line of said 200 acre tract and the N. E. corner of said 15 acre tract; thence N. with said E. B. line 3.84 chs. a stake from which a bois d'arc 2 in. in dia. mkd. X brs. W. 5 lks.; thence W. 25 chs. and 97 lks. from which a bois d'arc 4 in. in dia. mkd. X brs. S. 8 E. 25 lks.; thence S. 3.86 chs. to the beginning containing 10 acres of land.' This deed filed for record in the proper place February 7, 1877.

"(12) I further find that on the 27th day of January, 1877, Robert McRae and his attorneys, T. C. Goodner and J. H. Jenkins, by general warranty deed, conveyed to James Galliger the following land, to wit: 'Part of a 200 acre and beginning at the N. W. corner of a 10 acre tract sold by McRae to W. R. Wallis a stake from which a Bois d'arc 4 in. in dia. mkd. X brs. 88 deg. E. 25; thence E. 25 chs. and 25 lks. to N. E. corner of said Walker tract, a stake from which a bois d'arc 2 in. in dia. mkd. XZ bra. N. 5 lks.; thence N. 13 chs. and 48 lks. to a stake from which an Elm 10 in. in dia. mkd. X brs. S. 61 W. 59 lks.; thence W. 25 chs. and 27 lks. to a stake from which an elm 8 in. in dia. mkd. X bra. S. 14½ E. 189 lks.; thence S. with W. line of said 200 acre tract 13 chs. and 48 lks. to the place of beginning containing 35 acres.' This was filed for record in the proper place February 6, 1877.

"(13) I further find that on the 29th day of September, 1885, James Galliger conveyed to D. B. Sachse the 35-acre tract described in finding No. 12, above described. This deed was filed for record in the proper place October 9, 1885.

"(14) I further find that on the 23d day of October, 1890, W. R. Wallis and wife, by general warranty deed, conveyed to Wm. Sachse the 10-acre tract described in finding No. 11, hereinabove named, and Wm. Sachse filed his deed in the proper place January 13, 1894.

"(15) I further find that on the 25th day of October, 1893, Wm. Sachse, by general warranty deed, conveyed the 10-acre tract described in findings Nos. 11, 14, to D. B. Sachse. This deed was filed for record in the proper place on the 3d day of January, 1894.

"(16) I further find that on the 3d day of October, 1900, D. B. Sachse executed a deed in trust to R. T. Shelton, as trustee, to 175 acres of land embraced in the 200-acre tract originally sold to Robert McRae by Johnson and Wilson, or, in other words, that said trust embraced all of said 200-acre tract except the land in controversy. It also embraced other lands belonging to D. B. Sachse. This deed of trust was intended to secure a note of date September 15, 1900, for \$5,000, and drawing interest at 10% per annum. The note was executed by D. B. Sachse as principal, and was signed by J. K. Sachse, D. B. Sachse, J. C. Billingsly, W. W. Ingram, J. A. Sachse, A. J. Brand, F. M. Sachse, J. N. Sachse, F. M. Sachse, and Martha A. Sachse. The note was payable to and owned by the Plano National Bank, one of the defendants in this suit. The deed in trust was filed for record in the proper place on October 19, 1900.

"(17) I further find that on the 4th day of April, 1902, D. B. Sachse by general warranty deed conveyed to W. J. McBride, defendant in this suit, the following described tracts of land, to wit: 'Part of the Madison Walker survey and beginning at the N. E. corner of the original survey, thence S. 81 chs. a stake from which a triple bois d'arc mkd. X bra. N. 27 deg. W. 3 lks. to the N. E. corner of the J. H. Burns 25 acre tract; thence with said J. H. Burns N. B. Line 26 chs. & 77 lks. to said J. H. Burns N. W. corner a stake from which a fallen bois d'arc mkd. X bra. S. 34 deg. W. 12 lks. from root; thence S. with said J. H. Burns W. B. line 4 chs. & 90 lks. to a stake from which a Burr Oak mkd. X bra. S. 59 deg. W. 29 lks.; thence W. 5 chs. and 50 lks. to a stake on W. B. line of original survey, from which an elm marked X brs. N. 53 E. 15 lks.; thence N. 84 chs. & 90 lks. to N. W. cor. of original survey; thence E. 31 chs. and 84 lks. to beginning and containing 262.36 acres of land.' This deed was filed for record April 13, 1902. The consideration of this deed recited and proved was \$6,872, and was paid as follows, to wit: W. J. McBride, as a part of the consideration, conveyed to D. B. Sachse a 35-acre tract of the value of \$900. McBride paid cash \$2,172.80, and for the balance he executed three promissory notes, each for the sum of \$1,266%, and drawing

Interest from April 1, 1902, at the rate of 10% per annum, interest payable annually. That each of said notes were payable to the Plano National Bank or order. That said cash and the three notes aforesaid, by agreement between bank and D. B. Sachse, were given to said bank in extinguishment of the deed in trust and notes for \$5,000 secured thereunder, as set out and described in the sixteenth finding of fact hereinabove described. That on the same day on which the deed from Sachse and wife to McBride was executed, to wit, the 4th day of April, 1902, the Plano National Bank released the deed in trust above described, and canceled the note for \$5,000.

"(18) I further find that, before W. J. McBride bought the land described in the seventeenth finding of fact, he employed one P. Q. Russell to survey said land, and that W. J. McBride was informed before he bought and paid for said land that, while the field notes of the deed from D. B. Sachse and wife to W. J. McBride embraced 262.86 acres of land, yet, as a matter of fact, that D. B. Sachse only claimed 229 acres of land, and the several deeds through and under which D. B. Sachse claimed the land he sold to W. J. McBride in the aggregate only embraced 229 acres of land; that W. J. McBride, after this suit was commenced, and after the Plano National Bank was made a party to this suit, paid off to the Plano National Bank one of the three vendor's lien notes given as a part of the purchase price for the land; that the other two notes given for said land, and each of which constitutes a vendor's lien upon said land, after this suit was commenced, which was July 7, 1902, and after the Plano National Bank was made a party to this suit, were transferred to one J. C. Cowan for a valuable consideration; that said transfer to Cowan was made at the request of defendant W. J. McBride in order to enable him to get said notes carried at a lower rate of interest than the Plano National Bank was willing to carry said notes, in this: that now the said W. J. McBride pays interest on said notes at the rate of 8 per cent. per annum, while he paid interest to the Plano National Bank at the rate of 10 per cent. per annum.

"(19) I further find that D. B. Sachse is insolvent, and that W. J. McBride could not make him responsible on his warranty in case any part of the land was recovered by plaintiff in this suit; that W. J. McBride, at the time he bought the land, bought it by the acre, and not in gross; that he was to pay \$28.19 per acre, and that the 25 acres of land in dispute cost W. J. McBride, in the aggregate, the sum of \$554.75.

"(20) I further find that the Plano National Bank were purchasers in good faith of the notes given for the balance of the purchase money of said land, and were not aware that there was any shortage in the

land bought by McBride till after it was made a party defendant to this suit; that the bank never owned the land, nor warranted the title; that they have no means by which they could compel D. B. Sachse to reimburse them in case the bank should be compelled to pay W. J. McBride for any shortage on said land.

"(21) I further find that after the survey was made by P. Q. Russell, and after the trade was made with W. J. McBride for the land purchased by him of D. B. Sachse, the said Russell on one occasion asked the plaintiff where he claimed his land to be situated, with reference to the triple bois d'arc on the east boundary line of the Madison Walker survey, and the said plaintiff told said Russell that the plaintiff claimed his 25-acre tract to be south of where said triple bois d'arc now stands on the ground. At the time this statement was made by plaintiff, he was not on the land in dispute, and his statement had no influence in inducing W. J. McBride to purchase any of the land from D. B. Sachse.

"Conclusions of Law.

"From the findings of fact in this case I deduce the following conclusions of law, to wit:

"(a) That in a deed or grant the instrument must be most strongly construed against the grantor.

"(b) That it is a rule of construction that a private grant shall be taken most favorably for the grantee in case the construction is left in doubt after the application of other rules, upon the assumption that the language of the deed is the language of the grantor. Hence, in case there are two descriptions in a deed which are inconsistent with each other, the grantee is at liberty to select that which is most favorable to him.

"(c) The findings of fact in this case show that the calls in the deed from Robert McRae to John H. Burns, plaintiff in this case, are conflicting, if the triple bois d'arc called for at the northeast corner of the 25-acre tract, and the forked bois d'arc called for at the northwest corner of the 25-acre tract, are located where defendant claims them to be. If course and distance be adopted as the controlling calls, it will harmonize with the intention of the grantor to give plaintiff 25 acres of land in the 200-acre tract. It will harmonize with the call for the southwest and southeast corners of the 200-acre tract of land. It will harmonize with all the several deeds conveying parts of the 200-acre tract of land to different parties. In a word, it will harmonize with everything except the naked fact that there is a triple bois d'arc, with proper marks on it, on the east boundary line of the Madison Walker survey, way south of the south boundary line of the 200-acre tract sold Robert McRae, and that there is a fallen bois d'arc, with proper marks on it, situated on the west boundary

line of the Madison Walker survey, way south of the boundary line of the 200-acre tract of land. To adopt the construction contended for by plaintiff will give all parties claiming land in the 200-acre tract sold Robert McRae by Johnson and Wilson the full quantity of land sold them under their respective deeds, whereas, to adopt the construction contended for by defendant W. J. McBride will give parties under whom he claims an excess of land, and will place the tract of 25 acres entirely south of the 200-acre tract, and outside of it, and at a point where the evidence in the case shows that McRae owned no land whatever. I therefore conclude, as a matter of law, that the plaintiff is entitled to recover the land claimed by him in his petition, and judgment will be rendered accordingly on this branch of the case, and for costs.

"(d) The Plano National Bank not having owned the land, and not having warranted the title, and having transferred the notes to Cowan at the request of the defendant W. J. McBride, and the Plano National Bank having done nothing to induce W. J. McBride to purchase the land, and the cash received from the purchase price paid by W. J. McBride for the land being in settlement of a bona fide claim on the land of D. B. Sachse, on which it had a recorded lien, I conclude from all these facts that the equities of the bank were at least equal, if not superior, to any equities in favor of defendant W. J. McBride, and that for that reason judgment be rendered in favor of the Plano National Bank—that the defendant W. J. McBride take nothing as against the Plano National Bank, and that it recover its costs.

"(e) The defendant having purchased the land from D. B. Sachse under a warranty of title, and at so much per acre, and the title to 25 acres having failed, I conclude that defendant W. J. McBride is entitled to recover over and against D. B. Sachse the sum of \$654.75 for the 25 acres recovered of defendant McBride, and for all costs of suit."

Appellant may be correct in his construction of the evidence, wherein he contends that the conclusion reached by the court that the notes were transferred to Cowan by the bank at the request of McBride is not supported by the testimony. If we should concede the correctness of this contention, the judgment of the trial court in favor of the bank may be predicated upon the conclusion reached that the bank, in accepting the notes under the circumstances as stated in the findings of fact, did not become bound and obligated on the warranty of title executed by Sachse. Therefore the judgment in favor of the bank is correct.

The facts stated in the record also justify the conclusion of the court on the subject of boundary.

We find no error in the record, and the judgment is affirmed.

Affirmed.

FT. WORTH & D. C. RY. CO. v. HENRY
et al.

(Court of Civil Appeals of Texas. June 24, 1905.)

APPEAL—BOND—MISRECITAL OF APPELLATE COURT.

A bond reciting a justice's judgment, and stating that defendant desires to appeal therefrom to the county court, is insufficient to confer jurisdiction of the appeal on the district court.

Error from District Court, Henderson County; J. J. Word, Judge.

Action by Dempsey Henry and others against the Ft. Worth & Denver City Railway Company. There was a judgment of the district court dismissing an appeal from a justice's judgment for plaintiffs, and defendant brings error. **Affirmed.**

Spoons & Thompson and Marshall Spoons, for plaintiff in error. Richardson & Watkins, for defendants in error.

TALBOT, J. This suit was instituted in the justice court of Henderson county, and from an adverse judgment plaintiff in error attempted to appeal to the district court of that county. The civil jurisdiction of the county court had been abolished and vested in the district court. The appeal bond filed in the justice court, after describing the judgment rendered in that court, reads: "From which said judgment the said Fort Worth and Denver City Railway Company (a corporation) desires to appeal to the Honorable County Court of said county: Now, therefore, we, the said Ft. Worth & Denver City Ry. Co., Appellant, as principal, and the undersigned, acknowledge ourselves bound to pay the said Dempsey Henry and the St. Louis Southwestern Ry. Co. of Texas, or either of them, the sum of One Hundred and Fifty and $\frac{75}{100}$ (\$150.00) Dollars, conditioned that said appellant shall prosecute its said appeal to effect and shall pay off and satisfy the judgment which may be rendered against it on such appeal." A transcript of the proceedings in the justice court, together with the bond and the original papers, having been filed in the district court of Henderson county, the latter court, upon motion of defendants in error, dismissed the appeal. The specific ground upon which the court's action was based does not appear, but we infer the court ruled that the language, "from which said judgment the said Fort Worth and Denver City Railway Company (a corporation) desires to appeal to the Honorable County Court of said county," used in said bond, rendered the same void, and jurisdiction was not thereby conferred upon the district court of the case. To this effect is the holding of the courts in the cases of *Turner v. Southern Pine Lumber Co.*, 16 Tex. Civ. App. 545, 40 S. W. 1078, and *Gulf, B. & G. N. Ry. Co. v. Lyons* (Tex. Civ. App.) 86 S. W. 44, in which we concur.

Plaintiff in error's fourth assignment is that the court erred in sustaining the motion to dismiss its appeal from the justice court, "for the reason that prior to the court's action upon said motion to dismiss said appeal the defendant tendered to said district court of Henderson county an appeal bond conditioned in words and figures as required by the statute." The question involved in this assignment is not sufficiently raised and presented by the record to authorize a consideration and review of it by this court. We do not wish to be understood, however, as intimating that, if the question was properly presented, this court would hold there was error in the lower court's action in refusing to permit such bond to be filed.

The judgment of the court below is affirmed.

HIGLEY et ux. v. DENNIS et al.

(Court of Civil Appeals of Texas. June 17, 1905.)

1. AGENCY — PROOF — DECLARATIONS OF AGENTS.

Agency may not be established by the declarations of an alleged agent, nor can his admissions and statements bind the principal until the agency is shown.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 40, 330-343.]

2. NOTES—DEFENSE OF PAYMENT—BURDEN OF PROOF.

In an action on a note, where the defense was payments to one other than the plaintiff, who held the note, the burden was on defendant to show that the one to whom payments were made had authority to collect it.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 397.]

3. SAME—PAYMENT TO AGENT—POSSESSION OF NOTE—SUFFICIENCY.

Where the payee of a note indorsed it to another, payment made to the payee thereafter was good, the payee being in possession of the note, though it was not indorsed by the payee's indorsee.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1234, 1240-1242.]

4. AGENCY TO COLLECT NOTE—COLLECTION OF INTEREST—AUTHORITY TO COLLECT PRINCIPAL.

Authority to collect the interest on a note creates no presumption of authority to collect the principal.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 299.]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by Henry P. Higley and wife against R. A. Dennis and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

F. W. Bartlett, T. D. Starrus, and L. L. Bowman, for appellants. Looney & Clark, for appellees.

RAINEY, C. J. "Appellants Henry P. Higley and wife, Eliza M. Higley, brought this suit April 23, 1903, on a negotiable note for \$700, executed by Hugh H. Tilson, paya-

ble to the Bunnell & Eno Investment Company or order, dated December 1, 1899, due December 1, 1903, bearing interest at the rate of 6 per cent. per annum, according to seven annual interest coupons attached for the sum of \$42 each, principal and interest notes bearing 10 per cent. interest after maturity, and providing for 10 per cent. attorney's fee if suit should be instituted to collect the same. The principal note provided that if default should be made in the payment of any interest, then the principal sum, with all accrued interest, should, at the election of the holder, become due and payable at once. Appellants also asked for foreclosure of a mortgage lien created at the time said note was executed for the purpose of securing payment of same. Judgment was sought against appellees H. A. and Earnest Dennis by reason of their purchase of the land covered by said mortgage lien and their assumption of said indebtedness. W. Bostwick was made a defendant as the owner of an indebtedness secured by a junior lien on the same land. Appellees Dennis answered by general denial plea of payment, and plea of estoppel; and by cross-bill they asked cancellation of appellants' mortgages, and that same be removed as clouds on their title. The case was tried before the court without a jury, and judgment was rendered against appellants, and in favor of the appellees on their cross-bill."

A disposition of the case depends upon whether or not the evidence is sufficient to show that at the time Dennis paid to the Bunnell & Eno Investment Company the amount of the note it was authorized to collect said note. If so, the judgment must be affirmed; if not, the judgment must be reversed, and cause remanded. The note in suit was made payable to the order of the Bunnell & Eno Investment Company, at its office in Philadelphia, Pa. Interest was payable annually, and besides the interest it authorized the payment of \$100, or multiple thereof, on the principal, at any interest-paying period. The note was indorsed: "Pay to the order of Eliza M. Higley without liability except under the accompanying guaranty. The Bunnell & Eno Investment Company, Natt H. Ellis, Vice President." The note was given for part of the purchase price of land, and secured by a lien thereon. The Dennis brothers had bought the land and assumed the payment of said note. An interest-paying period occurred on December 1, 1901. Dennis and brother remitted to said investment company a sum, just before this date, sufficient to cover the principal and interest due at that time, which was received, and in due time Dennis and brother received through the mail the interest coupon; but the investment company wrote them in effect that the contract provided that 30 days' notice of intention to pay more than the accrued interest must be given (which was not true), and, as Dennis and

brother had not complied therewith, the company would not receive the money as payment of the note, but would hold it subject to their order, etc. There was some correspondence between the investment company and Dennis and brother, and in the company's letters there were statements from which it might be inferred that the said company held the note for collection; but these statements were not binding on plaintiff, there being no proof that said company was the agent of plaintiff. Agency cannot be established by the declarations of the one purporting to be an agent, nor can the admissions and statements of such a one bind the principal until such agency is established. *Coleman v. Colegate*, 69 Tex. 88, 6 S. W. 553.

The note being negotiable and indorsed to plaintiff, Eliza M. Higley, the burden was on defendants to show that the investment company was authorized to collect the note in order to obtain relief by reason of payment to said company. Mr. Daniel on Negotiable Instruments, in volume 2, § 1230, says: "Payment of a bill or note should be made to the legal owner or holder thereof, or some one authorized by him to receive it. If it be payable to bearer or indorsed in blank, any person having it in possession may be presumed to be entitled to receive payment, unless the payor has notice to the contrary; and a payment to such person will be valid, although he may be a thief, finder, or fraudulent holder." The note was not indorsed by Eliza M. Higley. Had it so been, or had it been in the possession of the investment company, the payment to said company would have been good. Mr. Daniel, in section 1230a, doubts the correctness of the holding in some cases that the payment to the holder of unindorsed negotiable paper is good. There are authorities to the contrary, but, as the note in this case was payable at the office of the investment company, we are inclined to the opinion that the payment in this case to said company discharged the note, provided, at the time of payment, it was held by said company.

Payment of installments of interest prior to the installment of December 1, 1901, to said company, and the appropriation to the payment of December 1, 1901, interest part of the amount remitted to said company to pay off and discharge said note, does not tend to show agency in said company to collect said note. In *Cunningham v. McDonald*, 83 S. W. 372, 11 Tex. Ct. Rep. 418, it is said: "If, however, it was admitted that the corporation, acting as the agent of Cunningham, collected the interest from McDonald, that fact would not tend to prove that it had the authority to collect the principal of the note. How can it be inferred from the agency to collect the interest that the agency to collect the note existed? The one fact does not form a basis for the presumption of the other fact."

88 S.W.—26

The evidence being insufficient to show that the investment company was authorized to collect the note or had possession thereof at the time of payment, the judgment is reversed, and cause remanded.

COBB v. GOOCH.*

(Court of Civil Appeals of Texas. June 10, 1905.)

TRESPASS TO TRY TITLE—RIGHT TO SUE.

Where plaintiff in trespass to try title forcibly ejected defendant from a position in line at a sale of the land in controversy as public land, any irregularity of the defendant in subsequently procuring the filing of his application ahead of the plaintiff and being awarded the land on his application was neutralized by plaintiff's use of force, and plaintiff could not bring the action to establish his prior right to purchase the land, because he could not come into court with clean hands.

Appeal from District Court, Glasscock County; Jas. L. Shepherd, Judge.

Action by A. H. Gooch against E. T. Cobb. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Beall & Beall, for appellant. J. B. Littler, E. Douthit, and S. H. Morrison, for appellee.

CONNER, C. J. The contestants in this case are rival claimants of sections 24 and 36 in block 36, and section 30 in block 35, of state school land surveys in Glasscock county. Both parties claim by virtue of applications to purchase and actual settlement on section 30 as the home section and the remainder as additional thereto. The applications of appellant were made and filed with the county clerk of said county at 12 o'clock and 56 minutes a. m. of August 1, 1902, and those of appellee were made and filed with said clerk about 2 a. m. on the same day. The applications, obligations, and payments of both parties were regular, but the lands were awarded to appellant by the Commissioner of the General Land Office on the 6th day of October, 1902, appellee's applications being rejected on the same day. The action was instituted in the form of trespass to try title by appellee, and the controverted issues upon the trial were actual settlement on appellee's part at the time he made and filed his applications, and whether appellant's priority in filing was surreptitiously and fraudulently acquired. The court found both of these issues in appellee's favor, and hence gave him judgment for the lands in controversy. That appellant was an actual settler upon section 30 at the time his applications to purchase were made and filed is not controverted. His right to recover, indeed, cannot be controverted save upon the ground that his priority in filing was illegally obtained, as found by the court; and the assignments of error present only the question

*Rehearing denied July 1, 1905, and writ of error denied by Supreme Court.

of the sufficiency of the evidence to sustain the court's findings of fact on the issues stated.

We have carefully considered the evidence, and do not see our way clear to overrule the finding that appellee was an actual settler at the time he filed his applications to purchase, and hence approve such finding. On the other issue, however, our conclusion is in appellant's favor. The following are the pertinent material facts: It was generally known that the sections of school land in controversy, together with some 35 or 40 other sections, would be upon the market, subject to sale, on August 1, 1902, and the appellant, appellee, and numerous other persons had assembled and stationed themselves at the south or main entrance of the courthouse in which the county clerk kept his office. It is undisputed that appellant was prior to appellee in position, appellant having stationed himself in the door or on the step of said entrance, appellee being among those immediately behind him. Appellee's evidence and the court's findings are to the effect that appellant was standing with several others just inside of the door when the sheriff of the county, several hours before the opening of August 1st, closed the door, stating to parties present that it would not be opened until 8 o'clock the following morning; that in closing the door appellant was pushed upon and straddled the neck of appellee, who thereupon rose up from his sitting position upon the doorstep, and threw appellant outward and forward into the crowd, and appellant thereupon entirely lost his position. Appellant requested the sheriff to replace him in the prior position he formerly occupied at the doorstep, but the sheriff declined to do so. Appellant thereafter, and after 1 o'clock p. m. of July 31st, met one L. E. Crutcher, a deputy county clerk, in the courthouse yard, and swore to his applications for the purchase of the lands in controversy, and said deputy, acting as appellant's agent, carried said applications into the clerk's office through a rear door, and the same were by the county clerk filed between 12 and 1 o'clock, as hereinbefore stated. Another purchaser did the same thing, and a number of others gained entrance into the clerk's office through said rear door, and caused their applications to be filed. In this manner all of the sections of land coming upon the market on August 1st were applied for prior to the opening of the south door, which was done by the sheriff about 2 o'clock a. m. of August 1st, upon the opening of which appellee entered and filed his applications as stated. The county clerk denied acting preferentially or collusively for or with any one, and stated that his custom was to receive applications whenever and wherever presented for filing, and that the closing of the south door and opening thereof was at the instance of the sheriff alone, who had control of said entrance.

There was some evidence tending to show that the rear door had been kept locked, though the evidence indicated that it had not been so kept after 12 p. m., July 31st. Appellant also denied collusion with the clerk or any one else, testifying that he simply met Mr. Crutcher, the deputy clerk, accidentally, not knowing that he was going to be at the place where he met him; that his applications had already been prepared, and that he swore to them before said deputy, and induced him to act as his agent in taking the applications in and causing them to be filed. The trial court's findings on the issue under consideration are as follows: "(c) I find that the acts of William Hanson, county clerk of Glasscock county, Texas, in filing the applications of E. T. Cobb, brought in by his deputy, acting as agent of defendant Cobb, and the acts of defendant Cobb in procuring same to be done, and defeating the rights of plaintiff, were of such character as to constitute fraud against plaintiff, whose rights were thus affected. (d) I find that such fraud on the part of defendant William Hanson, clerk, and his deputy, L. E. Crutcher, acting with E. T. Cobb, invalidated and rendered void the files of E. T. Cobb made after twelve o'clock midnight, July 31st, on sections in controversy. (e) I find that such files being so rendered void and invalidated, that the plaintiff, A. H. Gooch, by virtue of his applications and a full compliance of the law, is entitled to recover the lands in controversy from the defendant E. T. Cobb, and it is accordingly so adjudged." If it be admitted—though we do not decide—that appellant's action and that of the clerks' under ordinary circumstances was fraudulent as against public policy, appellee nevertheless, in the case before us, is not in position to take advantage thereof. As before stated, it is undisputed that appellant occupied position prior to that of appellee, and that, had he been permitted to retain this position, his application would, in the regular course of events, as insisted upon by appellee, have been first filed. It is also undisputed that by force exerted by appellee appellant was deprived of this advantageous position. The contention in appellee's behalf here is that appellee so did in protection of his own position, and without design of obtaining any undue advantage over appellant. The court, in his findings, has not so found, and it is significant that appellee did not so testify on the trial. He, indeed, is silent on the subject. There is also evidence in the record tending to show that appellee and some others, prior to the night of July 31st, had a meeting suggestive of a purpose to forcibly obtain advantageous positions at the opening of the door of the courthouse. Appellee's brother testified, among other things: That he witnessed appellee at the time he threw appellant out of position. That the purpose of his presence in the crowd was to see "that anybody didn't jump on" his brother.

That "he [appellee] fired him [appellant] out because he was trying to sit down on him. Sure, brother did it a purpose. * * * As well as I remember, my brother threw him out on his head. I was out in the crowd. Mr. Cobb fell headlong when my brother threw him, and I saw him go over on his head and shoulders on the ground. It is not a fact that I cursed Mr. Cobb when he was making his apology. I did not say he ought to be stamped, and that I would stamp him. * * * He [appellant] first apologized to my brother; then talked rough. He did not explain that that was his position, and try to get it back. I did not hear him call the sheriff to replace him at his position. I was there to see the thing go on, and to see if anybody jumped on my brother. * * * My brother and others had not got together and had an understanding the night before to get charge of the door and throw the others out. A few of them got together and sorter talked the matter over, agreeing that, if they wanted to file on the land, they would go to the door before filing on it. The meeting was at my mother's, and Earl Chaney, Tom Chaney, Mr. Wysong, and Seth Pike were all that I know of being there. I was there at that time, and talked with them, but never told them what I would do. I did not go in the room where they were, as it was none of my business. I did not file on any land. They were talking about the matter when they went out to go home. We did not agree to get our forces together and throw Mr. Cobb out of his position. * * * I was not in the meeting held here in town that day, in which we had an understanding to take charge of the door. It is not a fact that we had an understanding with the sheriff and deputy, and that Mr. Cobb was to be thrown out of his place by reason of shutting the door. Never said much to Mr. Cobb when he was thrown out on his head. I told brother that if anybody jumped on him I would see that they did not interfere. I told brother that if anybody sought to interfere with him that I would take care of him—anybody outside of Mr. Cobb. I would not help him against Mr. Cobb. If he beat him to death, would not say a word."

From the evidence as a whole we have concluded that appellee's force in depriving appellant of his advantageous position neutralizes whatever of irregularity there may have been in the filing of appellant's applications. Appellee, as the plaintiff below, is claiming under rejected applications, and before he should be heard to complain and to receive the aid of the court in setting aside the award actually made to appellant by the Commissioner of the General Land Office we think he should show clearly that he comes with clean hands. This, in our judgment, he has not done, and the judgment will accordingly be reversed, and here rendered for appellant.

Reversed and rendered.

JONES v. HUMPHREYS.*

(Court of Civil Appeals of Texas. June 3, 1905.)

1. APPEAL—QUESTIONS FOR REVIEW.

Where neither the briefs nor bill of exceptions taken at the time of excluding evidence discloses what the objection was which the trial court sustained to the evidence offered, the ruling is not reviewable on appeal.

2. WIFE'S SEPARATE ESTATE—CONVEYANCE BY HUSBAND TO WIFE.

A conveyance of real estate by a husband to his wife makes the land conveyed her separate estate, irrespective of whether the deed specifically so declares.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 426.]

3. MISTAKE—MUTUALITY — WHEN IMMATERIAL.

Whether the vendor in a deed shared in a mistake as to the person to whom the deed should have been made is immaterial, after a conveyance has been made by the vendee to correct the alleged mistake.

Appeal from District Court, Hardeman County; S. P. Huff, Judge.

Action by Thomas Jones against Minnie Humphreys. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. E. Diggs, for appellant. Kearby & Kearby, for appellee.

SPEER, J. Appellant instituted this suit against appellee to foreclose a judgment lien upon a tract of land situated in Hardeman county, known as section No. 240, certificate No. 1—120, in block H of the Waco & Northwestern Railway Company lands. The lien was alleged to have arisen by reason of the recording of an abstract of judgment in appellant's favor against one H. C. Davis, the alleged owner of the land, on July 3, 1901; said judgment having been recovered against Davis in the county court of Childress county on the preceding day. The appellee answered, setting up that the land was purchased by her and paid for out of her individual means, and that through mistake the deed to the same was taken in the name of H. C. Davis, her brother-in-law. She further alleged that on discovering this mistake, on March 30, 1901—the first deed having been made March 5, 1901—said Davis duly conveyed the property to herself and her sister Mary B. Davis. By way of replication, appellant attacked this last conveyance as being in fraud of his rights as creditor of Davis. Upon a trial before a jury there was a verdict and judgment in favor of appellee.

Under the charge given to the jury, they were required to find, before they could return a verdict for the appellee, that she in fact bought the land in the first place, and that Davis had no interest whatever therein, but that the deed from the vendor to him was made through mistake or inadvertence, instead of being made to appellee. And there being sufficient evidence to raise this issue,

*Rehearing denied July 1, 1905, and writ of error denied by Supreme Court.

and to support a verdict for appellee based on such charge, we are not at liberty to disturb the judgment. At the time of the acquisition of the property one-half of the purchase money, \$1,750, was paid in cash, admittedly out of funds belonging to Miss Humphreys, and the balance was evidenced by the notes of H. C. Davis. There was some evidence indicating that at the time it was the intention of all parties that the land should belong equally to Miss Humphreys and her sister Mrs. Davis, and that the latter should pay the purchase-money notes, which she expected to do out of an estate coming to her in Virginia. Upon the issues thus raised the court instructed the jury that if the property was bought by Davis and appellee jointly, even though appellee herself subsequently paid off the notes, or if they found the agreement to be that Mary B. Davis and appellee should purchase said land jointly, in either event one-half of the land in controversy would be subject to the appellant's judgment lien. In the face of these charges the jury returned a verdict for Miss Humphreys, as before stated.

The first and second assignments of error, to the effect that the undisputed evidence shows conclusively that the land in controversy at the date of the filing of appellant's abstract was the community property of H. C. Davis and wife, are obviously not well taken, in view of what we have previously said.

The third assignment attacks the ruling of the court in excluding the order of continuance in the county court of Childress county in the cause of this appellant versus H. C. Davis, upon the issue of fraud in the execution of the deed from H. C. Davis to his wife and appellee, of date March 30, 1901. What the objection was which the court sustained to this evidence when offered is not disclosed either in the briefs or the bill of exceptions taken at the time. This is fatal to the question. But looking to the contents of the proffered order, we find that it merely shows that on April 2, 1901, Davis made an application for a continuance, and the court, having heard and considered the same, was of the opinion that the cause should be continued, and it was so ordered. This, we think, does not throw any light upon the question of fraud, tending to impeach the conveyance in question. There was no evidence before the court which could be considered as constituting an attack upon the conveyance from Davis to his wife and sister; and, indeed, appellant does not complain that such issue was not submitted to the jury. This being true, the deed itself would constitute an insuperable barrier to appellant's recovery in this case, because at the date of the filing and recording of his abstract against Davis, the land did not stand in Davis' name, but in the names of appellee and her sister Mrs. Davis; the deed to them having been recorded on July 1, 1901. In so far as Mrs. Davis' interest in the land is concerned, the deed from

Davis to her would necessarily make it her separate estate, whether that instrument specifically so declared or not. It could have no other effect. *Lewis v. Simon*, 72 Tex. 470, 10 S. W. 554; *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027; *Swearingen v. Reed* (Tex. Civ. App.) 21 S. W. 383.

On the issue of mistake in taking the deed in the name of Davis, we take it to be immaterial that it was not shown that Scarbrough, the vendor, shared the mistake, and therefore overrule the assignment making this point.

We find no error in any of the assignments, but believe the court's charge was a proper exposition of the law as applied to the facts of this case, and find that the evidence was sufficient to support the verdict and judgment.

Judgment affirmed.

FREEMAN v. SLAY.*

(Court of Civil Appeals of Texas. May 27, 1905.)

1. APPEAL—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

Where there is conflicting evidence on an issue of fact, the verdict is conclusive, in the absence of material error in the proceedings.

2. TRESPASS TO TRY TITLE — BURDEN OF PROOF—PLEA IN RECONVENTION—INSTRUCTIONS—ERROR.

In trespass to try title, defendant alleged that he had leased the land from plaintiff, and claimed damages for eviction under a writ of sequestration in the action. Held, that a charge that the burden of proof was on defendant to establish the allegations of his plea in reconvention by a preponderance of evidence, and that on failure so to do the finding should be for plaintiff, was properly refused, as plaintiff was not entitled to recover possession without proving his right thereto by a preponderance of evidence.

3. SAME—EVIDENCE—HARMLESS ERROR.

The material controversy, on which the evidence was conflicting, not being as to the description of the land rented, but as to whether plaintiff had rented any land to defendant for the year 1904, testimony of a witness (shown by the agreed statement of facts to have given positive testimony as to the fact of plaintiff's renting land in 1903 to defendant for the year 1904) that, in a conversation with plaintiff in 1903 in regard to renting land to defendant for 1904, his "understanding" was that defendant was to have certain land, and that he "understood" defendant was to have 140 acres, while objectionable, in no way affected the result.

4. TRIAL—FAILURE TO REQUEST CHARGE.

Where an instruction was correct as far as it went, plaintiff could not avail himself of a mere omission, without having requested a charge to supply it.

5. LANDLORD AND TENANT—EVICTION—MEASURE OF DAMAGES.

In trespass to try title, where defendant alleged that he leased the land from plaintiff, and reconvened for wrongful eviction under the writ of sequestration in the action, a charge that defendant's measure of damages was the reasonable market value of the corn and cotton he would have reasonably been expected to raise on the premises during the year, less the rents due plaintiff therefrom, and less the amount

*Rehearing denied July 1, 1905.

defendant would have expended for hired hands to assist in making the crop, and less the amount he earned by engaging in a similar or different employment after breach of the contract, was correct, though not instructing, except inferentially, to credit the damages, if any, with the market value of corn and cotton shown to have been raised by defendant during the year on other premises.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 723-727.]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Trespass to try title by T. F. Freeman against J. P. Slay. Judgment for defendant, and plaintiff appeals. Affirmed.

The charge on the measure of damages referred to in the opinion was as follows: "Then you will find for defendant on his cross-action, and assess his damages at the reasonable market value of the corn and cotton which defendant and his family would have been reasonably expected to raise on said premises during the year 1904, less the rents due to the plaintiff therefrom, and less the amount of money defendant would have expended for hired hands to assist him and his family in making said crop, and less such an amount as defendant and his family are shown to have earned by engaging in a similar or different employment after the breach of the contract." Plaintiff's objection was that nowhere in the charge were the jury told to credit the damages, if any, on account of the breach of contract by plaintiff, except inferentially, with the market value of the corn and cotton raised by defendant, under the proofs, on other premises during the year.

Crudginton & Penix, for appellant. H. E. Bradford, for appellee.

STEPHENS, J. Appellant, suing in trespass to try title, and causing appellee to be ejected under writ of sequestration, was admitted in the answer of appellee to be the owner of the land in dispute, but his right to recover possession was denied on the ground that he had rented the land to appellee for the year 1904; the writ of sequestration having been sued out and executed during January of that year. On the same ground appellee sought to recover damages against appellant for the wrongful eviction; claiming the reasonable value of the crops he would have made on the land during that year if he had been permitted to cultivate it, and other special damage incident to the execution of the writ of sequestration. Whether or not appellant had rented the land to appellee for the year 1904 was the controlling issue of fact in the case, and on it the testimony was decidedly conflicting. The verdict, which was in appellee's favor, is therefore conclusive, unless there was material error in the proceedings.

Appellant assigns error to the court's refusal to instruct the jury as follows: "You

are charged that the burden of proof is upon the defendant to establish the allegations in his plea in reconvention, and, if he does not so establish said allegation in said plea by a preponderance of the evidence, you will find for the plaintiff, and so say by your verdict." He also assigns error because the following charge was given: "The burden is on the plaintiff to establish his right to possession of the premises sued for at the time of the filing of this suit, by a preponderance of evidence, and the burden is on the defendant to establish his injury by reason of the levy of the writ of sequestration by a preponderance of the evidence." Both charges were objectionable, but the one refused more so than the one given. True, the burden was on appellee to establish by a preponderance of the evidence the material facts alleged in his plea in reconvention, and, failing to discharge this burden, he was not entitled to recover damages; but the requested charge, instead of so declaring, in that event directed a finding "for the plaintiff." It thus went a little too far, and was consequently properly refused. The plaintiff was not entitled to recover possession without proving by a preponderance of the evidence his right to possession, which depended on whether or not he had rented the land to appellee, although the defendant may have failed to establish by a preponderance of the evidence his right to recover damages. The last clause of the charge given seems rather too restrictive, and possibly had a tendency to mislead the jury as to the extent to which the burden of proof was on appellee, but this is not the precise objection made to the charge. It was correct as far as it went, and appellant cannot avail himself of such error of omission without having requested a charge to supply it which might have been given.

The following deposition of M. T. Hatley was read in evidence: "I had a conversation with T. F. Freeman in the fall of 1903 in regard to renting land to Mr. Slay for the year 1904. I don't know the name of the survey. My understanding was that he was to have the land that Slay and Mitchell had tended for the year 1903, and it was on the south and west of the branch known as the 'East Branch.' I understood Slay was to have 140 acres. The number of acres was mentioned in the first conversation." The testimony was objected to because of the use of the words "understanding" and "understood." But in the agreed statement of facts we find that this witness gave positive testimony as to the fact of appellant's renting land to appellee in the fall of 1903 for the year 1904. The material controversy, on which the evidence was conflicting, was not as to the description of the land rented, but as to whether appellant had rented any land at all to the appellee for the year 1904. It is evident, therefore, from an examination of the agreed statement of facts, that the

objectionable feature of this particular answer in the deposition in no manner affected the result.

The charge on the measure of damages seems to have been warranted by the authorities cited in the briefs. *Raywood Rice Canal & Milling Co. v. Langford Bros.* (Tex. Civ. App.) 74 S. W. 927, and cases there cited; writ refused, 77 S. W. 253; *Rogers v. McGuffey* (Tex. Sup.) 74 S. W. 753. At all events, the charge given seems more in conformity to the authorities cited than those requested by appellant.

All the assignments have been carefully examined and found to be without merit, those discussed being the ones principally relied on.

Judgment affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. JACKSON et ux.

(Court of Civil Appeals of Texas. June 7, 1905.)

RAILROADS—CROSSING ACCIDENT—INSTRUCTIONS.

Where, in an action for injuries to plaintiff in a railroad crossing accident, one of the grounds of negligence alleged was that the engine bell was not rung as required by ordinance, and some facts tended to show that the accident might have happened whether the bell was rung or not, it was error to refuse an instruction that, if the failure to ring the bell was not the proximate cause, the jury should find for defendant on such issue.

Appeal from District Court, Hill County; Nelson Phillips, Judge.

Action by J. R. Jackson and wife against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

T. S. Miller and Ramsey & Odell, for appellant. Wear, Morrow & Smithdeal, for appellees.

FISHER, O. J. This is a suit by J. R. Jackson and his wife, Mrs. Mary L. Jackson, to recover the sum of \$10,000 as damages for personal injuries sustained to Mrs. Jackson in attempting to cross one of the public streets of the city of Hillsboro. It is alleged that in attempting to cross she was struck by one of appellant's engines, and sustained the injuries described in the petition. Verdict and judgment were in appellees' favor for \$1,500.

We have carefully considered every assignment of error presented in the brief, and find that no reversible error is pointed out, except as presented by the eighteenth assignment of error. That assignment is to the effect that the court erred in refusing to give the following charge requested by the appellant: "You are instructed that if you should believe from the evidence in this case that the plaintiff Mrs. Mary L. Jackson was struck

or fell or was frightened by an engine of defendant, as claimed by her, and that she was thereby injured as alleged by her in her petition, and should you further believe that at said time the bell on said engine was not rung when said engine was started to move and while it was in motion, but should further believe that the failure to ring the bell was not the proximate cause of such injury, or that, by reason of the time, place, and manner in which plaintiff undertook to cross said track, she would have received such injury whether said bell had been rung or not, then and in such event you will find for the defendant on the issue as to its alleged negligence in failing to ring the bell on said engine." This particular question was not covered by the main charge of the court, and the defense presented by the special instruction arises from the evidence. One of the grounds of negligence alleged by the plaintiff is that those operating the engine failed to ring the bell when approaching the public crossing, and that that was a duty required of the appellant by virtue of an ordinance of the city of Hillsboro. There are some facts testified to which had a tendency to show that the accident might have followed, whether the bell was rung or not, and there is some evidence which has a tendency to show that the failure to ring the bell was not the proximate cause of the alleged accident. This charge should have been given, and for the error in this respect the judgment will be reversed and the cause remanded.

The objections raised to the insufficiency of the averments of the petition in attempting to allege some of the grounds of negligence relied upon are possibly well taken, and which objections will be obviated, doubtless, by an amendment.

Judgment reversed and cause remanded.

W. SCOTT & CO. v. WOODARD.*

(Court of Civil Appeals of Texas. May 27, 1905.)

1. EVIDENCE—ADMISSIONS—APPLICATION FOR CONTINUANCE.

An application for a continuance made by plaintiffs through their attorney, containing an admission contradicting plaintiffs' testimony, is admissible for that purpose.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 730.]

2. APPEAL—VERDICT—CONFLICTING EVIDENCE.

Where a verdict is clearly supported by the testimony of a credible witness, it will not be set aside because of a conflict between his testimony and that of other witnesses.

Appeal from District Court, Howard County; Jas. L. Shepherd, Judge.

Action by W. Scott & Co. against E. T. Woodard. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

*Rehearing denied June 24, 1905, and writ of error denied by Supreme Court.

John B. Littler, Ellis Douthit, and Matlock, Miller & Dycus, for appellants. S. H. Morrison, for appellee.

STEPHENS, J. Appellants purchased of appellee four sections of school land in Howard county, Tex., for which they made a cash payment of \$2,500. Before this sale was made, appellee owed them several hundred dollars, which indebtedness according to his version, was extinguished by the sale, but, according to the version of appellants, remained unsatisfied, and this suit was brought to recover the amount claimed to be due. The case was one of conflicting evidence, and the verdict in appellee's favor therefore establishes his contention.

There was no error in allowing appellee to introduce in evidence the application for continuance made by the appellants through their attorney, since it contained an admission which contradicted the testimony of each of them on the trial. *H. E. & W. T. R. Co. v. Dewalt* (Tex. Sup.) 70 S. W. 531, and cases there cited.

The charge of the court is criticised, but we are unable to see how it could have been misleading, since it submitted in plain language the controverted issues of fact raised by the pleadings and evidence.

The verdict is also complained of, but was warranted by the testimony of appellee. That we have no power to set aside a verdict clearly supported by the testimony of a credible witness, because of a conflict between his testimony and that of other witnesses, is too well settled to admit of discussion.

The judgment is therefore affirmed.

PARLIN & ORENDORFF CO. v. VAWTER et al.*

(Court of Civil Appeals of Texas. May 24, 1905.)

1. EVIDENCE — DEPOSITION IN ANOTHER CAUSE.

Depositions taken in a cause are not admissible in evidence in a subsequent cause as against one not a party to that in which they were taken.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 297, 298.]

2. JUDGMENT—EVIDENCE—RECITALS.

Where, in a suit to set aside a conveyance as in fraud of plaintiff, there was an issue as to what constituted the homestead of the grantors at the time of the conveyance, recitals in a judgment obtained by plaintiff against the grantors establishing their homestead were not admissible as against the grantee, who had not been a party to the former action.

3. APPEAL—ASSIGNMENTS OF ERROR.

An assignment of error which raises several independent and distinct matters does not comply with the rules of court, and will not be considered.

4. ATTACHMENT—OWNERSHIP OF PROPERTY.

Where a deed by a husband and wife was made in good faith and was not fraudulent, it

was superior to a subsequent attachment by a creditor of the grantors, irrespective of whether the property conveyed was a homestead at the time of the conveyance.

5. APPEAL—ASSIGNMENTS OF ERROR.

An assignment of error will not be considered where it is not supported by any statement as required by the rules.

6. TRIAL—INSTRUCTIONS.

There is no error in refusing to give a special charge where the issue to which it relates was fully covered by the general charge and another special charge given at the same party's request.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by the Parlin & Orendorff Company against C. C. Vawter and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

J. M. Willis and H. G. Evans, for appellant. R. B. Young and Meade & McGrady, for appellees.

EIDSON, J. This is a suit of trespass to try title brought by appellant, as plaintiff in the court below, against appellees, C. C. Vawter, Ida Leeper, and her husband, J. A. Leeper, for the purpose of recovering the title to and possession of lot No. 12 in block No. 21, in the town of Leonard, in Fannin county, Tex. Appellant also alleged in his petition that the deed from C. C. Vawter and wife to Ida Leeper of date October 16, 1896, was voluntary and without consideration, and made for the purpose of hindering, delaying, and defrauding the creditors of C. C. Vawter, and especially appellant, of which purpose said Ida Leeper was fully cognizant at the time such conveyance was made, and that said deed is a cloud upon the title of appellant. Appellant prayed that the same be declared fraudulent and void, and that it be set aside and held for naught. Appellees, except C. C. Vawter, answered by general demurrer, general denial, and plea of not guilty; and appellee Ida Leeper further answered that the deed executed to her of date October 16, 1896, was made in good faith for the bona fide purpose of paying her a just debt, which said C. C. Vawter then owed her, in amount equal to the property so conveyed; that the property was the business homestead of C. C. Vawter at that date; and prayed that appellant take nothing by its suit, and that she be quieted in her title to said premises. C. C. Vawter filed a disclaimer, and prayed to be discharged with his costs. The case was tried before a jury, and the court submitted special issues to the jury, and, upon the answers made thereto, the court entered judgment for appellees Ida Leeper and J. A. Leeper for the lot in controversy.

Appellant's first assignment of error complains of the action of the court in excluding the certified copy of the depositions of C. C. Vawter and his wife which were taken in the case of *Parlin & Orendorff Company* against C. C. Vawter et al., No. 15,373 in

*Rehearing denied June 28, 1905.

the district court of Dallas County, Tex., which depositions show that C. C. Vawter and his wife used and occupied 80 acres of land situated four miles west of Leonard for a period of nearly 20 years prior to the failure of the said Vawter on October 16, 1896, as their homestead, and that it had all that time been their homestead; appellant's contention being that said depositions were links in the chain of its title, and were declarations of Vawter and his wife as to their homestead at the time of his failure, and for a period of 20 years prior thereto. In our opinion, the court below did not err in excluding said depositions. *Ida Leeper* not being a party to the suit in which said depositions were taken, they would be but hearsay, *res inter alios acta*, as against her, and therefore not admissible. *National Bank v. Mulkey*, 94 Tex. 395, 60 S. W. 753; *Stephens v. Johnson* (Tex. Civ. App.) 45 S. W. 328; *Wallace v. Berry*, 83 Tex. 323, 18 S. W. 595.

By its second assignment of error appellant complains of the action of the court in giving to the jury special charge No. 1, requested by appellees, which is as follows: "You will exclude from your consideration the recitals in the verdict and the judgment rendered in the district court of Dallas county, concerning what the court in that case adjudged to be the homestead of said Vawter and wife, because what took place in that case in Dallas county is not admissible evidence as to the homestead question now involved in this suit you are trying. Such records were not admitted by the court in the present case as being any evidence on the homestead question involved in this suit." The judgment of the district court of Dallas county, so far as it decreed title to appellant in the lot in controversy, was admissible, but the recitals in that judgment establishing the homestead of Vawter and wife could only affect the parties to that suit; and, although there is in this case the issue as to what constituted the homestead of said Vawter and wife at the date of the deed by C. C. Vawter to *Ida Leeper*, still, she not being a party to that suit, she could not be affected by the recital in that judgment as to the homestead, and therefore such recital was inadmissible as against her. *Hardin v. Blackshear*, 60 Tex. 132.

Appellant's fourth assignment of error is not in compliance with the rules of this court, and therefore will not be considered. The assignment raises several independent and distinct matters, and, for that reason, does not conform to said rules. *Cochran v. Siegfried* (Tex. Civ. App.) 75 S. W. 542; *Baum v. Bank*, Id. 863; *Wren v. Howland*, Id. 894; *Cammack v. Rogers* (Tex. Civ. App.) 74 S. W. 945.

Appellant's fifth assignment of error contends that the court erred in entering judgment for appellees upon the special findings of the jury, because said findings are inconsistent and contradictory, and contrary to

the charge of the court, in that to question No. 1, which is as follows, "Was the property in controversy the business homestead of C. C. Vawter on October 16, 1896?" the jury answered, "Yes;" to question No. 4, which is as follows, "Did C. C. Vawter abandon his homestead in the country; if so, at what date?" the jury answered, "No." The jury, in answer to question No. 3 submitted to them by the court, which was as follows, "Was the deed from C. C. Vawter and wife to *Ida Leeper* made in good faith, or was it fraudulent as to C. C. Vawter's creditors?" found that the deed to *Ida Leeper* was made in good faith. If the deed to *Ida Leeper* was made in good faith and not fraudulent, the title to the lot in controversy vested in her prior to the levy of the appellant's attachment, and hence was not subject to such attachment, and, that being true, it was immaterial as to whether the property conveyed was homestead or not at that date.

Appellant's sixth assignment of error is not in compliance with the rules of this court, because same is not supported by any statement, and therefore it will not be considered. *Ry. Co. v. Puente et al.* (Tex. Civ. App.) 70 S. W. 362; *Chimine et al. v. Baker et al.* (Tex. Civ. App.) 75 S. W. 330; *Raywood Rice Canal & Milling Co. v. Langford Bros.* (Tex. Civ. App.) 74 S. W. 926. However, we are of opinion that the court below did not err in refusing to give to the jury appellant's special charge No. 4, because the issue to which it relates was fully covered by the general charge, and a special charge given at the request of appellant.

There being no reversible error pointed out in the record, the judgment of the court below is affirmed.

PARLIN & ORENDORFF CO. v. LEGGETT et al.

(Court of Civil Appeals of Texas. June 21, 1905.)

ATTACHMENT—OWNERSHIP OF PROPERTY.

Where a deed by a husband and wife was made in good faith and not fraudulent, it was superior to a subsequent attachment by a creditor of the grantor, irrespective of whether the property conveyed was a homestead at the time of the conveyance.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by the Parlin & Orendorff Company against Alice Leggett and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

J. M. Willis and H. G. Evans, for appellant. R. B. Young and Meade & McGrady, for appellees.

KEY, J. This is a companion case to *Parlin & Orendorff Co. v. C. C. Vawter et al.*, recently decided by this court. 88 S. W. 407.

In this case, as in that, the successful appellees claim under a prior deed made by C. C. Vawter, and charged by appellant to have been made for the purpose of defrauding creditors. Appellees, resisting the attack on their title, contended (1) that the property involved was the homestead of C. C. Vawter when he executed the deed under which they claim, and therefore creditors could not attack the sale; and (2) that they bought the property in payment of a pre-existing judgment, and that there was no fraud in fact. The case was submitted on special issues, and the jury found for appellees on both the issues referred to.

The finding of the jury that the sale was in good faith, and not made to defraud creditors, is amply supported by the testimony, and therefore it is unnecessary to decide any questions relating to the issue of homestead. Both parties claiming under C. C. Vawter, and appellees' title being older than appellant's, if the sale to appellees was not fraudulent, their title must prevail, although the property may not have been Vawter's homestead.

Our rulings in the other case concerning the admissibility of testimony are applicable to this, and support the rulings here complained of. No reversible error has been shown, and the judgment will be affirmed.

Affirmed.

HOWARD v. MAYHER et al.*

(Court of Civil Appeals of Texas. May 24, 1905.)

1. HOMESTEAD—JUDGMENT—LIEN — CONVEYANCE—EFFECT.

The purchaser of a homestead acquired it unaffected by the lien of a judgment against the grantor.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 228.]

2. SAME—PROCEEDS OF SALE — RIGHTS OF CREDITORS.

Where a wife parted with her interest in the homestead, on agreement that she should receive the proceeds in payment of a debt from the husband, a judgment lien creditor of the husband could not subject to his lien the vendor's lien notes given the wife.

Appeal from District Court, Bowie County; S. P. Paunders, Special Judge.

Suit by W. H. Howard against John W. Mayher and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Chas. S. Todd, for appellant. Glass, Estes & King, for appellees.

FISHER, C. J. Appellant, as the owner of two judgments against L. C. De Morse, which had been recorded in Bowie county, brought this suit against the appellees to subject certain real property, or the proceeds of the sale thereof in the shape of vendor's

lien notes, to the payment of the judgments. After hearing the evidence, the court below directed a verdict for the appellees.

The facts, substantially, are as follows: On May 7, 1894, in the justice's court of Galveston county, Tex., a judgment was rendered in the case of Leon & H. Blum against L. C. De Morse for the sum of \$169.50, with interest at the rate of 10 per cent. from date of judgment. May 18, 1894, execution issued upon that judgment, and returned "No property found." April 19, 1898, this judgment was transferred and assigned to the appellant, W. H. Howard. This judgment was recorded and abstracted in Bowie county May 7, 1899. On the 22d day of December, 1892, Leon & H. Blum recovered a judgment against L. C. De Morse for the sum of \$1,418.15, with 10 per cent. interest per annum from date of judgment. April 18, 1898, this judgment was transferred and assigned to appellant, W. H. Howard. This judgment was also recorded and abstracted in Bowie county.

The plaintiff admitted the following facts pleaded by the appellees: That the appellee Mrs. M. L. De Morse married L. C. De Morse on the 3d of January, 1869; that at the time of her marriage she was possessed of a large amount of money and property, both real and personal, having inherited the same from her father; that after their marriage she loaned her husband large sums of money, and advanced him a large amount of property, which he promised to pay, with interest; that in such manner he was indebted to her on or before the 20th day of November, 1900, in various sums, aggregating about \$20,000; that during his lifetime he offered and promised to pay her back, and at the time of his death he was still largely indebted to her; that since their marriage they have lived together as husband and wife until the death of L. C. De Morse, which occurred on the 6th day of May, 1902; that they became the owners of the lands and property described in plaintiff's original petition, situated in Texarkana, Bowie county, Tex., prior to the month of October, 1888, and during the summer and fall of that year they erected a residence upon the lots, and lived in and occupied the same as their homestead from that time up to and including the date of the sale of the same to the defendant John W. Mayher; that during all that time, to the date of the sale of the same to Mayher, the property was their homestead, and was used by them as such; that in the summer or fall of 1900 the codefendant John W. Mayher proposed to buy their homestead, and that appellee Mrs. M. L. De Morse would not agree to the sale of the same unless her husband L. C. De Morse would have the proceeds and the notes taken to secure the purchase price for the same made to her, and turned over to her and paid to her in part on the debt which her said husband then owed her; that during the pendency of the trade

*Rehearing denied June 28, 1905, and writ of error denied by Supreme Court.

with Mayher, and while it was being made, her husband, L. C. De Morse, agreed with her that when the homestead was sold to Mayher the proceeds and notes would be turned over to her and paid to her in part payment on the debt that he owed her; that thereupon she joined with her husband in the sale of the homestead to the defendant Mayher, and executed and delivered to him a warranty deed conveying the same, and her husband procured from Mayher the proceeds that were paid in cash, and the notes that were given to secure the balance of the purchase money were made payable to the appellee Mrs. M. L. De Morse, and turned the proceeds and notes over to her, and paid them to her, immediately upon the execution of the deed, in part payment of the debt that he then owed her, and delivered the proceeds and the notes over to her to become her separate and individual property; that ever since that time she has owned and held the notes, with the exception of the two that have been paid, as her separate individual property and in her own right; that the proceeds and the notes taken to secure the purchase money due by Mayher on the homestead were turned over and delivered and paid to her in the month of November, 1900, and that the proceeds and notes were exempt, and not subject to the payment of the judgment sued on by the plaintiff in this case.

Upon the evidence as stated as aforesaid, the trial court peremptorily instructed a verdict in favor of appellee.

Appellant assigns the following error: "The court erred in directing the jury to return a verdict in favor of the defendants for the following reasons, to wit: (1) The evidence introduced by the plaintiff was sufficient to entitle him to a recovery of a decree subjecting the unpaid vendor's lien notes in the possession of Mrs. M. L. De Morse to the judgment lien held and proved by plaintiff. (2) The evidence introduced by the plaintiff entitled him to a decree subjecting to the payment of his judgment lien the superior legal title remaining in Mrs. M. L. De Morse, by reason of the express reservation of the vendor's lien contained in the deed from De Morse and wife to Mayher. (3) The facts shown by the defendant, Mrs. M. L. De Morse, and admitted by the plaintiff, are not sufficient in law to constitute any defense to plaintiff's cause of action, because immediately upon the sale of the property by De Morse and wife to Mayher the liens of the judgments held by the plaintiff attached eo instanti to the interest in said land remaining in the vendors, subject to a defeasance only by application of the proceeds of the sale to the acquisition of another homestead within six months of said sale. The said proceeds not having been so applied within said time, the said judgment lien became absolute from the time of the sale, and constituted a charge which was paramount to the claim of the defendant M. L. De Morse as an unsecured

creditor, and she took said notes and retained the legal title to said land subject to a charge for the payment of said judgment lien."

None of these objections to the judgment, in our opinion, are well taken. It may be conceded that the appellant was a judgment lien creditor of L. C. De Morse at the time that the homestead was sold, but, so long as the homestead continued and was not abandoned during the ownership of L. C. De Morse and his wife, no rights were acquired against it by virtue of the judgment lien. The judgment lien was no impediment to a valid sale by the parties asserting the homestead right to a purchaser; and such purchaser, if he acquired the property at a time when the homestead right existed, would receive it unaffected by the judgment lien that might exist generally against the real estate of the debtor in the county where the judgment is properly recorded. Furthermore, as we understand the brief of the appellant, the purpose is not to assert and foreclose a lien against the property itself, but the object is to subject the vendor's lien notes outstanding to the lien, claim, and demand of the appellant. We do not think it was the purpose and intention of the registration statute to create a lien against the proceeds of the sale of property, but to create and preserve a lien against the property itself. While it is true cases might arise in which a court of equity would permit the proceeds of the sale of property against which a lien existed to be subjected to the payment of the claim of the lien creditor, we are of the opinion that the pleadings of the appellant do not make a case of this character. But, however, this particular question is not necessary to be decided in the view that we take of the case. The appellant, as a creditor of L. C. De Morse, had no interest whatever in the homestead, as long as that right continued; and Mrs. De Morse, upon the sale of the same, was not required to part with her interest therein without the husband complying with the agreement that she should receive the proceeds in payment of the debt that he owed her. The facts admitted conclusively show that she only agreed to sell, and did sell, upon the express understanding that the proceeds of the sale should be turned over to her, and the vendor's lien notes, which the appellant is now seeking to subject to his debt, should be executed and made payable to her in part payment of the debt due to her from her husband in her separate right. The sale, when made, was upon this condition, and it took effect immediately upon the consummation of the sale, and whatever rights as a judgment lien creditor the appellant might have had in the property, if any at all, were subject to the contract upon which the sale was based.

We find no error in the record, and the judgment is affirmed.

Affirmed.

CREWS v. HARLAN.

(Court of Civil Appeals of Texas. June 28, 1905.)

SALES — VERBAL RESERVATION OF TITLE—EFFECT.

A sale of personal property with a verbal reservation of title to secure the payment of the purchase price constitutes a valid mortgage between the parties.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 31, 38.]

Appeal from Navarro County Court; A. B. Graham, Judge.

Action by J. R. Harlan against J. W. Crews. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. S. Simkins and Richard Mays, for appellant. Callicutt & Call, for appellee.

EIDSON, J. This suit was originally brought in the justice's court of Navarro county by the appellee against the appellant to recover the title and possession of two certain mules, appellee alleging in his complaint that possession of said property was delivered to appellant upon the express condition that the title to same should remain in appellee until the mules were paid for by appellant. Appellee recovered judgment in the justice's court for the title and possession of the mules, from which judgment appellant appealed to the county court, where appellee recovered the same judgment, from which appellant has appealed to this court.

In the county court, in addition to pleading title and right of possession to the property, and praying for the recovery thereof, appellee, as a second count in his petition, pleaded as follows: "Second. This plaintiff further shows to the court that in about the fall of 1901 the plaintiff delivered to the defendant the two mules in controversy and above described, and described in plaintiff's citation and affidavit for sequestration, but gave no bill of sale therefor to defendant; that it was intended between plaintiff and defendant that no title should pass to the defendant until said defendant should pay for said mules in full to plaintiff, and defendant should have the right to become the owner of said two mules only when he should pay to the plaintiff amounts on the following dates, to wit, the sum of \$105 on or about October 1, 1902, and interest, and the sum of \$87.50 on or about October 1, 1903, and interest, and until said amounts, etc., were paid to plaintiff by defendant, the said mules were to remain the property of plaintiff, and the two mules were to stand and remain good as security for the payment of the purchase money, and the title to be reserved in the plaintiff until the above amount should be paid off and discharged by defendant, according to his promise and

agreement; * * * that if it should be found or determined that, under the law, title passed to said Crews, the defendant, and that said Crews became indebted to plaintiff for the price of said mules, and that, under the law, plaintiff has a lien on said mules for said purchase price, or that said mules, under the law, stood good for the purchase price, and that plaintiff has a lien thereon therefor, and not absolute title thereto, holding that a reservation of title is a lien under the law—then the plaintiff sues the defendant, and asks judgment in the alternative for the sum of \$105, which was due and to be paid October 1, 1902, without interest, and for the sum of \$87.50, with interest (this plaintiff here specially waiving any attorney's fees on said amounts and sums, if he is entitled thereto, and setting no claim to 10% attorney's fees, or attorney's fees for any other amount), and for the establishment and foreclosure of his lien on said mules involved in this suit against defendant and his sureties, as above set out, and for costs and general relief." Appellant excepted to the above pleading, and the court below sustained the exception, and struck from the record the above pleading.

According to the record, there is no testimony authorizing the verdict and judgment in favor of appellee for the title and possession of the mules. The testimony is uncontroverted to the effect that appellee made a sale and delivery of the mules to appellant, and that the sale was on a credit. The testimony on the part of appellee shows that there was a verbal reservation of the title to the mules until the purchase price was paid. That of appellant tends to show that there was no reservation of title, but that the sale was absolute, without any agreement or understanding whatever as to a reservation of the title to the property.

The Supreme Court, in answer to the question certified by this court, held that a sale of personal property, with a verbal reservation of title to secure the payment of the purchase price, constituted a valid mortgage between the parties. *Crews v. Harlan*, 87 S. W. 656, 13 Tex. Ct. Rep. 63.

Appellant's general demurrer to the first count of appellee's petition should have been sustained, as it appears from said count that the sale of the property was made with a reservation of title; but appellant's exceptions to the second count of appellee's petition should have been overruled, and the action of the court below in sustaining the same was error, and appellee has assigned this action of the court as error by cross-assignment of error brought up in the record and presented in his brief.

For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

**JACKSON-FOXWORTH LUMBER CO. v.
HUTCHINSON COUNTY.**

(Court of Civil Appeals of Texas. June 14, 1905.)

**1. COUNTIES—AUTHORITY OF COMMISSIONERS—
APPOINTMENT OF AGENT TO CONTRACT.**

Under Sayles' Rev. Civ. St. 1897, art. 797, authorizing the appointment by the county commissioners' court of an agent to contract for the county for the erection and repair of buildings, etc., in order to bind the county the agent must have been authorized by the commissioners acting as a body.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, §§ 58, 88.]

**2. SAME—AUTHORITY OF AGENT — PROOF —
PAROL.**

The authority of an agent appointed under the statute may be shown by parol, it not being necessary that an order be actually entered on the minutes.

**8. ACTION ON CONTRACT — PLEADING — AU-
THORITY OF AGENT—SUFFICIENCY.**

Where, in an action against a county, the petition alleged that plaintiff furnished defendant, at the instance and request of the county, acting through a specified agent, certain materials, for which defendant obligated itself to pay, it stated a cause of action good against a general demurrer, inasmuch as it authorized proof of the agent's authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 713, 716, 719.]

**4. ACTION FOR GOODS SOLD—ALLEGATIONS OF
PETITION—ACCOUNT—VARIANCE.**

There was no variance between the allegations of the petition and the account sued on, which was annexed to the petition as an exhibit, the allegations stating in one place that the goods were furnished on July 27, 1901, as shown by an itemized account attached to the petition, though the exhibit was dated "Aug.—," the allegations having referred to the exhibit as a part of it, and one of them having been that the goods were furnished on or about July 28, 1901.

Appeal from Hutchinson County Court; W. P. Hedgecoke, Judge.

Action by the Jackson-Foxworth Lumber Company against Hutchinson county. From a judgment in favor of defendant, plaintiff appeals. Reversed.

John W. Veale, for appellant. Coffee & Kelley, for appellee.

JAMES, C. J. Appellant sued the county, alleging in paragraphs 4 to 8, inclusive, a case based upon the theory that a Mr. Akers had contracted with the county to build it a courthouse, and applied to plaintiff for certain building material to use in said building, representing that he had a contract with the county to construct it, but plaintiff was unwilling to deliver same to him on the strength of said contract, and notified the county judge that unless the county would become bound by original undertaking to pay plaintiff for the lumber, independent of said contract, it would not be delivered to Akers, whereupon the county, acting through its said county judge, then and there promised and assured plaintiff that it would be in-

dividually responsible therefor, and plaintiff accordingly delivered the material; and that Ingerton, the said county judge, had been appointed to oversee and look after the construction and building of said courthouse, and was holding himself out to plaintiff and to the public as acting for it in all matters connected therewith. As to so much of the petition the court properly sustained the general demurrer. The allegations taken as true would show, at the most, that Judge Ingerton had been authorized by the commissioners "to oversee and look after the construction of the building" which was under contract. This authority would not have authorized him to buy material, nor to assure the payment by the contractor for material, to be used in the building. The county would doubtless be bound to pay for material which the commissioners had authorized the purchase of for the county; in other words, to bind the county for such a purchase, the commissioners, acting as a body, must have authorized it. It would not be necessary, however, for such authority to be shown by an order actually entered on the minutes. The fact that such order or action was had could be shown by parol. *Ewing v. Duncan*, 81 Tex. 235, 16 S. W. 1000. It would, in our opinion, not be sufficient for the individual commissioners to have refrained from objecting to the assumption of such authority by the county judge. Article 797, Sayles' Rev. Civ. St. 1897, authorizes the appointment by the county commissioners' court of an agent to make and contract on behalf of the county for the erection or repairing of county buildings, and to superintend their erection or repairing, and such contract, duly executed and done on behalf of the county and within such agents' powers, shall be binding on the county. This contemplates an express authority to make the particular contract, or one which arises by necessary implication from the power actually granted.

The twelfth paragraph of the petition reads: "Plaintiff says that if it be mistaken as to defendant county's being bound to it by or through the acts of the then county judge, W. H. Ingerton, as set out in paragraphs 6, 7, 8, and 9 herein, then it further says and charges that on or about the 28th day of July, A. D. 1901, as set out in said itemized account, it furnished to said defendant county, at the instance and request of said county, acting through its said agent and county judge, W. H. Ingerton, divers lumber and building material, which was accepted by said county and used by it in the construction and erection of its said courthouse, as will be fully shown by its said itemized account, which is attached hereto and made a part hereof, as aforesaid, amounting in the aggregate to the sum of \$336.11; that said county thereby promised and obligated itself to pay plaintiff the reasonable

value of said materials, which plaintiff alleges was and is the reasonable value of the various items thereof." This is a separate count upon which plaintiff relies in case he be mistaken in the case alleged in the preceding paragraphs. This is correct pleading, and, if the paragraph quoted states a case, plaintiff was entitled to be heard on it. In our opinion, it states a case which is good against a general demurrer, and against any of the special exceptions, all of which were sustained by the court. It alleges that the material was furnished to the county at the instance and request of the county, the county acting through its agent and county judge, Ingerton. This was sufficient to authorize proof of Ingerton's authority, if any, from the county commissioners, whether by an order entered upon the minutes, or by an order made, or authority granted, though not entered. It was not necessary to plead this matter of evidence.

To the petition there was interposed a general demurrer and three special demurrers. The special demurrers are not presented here by assignment copied in the briefs, and under the rules they are deemed abandoned. Only the action upon the general demurrer is presented as error. The special exceptions, in their nature, have no reference to the twelfth paragraph of the petition, and certainly are not sustainable so far as it is concerned.

There is no variance between the allegations and the account sued for, which is annexed to the petition as an exhibit. The allegations stated in one place that "the goods were furnished on July 27, 1901, a verified itemized account of which bill of material is hereto attached, marked 'Exhibit A' and asked to be considered herewith." The exhibit bears date thus: "Aug. —." There can be no question of variance, because the allegation refers to the exhibit as a part of it. Moreover, in said paragraph 12 the allegation is that the goods were furnished on or about the 28th of July, 1901.

Reversed and remanded.

LOUISVILLE & N. R. CO. v. MISSOURI, K. & T. RY. CO. OF TEXAS et al.

(Court of Civil Appeals of Texas, June 14, 1905.)

JURISDICTION—NOTICE TO NONRESIDENT DEFENDANT—PERSONAL JUDGMENT.

Under Rev. St. 1895, arts. 1230, 1233, providing that where the defendant is a nonresident the clerk shall, upon application, address a notice to the defendant requiring him to appear and answer the petition, etc., and that the return of service in such cases shall be attached to the original notice, and state when the same was served and the manner of service, the service of such a notice in another state upon a nonresident defendant corporation does not authorize the rendition of a personal judgment against it, although it be alleged in the petition that the defendant transacted business in this state.

Error from Collin County Court; F. E. Wilcox, Judge.

Action by Fred Emerson against the Louisville & Nashville Railroad Company and others. From a judgment for plaintiff as against the defendant named, but in favor of the Missouri, Kansas & Texas Railway Company of Texas and others, the defendant first named brings error. Affirmed in part.

Hawkins & Haynes, for plaintiff in error. T. S. Miller and Garnett & Smith, for defendants in error.

KEY, J. Fred Emerson brought this suit against the Louisville & Nashville Railroad Company and four other railroad companies to recover damages on account of alleged injuries and overcharges in freight in the transportation of certain live stock from Mount Sterling, Ky., to McKinney, Tex. It was alleged in plaintiff's petition that the Louisville & Nashville Railroad Company was a corporation incorporated under the laws of Kentucky, and had its office and place of business at Louisville, Ky. No citation was served on that defendant or any of its agents in this state, but a notice was issued and served upon it in the state of Kentucky, in conformity with articles 1230 and 1233 of the Revised Statutes of 1895. That defendant filed no answer. By agreement between the plaintiff and all the other defendants, the plaintiff took judgment against the Missouri, Kansas & Texas Railway Company of Texas, and dismissed his suit as against all the other defendants, except the Louisville & Nashville Railroad Company, against which defendant judgment was rendered for \$200. The last-named defendant has brought the case to this court by writ of error, and seeks a reversal upon the ground that the notice served upon it in the state of Kentucky was ineffectual to confer jurisdiction authorizing a personal judgment against it. We sustain that contention. That defendant being a nonresident, and not having been served with citation within the limits of this state, and not having filed an answer, the court below had no jurisdiction to render a personal judgment against it. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Wilson v. Seligman*, 144 U. S. 45, 12 Sup. Ct. 541, 36 L. Ed. 338; *York v. State*, 73 Tex. 651, 11 S. W. 869; *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328. The rule referred to is applicable to a nonresident corporation as well as a nonresident individual. *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; *Baltimore & Ohio Ry. Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643.

The averment in the petition that the defendant did business within this state, and had contracted to deliver the property in the county where the suit was brought, did not authorize the service of process outside of the state of Texas. As between the

plaintiff Fred Emerson and the Louisville & Nashville Railroad Company, the judgment will be reversed and the cause remanded; but as between the other parties, and in all other respects, the judgment will be affirmed.

Affirmed in part, and in part reversed and remanded.

TEXAS CENT. R. CO. v. HARBISON.*

(Court of Civil Appeals of Texas. June 14, 1905.)

1. RAILROADS — NEGLIGENCE — INJURIES TO HORSE ON TRACK IN DEPOT GROUNDS.

In an action against a railroad for injuries to plaintiff's mare while on the track in defendant's depot grounds, evidence examined, and held insufficient to show negligence on defendant's part.

2. SAME—DUTY OF RAILROAD — PREVENTION OF INJURIES.

Where one in charge of a team had no authority to be at a railroad baggage room at night to transact business with the railroad, and in fact was not there for that purpose, the railroad company owed him no duty, except to use all means to prevent injuries to him and his team when seen in a position of danger.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1393, 1397, 1405, 1408.]

3. APPEAL — REVERSAL—RENDERING FINAL JUDGMENT.

Where, after having two opportunities, plaintiff fails to establish his cause, the Court of Civil Appeals will exercise the authority conferred on it by law, and will reverse the judgment of the county court in his favor, and render judgment that he take nothing by the suit and pay all costs.

Appeal from Eastland County Court; S. A. Bryant, Judge.

Action by M. T. Harbison against the Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

For prior report, see 75 S. W. 549.

Earl Conner and Clark & Bolinger, for appellant. B. W. Patterson, for appellee.

FLY, J. This is a suit instituted by appellee in the justice's court to recover of appellant the sum of \$150, alleged to have resulted from the loss of a mare that was injured to such an extent by an engine of appellant that it became necessary to kill her. Appellee recovered judgment for full amount sued for in justice's court, and also in the county court on appeal. This is a second appeal of this case. 75 S. W. 549. On the first appeal the judgment was reversed on the ground that the evidence failed to show that appellant had been guilty of negligence, and tended to show that appellee had been guilty of contributory negligence. We suppose that the cause was remanded for a fuller development of the evidence.

The evidence discloses that F. A. Harbison, who was engaged in hauling freight for an express company, drove to the baggage room,

which was near the railroad track, and backed the mare of appellee, which was attached to an express wagon, up to an opening in the baggage room. When thus backed up against the sill of the baggage room, the mare's head was about even with a track that connected appellant's railway with that of another railroad, known as the "Y Track." Leaving the mare unfastened with her head near the track, where she could not get away except by crossing the track, F. A. Harbison went around the baggage room to unlock it; and as he returned, and had reached the back of his wagon, an engine came down the track, and the mare, while attempting to get across the track, was struck by the engine and injured. F. A. Harbison knew that an engine was up the track, and heard it coming, and saw the reflection of its headlight when it was 250 or 300 feet off, but did not know it was on the Y track. He said: "I knew that, if a train came along that Y, that my mare would not stand without being held." F. A. Harbison had been told that he ought to be careful about the mare. The train had stopped about two or three car lengths from the place of the accident, or about 112 feet. There was a conflict in the evidence as to whether the bell was being rung, and as to the rate of speed. The railroad employes had no knowledge of the presence of the mare until she sprang upon the track, although a watchman was kept, and then every means was used to stop the engine. The mare, when seen, was just in front of the engine. There was an ordinance making it a penal offense for any person to leave a horse hitched to a wagon unguarded by some person competent to control him. The evidence is practically the same that it was upon the former appeal, and it fails to establish any negligence upon the part of appellant, and tends strongly to show negligence upon the part of F. A. Harbison, who had the mare in charge. In an action brought by F. A. Harbison on account of personal injuries received by him at the time the mare received her injuries, the Supreme Court, in reversing a judgment of affirmance on the part of the Court of Civil Appeals of the Second District, held that Harbison had no authority to be at the baggage room at night to transact business with the railroad company, and in fact he was not there for that purpose. *Railway v. Harbison* (Tex. Sup.) 85 S. W. 1138. It was further held that appellant did not owe Harbison any duty in regard to lighting the grounds. We conclude that it owed him no duty except to use all means to prevent injuries to him and his team when seen in a position of danger. The railroad company fully responded to that duty. *Railway v. Townsend* (Tex. Civ. App.) 82 S. W. 804.

Appellee has had two opportunities afforded him to establish his cause, and having failed, this court will exercise the authority conferred upon it by law, and will reverse the judgment of the county court, and here ren-

*Rehearing denied July 1, 1905.

der judgment that appellee take nothing by his suit, and that he pay all costs in this behalf expended.

TEXAS & P. RY. CO. v. McDOWELL.*

(Court of Civil Appeals of Texas. June 7, 1905.)

1. DAMAGES—PERSONAL INJURIES — EARNING CAPACITY—EVIDENCE.

In an action for injuries, evidence held sufficient to justify a recovery for time lost in the past and future.

2. SAME—PHYSICIAN'S SERVICES — INSTRUCTIONS.

Where, in an action for personal injuries, it appeared that plaintiff was solely treated by a single physician, and that another physician, who saw him once, did not treat him, or make any charge as for a professional visit, an instruction that the jury might consider the reasonable expense incurred for physician and medicine was not erroneous, as authorizing a recovery for the services of both physicians, in the absence of evidence of the reasonable value of the services of such other physician.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by Ira McDowell against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. J. Freeman and Head, Dillard & Head, for appellant. Hogg, Watkins & Jones, Meade & McGrady, and Henry B. Taylor, for appellee.

EIDSON, J. This is a suit brought by appellee in the court below against the appellant to recover damages in the sum of \$2,000 for personal injuries received through the alleged negligence of appellant on the 24th day of November, 1903. Appellant answered by general denial and plea of contributory negligence, and that appellee and Isalah McDowell were joint enterprisers, so that the negligence of one was that of the other. The case was tried before a jury, and resulted in a verdict and judgment for appellee in the sum of \$1,050.

Appellant's first and only assignment of error complains of the following paragraph of the charge of the court below: "If you should find a verdict for the plaintiff, you may, in estimating the damages, consider the physical and mental suffering, loss of time, reasonable expense incurred for a physician and medicine, and decreased ability, if any, of plaintiff to earn money in the future, which you may find from the evidence to have been the direct result to the plaintiff of his injuries, if any, and assess an amount, which, if paid now, would, in your judgment, be a fair and reasonable compensation to him for the same." Appellant's first proposition under this assignment is that the evidence was insufficient to war-

rant a recovery on account of time lost in the past, and evidence was wholly wanting on which to base a recovery for time that might be lost in the future; and that, therefore, the charge was unwarranted by the evidence, and permitted the jury to resort to conjecture to find a verdict. We are of the opinion that there is sufficient evidence in the record to authorize a recovery on account of time lost in the past and that which might be lost in the future. Appellee testified: "I was hurt bad, and my children carried me away. I did not know anything after that for maybe three days. My physical condition is such now that I can't do work like I did. Maybe I can hoe for ten or fifteen minutes. Then this hand goes; and I don't know what you call it. It goes like it was asleep. My right arm is injured all the way up to my shoulder. It pains me sometimes up to my shoulder. And then my right knee is the worst part. That knee gives out and I fall down sometimes. Before this injury I don't know as I had a boy that could handle me. I was stout. I was in good health. I suffer pain now in my knee from that injury. I was not that way before. I received an injury to my head. Since the accident I cannot recollect anything like I used to. My leg, when it gives way, just appears like it is asleep. I was able to do work of value before I was injured. I could make a very good living. I hauled wood, and went out in the woods and cut wood, and such as that; but I can't do that now. I would get a dollar and a dollar and fifty cents per day for some things, just owing if a man was anxious for a hand or something. I could drive my team and haul, such as that. I would haul my own wood, and haul for the boys around. I could work as good as anybody. I could hoe as much corn and cotton. I am not able to do any kind of work or take exercise now without pain and misery. I can go out and hoe in my garden for a quarter of an hour; then my hand goes like it is asleep. This injury hurts me sometimes at night yet. I did suffer pain in my head after the injury." Dr. Neel, the physician who treated appellee, described his injuries particularly, and, among other things, testified as follows: "He was said to have been hurt about six or seven o'clock in the morning. I was out there an hour, or something like that, afterwards. He had been carried home when I first saw him. I found that he was pretty severely shocked and unconscious, and he had a severe wound here in the face in the right cheek, the temporal bone, and he had a small wound upon his head, and he had been injured on the right side. The skin was nearly off his face where he had been dragged, and his right side was bruised. I remember about his forehead. All his whole face was bruised and skinned. It was several days before he was at himself so he could remember how he had been hurt. For several weeks after

*Rehearing denied June 28, 1905.

that his arm was swollen, and he was nervous and restless, and could not sleep very well. His nervous system was in such shape he had to be looked after for several weeks. I don't think his mind was entirely restored, and I don't think it is entirely restored now. In my judgment, he has had evidently a fracture at the base of the brain. I know, as a rule, people do not get well of a fracture at the base of the brain. It results in a partial paralysis. In my judgment, at his age he will always be bothered somewhat with it. Sometimes it improves a little, but at his age, and in his condition, I do not believe he will get entirely over it. We did not have any trained nurse with him at any time, but some one had to be there all the time with him for quite a while. I think we had some one with him day and night for about two weeks, and then we had somebody there to wait on him after that, and longer than that, well, for probably a couple of weeks after, we did not have to have some one with him constantly day and night. We had somebody to assist him in getting out of bed and in bed and watch him. I know that he suffered from those injuries after he regained consciousness. He continued to suffer something like two or three weeks severely, but he gradually got more and more quiet, but he suffered all the time more or less. I think he began to sit up a little after three weeks. He was in bed longer than that. I really could not tell you how long it was before he was out of the bed, without looking on my books, but it was something like three or four weeks. He was sitting up part of the time, and he was lying down a great deal of the time." We think the evidence above quoted was amply sufficient to justify the part of the charge complained of.

Appellant's second proposition under said assignment is to the effect that the charge complained of was error, in that it permits recovery for reasonable expense incurred for physicians, while the evidence shows that there was a physician, Dr. Gray, who waited on plaintiff in addition to Dr. Neel, and it does not show the value of his services; and that the charge therefore permits recovery for this service, without any evidence to support it; and that there is no method of telling what amount the jury allowed for it. The only testimony in the record that in any manner refers to or mentions Dr. Gray in connection with the treatment of appellee is the statement in the testimony of Dr. Neel that "Dr. Gray had been called to see him just temporarily, and he was there, but left shortly, and I treated the case." Appellee testified that he had a doctor to treat him for his injury, and it was Dr. Neel who treated him. There is no testimony in the record that Dr. Gray treated appellee, or that he made any charge against plaintiff for a professional visit. The only testimony in the record showing that appellee was

treated by a physician is that of appellee and Dr. Neel, and that shows that Dr. Neel was the only physician who treated appellee, and it also shows that he was the only physician who made any charge against appellee for treatment. Hence, in our opinion, the jury were not authorized to, and evidently did not, consider any expense on account of any treatment of appellee by Dr. Gray, or any professional visit by him to appellee. The charge of the court instructed the jury that in estimating the damages, in the event they should find a verdict for the plaintiff, they might consider reasonable expenses incurred for physician and medicine. This charge, in our opinion, was fully authorized, in view of the evidence showing that only one physician treated plaintiff, and that only one physician charged for such services. There being no reversible error pointed out in the record, the judgment of the court below is affirmed.

Affirmed.

LONGWELL v. LONGWELL.*

(Court of Civil Appeals of Texas. May 31, 1905.)

1. APPEAL — STATEMENT OF FACTS—PRESUMPTIONS.

In the absence of a statement of facts from the record, it must be presumed that all matters pleaded by the parties necessary to sustain the judgment were proven.

2. DIVORCE—JURISDICTION — RESIDENCE OF PETITIONER.

Where plaintiff in an action for divorce alleged that she was a bona fide resident citizen of El Paso county, Tex., where she had resided for more than one year next preceding the filing of her petition, it must be presumed, in the absence of a statement of facts, that the court found she was such a bona fide inhabitant, and the decree cannot be disturbed on the ground that there was no allegation that plaintiff was a bona fide inhabitant of the state at the time of filing her petition.

3. SAME — PRESUMPTION TO SUSTAIN JUDGMENT.

In a suit for divorce and partition of community property it must be presumed in favor of the judgment that a sum adjudged to defendant as a charge on the community was proven, as alleged, to be the amount of his separate funds invested in the community property.

4. SAME.

In a suit for divorce and partition of community property it must be presumed, in the absence of a statement of facts, that the court made a fair and equitable settlement, and that its adjudication was founded on evidence sustaining it.

Error from District Court, El Paso County; A. M. Walthall, Judge.

Action by Mrs. Jennie Longwell against J. J. Longwell. From a decree granting a divorce and partitioning the community property, the plaintiff brings error. Affirmed.

M. W. Stanton, for plaintiff in error. Beall & Kemp and Patterson & Wallace, for defendant in error.

*Rehearing denied June 23, 1905.

NEILL, J. This is a suit for a divorce and for a partition of the community property, brought by plaintiff in error against defendant in error. The case was tried before the court on the 30th of March, 1904, without a jury, and the court, having found all the material facts alleged by the plaintiff true, decreed the divorce, and partitioned the community property between the parties. On the 12th day of December, 1904, the writ of error by which it is sought to have the judgment reviewed by this court was sued out. There is no statement of facts in the record, and it must be presumed, therefore, that all matters pleaded by the parties necessary to sustain a judgment of the court were proven.

By the first assignment of error it is urged that the court was without jurisdiction to grant the divorce, because there was no allegation either in plaintiff's petition or defendant's answer that Jennie Longwell, at the time of exhibiting her petition, was an actual bona fide inhabitant of the state of Texas. This presents the anomalies of a plaintiff objecting to the sufficiency of the allegations in her own petition, and, on account of such objections, seeking to have the decree which she sought by her petition annulled. Unless the decree is absolutely null and void, it may be questioned whether this can be done even by directly attacking it on appeal or error. But, aside from any such question, we do not believe her petition is subject to the objection urged. It alleges that "both plaintiff and defendant are bona fide resident citizens of the city and county of El Paso and state of Texas, where they have resided for more than one year next preceding the filing of this petition." It is true it does not allege that at the time of exhibiting her petition she was "an actual bona fide inhabitant of the state," but this is clearly implied from the allegation quoted from her petition. If both she and her husband were bona fide resident citizens of the city and county of El Paso and state of Texas, and had resided there for more than one year next preceding the filing of her petition, she was necessarily a bona fide inhabitant of the state of Texas. As is said by this court in *Michael v. Michael*, 79 S. W. 74: "It is evident that if the plain, ordinary signification of the word 'reside,' used in the statute, is given to it, it would necessarily be construed to require an actual living in the county for more than six months immediately preceding the filing of the suit. The word 'reside,' in its ordinary sense, carries with it the idea of permanence as well as continuity." If, then, plaintiff resided 12 months in El Paso county, Tex., next prior to the date of filing her petition, she was a bona fide inhabitant of such state and county during that time, and in the absence of a statement of facts it will be presumed that the court found that she was such bona fide inhabitant. In fact, this is implied in the finding by the court "that the material allegations of plaintiff's petition asking for a divorce are true."

88 S.W.—27

It will be presumed in favor of the judgment partitioning the property that the \$2,500 adjudged in favor of defendant as a charge upon the community property was proven, as alleged, to be the amount of his separate funds, the investment of which could be traced into property of the community on hand and identified at the time such judgment was rendered. It must be also presumed, in the absence of the statement of facts, that the court made a fair and equitable settlement, adjustment, and disposition of the rights of the parties as to both their separate and community property, and that its adjudication of all such matters was founded upon evidence authorizing and sustaining it.

No error is assigned that would authorize us to reverse the judgment. It is therefore affirmed.

TEXAS & N. O. RY. CO. v. E. R. & D. C. KOLP, JR., et al.*

(Court of Civil Appeals of Texas. June 14, 1905.)

1. CARRIAGE OF GOODS—CONNECTING CARRIERS—NEGLIGENCE.

An initial carrier was not negligent in delivering freight to a connecting carrier for transportation to a station on the line of the connecting carrier which that carrier had officially stated to be open for business, but which was not so open in fact.

2. SAME — UNREASONABLE DELAY—INSTRUCTIONS.

In an action against a carrier for delay in delivering freight consigned to a station which had not been opened for business at the time the freight was shipped, an instruction that, in determining whether there was delay in the transportation of the freight, the jury should estimate the entire time consumed for transportation, without reference to when the station was in fact opened, unless they believed that plaintiffs knew or should have known that the station was not open when the shipment was made, in which event they should exclude from their estimate as much time as elapsed between the date of the shipment and the time when the station was actually opened, was sufficiently favorable to defendant.

3. SAME—DEFENSES.

Where freight is accepted by a carrier without notice to the shipper that its delivery will be delayed, any delay occasioned by unusual rush of business or large accumulation of freight is no defense to an action for delaying the shipment.

4. SAME—DAMAGES—DEMURRAGE.

Where, owing to unreasonable delay by a railroad in forwarding a car load of grain, the consignee refused to accept it, so that the consignor was compelled to leave it in the car, and the railroad company demanded and received demurrage, the consignor was entitled to recover the demurrage in an action for the damages occasioned by the delay.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Action by E. R. & D. C. Kolp, Jr., and others, against the Texas & New Orleans Railway Company and others. From a judg-

*Rehearing denied July 1, 1906.

ment for plaintiffs against the defendant named, it appeals. Affirmed.

Baker, Botta, Parker & Garwood and C. M. Templeton, for appellant. Flournoy & Smith, Andrews, Ball & Streetman, and W. Storer, for appellees.

NEILL, J. This suit originated in the justice's court, and was brought by E. R. & D. C. Kolp, Jr., against the Houston & Texas Central Railroad Company and the Texas & New Orleans Railway Company for loss and damage alleged to have been sustained by reason of delay in the delivery of a car load of oats shipped by plaintiffs in June, 1903, to Sour Lake, Tex. The loss and damage were thus itemized in plaintiffs' account:

Loss by reason of depreciation in market value of 987 bushels and 22 pounds of oats.....	\$ 84 40
Demurrage on car for 24 days, @ \$1.00 per day, paid by plaintiffs....	24 00
Overcharge in freight rate on car.....	15 00

Total \$128 40

The defendants each answered by a general denial, and impleaded the Ft. Worth & Denver Railway Company, alleging that it accepted the car load of oats at Day's Switch, Tex., for transportation to Sour Lake, Tex., giving plaintiffs a bill of lading for same, calling for that point at its destination; that at the time said railway company received and shipped the same from Day's Switch and gave said bill of lading, routing the car over defendants' lines of railway, calling for Sour Lake, knowing that there was no such railway station. They prayed that, in event plaintiffs recovered against them, they have judgment over against the Ft. Worth & Denver Railway Company for a like amount. There was a judgment for plaintiffs in the justice court, and upon appeal to the county court the case was tried on the same pleadings, and a judgment rendered in favor of plaintiffs against the Texas & New Orleans Railway Company for the full amount sued for. Judgment was also rendered in favor of the Houston & Texas Central Railroad Company and the Ft. Worth & Denver Railway Company.

Conclusions of Fact.

The evidence shows that on June 22, 1903, the firm of E. R. & D. C. Kolp, Jr., delivered to the Ft. Worth & Denver Railway Company at Day's Switch, Tex., in Wichita county, a car of oats to be shipped thence to the order of the firm at Ft. Worth, Tex.; that on the arrival of the car load of oats at Ft. Worth, on the 24th of June, the Ft. Worth & Denver Railway, upon the order of plaintiffs, directed it to Sour Lake, Tex., and it was routed there over the Houston & Texas Central and the Texas & New Orleans Railway Companies' railroads, with instructions to notify the Wilhelm Brokerage Company

at Sour Lake. The car reached Houston, Tex., over the road of the Houston & Texas Central Railway on the 27th of June, and at 3:30 p. m. on that day was delivered to appellant, the Texas & New Orleans Railway Company, to be forwarded over its road to Sour Lake. At that place, though on the line of appellant's road, no station had been opened by appellant for the reception of freight when the oats were shipped from Ft. Worth, and, though official notice of the opening of the station there was issued on the 27th of June, it was not opened until the 1st of July. Up to that time Nome, which is about seven miles from Sour Lake, was the nearest railroad station on appellant's road to said place. The car load of oats did not reach Sour Lake until the 14th of July, 1903, and then the Wilhelm Brokerage Company would not receive it, and plaintiffs were not notified of its arrival until the 23d of July. When the plaintiffs ordered the shipment of oats to be diverted from Ft. Worth to Sour Lake they did not know, nor were they charged with knowledge, that the last-named place had not in fact been opened as a station on appellant's road. When the oats arrived at Sour Lake the brokerage company, to whom plaintiffs had contracted to sell them at 45 cents per bushel, refused to take them. The oats remained in the car 24 days after plaintiffs were notified of their arrival before they could dispose of them, and then plaintiffs had to sell them at 36 cents per bushel, which was 9 cents less than their market value (as well as the contract price at which they had previously been sold) at Sour Lake at the time they should have arrived had there been no delay, resulting in a loss to plaintiffs of \$84.40. The plaintiffs were also, on account of appellant's negligence, compelled to pay demurrage charges for the 24 days the car containing the oats stood on the track at Sour Lake. The railroad company also made an overcharge in the freight rate fixed by the Railroad Commission of Texas that amounted to \$15, which was paid by plaintiffs.

Conclusions of Law.

1. The court did not err in instructing the jury to return a verdict in favor of the Ft. Worth & Denver Railway Company. We cannot perceive any negligence in that company's routing the oats over the lines of the Houston & Texas Central and the Texas & New Orleans Railroad Companies, to be delivered by the latter at Sour Lake, when it is shown that, at the time of the shipment from Ft. Worth, official notice had been given by the company of the opening of its station at that place. If not prepared to deliver the freight at its destination when tendered, appellant should have declined to receive it, and have notified plaintiffs of the fact. Instead of doing so, it accepted the freight for transportation to its destination, and, having accepted it, should have

delivered it there with reasonable dispatch, though it might have had to haul it there from its nearest station on wagons.

2. This paragraph: "The jury are instructed that, in determining whether there was any reasonable delay in the transportation of the freight in controversy from Ft. Worth to Sour Lake, they will estimate from the evidence the entire time consumed for such transportation, without reference to when the station at Sour Lake was opened for the receipt and delivery of freight, unless they believe from the evidence that plaintiffs knew, or ought to have known, when they instructed the shipment of said freight to Sour Lake, that said station was not opened for the delivery and receipt of freight when such instructions were given; and in the event that they believe that the plaintiffs did so know, or ought to have known, that said station was not at such time opened for receipt and delivery of freight, they will exclude from their estimate of what was a reasonable time for the transportation in question as much of the time as elapsed between the date of the shipment of the said freight from Ft. Worth and the time when said station of Sour Lake was so open"—of the court's charge, is as favorable to appellant upon the matters presented as it had a right to ask.

3. The court did not err in refusing to give, at appellant's request, the following special charge: "If you believe from the evidence in this case that at the time the line of railway from Nome to Sour Lake was opened for the transportation of freight to Sour Lake, that an unusual amount of freight had accumulated on the line of the Texas & New Orleans Railway at Nome and other points adjacent thereto, to be transported to Sour Lake, and that the car in question was a part of said freight, and that, after the opening of said line of railway from Nome to Sour Lake, the said defendant Texas & New Orleans Railway Company exercised ordinary care and diligence for the delivery of the car of oats in question after said time, then it would not be liable to the plaintiffs, and you will find for the defendant Texas & New Orleans Railway Company." For, after accepting freight by the carrier, without notice to the shipper of its inability to deliver it, delay in delivering on account of unusual rush of business or large accumulation of freight is no defense. *I. & G. N. Ry. Co. v. Anderson* (Tex. Civ. App.) 21 S. W. 691. The large accumulation of freight destined for Sour Lake seems to have resulted from appellant's having notified the public that its station there had been opened when it was not, and in receiving freight for transportation there without notifying the shippers of its inability to deliver it at its destination. It was therefore through its own fault that it had on hand, when its station was actually opened there, more freight than it could promptly deliver, and it is

chargeable with the consequent damages to shippers.

4. The necessity of plaintiffs' keeping the oats in the car until they could dispose of them was the direct consequence of appellant's negligence, and, it having demanded and received from plaintiffs \$24 demurrage on that account, they were entitled to recover it.

5. Our conclusions of fact and the questions of law passed upon dispose of the remaining assignments of error adversely to appellant.

There is no error in the judgment, and it is affirmed.

PADDOCK v. BRAY.

(Court of Civil Appeals of Texas. June 28, 1905.)

1. JOINT PURCHASERS OF PROPERTY—FIDUCIARY RELATION.

The relation of joint purchasers of property is fiduciary, and one will not be permitted to acquire a secret advantage in the purchase over his associates.

2. SAME—DEEDS—CONSIDERATION.

Defendant proposed to plaintiff that they purchase certain land, which defendant said could be obtained at a certain price, when in fact defendant had a contract to sell it for much less, and have all that he obtained above this less sum as commission. Defendant procured the property, representing to plaintiff that he had paid the full price. Plaintiff conveyed property to defendant in payment for the latter's supposed interest. Defendant in fact paid nothing on the property, the amount supposed to have been paid by him being merely the amount of his commission. *Held*, that the conveyance from plaintiff to defendant was without consideration.

3. SAME—FALSE REPRESENTATIONS AND CONCEALMENT—MATERIALITY.

Where plaintiff and defendant agreed to purchase certain property jointly, false representations by defendant as to the lowest price at which the property could be purchased were as to an existing material fact, and were such as plaintiff was entitled to rely on; and concealment by defendant of an agreement by the owner of the property to sell for a much less sum, and to give defendant all that he obtained for the property over this sum, was concealment of a material fact.

4. SAME—JOINT PURCHASE—EVIDENCE—QUESTION FOR JURY.

In an action to cancel a deed given defendant by plaintiff in payment for defendant's supposed interest in property which the parties had agreed to purchase jointly, but for which it was alleged defendant had paid nothing, owing to a secret agreement with the vendor, evidence *held* to require submission to the jury of the question whether the parties in fact purchased jointly, or whether plaintiff purchased on his own account.

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Action by E. S. Bray against L. H. Paddock. From a judgment for plaintiff, defendant appeals. Reversed.

Hale, Allen & Dohoney, for appellant. Burdett & Connor, for appellee.

EIDSON, J. This suit was brought in the court below by appellee against appellant to cancel two deeds executed by him to appellant upon the ground that they were executed without consideration. Appellee, in his petition, alleged, in substance: That appellant proposed to him that they jointly buy a certain piece of property in Paris, Tex., known as the "Richards Hotel"; stating that he had a talk with Richards, the owner, and that he would sell for \$5,000, but that he would not take less, and that there would be a profit in the property at that price, and proposing that he would pay \$1,500 of the purchase price, and appellee the balance; they to own the property in those proportions; the deed to be taken in appellee's name. That appellee accepted said proposition, and it was agreed that he should buy the lot from Richards at \$5,000, provided it could not be bought cheaper. That on November 6, 1903, appellee bought said lot for \$5,000, \$1,500 of which had been furnished by appellant, and took the deed in his name; the consideration being \$1,500 cash, and vendor's lien notes for \$3,500. That, at the time of the agreement between them to jointly purchase said property, appellant, unknown to appellee, had a contract with Richards by which he was to sell the property for him, and receive as a commission all he should sell for over \$3,500, which was concealed from appellee, and that Richards had promised appellant that he would not sell for less than \$5,000 to any person appellant should send to him to buy. That, after the purchase of the Richards property, appellee, still not knowing of the relations and contracts between appellant and Richards, and relying on appellant's statements, made a settlement with him by which he paid appellant \$2,000 for his supposed interest in said Richards property; giving appellant his note for \$600, and making him a deed to the first lot in controversy at a valuation of \$1,400. That, after the consummation of the trade with Richards, appellant was paid by Richards \$1,500 of the money paid Richards by appellee. That afterwards, on the _____ day of November, 1903, appellant told appellee that they could buy a lot from Collins & Dulaney, situated just across the street from the Richards property, for \$2,000, and proposed that they buy the lot jointly; appellant to pay \$500 of the purchase price, and appellee the balance; the price to be \$2,000—to which appellee agreed. That appellant stated that he had sent a messenger to Collins & Dulaney, and \$2,000 was the least they would sell for. It was agreed that appellee should buy the lot, and take the deed in his own name, or the name of some other person. That, at the time of this agreement, appellant had a contract with Collins & Dulaney, by which he was to sell said lot for them, and receive as commission all he should get over \$1,500, and that Collins & Dulaney had agreed with him that they would not sell for less than \$2,000 to any per-

son appellant should send to them. That, in pursuance of said agreement, appellee bought said lot from Collins & Dulaney, and had the deed made to one Charles N. Priddy; paying therefor \$1,000 in cash, and Priddy's note, secured by vendor's lien, for \$1,000, which said note was indorsed by appellee. That said Collins & Dulaney paid over to appellant \$500 of the amount paid to them by appellee for said lot. That on November 23, 1903, appellee, still not knowing that appellant was Collins & Dulaney's agent, and of the aforesaid agreements between him and them, had a settlement with appellant, by which he deeded him the second lot in controversy in consideration of appellant's profit in the Collins & Dulaney lot, which was agreed to be \$400, the surrender of the aforesaid note for \$600, and \$300 in cash paid by appellant. Appellant answered by general demurrer, special exceptions, and general denial. Appellant's demurrers and exceptions were overruled. The case was tried before a jury, and the court instructed the jury peremptorily to find for plaintiff, and judgment was rendered as prayed for upon the verdict so found by the jury.

Appellant's first and fifth assignments of error, which are submitted together, complain of the action of the court below in overruling his general demurrer to appellee's first amended original petition, and his fourth special exception to said petition, which sets up that the same is insufficient, in law, in that the prayer of said petition for cancellation of the deeds and rescission of contracts alleged in said petition do not entitle appellee to such relief, because he does not tender back the money shown to have been paid him by appellant. The relation of joint purchasers of property is fiduciary, in the same general sense as is that of an agent dealing with his principal, and one will not be permitted to acquire a secret advantage in the purchase over his associates. 1 Bigelow on Frauds, § 815. If it is true, as alleged by appellee, that he agreed with appellant to purchase jointly with him the Richards and Collins & Dulaney property, relying upon the representations of appellant that the former could not be purchased for less than \$5,000, and the latter for less than \$2,000, and that at the time appellant had, unknown to appellee, a secret agreement and understanding with the respective owners of such property, whereby he was authorized to sell the Richards property at \$3,500, and the Collins & Dulaney property at \$1,500, and to retain for himself all over such amounts, and the joint purchases of the two tracts were made at the respective prices represented by appellant, and appellant, unknown to appellee, received from the respective vendors the excess over the prices at which he was authorized to sell said property, and appellee, in consideration of the supposed interest of appellant in the property jointly purchased, based upon the supposed payment by appellant of the

amount agreed to be paid by him in the joint purchase of said property, conveyed to him the property, the deeds to which are sought to be canceled by this suit, appellant having paid nothing for such property, appellee would be entitled to a cancellation of said deeds. Appellant's fiduciary relation to appellee would not permit him to acquire an interest in the property by virtue of the payment by appellee of the entire amount for which he (appellant) was authorized to sell the property. As to appellant there was no consideration upon which to base an acquisition of any interest in the property. *King v. Wise*, 43 Cal. 628; *Barry v. Bennett*, 45 Cal. 80; *Willink v. Vanderveer*, 1 Barb. 599; *Yeoman v. Lasley*, 40 Ohio St. 190; *Hodge v. Twitchell*, 33 Minn. 389, 23 N. W. 547. Appellee alleged that Collins & Dulaney paid to appellant \$500 of the \$2,000 paid them by appellee, and that appellant had paid to appellee only \$300 in part payment of the consideration of one of the tracts of land, the deed to which is sought to be canceled in this suit. This, in connection with other allegations of appellee's petition, shows that appellant, after returning to appellee the property involved in this suit, will have a profit of \$200 out of the transaction. Hence it is clear that it was not necessary for appellee to tender back any money to appellant. We are of the opinion that appellee's petition states a good cause of action, and is not subject to the general demurrer or fourth special exception addressed thereto by appellant.

Appellant's second, third, and fourth assignments of error are overruled. The allegations in appellee's petition that: appellant represented that Richards would not take less than \$5,000 for his property, and that Collins & Dulaney would not take less than \$2,000 for their property, are allegations of representations of present existing facts at the time the representations were made, and such facts were material to the matter of the joint purchase being then proposed by appellant, and appellee was justified in relying upon such representations being true. In view of the fiduciary relation between appellant and appellee, as joint purchasers of the property, the fact that appellant had an agreement with the owners of the property that he should have the amount for which the property sold, over the price at which he was authorized to sell same, was a material fact, and its concealment was the concealment of a material fact.

Appellant's eighth assignment of error complains of the action of the court below in instructing the jury peremptorily to find for the plaintiff, because the evidence is conflicting as to whether plaintiff bought the Richards lot and the Collins & Dulaney lot for himself and defendant, or for himself alone. When the evidence is sufficient to raise an issue, it must be submitted to the jury; the trial being before a jury. If appellee bought

the Richards and Collins & Dulaney property, or either parcel, for himself alone, and not for himself and appellant jointly, in pursuance of the alleged agreement, then there was no fiduciary relation existing between him and appellant in the purchase of said property, or such parcel thereof, upon which he could hold appellant bound by or responsible for the alleged representations and concealments. Without intimating any opinion as to the weight to be given to the testimony raising the question as to whether appellee bought said property, or either parcel thereof, for himself alone, or for himself and appellant jointly, we are of the opinion that there is testimony in the record raising that issue, and that same should have been submitted to the jury. The appellant, after testifying that Richards held his property at \$3,500, and that he had an understanding with him that he could have all over \$3,500 that he could sell the property for, and that Richards would not quote the property to a buyer sent to him by appellant at less than \$5,000, testified as follows: "Shortly after that I saw Mr. Bray, and asked him if he was still thinking of buying the Richards property, and proposed that we go in together and buy it; that I would pay \$1,500, if he would pay the balance, and we could own it in the proportions paid by each. He agreed to this, and it was agreed that he should do the buying, and buy it at the best price he could. I told him, if he bought it, to take the deed in the name of Bray and Paddock, which he agreed to do. The agreement was that it was to be a cash transaction, each party to pay his part. Bray did not say anything to me about making a note for his part of the purchase money, and incumbering the whole property with a vendor's lien. I gave Bray a check for \$1,500, and he went and made the trade. Before he closed it, however, he came back and said Richards wanted \$6,000, and afterwards told me that he had to pay \$5,500 for it. I found out from Richards that Bray had bought it for \$5,000, and taken the deed in his own name, and left me out, and that he had incumbered the whole property for \$3,500. I went to Bray and told him I wanted some showing for my money; that he had used my money, and taken the deed in his own name, had not paid anything himself, but had incumbered the whole property with a lien for \$3,500, which was not in accordance with our agreement. He said he took the deed in his own name because he thought he could handle it to better advantage, as I was agent for the railroad company. He then offered to give me something on the outside. I asked him what he had, and he mentioned this property on North Main street. I asked him what he would take for the house and lot, and he said \$1,400. I went and looked, and told him I thought \$1,000 would be a big price for it. We then agreed on that price, and made a settlement. We figured that I was entitled

to a profit of \$100 on my \$1,500, which would make him due me \$1,600. In settlement of this he made me a deed to the North Main street property, and gave me his note for \$600, due in six months." Appellant, after testifying that Collins & Dulaney held their property at \$1,500, and had given him an option on same at that amount, and agreed not to quote the price to a buyer sent them by him at less than \$2,000, testified as follows: "I then saw Bray, and told him about the Collins & Dulaney lot, and proposed that we buy it together; that I would put in \$500 if he would put in the balance, and we would own it in the proportions paid by each. He agreed to this. We agreed that Bray should go to them, and do the buying, and buy at the lowest figure he could. This was to be a cash transaction, and each was to pay the money for his part. Nothing was said about buying it partly on time, and incumbering the property with a vendor's lien for \$1,000. I saw Bray two or three times after this, and asked him about the trade for the Collins & Dulaney lot, and he said he could not buy it; that they wanted \$2,500 for the lot. In the meantime I saw Mr. Collins, and he first told me that they had agreed on a trade, and that Bray had put up \$100 to bind it pending an investigation by him of the title. Afterwards, Bray having again told me that he had not bought the property and could not buy it, I went to Mr. Collins, and asked him about it, and he said the trade was closed; that Bray paid them \$1,000 cash, had the deed made to one Priddy, and Priddy made a note for \$1,000, which Bray had also signed; and that Mr. E. S. Connor had taken up the note. They paid me \$500 as per our contract. I don't know Priddy, had never heard of him, and certainly was not willing to have my property in his name. I went to Bray and asked him why he had left me out on this deal, and he said that he had to pay \$2,500 for the property, and he did not think I wanted it at that figure. As he had incumbered the property for \$1,000, and had not bought it according to our agreement, I did not insist on claiming an interest in the Collins & Dulaney lot. I had tried to sell Bray's note for \$600, that I had, and had failed to do so. In order to get this note paid, I proposed to Bray to buy another lot he owned on North Main street, adjoining the first one, that I had already bought from him. I asked him what he would take for it, and he first asked me \$1,000. I offered him \$900, to be paid by surrendering his note for \$600, and paying him \$300 in cash, and we traded on that basis. I gave him his note and paid him \$300, and he made the deed to me." We are of the opinion that the testimony of appellant quoted raised the issue above mentioned, and thereby created a conflict in the testimony as to the right of appellee to recover, and that therefore the case should have been submitted to the jury under appropriate instructions upon the is-

sues raised by the pleadings and the evidence of both parties. *Wallace v. Southern Cotton Oil Co.*, 91 Tex. 18, 40 S. W. 399; *Lee v. Railway Co.*, 89 Tex. 588, 36 S. W. 63; *Johnston v. Drought* (Tex. Civ. App.) 22 S. W. 290; *Royall v. G., C. & S. F. Ry. Co.* (Tex. Civ. App.) 32 S. W. 186.

For the error pointed out, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

CARDWELL v. GULF, B. & G. N. RY. CO. et al.*

(Court of Civil Appeals of Texas. June 8, 1905.)

1. NEGLIGENCE — DISCOVERED PERIL — APPLICATION OF DOCTRINE.

The doctrine of discovered peril has no application in the absence of actual knowledge on the part of the person causing the injury of the peril of the person injured in time to prevent the injury by the use of the means within his reach.

2. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROAD FELLOW SERVANTS—DUTY TO KEEP WATCH.

The fact that a locomotive engineer knew that the conductor was riding on the pilot did not charge him with the duty of keeping a continuous watch upon the conductor's movements, or require him to anticipate that the conductor would fall from the engine, and to be on the lookout for such an emergency, to the neglect of other duties requiring him to keep watch in another direction; but he was entitled to assume that the conductor knew the insecurity of his position, and was bound only to be careful not to do anything to increase the danger to which the conductor was subjected.

Appeal from District Court, San Augustine County; Tom C. Davis, Judge.

Action by Maggie Cardwell, individually and as next friend of her minor child, V. O. Cardwell, against the Gulf, Beaumont & Great Northern Railway Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. Felton Lane, W. T. Davis, and Makemson, Hudson & Lord, for appellant. J. W. Terry and F. J. & R. C. Duff, for appellees.

PLEASANTS, J. This is a suit by appellant, Maggie Cardwell, for herself and as next friend of her minor child, V. O. Cardwell, to recover damages for the death of her husband, the father of said minor. The suit is against the Gulf, Beaumont & Great Northern Railway Company, the Gulf, Beaumont & Kansas City Railway Company, the Gulf, Colorado & Santa Fé Railway Company, and the Old Colony Contracting Company. The petition alleges, in substance, that the deceased, V. O. Cardwell, met his death on the 10th day of October, 1902, while in the employment of some or all of the defendants in the capacity of conductor of a railroad train owned and operated by some or all of the defendants, and plaintiff is in-

*Writ of error denied by Supreme Court.

formed and believes, and, so believing, charges, that the railroad and train in the operation of which the said V. O. Cardwell was killed was then and there owned and operated by the defendant Gulf, Colorado & Santa Fé Railway Company, and the said Cardwell's death was caused by the negligence of the employés of said defendant. It is then alleged that, if plaintiff is mistaken in the above allegation as to the ownership of said railroad and the responsibility for its proper operation, it was owned and operated by some one or all of the named defendants, and judgment is asked against the defendant or defendants found to be responsible for the death of said Cardwell. The allegations as to the circumstances under which Cardwell was killed are, in substance, that while engaged in the work of switching a train on defendant's road, and acting in the capacity of conductor, brakeman, and switchman, it became proper for him, in the discharge of his duties, to get upon the pilot of the engine which was drawing said train, and that while so riding upon the engine, or in attempting to step therefrom, he slipped and fell, and was caught and dragged by the engine for a distance of 50 feet, and his body was thereby so crushed and mangled as to then and there cause his death. The negligence alleged, and upon which the right of recovery is based, was the failure of the engineer and fireman to use proper care to stop the engine after they discovered that Cardwell had fallen therefrom, and, in the alternative, the failure of said employés to keep a proper lookout, and, as a consequence, their failure to discover Cardwell's peril in time to stop the engine before it struck him, and the failure of the defendant to have its train properly equipped with the appliances necessary to stop it suddenly in case of emergency. The amount of damages claimed in the petition is \$40,000. The defendants answered by general denial, and by special pleas, which, among other defenses, charged that the deceased was guilty of contributory negligence in riding upon the pilot of the engine, and that he assumed the risk incident thereto. Upon the trial below, after hearing the evidence, the trial judge instructed the jury to find a verdict for the defendants; and, upon the return of such verdict, judgment was rendered in accordance therewith.

The evidence shows that the deceased, V. O. Cardwell, was killed on October 10, 1902, in the manner and under the circumstances alleged in the petition. The engine which ran over deceased was being operated by D. D. Barfield, engineer, and Frank Flores, fireman. Cardwell was conductor of the train, and it was being switched to allow a train that was meeting it to pass. He was performing the duties of switchman as well as conductor, and had gotten on and off the pilot of the engine several times, presumably for the purpose of placing the switch. As the two trains were passing each other, he was

seen to slip or fall from his position on the engine, and was caught and killed in the manner stated in the petition. At the time he fell the train was moving at the rate of four or five miles an hour going up a slight grade. He fell just in front of the train, and his body was pushed along by the engine for a distance of 24 feet. The engine was stopped about 65 feet beyond the point at which he fell. It was equipped with proper appliances for stopping it, and these appliances were in good condition. There is evidence that the engine could have been stopped within 3 or 4 feet by the use of the automatic brakes with which it was equipped.

There is no testimony from which the jury could have found that either the fireman or the engineer saw Cardwell fall, or knew of his having fallen, until after he had been killed. The engineer testified that at the time the accident occurred his engine was passing the engine of the other train on the side track, and was moving in the opposite direction. He further testified: "I thought this engine was going south of this switch stand to take up a water pump there, and I knew that I would have to take care of my engine some way. So I hollloed to ask if he was going to take up the pump. I knew that I could tell by the way his mouth worked whether he was going to move the pump or not. While waiting for his answer, it was then that Mr. Cardwell fell from the pilot of my engine. He stepped up on the pilot, and fell off in front of the pilot in a sitting position, with his back toward the pilot; and, the engine moving at the rate of four or five miles per hour, he was struck in the back by the pilot, crushed down, and, the engine passing over his body, he was killed. I was looking out on the left-hand side of the cab of my engine, at the engineer of the other engine on the side track, waiting for his answer to a question I had asked him. The other engineer was standing in what is known as the 'gangway.' The last time that I saw Mr. Cardwell, before his injuries, he was standing on the right side of the pilot, erect, with one hand on the hand-hold. I did not see him fall. The first time I saw him was after he fell—was after they got him out from under the engine. I first knew of the accident by hearing the conductor of the other train hollloaing in a tone of voice that warned me that something was wrong. I applied the emergency brake and stopped the train as quickly as brakes could be applied. Mr. Cardwell's body, when I saw him, was by the first front wheel of the tender. On my engine I could not see a person lying or sitting on the ground immediately in front of the pilot without getting up off the box, and I did not and could not see Mr. Cardwell in that position any time after he fell. Did not know that he had fallen until I heard Mr. Bennington hollloa. The fireman on my engine could not, from

his box, see a man standing on the pilot, on the right-hand side of the pilot. I heard the voice of Mr. Bennington, and knew there was something wrong, and stopped as quickly as air brakes could stop. I applied the brakes the minute I heard him holla. I took it to be danger. There would have been no danger to myself and fireman to stop that train as quickly as possible, at the rate we were running. I did not hear Mr. Cardwell cry out. The fireman was on his seat box. I supposed that Frank Flores was looking out for the car I had called his attention to. I told him to keep a lookout until all the cars were clear. A body could not be seen from that engine if lying right in front of the pilot of the engine. It would be something like 15 feet ahead of the engine that a person on the track could be seen by the engineer and fireman. On last Saturday afternoon I made the test as to whether or not a man in front of the pilot of the engine could be seen from the engine. I could see about that much [about six inches below the waist line] of the body of a man standing on the pilot." The fireman, Flores, was not a witness in the case. No witness testifies that either the engineer or fireman saw Cardwell fall, or that either of them was looking towards the front of their train at the time he fell, and the evidence is undisputed that he could not have been seen by a person on the engine after he fell upon the track.

We think it clear that the evidence does not raise the issue of discovered peril. The principle upon which the doctrine of discovered peril is based has no application in the absence of actual knowledge on the part of the person causing the injury of the peril of the person injured in time to prevent the injury by the use of the means within his reach. *Ry. Co. v. Bredow*, 90 Tex. 27, 36 S. W. 410; *Ry. Co. v. Staggs*, 90 Tex. 461, 39 S. W. 296; *Ry. Co. v. Shetter*, 94 Tex. 197, 59 S. W. 533; *Ry. Co. v. Haltom*, 95 Tex. 113, 65 S. W. 625; *Ry. Co. v. Townsend* (Tex. Civ. App.) 82 S. W. 804.

There is no evidence to sustain a finding of negligence on the part of the railroad company or the operatives of the train upon either of the other grounds alleged in the petition. All of the evidence shows that the appliances for stopping the train were of the proper kind and in good condition, but, were the facts otherwise, no liability would be shown, because, under the undisputed evidence, the peril of the deceased was not discovered in time to have prevented his death by the use of any possible means.

We do not think the evidence shows any negligence on the part of the engineer or fireman in failing to sooner discover the fact that deceased had fallen from the engine. It is true that the engineer knew that Cardwell was riding on the pilot of the engine, and he was charged with knowledge of the fact that this was an insecure and

dangerous position, but it is clear from the evidence that at the time he fell the duties of both the engineer and fireman required them to look in a different direction from the front of the train. Cardwell was the conductor and directed the movements of the train, and the fact that he may have placed himself in a more dangerous position than the proper discharge of his duties required did not charge the operatives of the train with the duty of keeping a continuous watch upon his movements, to the neglect of other duties of their employment, the performance of which the situation might demand. They could assume that Cardwell understood the insecurity and danger of his position upon the engine, and would take every precaution to keep from falling therefrom; and, while they were required to be careful not to do anything to increase his danger, they were not required to anticipate that he would probably fall while the train was being operated in a careful manner, and to be on the lookout for such an emergency. There is neither allegation nor proof that the train was not being operated in a careful manner at the time the deceased fell.

We are of opinion that the evidence raised no issue of liability against any of the defendants, and the trial court properly directed a verdict in favor of them all. Such being our conclusion, it follows that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

JONES v. DAY et al.

(Court of Civil Appeals of Texas. June 21, 1905.)

1. NOTES — TITLE — PAROL EXPLANATION—TRUSTS.

Where notes given for the purchase money of land were payable, as to the principal, to the grantor's children, and the interest to her, in an action by the heir of one of the payees of the principal for partition of the notes, parol evidence was admissible to show that the payees held the legal title to the principal in trust for their mother during her life.

2. WITNESSES — TRANSACTIONS WITH DECEDENT—DISCLAIMER OF INTEREST.

Where the heir of one of the payees of the principal of notes sued for partition of the notes, defendants who disclaimed any interest in the notes were competent to testify as to transactions with plaintiff's ancestor.

3. SAME—INCOMPETENT WITNESS.

In an action by an heir of one of the payees of the principal of notes for partition of the notes, a defendant was incompetent to testify as to transactions with plaintiff's ancestor, owing to Sayles' Rev. Civ. St. 1897, art. 2302, prohibiting testimony as to transactions with a decedent.

4. APPEAL—HARMLESS ERROR—RECEPTION OF INCOMPETENT EVIDENCE.

The admission of incompetent testimony is not reversible error in a case tried before the court, there being ample competent testimony to authorize the judgment.

Appeal from District Court, Franklin County; P. A. Turner, Judge.

Action by C. J. Jones against Ledger Day and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

L. L. Wood, for appellant. R. T. Wilkenson, for appellees.

EIDSON, J. This suit was brought by appellant against the appellees, Ledger Day, Della Day, J. J. Bennett, Sarah Bennett, W. E. Riddle, and Alice Riddle, for partition of three promissory notes, each for the sum of \$400, of date August 1, 1901, due, respectively, January 1, 1904, 1905, and 1906, signed by the defendant W. E. Riddle, and payable to Lydia Bennett, Alice Riddle, and Della Day; said notes bearing 10 per cent. per annum interest, payable annually to appellee Sarah Bennett. It is alleged that the defendants J. J. Bennett and Sarah Bennett are husband and wife, and that Lydia Bennett, Della Day, and Alice Riddle were their only children; that Ledger Day is the husband of Della Day, and that W. E. Riddle is the husband of Alice Riddle; that Lydia Bennett married the appellant, C. J. Jones, after the notes were executed, and died without issue; that said notes were given in consideration of a tract of land deeded by J. J. Bennett, Sarah Bennett, Lydia Bennett, Ledger Day, and Alice Day to W. E. Riddle on the same day the notes were executed, and the vendor's lien retained; that the principals of these notes belong to appellant, Alice Riddle, and Della Day, and the interest thereon to Sarah Bennett; and appellant prays for partition. Alice Riddle and W. E. Riddle answered, confessing the facts as set up in appellant's petition, and joined him in the prayer for partition. J. J. Bennett, Della Day, and Ledger Day, on the day of and before the trial, filed disclaimers. Sarah Bennett answered, claiming to be the owner of the three notes, and denied the appellant's right to partition. She admitted that the principals of the notes were expressly made payable to her said children, and that the interest was expressly made payable to her, but alleged that there was a contemporaneous parol agreement that the principals of the notes should not be paid to the children during her life, but were to be paid to her, as well as the interest. Sarah Bennett also alleged in her answer that the notes described in appellant's petition were given as the purchase money for land that was her separate property and her homestead, and that the parties named as payees in said notes had no interest in said land, and that it was agreed by all parties that the notes were not to be paid to the payees therein named, except in the event of her death before maturity of them; that said notes were negotiable and were delivered to her, and that she had had possession of them all the time since their execution, and that said notes constitute the only property she has. It was shown by the evidence that at the

time of the execution of said notes, since and at the date of the trial, the said Sarah Bennett and her husband, J. J. Bennett, were separated and not living together. The case was submitted to the court without a jury, and judgment was rendered in favor of Ledger Day, Della Day, and J. J. Bennett on their disclaimers and in their favor for costs, and that appellant, plaintiff below, take nothing by his suit, and that Sarah A. Bennett is the legal and equitable owner of the notes described in appellant's petition, and in her favor for costs of suit against appellant, plaintiff in the court below, and W. E. Riddle and Alice Riddle, defendants in the court below.

Appellant's first, second, third, and fourth assignments of error are presented together, and are as follows: "(1) The court erred in admitting in evidence the following testimony of R. L. Day: 'I remember the circumstances of this deed having been made. I know why the notes were made payable as they were. They were made payable this way to pacify Mrs. Bennett. At that time Mr. and Mrs. Bennett were separated. She did not want him to have any of the land or any of the proceeds of the land. These notes were made payable to the children to keep him from getting any of it after Mrs. Bennett's death. They were made payable to the children to make them their property as long as she lived'—over plaintiff's objection, as shown by bill of exception No. 1. (2) The court erred in admitting in evidence, over plaintiff's objection as shown by bill of exception No. 2, the following testimony of Sarah A. Bennett, to wit: 'It was understood by all the parties that the notes were to be paid to me if I was alive, but, being in bad health, I had them made payable to my children, in order that J. J. Bennett could not collect them at my death. I was to own them during my lifetime. They were placed in my possession by agreement of all the parties as my property. It was not intended that said notes should be collected by these parties during my lifetime. I did not intend to give these notes or the money to my children during my lifetime. I fixed it in this way in order that I might have the interest on this money to support me during my lifetime, and, in case of my death, the balance, if any remained, would go to my children.' (3) The court erred in admitting in evidence over plaintiff's objections, as shown by bill of exception No. 3, the following testimony of Della Day, to wit: 'It was understood by all the parties that these notes were the property of our mother, Sarah A. Bennett; that it was not a gift to the children, and they were not to collect them during her lifetime, and only in case of her death. Sarah A. Bennett was to own the notes during her lifetime, and she took possession of them immediately after their execution, by consent of all parties.' (4) The court erred in admitting in evidence over plaintiff's ob-

jection, as shown by bill of exception No. 4, the following testimony of J. J. Bennett, to wit: 'My children told me they were willing to deed it [the land] back to me. They did not state anything about claiming any interest in it. They said they did not claim it; did not claim any interest in these notes. They all stated to me that they did not claim any interest in the notes. They all claimed that it was their mother's.'"

Appellant's first proposition under the above assignments of error is to the effect that, it appearing on the face of the notes that their principals were payable to Lydia Bennett, Alice Riddle, and Della Day, and the interest payable annually to Sarah Bennett, the testimony of Sarah Bennett, J. J. Bennett, Ledger Day, and Della Day that there was a contemporaneous agreement that said notes were not to be paid as provided in the notes, but were to be paid to Sarah Bennett, varied and contradicted the terms of the notes, to which they were all parties, and hence was inadmissible. The uncontroverted testimony showed that the notes sought to be partitioned were given for the purchase money of a tract of land the separate property of appellee Sarah Bennett; and hence, if appellant was entitled to any interest in them, it was by reason of the gift by the said Sarah Bennett of the consideration of the sale of said land to her daughters, Lydia Bennett, Della Day, and Alice Riddle. The testimony, the admission of which is complained of, showed that the payees in the notes held the legal title to the principals thereof in trust for Sarah Bennett during the period of her natural life. Parol evidence was admissible to prove this fact, and hence the court did not err in admitting the testimony. *Thompson v. Caruthers*, 92 Tex. 530, 50 S. W. 331.

Appellant, by his second proposition under said assignments of error, contends that as this suit was an action by him as heir of Lydia Bennett, deceased, and Sarah Bennett, J. J. Bennett, Ledger Day, and Della Day being parties to the suit, their testimony to the effect that there was a parol contract and understanding between J. J. Bennett, Sarah Bennett, Lydia Bennett, deceased, Ledger Day, Della Day, W. H. Riddle, and Alice Riddle, that the principals of the notes were not to be paid to Lydia Bennett, Della Day, and Alice Riddle, but were to be the property of Sarah Bennett, was inadmissible, when offered over appellant's objections. The witnesses J. J. Bennett, Della Day, and Ledger Day having before the trial disclaimed any interest in the notes sought to be partitioned, their testimony was admissible. *Eastman v. Roundtree*, 56 Tex. 110; *Markham v. Carothers*, 47 Tex. 21.

This being an action by the appellant as heir at law of his deceased wife, formerly Lydia Bennett, the testimony of Sarah Bennett as to transactions with or statements by the deceased, Lydia Bennett, relating to

material issues in the case, was inadmissible, being in contravention of article 2302, Sayles' Rev. Civ. St. 1897. However, the action of the court in admitting her testimony is not reversible error, the case having been tried before the court without a jury, and there being ample competent testimony, as shown by the record, to authorize the judgment of the court. *Clayton v. McKinnon*, 54 Tex. 206-213; *Lindsay v. Jaffray*, 55 Tex. 640; *Bank v. Oil Co.* (Tex. Civ. App.) 60 S. W. 828; *Wells v. Burts*, 8 Tex. Civ. App. 436, 22 S. W. 419.

There being no reversible error pointed out in the record, the judgment of the court below is affirmed.

Affirmed.

TEXAS CENT. R. CO. v. WEST et al.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. CONTRACTS—NON EST FACTUM—PLEADING—VERIFICATION.

It is not necessary that the execution of a written contract be denied under oath in order to avoid it for duress, fraud, or mistake.

2. CARRIERS—INJURY TO FREIGHT—EVIDENCE—QUESTION FOR JURY.

In an action against a carrier for damages to a shipment of cattle, evidence held to justify submission to the jury of the question whether any of the damage occurred on defendant's line.

3. SAME—INSTRUCTIONS.

In an action against a carrier for damages to a shipment of cattle, caused by delay, it was not necessary for the court to define negligence.

4. SAME—WITNESSES—COMPETENCY.

In an action for damages to a shipment of cattle it was proper to allow a witness, who stated that he knew the freight rate between the terminals of the shipment, because he had paid it a number of times, and had been told by the agent what it was, to testify from his own knowledge as to the freight rate.

5. APPEAL—HARMLESS ERROR.

The admission of incompetent evidence tending to establish a fact proven by other uncontradicted and competent evidence is harmless.

Appeal from Eastland County Court; S. A. Bryant, Judge.

Action by R. L. West and others against the Texas Central Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Earl Conner and Clark & Bolinger, for appellant. J. R. Stubblefield and D. G. Hunt, for appellees.

JAMES, C. J. The court, by its charge, submitted the case for recovery by plaintiff West against the Texas Central Railroad Company on the theory of an oral contract of shipment of cattle, alleged to have been made by the agent of appellant, Texas Central Railroad Company, to transport the cattle from Mathews Station to Ft. Worth, and to have them at Ft. Worth by a certain time; that is, in time for next morning's market.

The negligence or breach of contract submitted was solely that of delay in the transportation, the result of which was alleged to have been shrinkage in the cattle and loss in market price. The defendant Texas Central Railroad Company had pleaded a written contract confining its liability to its own line, which terminated at Waco. Plaintiff, as to such written contract, alleged facts and circumstances which would defeat it as the contract of shipment under a uniform line of decisions in this state. The Missouri, Kansas & Texas Railway Company of Texas was also a defendant, but a verdict for said company was returned by direction of the court. Against the appellant the verdict was for \$230.

The second, third, and twenty-seventh assignments of error are overruled. It was, in our opinion, not necessary for plaintiff to deny under oath the execution of the written contract, in order to avoid it for duress, fraud, mistake, or the like. Ry. v. Jackson, 86 S. W. 47, 11 Tex. Ct. Rep. 855.

The propositions advanced under the sixth assignment are foreign to it.

Under the eighth assignment it is claimed that the undisputed facts failed to show any damage to plaintiff's cattle while on appellant's line; hence it was error to submit to the jury appellant's liability if the written contract was found to prevail. This contention is not substantiated. It was in evidence that the cattle did not arrive at Ft. Worth when they should have done, but did so so late in the day that the market for that day was practically closed. The delay occurred on appellant's line. There was proof that the delay in reaching there would result in shrinkage over and above that which would have occurred had they not been delayed. Plaintiff received less for his cattle than their market price that prevailed at Ft. Worth on the day they reached there. What plaintiff received for his cattle and what he would have received had they reached there at the proper time was shown. What is here said disposes of the fourteenth assignment. Under the same assignment we have the further proposition that the charge complained of put the burden on defendant to show that there was no oral contract, but this we find was not the case.

The eleventh and twelfth assignments are without any merit whatever.

The seventeenth and twentieth assignments complain of the refusal of special charges, which, if given, would have assumed that there was no oral contract.

In this case there was no necessity for defining the term "negligence," because the act complained of was delay. Hence we overrule the twenty-first assignment.

The twenty-third assignment is overruled, because a charge on the measure of damages was given as appellant asked, as appears from the supplemental transcript.

The witness Drahm was properly allowed

to testify from his own knowledge as to what was the freight rate from one point to another. As to the particular freight rate he was testifying about, he testified he knew it because he had paid it a number of times, and had been told by the agent what it was.

The thirty-fourth assignment complains of the following testimony of witness Miller: "After arriving at Waco, and after having boarded the train on the transfer track, I heard a man who was on the engine of the transfer track make the following statement: 'I was called out to meet this train of the T. C. R. R. Co. at 3 o'clock this morning.'" The statement of facts shows this testimony in the connection in which it was given by the witness thus: "We got to Waco about 6 in the morning. When we got to Waco, they cut our cars off this side of Waco, at the end of the Central tracks, I suppose. I crawled up on the cars, and they took us over to the M., K. & T. I rode over on the cars. After boarding the train on the transfer track, I heard a man who was on the engine of the transfer track make the following statement, to wit, 'I was called out to meet this train of the Texas Central R. R. at 8 o'clock this morning.'" The tendency of this testimony was to prove that the Texas Central Railroad had made an unreasonable delay of three hours before reaching Waco. It is not necessary to inquire into its admissibility, owing to the undisputed testimony substantially to the same effect.

W. C. Tucker, a witness for appellant, gave the testimony most favorable to it. He testified that from Mathews Switch, where these cattle were taken on, to Cisco, it was 44 or 45 miles, and they were then five hours out from Mathews Switch. The testimony showed the minimum of average speed for such a train was 13 miles an hour, and they stopped at Cisco 40 or 50 minutes. At Reynolds, which was 7 or 8 miles out from Mathews Switch, a drawhead pulled out of the engine, and they had to chain the engine to the cars. Thus, up to the time of leaving Cisco, a delay had been sustained of between two and three hours. His testimony indicates other delays before arriving at Waco. In view of this testimony, and more specific testimony by plaintiff's witnesses, which was not contradicted, we think the testimony complained of was not calculated to prejudice appellant. But for such delay (the run on the Missouri, Kansas & Texas being expeditious, as was clearly shown) the cattle would have reached Ft. Worth some hours sooner, and in time for the market.

The thirty-fifth assignment is not supported by the evidence. The assignment is based on the statement of plaintiff's witness Miller: "There was no market at Ft. Worth for West's cattle at the time they arrived. They said that the market was closed." The contention is that, as there was no other testimony tending to show that the market was closed when plaintiff's cattle arrived there,

the admission of the testimony, it being hearsay, constitutes reversible error; that the cattle arrived at Ft. Worth between 12 and 1 o'clock, according to Miller, and the market did not close until 5 p. m. The cattle were delivered at 2 p. m., and there was no testimony as to difference in the morning and evening market. This above is not a fair statement of the testimony. Plaintiff West testified: "We got our cattle in the yards at Ft. Worth somewhere between 2 and 3 o'clock. I stayed around the pens until about sundown, and during that time saw no cattle sold at all." Miller testified that the cattle were not delivered until between 2 and 3 o'clock. He was certain that they never turned the cattle out of the cars until that time, and it was some time later before they were turned into the pens. Also after the cattle were in the pens no selling or buying was going on. The witness referred to by appellant as testifying to the market closing at 5 o'clock stated that, as far as packing houses were concerned, the market closed at 3 o'clock, but outside buyers kept buying as late as 5 p. m. No one testified to any transaction occurring after these cattle were delivered. Under these circumstances the assignment is overruled.

The forty-first and thirty-first assignments must also be overruled. The testimony of witnesses excluded was as to the custom or habit of this defendant and other railroads in requiring written contracts for the shipment of cattle; also as to the custom or habit of plaintiff's agent who shipped these cattle in making written contracts. This testimony was improper.

We think there was no error in instructing the jury to find for the Missouri, Kansas & Texas Railway Company of Texas.

Affirmed.

SAN ANTONIO TRACTION CO. v. YOST.*
(Court of Civil Appeals of Texas. May 24, 1905.)

1. STREET RAILROADS — INJURIES—INSTRUCTIONS—UNAUTHORIZED ISSUES.

Where plaintiff charges negligence in defendant's permitting its rails to become charged with electricity, causing his horse to fall and throwing him from his cart, and alleges that, after the horse was on the ground, defendant's servants, not having the car under control, ran it against plaintiff, an instruction to find for plaintiff if the jury believe that defendant's car collided with plaintiff's cart by the negligence of defendant's employes, and such negligence was the proximate cause of the collision, or if the car was being operated with ordinary care, but plaintiff was on defendant's track in a position of peril, and defendant's employes knew his position of peril, and failed to exercise ordinary care to avoid injuring him, is erroneous, as not presenting the issues involved.

2. APPEAL—FAILURE TO ASSIGN ERROR—EFFECT—FUNDAMENTAL ERRORS.

Where an instruction authorizes a finding for plaintiff on an issue not made by the plead-

ing, the error, though not assigned, is so fundamental as to require the court to act on it.

Appeal from Bexar County Court; R. B. Green, Judge.

Action by Fred Yost against the San Antonio Traction Company. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. B. Taliaferro, for appellant. J. R. Norton, for appellee.

NEILL, J. This is a suit by appellee against appellant for damages. The plaintiff, after averring that while he was passing along a public street of the city of San Antonio he was thrown from the cart in which he was riding, by the negligence of defendant, in his petition states the negligence as follows:

"Plaintiff alleges that the defendant was negligent in this: that it failed to prevent said rails from becoming charged with electricity, so as to render them dangerous for horses or pedestrians to step upon, and being shocked thereby, as was its duty to do, and negligently caused said rails to become charged in a dangerous manner, and in such manner as to cause the horse drawing the cart in which plaintiff was riding to fall when stepping on same, which resulted in throwing plaintiff out of said cart upon the street, and said negligence proximately caused plaintiff's aforesaid injuries.

"Plaintiff further alleges that the defendant was negligent in this: that its operatives and employes in charge of one of its electrical cars, which was at that time being operated upon the track upon Austin street, failed to control said car, and failed to exercise proper care to prevent running said car against said cart and plaintiff after said horse had become shocked and had fallen, and plaintiff had been thrown out of said cart, as was his duty to do, and negligently ran said car upon and against said cart and against plaintiff, and said negligence also proximately caused plaintiff's aforesaid injuries."

It will be observed that in the first paragraph quoted the negligence charged is defendant's permitting its rails to be charged with electricity in such manner as to cause the horse to fall, resulting in throwing plaintiff from the cart in the street and injuring him. In other words, permitting the rails to be charged with electricity was defendant's negligence, and the fall of the horse, and plaintiff's being thrown from the cart and injured, its consequences. In the second paragraph the negligence charged is the failure of defendant's servants to control the car, and their failure to exercise proper care to prevent running the car against the cart and plaintiff after the horse had been shocked and fallen, and plaintiff had been thrown out of said cart, and in running the car against the cart and the plaintiff. In other words, after the horse had been shocked

*Rehearing denied June 28, 1905.

and plaintiff thrown on the ground, defendant's servants operating the car, not having it under control, in their failure to exercise proper care, ran the car against the cart and plaintiff, thereby causing his injuries. In its charge the court instructed the jury, if they believed from the evidence that a car of defendant collided with a cart in which plaintiff was riding, and that such collision was caused by the negligence of its employes in control of the car, and that such negligence was the proximate cause of the collision and resulted in plaintiff's injury, then to find for him; that if they believed from the evidence that the car of defendant was being operated with ordinary care, yet, if they believed plaintiff was on defendant's track in a position of peril, and defendant's employes knew his position of peril, and failed to exercise ordinary care to avoid injuring him, then to find for plaintiff. So much of the charge as we have in substance recited presents the only issues upon which the jury were authorized to find for plaintiff. In another paragraph the jury were told, if they believed from the evidence the plaintiff was not thrown out of his cart by reason of a collision with defendant's car, to find for the defendant. It is thus seen there was no presentation by the charge of the grounds of negligence alleged by plaintiff as his cause of action, but that grounds of negligence averred were expressly withdrawn, and entirely different facts from those averred were submitted; and the jury instructed to find for him upon them if they believed from the evidence they were proven. Unless the plaintiff was thrown from his cart by the fall of his horse, caused either from the animals being shocked by a current of electricity with which the rails of the track were charged through defendant's negligence, and plaintiff was thereby injured, or while, after being thrown from this cart by reason of the fall of the horse, caused by a shock of electricity from the rails (whether by defendant's said negligence or otherwise), he was on the ground, defendant's servants in charge of the car negligently ran it against the cart on plaintiff, and thereby injured him, he could not, under the allegations in his petition, legally recover damages for his injuries. There was no allegation in the petition that plaintiff was thrown from his cart and injured by a collision, or that he was in a position of peril which was discovered by appellant's servants operating the car in time, by the exercise of the means at hand, to have avoided injuring him, and that his injury was caused by their negligent failure to exercise such means. Yet these were the grounds of negligence submitted, to the exclusion of those alleged, and upon which the verdict was found and the judgment rests. It is error to instruct a jury to find for a plaintiff upon an issue not made by his pleadings. While this error is not assigned by the ap-

pellant, it is apparent upon the face of the record, and from its very nature is so fundamental as to require the court to notice and act upon it. For, as is held by the Supreme Court in *Wilson v. Johnson*, 94 Tex. 276, 60 S. W. 242, "an error apparent upon the face of the record," which may be considered without assignment, is a "prominent error, either fundamental in character, or determining a question upon which the very right of the case depends." Of such prominence is the error in the charge.

The errors assigned are such as are not likely to arise on another trial.

For reason of the error indicated, the judgment of the county court is reversed, and the cause remanded.

LASATER v. FIRST NAT. BANK OF JACKSBORO.

(Court of Civil Appeals of Texas. July 1, 1905.)

USURY—RECOVERY OF PENALTY—PAYMENT BY SURETY.

A discharge of a note by a surety by giving his own note in renewal thereof does not operate as a payment by the principal in such sense as to entitle him to avail himself of the federal statute authorizing the recovery from a national bank of twice the amount of usurious interest paid to the bank, nor does the subsequent payment of the renewal note by the surety operate to give the principal a cause of action under such statute.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 1046; vol. 40, Cent. Dig. Principal and Surety, §§ 492, 494.]

Appeal from District Court, Jack County; J. W. Patterson, Judge.

Remand from the Supreme Court of the United States.

Wayne H. Lasater and Howard Martin, for appellant. Thos. D. Sporer, for appellee.

SPEER, J. This suit is again before us upon a judgment of the Supreme Court of the United States reversing the judgment of reversal and rendition heretofore rendered in this court on November 8, 1902. For a full statement of the nature of the case, and of the facts material to the questions involved, see the opinions of this court and of the Supreme Court on certified questions in 72 S. W. 1054, 1057.

In the opinion of this court deciding the case upon the original hearing, what we consider to be the most material question involved was disposed of in the following language: "The payment made by A. M. Lasater, the surety, who purchased the mortgaged cattle from appellant, and in consideration thereof agreed to pay off the note to the bank, and in discharge thereof executed his own note, which was afterward paid, was in law a payment by appellant in property, and the same as payment in money." Upon a motion for rehearing being filed by the bank, this court certified to the Supreme

Court for answer the questions shown in the certificate, as incorporated in the Supreme Court opinion already referred to. The Supreme Court answered generally that the opinion of this court correctly decided the several points presented. This court thereupon overruled the motion for rehearing, whereupon the appellee removed the cause by writ of error to the United States Supreme Court, where a judgment was rendered reversing the judgment of this court, and remanding the cause for further proceedings not inconsistent with that opinion. *First National Bank of Jacksboro v. J. L. Lasater*, 186 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408.

The question decided by this court in the language heretofore quoted, and by the Supreme Court upon the certificate, is thus disposed of by Mr. Justice Brewer in the following language: "The mere discharge by A. M. Lasater of the note executed by himself and J. L. Lasater by giving his own note in renewal thereof would not uphold a recovery from the bank on account of usurious interest in the former note. *Brown v. Marion National Bank*, 169 U. S. 416, 42 L. Ed. 801, 18 Sup. Ct. 390. The payment contemplated by the statute is an actual payment, and not a further promise to pay, and was not made until the bank in June, 1901, received its money. Prior to the renewal by A. M. Lasater, in October, 1900, there were only two or three small cash payments on the indebtedness." It was only upon the theory that the discharge by A. M. Lasater of the note executed by himself and J. L. Lasater, by giving his own note in renewal thereof, "was in law a payment by appellant in property, and the same as payment in money," that this court in the first place reversed the judgment of the district court and rendered one in favor of appellant. But this construction of the federal statute being held to be erroneous by the Supreme Court of the United States, it follows that, if appellant ever had a cause of action for usurious interest paid the bank, it was by reason of the subsequent actual payment made by A. M. Lasater in June, 1901. This court never intended to hold, nor do we think it should be held, that appellant can avail himself of this final payment made by A. M. Lasater. If appellant ever paid usurious interest to appellee, it was on the 17th day of October, 1900, at the time when A. M. Lasater took up appellant's note by substituting his own. Clearly, appellant's debt was discharged at that time. He never afterward owed the appellee anything, and the appellee never took, received, reserved, or charged any interest whatever, so far as he is concerned. When A. M. Lasater, in June, 1901, paid the bank the sum of \$4,457, he paid his own debt, and not appellant's. Then, if the transaction of October 17th, whereby appellant's indebtedness to the bank was discharged and he was released, would not uphold a recovery from the bank, it is clear to our minds that, irrespective of the

question of fraud upon his part in withholding from his trustee in bankruptcy notice of the existence of this claim, upon which the cause was decided in the United States Supreme Court, appellant has no case, and the judgment of the district court should be affirmed.

For this reason, and in obedience to the mandate of the United States Supreme Court, the judgment of the district court is in all things affirmed.

MORONEY v. COOMBES et al.*

(Court of Civil Appeals of Texas. June 3, 1905.)

1. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—EXTENSION OF TIME—EVIDENCE.

In an action on notes and seeking a foreclosure of a mortgage securing them, evidence that a part of the consideration of the mortgage was a contemporaneous parol agreement by plaintiff with the principal, made without the knowledge of the sureties on the notes, to extend the time of payment of the notes, was admissible as affecting the liability of the sureties.

2. SAME—CONTRADICTING WRITING.

The evidence was not inadmissible on the ground that it varied or contradicted an unambiguous written contract.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by W. J. Moroney against Z. E. Coombes and others. From a judgment for plaintiff as against Z. E. Coombes, and in favor of the other defendants, plaintiff appeals. Affirmed.

C. L. Simpson, for appellant. W. A. Hudson, for appellees Hinton and Brannin.

TALBOT, J. Plaintiff, W. J. Moroney, brought suit against defendants, Z. E. Coombes, Jr., Charles Coombes, W. N. Coombes, J. W. Hinton, and A. E. Brannin, to recover the balance due on three notes executed by Z. E. Coombes, Jr., as principal, and Charles E. Coombes, J. W. Hinton, and A. E. Brannin as sureties, payable to the order of Martin Auer, and indorsed by Auer to plaintiff, and to foreclose a mortgage securing said notes executed by Z. E. Coombes, Jr., to plaintiff on a block of land in Benjamin, Tex. W. N. Coombes had waived a prior lien in favor of plaintiff, and was made a party merely to perfect the foreclosure. Charles E. Coombes established the defense of minority, and on this point no question is raised on this appeal. Defendant Z. E. Coombes, Jr., made default. W. N. Coombes filed a disclaimer, and defendants Brannin, Hinton, and Charles E. Coombes pleaded, among other things, in substance, that they were sureties on said notes, and that a part of the consideration for said mortgage was the contemporaneous parol agreement of plaintiff that the pay-

*Rehearing denied June 24, 1905, and writ of error denied by Supreme Court.

ment of said notes should be extended for one year, and that said sureties should be discharged, and that said parol agreement was made without the knowledge or consent of said sureties. A trial by jury resulted in a verdict and judgment in favor of plaintiff against Z. E. Coombes, Jr., for the sum of \$810, with a foreclosure of the mortgage lien, and in favor of defendants Brannin, Hinton, and Charles E. Coombes, that plaintiff take nothing as to them, and that they recover their costs, from which judgment appellant has appealed.

The assignments of error present but one question for our determination. Testimony was offered by defendants Brannin, Hinton, and Charles E. Coombes in support of their plea that, as a part of the consideration for the mortgage sought to be foreclosed, appellant, at the time of the execution of said mortgage, entered into an agreement with Z. E. Coombes, Jr., the principal obligor on the notes sued on, extending the time of the payment of said notes and discharging these defendants from all liability as sureties thereon, without their consent. Appellant objected to the admission of this evidence on the ground that it varied the terms of a valid written instrument. The objection was overruled, and this action of the court is assigned as error. We think there was no error in the admission of this testimony. It is settled law that the liability of a surety or guarantor is limited to and controlled by the very terms of the contract out of which his obligation arises. If the contract be materially changed by the principals thereto without his consent, he will be released, without regard to whether he has been benefited or prejudiced by such change, and it follows that parol evidence is admissible under proper pleadings to show such change. *Ryan v. Morton*, 65 Tex. 260; *Stafford v. Christian* (Tex. Civ. App.) 79 S. W. 595; *Lane v. Scott*, 57 Tex. 367. Falling within the above rule is a contract by the principal obligor in a promissory note extending the time of the payment of such note upon a valuable consideration, without the consent of the surety sought to be held. Such extension creates a new and binding contract, and is such an alteration of the old contract as will release a surety thereon, if made without his consent.

Appellant's further contention, that the testimony was inadmissible to show that a part of the consideration for the execution of the mortgage sought to be foreclosed was a contemporaneous parol agreement between the principals to the note sued on that the defendants as sureties thereon should be discharged, cannot be sustained. There is nothing upon the face of the mortgage that discloses such an agreement, but the establishment of such an additional consideration by extraneous proof does not violate the rule which prohibits the introduction of parol evidence to vary or contradict an unambig-

uous written contract. To this effect is the holding of the Court of Civil Appeals of the Third District in the case of *Martin et al. v. Rotan Grocery Co.*, 66 S. W. 212, in which a writ of error was denied by our Supreme Court. The facts in that case are so nearly identical with the facts in the case at bar that we think they are not distinguishable on principle. In such case it is not necessary to allege fraud, accident, or mistake in order to render such testimony admissible. The testimony upon the issue was conflicting, but the verdict of the jury embraces the finding that the payment of the notes was extended and sureties discharged as alleged, and the evidence sustains such findings.

There was no error, either in the admission of the evidence objected to or the charge of the court, submitting the issues to the jury, and the judgment of the court below is affirmed.

SANGER BROS. v. BRANDON.

(Court of Civil Appeals of Texas. May 31, 1905.)

WRONGFUL ATTACHMENT—UNAUTHORIZED ISSUANCE OF WRIT—RATIFICATION—LIABILITY OF PLAINTIFFS.

Where defendant's property was wrongfully seized under a writ purporting to be signed by the justice before whom the action was commenced, and plaintiffs ratified and adopted the issuance and execution of the writ, they were liable for the wrongful conversion, though the writ was not in fact signed by the justice or by one having authority.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, § 1823.]

Appeal from Hill County Court; L. C. Hill, Judge.

Action by Sanger Bros. against T. H. Brandon, in which defendant filed a plea of reconvention. From a judgment for defendant on the plea, plaintiffs appeal. Affirmed.

A. P. McKinnon, for appellants. Derden & Killough, for appellee.

KEY, J. This suit originated in a justice of the peace court, and was appealed to the county court. Acting under a writ signed with the name of the justice of the peace, the constable seized certain personal property belonging to the defendant, and the latter filed a plea in reconvention to recover damages on account of such seizure. Sanger Bros., the plaintiffs in the suit, dismissed the same, and the case was tried on the plea in reconvention, resulting in a judgment for the defendant for \$49.80, and the plaintiffs have appealed.

There is no statement of facts in the transcript, but the trial judge filed elaborate conclusions of fact, and it is contended that such findings fail to show that Sanger Bros. were responsible for the seizure of the defendant's property under the alleged writ

If it be conceded that the justice of the peace could not authorize any other person to sign his name to a writ or other official document, and that he did not himself sign the writ referred to, nevertheless appellants were properly held to be liable for the conversion of appellee's property, because the findings of fact show that they ratified and adopted the acts of those who caused the alleged writ to be issued and executed.

No error has been shown, and the judgment is affirmed.

Affirmed.

COLLINS et al. v. BRYAN.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—IMPROVEMENTS ON WIFE'S SEPARATE ESTATE—PRESUMPTION.

No presumption arises that improvements erected by a husband out of community funds on land which is the separate property of the wife are a gift, in the absence of evidence to show such intention.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 909, 913.]

2. SAME — LIABILITY OF WIFE'S SEPARATE PROPERTY.

The separate property of a wife cannot be sold to reimburse the community estate for improvements made out of community funds.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 577-580, 909.]

3. SAME — BANKRUPTCY OF HUSBAND—SALE OF COMMUNITY PROPERTY.

Where funds belonging to the community estate of husband and wife were used by the husband in the erection of improvements on his wife's separate real estate, and the fund remained to that extent community property, the husband's trustee in bankruptcy was entitled to recover the amount of the community funds so expended, to be paid out of the proceeds of the sale of the improvements.

4. SAME—JUDGMENT—INTEREST.

Where funds belonging to the community estate of a husband and wife are used by the husband in the erection of improvements on the wife's separate real estate, and the funds remain community property, the husband's trustee in bankruptcy is not entitled, on recovering judgment for the amount of community property so invested, to interest on the judgment.

5. SAME—COSTS.

Where a wife denied that any part of the improvements on her separate estate were made with community funds, and unsuccessfully contested the right of the husband's trustee in bankruptcy to recover any amount for improvements made with such funds, the costs of the suit proper were taxable against her interest in the improvements, both in the trial court and on appeal.

6. SAME.

Where a wife denied that any part of the improvements on her separate estate was made with community funds, and unsuccessfully contested the right of her husband's trustee in bankruptcy to recover any amount for improvements made with such funds, and the judgment was entered subjecting the improvements to sale for the recovery of the amount found by the court to have been contributed from the community funds to the improvements, the sale of the improvements on partition to enforce the collection of the judgment subjects the wife

and the trustee to costs in proportion to their respective interests in the property partitioned.

7. SAME—PETITION—SUFFICIENCY TO SUSTAIN JUDGMENT.

The averments of the petition of a trustee in bankruptcy to enforce a claim against the separate estate of the bankrupt's wife, that \$1,000 of the community estate of the bankrupt had been expended in permanent improvements on the separate real estate of the wife, was sufficient to justify the findings of fact and judgment of the court that the community estate owned an interest in the improvements to the extent of \$300.

8. SAME—PRAYER.

The prayer of the petition of a trustee in bankruptcy to enforce a claim against the separate estate of the bankrupt's wife for the amount of community funds expended in improving the wife's separate property, "for such other and further relief, general and special, legal and equitable, as to the court shall seem meet and just," authorized the court to decree a sale of the improvements to satisfy a judgment for the trustee.

9. SAME—PETITION—SURPLUSAGE.

The allegation in the petition of a trustee in bankruptcy to enforce a claim against the separate property of the bankrupt's wife, that the community estate had a lien on the land to reimburse it for improvements made thereon, was merely an incorrect legal conclusion of the pleader, and was properly treated as surplusage.

Error from District Court, Limestone County; L. B. Cobb, Judge.

Action by T. F. Bryan, trustee in bankruptcy of A. L. Collins, against Mrs. Sallie Collins and others. From a judgment in favor of plaintiff, defendants appeal. Modified.

Harper & Harper, for appellants. T. F. Bryan and V. Williams & Bradley, for appellee.

EIDSON, J. This suit was brought by appellee, as trustee in bankruptcy of A. L. Collins, alleging that A. L. Collins, just prior to being adjudged a bankrupt, with intent to hinder, delay, and defraud his creditors, had conveyed to appellant Mrs. Sallie Collins 100 acres of land in Limestone county, Tex., a part of the J. G. Minor survey and described in his petition, with a prayer for its recovery; and further alleging, if not entitled to recover the land, that during the time that A. L. Collins was seised with the title to said land he expended large sums of money, to wit, \$1,000, out of the community estate of himself and his wife, Mrs. Sallie Collins, in permanent improvements on said land, for which said land is charged, and on which land said community estate, of which appellee was the trustee, had a lien for reimbursement; praying that he be adjudged to have a lien on said land, that the same be foreclosed, and that the land be ordered sold, and "for such other and further relief, general and special, legal and equitable, as to the court shall seem meet and just," etc. Appellants answered by general demurrer, general denial, and plea of not guilty, and appellant Mrs. Sallie Collins answered, in substance, that the improvements on said land were placed there by her father and

mother prior to the date of her father and mother executing the deed to her, and that A. L. Collins had no interest in said land, and had placed no improvements thereon, either out of his separate estate or the community estate of herself and her said husband. The case was tried before the court without a jury, and the court found that the land sued for was the separate property of appellant Sallie Collins, and that appellee was not entitled to recover the land, but further found that during the years 1895 and 1896 A. L. Collins expended \$300 of the community funds of himself and wife, appellant Sallie Collins, in erecting two dwellings and one barn on the land, her separate property, and to that extent said improvements were community, and that appellee was entitled to \$300, to be paid out of such improvements, and ordered that said improvements be sold for the purpose of partition, and that the proceeds arising from such sale be applied to the payment to appellee of said sum of \$300, with interest from date at the rate of 6 per cent. per annum, and all costs of suit; the remainder of such sum arising from said sale to be paid to appellant Sallie Collins.

The court filed conclusions of fact, based on the admissions made at the trial and the evidence adduced, which are as follows: "(1) The defendant Mrs. Sallie Collins, prior to her marriage to defendant A. L. Collins, owned a farm in her own right, worth \$2,200, which her father sold with her consent, and used the money in the purchase of 900 acres, out of which the 100 acres in controversy was taken, and with intent on his part to deed the said 100 acres to said defendant. He paid \$12 per acre for same. (2) Her father also sold personal property of Sallie Collins, prior to her marriage to A. L. Collins, to the amount of \$250, and used the money. (3) In 1898, after he had paid for said land, her father deeded said 100 acres by warranty deed reciting \$250 paid and love and affection he had for his daughter Sallie Collins. The \$250 was, in fact, money of Sallie Collins which her father had received from the sale of personal property used, and his intention was to repay the same. (4) December 31, 1903, A. L. Collins was insolvent, within the meaning of the bankrupt law. (5) On January 4, 1904, on his voluntary petition, A. L. Collins as an individual, and the partnership of A. L. Collins and J. J. Vannoy, of which he was a member, were duly adjudged bankrupt in the United States District Court at Waco, and plaintiff T. F. Bryan was appointed and qualified and now is the trustee of said bankrupt. (6) During the years 1895 and 1896, defendant A. L. Collins expended \$300 of the community funds of himself and wife Sallie Collins by way of erecting buildings, fences, and other valuable and permanent improvements upon said 100 acres, and thereby enhanced its value \$300." And bas-

ed upon such findings of fact the court below filed the following conclusions of law: "(1) That said 100 acres is the separate estate of Sallie Collins. (2) That T. F. Bryan is entitled, as such trustee, to all of the community estate of said A. L. Collins and wife, including said \$300 expended on said land. (3) That it would be inequitable, if not unlawful, to order any part of said land sold to pay said \$300, and that the most equitable method for enforcing the collection of said sum is that provided for in the decree, which is made a part of these findings."

Appellants, under their first and second assignments of error, contend that the court erred in its second conclusion of law, because, in the absence of fraud, improvements placed on land, the separate property of the wife, out of community funds, become a part of the realty, and are not subject to sale for the debts of the husband. We do not agree with this contention of appellants. Improvements erected upon land, the separate property of the wife, by the husband out of community funds, will not be presumed to be a gift, in the absence of evidence to show such intention. There was no pleading or proof in this case that the improvements in controversy were intended by the husband of appellant Sallie Collins as a gift to her. She alleged in her answer that said improvements were placed on the land by her father and mother prior to the date of their executing the deed for the land to her, and that her husband A. L. Collins placed no improvements on said land, either out of his separate estate or the community estate of herself and said husband. The court below properly held that the land, being the separate property of the wife, could not be sold to reimburse the community estate for improvements made thereon out of funds belonging to said estate. *Maddox v. Summerlin*, 92 Tex. 484-487, 49 S. W. 1033, 50 S. W. 567.

The court having found as a fact that A. L. Collins had expended \$300 of the community estate of himself and wife, Sallie Collins, in erecting improvements on the land, the separate property of the said Sallie, such improvements, to that extent, remained the community property of the said A. L. and Sallie Collins, and the appellee, as trustee in bankruptcy of the said A. L. Collins, was entitled to recover judgment for said sum, to be paid out of the proceeds of the sale of said improvements, and the court below did not err in so holding. *Maddox v. Summerlin*, *supra*. And in our opinion the decree of the court properly and fully protects the title of appellant Sallie Collins to the land, and all the benefits derived from it, except as to the matter of interest and costs. In view of the fact that the court found that the community estate had contributed only \$300 to the erection of improvements on the land, that amount is the extent of the recovery to which appellee is

entitled, and to allow interest in addition to this amount would be an unauthorized encroachment upon the separate property of the wife.

As appellant Sallie Collins denied that any part of the improvements were made with community funds, and contested appellee's right to recover in this suit any amount for improvements made with such funds, it would be just to tax the costs of the suit proper against her interest in the improvements, both in the court below and in this; but if it should be necessary to partition such improvements, in order to enforce the collection of the said sum of \$300, adjudged to the appellee, then the costs of the partition proceedings should be taxed against appellant Sallie Collins and appellee in proportion to their respective interests in the property. We think the averments of appellee's petition that \$1,000 of the community estate of A. L. Collins and wife had been expended in permanent improvements upon the land was sufficient to justify the finding of fact and judgment of the court, to the effect that the community estate owned an interest in the improvements to the extent of \$300; and the prayer of the petition "for such other and further relief, general and special, legal and equitable, as to the court shall seem meet and just," authorized the court to grant the relief decreed by the judgment.

The allegation in appellee's petition to the effect that the community estate had a lien on the land described to reimburse it for the improvements made thereon, being an incorrect legal conclusion of the pleader, was properly regarded by the court below as surplusage. *Wagner v. Insurance Co.*, 92 Tex. 554, 50 S. W. 569; *Connor v. Saunders*, 81 Tex. 633, 17 S. W. 236; *Lee v. Boutwell*, 44 Tex. 153.

All of appellants' assignments of error have been considered, and, in our opinion, none of them point out reversible error. The judgment of the court below is reformed so that same will bear no interest, and so as to adjudge the costs against appellant Sallie Collins of the suit, both in the court below and in this court, except such as may be incurred in the partition proceedings, which are adjudged against the appellant Sallie Collins and appellee in proportion to their respective interests in the property partitioned; and, thus reformed, the judgment of the court below is affirmed.

Reformed and affirmed.

WORDEN v. PRUTER.*

(Court of Civil Appeals of Texas. June 15, 1905.)

CORPORATIONS — RECEIVERS — PETITION—
CONSIDERATION — JURISDICTION—ATTACH-
MENT LIEN.

Where a petition for the appointment of a receiver of a corporation was presented to a dis-

trict judge in chambers prior to the issuance and levy of an attachment on the corporation's property, and the judge indorsed thereon an order on the defendants to show cause why a receiver should not be appointed, returnable before him at chambers on a subsequent date, the consideration of such petition constituted an assumption of jurisdiction by the district court over the corporation's property, precluding a subsequent attachment from operating as a lien thereon.

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by H. W. Pruter against the Raywood Rice Company, in which A. H. Worden, receiver, intervened. From a judgment sustaining plaintiff's attachment lien, the receiver appeals. Reversed and rendered.

Stevens & Pickett and W. W. King, for appellant. Marshall & Dabney, for appellee.

PLEASANTS, J. Appellee brought this suit in the district court of Liberty county against the Raywood Rice Company, a corporation organized under the laws of this state, to recover a debt for \$1,092.58. The suit was filed on April 25, 1904, and thereafter on the same day a writ of attachment was issued on application of plaintiff, and was levied upon property of the defendant at 11:30 a. m. of said day. At 11 o'clock a. m. on the same day other creditors of the defendant corporation presented to Judge Edward Dwyer, judge of the district court of Bexar county, a petition praying for the appointment of a receiver for said corporation. After considering this petition, Judge Dwyer indorsed thereon the following order: "In Chambers. April 25, 1904. The clerk of this court is directed to issue forthwith a notice to the defendants herein to appear before me in chambers on Thursday, the 5th day of May, 1904, at 10 o'clock a. m., then and there to show cause, if any they have, why a receiver should not be appointed as prayed for. [Signed] Edw. Dwyer, Judge Thirty-Seventh Judicial District of Texas." This petition, with the indorsement thereon, was filed with the clerk of the district court of Bexar county on April 25, 1904, at 1:14 p. m. The exact time at which the order of the court indorsed on this petition was made is not shown. Appellee had no notice at the time the writ of attachment was levied that a petition for a receivership had been presented to the judge of the district court of Bexar county. At the hearing on May 5, 1904, the prayer of the petition was granted, and appellant was appointed receiver, and qualified as such. Thereafter appellant intervened in this suit, and sought to recover possession of the property levied on under the writ of attachment, and resisted the establishment and foreclosure of appellee's asserted attachment lien thereon. The trial in the court below without a jury resulted in a judgment in favor of the plaintiff against the defendant for the amount of his debt, and against the defendant and intervener

*Writ of error denied by Supreme Court.

foreclosing the attachment lien upon the property, but directing that said judgment of foreclosure be enforced through the district court of Bexar county, in which said receivership proceedings are pending. From this judgment the intervener, Worden, prosecutes this appeal.

Under appropriate assignments of error, appellant contends that the trial court erred in holding that appellee acquired a lien upon the property by the levy of the writ of attachment, because at the time said levy was made the application for the appointment of a receiver for the defendant corporation was pending before the judge of the district court of Bexar county, and, the jurisdiction of said court having thereby attached, the property of the defendant was in custodia legis, and therefore no lien was created by the levy of the writ of attachment. It is a well-settled general rule that, when the jurisdiction of a court once attaches to the subject-matter of litigation, it becomes exclusive for all purposes necessary to the accomplishment of the object of the suit, and thereafter, while said suit is pending, the jurisdiction of other courts over said subject-matter cannot be called into exercise, even though they have general concurrent jurisdiction with the court in which the suit is pending. The strict enforcement of this rule is necessary to prevent conflicts between courts of concurrent jurisdiction, and it has been uniformly recognized and followed by the courts of this state, the only difficulty in its enforcement being the determination of the question as to when the jurisdiction of the court attaches to the subject-matter of the particular suit. In the case of *Riesner v. Ry. Co.*, 89 Tex. 456, 36 S. W. 53, 83 L. R. A. 171, 59 Am. St. Rep. 84, our Supreme Court held that the jurisdiction of the court in which an application for the appointment of a receiver for a railroad had been presented to the judge attached when the judge had acted upon the application in such way as to indicate that he had determined to investigate the matter and might at some future date appoint a receiver. In that case the only action taken by the judge from which the jurisdiction of the court was held to have attached was to order the application filed. It is true, the application was in fact filed under the order of the court before the levy of the writ of garnishment under which the lien adverse to the title of the receiver was asserted, but the fact of the filing was only considered material as showing that the judge had acted upon the petition in a way indicating that he had assumed jurisdiction of the subject-matter of the suit. If the act of the judge in ordering a petition for the appointment of a receiver filed should be considered a sufficient assumption of jurisdiction to exclude that of other courts over the subject-matter of the suit, it necessarily follows that the indorsement on a petition

of an order setting a day for its hearing would have a like effect.

The agreed statement in the record showing the act of the judge after the petition for a receiver was presented to him is as follows: "The application was delivered to the judge at 11 o'clock a. m., April 25, 1904, and the following fiat entered thereof: 'In Chambers. April 25, 1904. The clerk of this court is directed to issue forthwith a notice to the defendants herein to appear before me in chambers on Thursday the 5th day of May, 1904, at 10 o'clock a. m., then and there to show cause, if any they have, why a receiver should not be appointed as prayed for. [Signed] Edw. Dwyer, Judge Thirty-Seventh Judicial District of Texas.' And said petition was delivered to the clerk by the judge, and filed by the clerk at 1:14 p. m. on April 25, 1904." We think the reasonable inference from this statement is that the judge examined the petition at once and made his order thereon, and it certainly shows that the judge was at least considering the petition from the time it was presented to him. We think the jurisdiction of the district court of Bexar county attached to the subject-matter of the suit from the time the judge of said court began an examination of the petition for the purpose of determining whether he would appoint a receiver. The act of receiving and considering the petition was an assumption of jurisdiction over the subject-matter of the suit, and the order thereafter made appointing a receiver related back to the time when the judge began the consideration of the petition.

Such being our conclusion, appellant's assignment of error must be sustained, and the judgment of the court below foreclosing an attachment lien in favor of appellee upon the property in controversy reversed, and judgment here rendered in favor of appellant, and it is so ordered.

Reversed and rendered.

SUPREME COUNCIL A. L. H. v. LYON et al.*

(Court of Civil Appeals of Texas. May 31, 1905.)

MUTUAL BENEFIT SOCIETIES — SUBSTITUTION OF CERTIFICATES—RECOVERY OF PREMIUMS.

Where, after the passage by a mutual benefit society of a by-law scaling all \$5,000 certificates to \$2,000, the holder of a certificate for \$5,000 returned the same, with a request that a new certificate for \$2,000 be issued, she was not entitled to recover the premiums paid on the \$5,000 certificate.

Appeal from District Court, Johnson County; Nelson Phillips, Judge.

Action by E. C. Lyon and husband against the Supreme Council American Legion of Honor. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

*Writ of error denied by Supreme Court.

John L. Terrell, for appellant. Odell, Phillips & Johnson and Ramsey & Odell, for appellees.

KEY, J. Appellees brought this suit against appellant and recovered \$5,380.05, the amount of premiums paid on a benefit certificate issued to Mrs. E. C. Lyon, the substantial plaintiff; the other plaintiff being her husband. The suit was predicated upon the theory that the defendant had breached the contract by adopting and undertaking to enforce a by-law scaling all \$5,000 certificates to \$2,000. The original certificate issued to Mrs. Lyon was for \$5,000, but the undisputed testimony shows that after the passage of the by-law referred to she returned that certificate to the home office of the defendant order in Boston, Mass., with this indorsement made thereon by her: "I herewith enclose benefit certificate No. 12,370 for \$5,000, for which please send certificate for \$2,000, payable to John H. Lyon, and oblige, E. C. Lyon." And thereafter a benefit certificate for \$2,000 was issued by the defendant to Mrs. E. C. Lyon, in which John H. Lyon was named as beneficiary. It was sent to her by mail, and received by her at Cleburne, Tex., where she then resided. After the issuance and acceptance of the second certificate the premiums were paid thereon for a time, but were finally discontinued. The premiums required to be paid on the \$2,000 certificate were much less than those required to be paid on the \$5,000 certificate.

On these facts, about which there is no controversy, the plaintiffs were not entitled to recover. On this point this case is quite similar to *Supreme Council American Legion of Honor v. Garrett*, 85 S. W. 27, 12 Tex. Ct. Rep. 49, in which it was held by this court that the surrender of a \$5,000 benefit certificate and the acceptance of a \$2,000 certificate in lieu thereof created a new contract, and released the parties from liability upon the old one. We think our decision in that case was correct, and that the rule there announced is equally applicable to this case. Accordingly, there being no dispute about the facts, the judgment in this case is reversed, and judgment here rendered for the appellant.

Reversed and rendered.

AYRES v. GULF, C. & S. F. RY. CO. et al.
(Court of Civil Appeals of Texas. May 26, 1905.)

1. RAILROADS — RIGHT OF WAY — PUBLIC LAND—RIGHT TO USE—IMPLICATION.

Where a railroad was chartered in 1866, and authorized to construct a railroad through a certain county and to other points, and by 1871 it had constructed the road and begun its operation, and the statutes then in force authorized it to condemn private property for a right of way, it was impliedly authorized to construct its line over the public domain, though prior to the passage of Rev. St. art. 4423, in 1879, ex-

pressly conferring on railroad companies a right of way through the public domain, there was no statute expressly conferring such right.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 91-93.]

Appeal from District Court, Montgomery County.

Action by J. K. Ayres against the Gulf, Colorado & Santa Fé Railway Company and others. From a judgment in favor of plaintiff for less than the relief demanded, he appeals. Affirmed.

Dean, Humphrey & Powell, for appellant. J. W. Terry and F. J. & R. C. Duff, for appellee Gulf, C. & S. F. Ry. Co. N. A. Stedman and Gould & Morris, for appellee International & G. N. R. Co.

GILL, J. This was an action of trespass to try title, by which J. K. Ayres sought to recover a strip of land extending through the Wilson Lang survey in Montgomery county, and claimed by the International & Great Northern Railroad Company as a part of its right of way. The Gulf, Colorado & Santa Fé Railway Company was made a party defendant as a joint occupant of a part of the strip in dispute. The defendants pleaded not guilty and limitation of five and ten years. On a hearing the court instructed a verdict for defendants on the theory that the undisputed proof established limitation of ten years in favor of the International & Great Northern Railroad Company to a strip 120 feet wide extending through the Lang tract, and a judgment was rendered therefor. The costs were adjudged against defendants because the width sued for was 150 feet, and the plaintiff recovered the difference. The plaintiff has appealed.

The facts are as follows: In 1866 the Great Northern Railroad Company obtained a charter from the state of Texas empowering it to construct a railroad through the county of Montgomery, and to other points not necessary to be disclosed. By 1871 it had constructed the road and begun its operation. In 1879 it sold its road and franchise to the International & Great Northern Company, which continued the operation of the road up to the time of the bringing of this suit. Inasmuch as the defendant Santa Fé Company holds only under and by virtue of the rights of its codefendant, we do not further state its connection with this case. At the time of the construction of the road in question the land was a part of the public domain. The charter of the Great Northern Company was special, and authorized it to acquire a right of way along its route, not to exceed 50 yards in width, but contained no express and unequivocal terms of donation in that respect. The Wilson Lang survey was patented in November, 1873, and was described as lying on the Great Northern Railroad. In March, 1887, the plaintiff acquired the Lang survey, moved upon the tract, and has occupied it ever since. The

town of Conroe, which is the county site of Montgomery county, was established after appellant's purchase, and is partly on the Lang survey. It is situated at the intersection of the roads of the two defendants. In 1888 or 1889 appellant platted a part of the Lang survey into town lots, and began to sell them according to the plat. This plat recognized the right of way of the Great Northern as having a width of 65 feet from the center of the track each way, the lots abutting on the right of way according to that width. Plaintiff testified that he saw the road in 1872. It was completed and the right of way cleared at that time. It has been kept cleared ever since in the general maintenance of the line, but a little wider now than then. The general width to which the right of way has been cleared and maintained through the Lang survey for years is at least 130 feet. Whether the possession of this, uninclosed as it was, was of such continuous character as to sustain the plea of limitation to the entire width, may well be doubted, but that the railway company, in the exercise of its charter powers, took possession of a right of way at least the width awarded by the court, is to our minds established beyond controversy. This being true, if the authority given by the state to construct the road through Montgomery county, and to that end to acquire a right of way not to exceed 50 yards in width, carried with it either directly or inferentially a grant of right of way through and over such tracts on its route as were yet a part of the public domain, the judgment should be affirmed whatever may be the state of the proof on the issue of limitation. Article 4423 of the Revised Statutes, which became a law in 1879, expressly gave to railway companies a right of way through the public domain. Prior to that time there had been no express provision on the subject; so it follows that the defendants are unaided by the article cited, or anything of a like nature preceding it. As stated, however, in *Tex. Cen. Ry. Co. v. Bowman* (Tex. Sup.) 79 S. W. 296: "The general laws which had been enacted regulating railways theretofore seem to have assumed, rather than to have expressly declared, the existence of the right over the lands of the state, for the provisions for the acquisition of such rights by purchase or condemnation applied only to private property. The general law passed in 1876 for the chartering of railway corporations omitted any express provision as to right of way upon lands belonging to the state, but, as before, regulated the acquisition of such right over private property." Justice Williams, after this comment upon the state of the law, proceeds to show that the absence of any provision for the acquisition of right of way over public properties pervaded all general legislation on the subject until the Revision of 1879. While it is not expressly held, nor was it necessary to

be decided in the case cited, it is inferentially held that prior to the passage of the act a charter authorizing the construction of a railway through a country held in part by private ownership and in part by the state, the general laws providing for acquisition of right of way from private owners, but leaving the company powerless against the lands of the state, impliedly granted the right to construct through and over the public domain. The grant is so necessary to the exercise of the general power conferred it is inevitably carried by the general terms of the grant. This is in accord with the elementary rule of construction that a power necessary to the exercise of a power already granted will be implied. We are of opinion, therefore, that by its charter the Great Northern Company acquired the right to enter upon and appropriate so much of the public domain over which its route was projected as was necessary for its right of way, not to exceed the prescribed width, and that, having done so, the width actually appropriated was not affected by the subsequent grant by the state of the Lang survey.

By the description in the grant the grantees had actual notice of the railway company's existence, and its powers, and of the fact that the Wilson Lang grant had been located along its line. They took subject to the rights acquired by the company. As to the width of the right of way thus appropriated, we think the proof is undisputed that it amounted to at least as much as was awarded to defendants by the judgment of the court. In this view of the case all errors become harmless. We therefore do not notice the other assignments. Because, under the facts the judgment could not have been otherwise, it is in all things affirmed.

The cross-assignment assailing the trial court's disposition of the question of costs is overruled.

Affirmed.

HANAWAY v. WISEMAN.*

(Court of Civil Appeals of Texas. June 3, 1905.)

1. CONVERSION—DAMAGES—INSTRUCTIONS.

Where, in an action for conversion of corn, it was conceded that defendant was the owner of a one-third of the stack of corn, an instruction that the jury should compensate plaintiff for the value of "the corn," was not erroneous.

2. SAME—INSTRUCTIONS.

An instruction that the jury should "compensate" plaintiff for the value of the corn converted, was not erroneous, though not literally in the approved form.

Appeal from District Court, Knox County; J. M. Morgan, Judge.

Action by J. M. Wiseman against R. W. Hanaway. From a judgment for plaintiff, defendant appeals. **Affirmed.**

*Rehearing denied July 1, 1906, and writ of error denied by Supreme Court.

Montgomery & Hughes and D. J. Brooker-son, for appellant. Glasgow & Kenan, Chas. E. Coombes, and Sam J. Hunter, for appellee.

CONNER, C. J. This is an appeal from a judgment in appellee's favor for the sum of \$300 as actual damages for the conversion of certain kaffir corn and straw. The facts are that on December 2, 1901, appellant sold to one J. D. Gray a section of land upon credit, the payments being made to mature one, two, three, four, and five years after that date, the vendor's lien being retained to secure the notes for the deferred payments. Gray failed to pay anything on the land, and in November, 1902, Hanaway filed suit in the proper court to collect his debt and foreclose said lien. Gray was served with citation in January, 1903, and Hanaway obtained judgment on April 7, 1903, and a foreclosure of lien, with order of sale, by virtue of which appellant in July, 1903, again became the owner, and was placed in possession of said section. In October, 1902, appellee rented part of the land in controversy from Gray for the year beginning January 1, 1903, with the agreement that he was to pay one-third of the kaffir corn in the stack to Gray as rent, there being no contract as to straw. The kaffir corn was planted in the latter part of April, 1903, and was ready for harvest in the latter part of September of that year, at which time it further appears that appellant caused appellee's arrest upon complaint filed charging criminal offenses, and thereafter converted the kaffir corn and a certain stack of straw to his own use. Appellee, in his petition, also alleged that the prosecution instituted against him upon affidavits of appellant were malicious, and he prayed for the recovery of damages therefor. But from the verdict of the jury, construed in the light of the court's charge, it plainly appears that the jury found against appellee on the issue of damages for the alleged malicious prosecution. The first and second assignments of error therefore will be overruled without discussion, inasmuch as they relate to that issue alone.

The remaining assignments (the third and fourth) complain of the court's charge; but we do not think the objections thereto maintainable. The court charged the jury, in substance, that, if they found the facts as hereinbefore stated, they should find for appellee, and "assess his actual damages at such sum as you [they] consider from the evidence will reasonably compensate him for the value of said kaffir corn and wheat straw." Appellant insists that it is undisputed that he, as owner, was entitled to one-third of the kaffir corn as rent, and that the charge quoted permitted the jury to find against him for the value of the whole. Appellee testified that "the rent was Hanaway's," and that such was the fact is not disputed. The charge limiting, as it does, appellee's damages to compensation merely, we think it quite improbable that the jury understood the charge as

requiring of them a finding for the value of the entire crop; particularly in view of the special charge given by the court at appellant's request, "that whatever quantity of kaffir corn or straw was the property of J. D. Gray became (when the land referred to in plaintiff's petition was sold to defendant) the property of the defendant, and you can find nothing for plaintiff as to said property."

The further contention that the charge "did not give the jury the correct measure of damages, and left it to the jury to adopt such measure as they saw proper," presents a difficulty more apparent than real. While the charge is not literally in the form approved by the decisions, we yet think it substantially correct. As before stated, the jury was thereby limited to "compensation" for the damages done appellee. This is the true basis for the rule, and there is nothing in the record to indicate that the jury entertained any other thought. It is true the evidence as to the value of the kaffir corn and straw was conflicting, but appellee's testimony abundantly sustains the verdict. Indeed, such testimony fixed the value of said property in the aggregate at \$800 or \$900.

There being no other assignments, and finding that the evidence sustains the material allegations of appellee's petition and the verdict of the jury, it is ordered that the judgment be affirmed.

HILDEBRAND v. HEAD.

(Court of Civil Appeals of Texas. June 7, 1905.)

1. SET-OFF AND COUNTERCLAIM—EFFECT OF JUDGMENT.

Plaintiff recovered a judgment against defendant for a certain sum and for the foreclosure of a landlord's lien on certain syrup in plaintiff's possession. Defendant in the same action set up a claim against plaintiff for the wrongful suing out of an injunction, and the court charged that defendant was entitled to recover, if at all, the reasonable market value of the syrup that could have been made out of the cane by the plaintiff, less the cost of converting it into syrup. The jury found for defendant for a sum less than that found in favor of plaintiff. *Held*, that a judgment for plaintiff for the difference made the syrup the property of plaintiff, so that it was error to adjudge a lien on it and require it to be sold to satisfy the judgment.

2. APPEAL—THEORY OF TRIAL.

Where plaintiff's claim to a certain item of damage was conditioned at trial on the jury finding in his favor upon another issue, and the jury found against him, he was not entitled to claim the item of damage mentioned on appeal.

Appeal from Bexar County Court; Robt. B. Green, Judge.

Action by H. E. Hildebrand against G. M. Head. From a judgment for plaintiff, he appeals. Reformed and affirmed.

Cobbs & Hildebrand, for appellant. C. C. Clamp and Frank J. Bosshardt, for appellee.

JAMES, C. J. This appeal is from a judgment rendered upon a verdict which was in

favor of appellant (plaintiff) for \$169.66 and interest, and for foreclosure of landlord's lien on certain syrup in plaintiff's possession, and in favor of defendant for the sum of \$139.20 actual damages. The latter sum was for the damages sustained by defendant for the wrongful suing out of an injunction, which the court had instructed the jury would consist of what the evidence showed was the reasonable market value of the syrup that could have reasonably been made out of the cane by plaintiff, less the reasonable cost of converting it into syrup. Therefore the \$139.20 damages was the finding of the net value of the syrup. When this was deducted from the sum of \$169.66, found in favor of plaintiff (which was an admitted indebtedness from defendant to plaintiff), and judgment rendered for the difference, \$43.18, defendant was compensated for the syrup, and the effect of the deduction was to pay defendant for the syrup and made it the property of plaintiff. It was therefore manifest error to adjudge plaintiff a lien on the syrup, and require it to be sold to satisfy the judgment for the difference. Hence we conclude that that part of the decree ordering the syrup sold to satisfy plaintiff's judgment for \$43.18 and interest thereon, as under execution, and, after paying off said judgment, directing the officer to pay the excess over to defendant, should be expunged, and instead that the plaintiff be declared entitled to the syrup.

We think plaintiff is not entitled to claim in this court that he should be allowed a further sum of \$76.30 for hauling the cane to the mill. The only charge by which he requested that matter to be submitted was conditioned on the jury finding in his favor upon the issue of wrongful suing out of the injunction. The jury, however, found against him on that issue.

Appellant has filed here a paper consenting to waive his assignments of error in case we hold as above. Therefore we do not notice them.

Appellee has a cross-assignment, which we think is not well founded. We fail to see wherein the written contract and the previous oral agreement show any substantial difference in the rights of the parties.

The judgment will be reformed as indicated, and, as reformed, will be affirmed.

RASCOE v. WALKER-SMITH CO. et al.
(Court of Civil Appeals of Texas. May 17, 1905.)

REVERSAL—REMANDING CAUSE.

In a suit against a partnership and the executrix of a decedent, alleged to have been a partner when the notes sued on were executed, where the Supreme Court, in answer to a certified question, holds that the transactions occurring between a member of the partnership and decedent are not admissible against the executrix, and the remaining evidence tends to show decedent was not a partner, and the part-

nership issue has been fully developed, the Court of Appeals will not remand, but render judgment for the executrix.

Appeal from Coleman County Court; B. F. Rose, Judge.

Action by the Walker-Smith Company against Cornelia E. Rascoe, as executrix of the estate of W. P. Rascoe, deceased. From a judgment for plaintiff, defendant Cornelia E. Rascoe appeals. Affirmed as to the other defendants, and reversed and rendered as to Cornelia E. Rascoe.

F. L. Snodgrass, for appellant. G. N. Harrison, for appellees.

FISHER, C. J. The appellee Walker-Smith Company brought this suit to recover on two promissory notes executed August 4, 1902, each for the sum of \$250, signed by T. W. White & Co., by T. W. White. The suit was against the partnership of T. W. White & Co., and also T. W. White individually, and against the appellant Mrs. Rascoe, as executrix of the estate of W. P. Rascoe, deceased, claiming that W. P. Rascoe was during his lifetime a member of the firm of T. W. White & Co. T. W. White filed no answer. The appellant, as executrix, answered by general denial and special plea, denying the existence of any partnership between W. P. Rascoe and White. Judgment in the court below was against T. W. White and T. W. White & Co., in favor of the appellees, for the amount sued for and costs of suit, and also against the appellant Mrs. Rascoe, as executrix of the estate of W. P. Rascoe, for the amount sued for. Mrs. Rascoe alone has appealed.

At a previous day of this term of the court we certified to the Supreme Court the question whether or not the evidence of witness White, as to statements and transactions that occurred between him and W. P. Rascoe, deceased, was admissible, as against appellant Mrs. Rascoe, to establish the fact of partnership. The Supreme Court, in answering the question, held that such testimony was not admissible. 86 S. W. 728.

The principal question in the case is whether or not W. P. Rascoe was ever a member of the firm of T. W. White & Co. The appellees contend that he was a member of the firm before the notes in question were executed, and that the notes were given for the purchase price of goods sold by appellees to T. W. White & Co., and that, if there was ever a dissolution of the firm, the appellees had no notice of that fact at the time the goods were sold and the notes executed, and that, if Rascoe was not in fact a member of the firm, he permitted T. W. White to represent that he was a member, and the appellees, acting upon such representation and holding out, sold the goods to T. W. White & Co. upon the basis that Rascoe was a member of the firm. There are a number of assignments of error in appellant's brief

which are not necessary to be considered, because, in view of the ruling of the Supreme Court upon the question certified, we have concluded to reverse and render so much of the judgment as affects the appellant Mrs. Rascoe. When we eliminate the evidence of White as to transactions and statements that occurred between him and Rascoe relating to the question of partnership, there is very little evidence, if any, of any importance left in the case upon that subject. In fact, the balance of the evidence upon the subject of partnership, as we construe it, tends to show that Rascoe was never a member of the firm of T. W. White & Co. It is true, some letters passed between the Walker-Smith Company and Rascoe with reference to signing certain notes, which notes are not those sued upon. The letters from the Walker-Smith Company to Rascoe were merely to the effect that certain notes were signed by White & Co., but that they desired the personal signature of Rascoe. Rascoe replied that he would sign, and as a matter of fact he did sign the notes individually. There is no intimation in the correspondence between these parties of any partnership between White and Rascoe; and it is believed that the fact evidenced by these letters has a stronger tendency to establish the fact that there was no partnership than to prove that a partnership existed; for if the Walker-Smith Company relied upon the representations of White that Rascoe was a member of the firm, and relied upon the fact that Rascoe had held himself out as a member of the firm, and that the Walker-Smith Company believed that he was a member of the firm, or that Rascoe in fact was a member of the firm, it is singular that the Walker-Smith Company would desire, in addition to the signature of the firm, the individual signature of Rascoe; and if Rascoe knew that he was held out as a member of the firm, or regarded that he was a member of the firm, it is also singular that he would, in addition to the execution of the note by the firm, individually sign the same. And it is further significant that in all this correspondence there is no statement or intimation whatever from either party tending to show that Rascoe was ever a member of the firm. As said before, the remaining evidence in the record on the issue of partnership, excluding that of White, tends to show that Rascoe was not a member of the firm.

On the issue of partnership, the case seems to have been fully developed, and that all evidence accessible on that subject was introduced. Therefore we see no occasion to reverse and remand, but will here reverse and render judgment in favor of the appellant Mrs. Rascoe to the effect that the appellee Walker-Smith Company take nothing by their suit against her individually or as executrix, and that she go hence fully discharged with a judgment in her favor for all costs incurred in her behalf in the trial

court and in this court against the appellee Walker-Smith Company. The judgment in favor of appellees against T. W. White and T. W. White & Co. is affirmed.

Affirmed in part, and in part reversed and rendered.

HARDIN v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.*

(Court of Civil Appeals of Texas. May 17, 1905.)

1. CARRIERS — NEGLIGENCE — ACTION — INSTRUCTIONS.

Where plaintiff alleged a partnership between defendant railroad company and another in carrying plaintiff's wife, and sought damages for her death from a failure on the part of the railroads to keep the car warm, and there was evidence of such negligence on the part of both roads, an instruction that, in order for plaintiff to recover, the burden was on him to show negligence of defendant, was reversible error, notwithstanding an instruction making defendant responsible for the negligence of both roads.

2. SAME—EVIDENCE—ADMISSIBILITY.

Defendant might, under the general issue, show that the wife, at the time she sustained the injuries, had a disease which would have caused her death as soon as she did die, independent of the injuries.

3. SAME—DECLARATIONS.

The declarations of the wife concerning her condition were admissible against plaintiff.

4. SAME—EVIDENCE—STATEMENTS AS TO MANNER OF INJURY.

In an action for injuries, statements by the person injured to her physician as to how she was injured were not admissible in favor of plaintiff.

5. SAME — EVIDENCE — CREDIBILITY OF WITNESSES.

The belief or opinion of a witness to the effect that certain other persons would swear to the truth was not admissible.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Action by J. H. Hardin against the St. Louis Southwestern Railway Company of Texas. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Evans & Elder, for appellant. E. B. Perkins and Templeton, Crosby & Dinsmore, for appellee.

FISHER, C. J. This is a suit for damages by Hardin against the St. Louis Southwestern Railway Company of Texas for personal injuries to himself, and for injuries resulting in the death of his wife. Plaintiff substantially alleged as his cause of action that on the 20th of December, 1900, he purchased from the defendant at Josephine, Tex., two first-class tickets (one for himself and one for his wife) to Perryville, Tenn., via Texarkana and Memphis, and that they boarded said train as passengers on the 20th of December, 1900; that the weather was cold and disagreeable throughout the trip; that the defendant was a common carrier of passengers for hire from Josephine to Tex-

*Rehearing denied June 23, 1905.

arkana, Tex.; and that the St. Louis Southwestern Railway Company was a common carrier of passengers for hire from Texarkana to Memphis, Tenn.; and he alleged a joint operation and partnership between these two railway companies in undertaking to carry plaintiff and his wife as passengers from Josephine, Tex., to Memphis, Tenn. Plaintiff alleged negligence on the part of both railway companies in failing to keep their coaches warm from Josephine to Memphis, and that, in consequence of such negligence, plaintiff and his wife each suffered from cold and exposure while being so carried over the lines of the two companies, resulting in personal discomfort, pain, and suffering to each, and incurring expense to plaintiff, and resulting in the death of his wife, and incurring expense during her sickness, for all of which he claims damages in the sum of \$20,800. Verdict and judgment resulted in favor of the railway company.

Appellant's first and second assignments of error will be considered together. The first assignment complains of the action of the trial court in giving charge No. 2 requested by appellee, on the ground that the same is contradictory of the main charge, and was calculated to mislead the jury, in withdrawing from their consideration the negligence of the servants of the St. Louis Southwestern Railway Company, and because the testimony shows and raises the issue of the failure to furnish fires sufficient to warm the coaches in which the plaintiff and his wife were passengers, not only on the line of the St. Louis Southwestern Railway Company of Texas, but also on the line of the St. Louis Southwestern Railway Company, which is alleged to run from Texarkana to Memphis. The second assignment of error complains of the first paragraph of the charge of the court, wherein the jury are instructed that the burden was upon the plaintiff to show by a preponderance of the evidence that the defendant was negligent, as alleged, and that such negligence proximately caused or hastened the death of his wife. There is evidence in the record which tends to show that, by reason of the negligence alleged upon the part of the two roads, the wife sustained the injuries that resulted in her death; and there is evidence to the effect that each of the roads failed to provide fires sufficient to warm and heat the cars in which the plaintiff and his wife were riding as passengers, though the weather was very cold and disagreeable. The petition of the plaintiff also alleged that there was a partnership between the two roads, and substantially alleged that by reason of such partnership the appellee was responsible for the negligence committed by both roads, and there was no denial of the partnership charged in the petition. The first paragraph of the charge of the court which is complained of is as follows:

"The burden of proof is upon the plaintiff

to show by a preponderance of the evidence that the defendant was negligent as alleged, and that such negligence proximately caused or hastened the death of his wife, as herein-after explained."

The special charge requested, and which was given, and which is complained of, is as follows:

"In view of the court's charge, counsel for defendant request the court to instruct the jury as follows: The burden of the proof is upon the plaintiff to show by the evidence that defendant's servants were negligent, and that such negligence was the proximate cause of the death of Mrs. Edna Hardin, the wife of plaintiff, or that the life of Mrs. Edna Hardin was shortened, and that such shortening of her life was caused by the negligence of defendant's servants."

The court, in its general charge, in effect, instructed the jury that the appellee railway company would be responsible for the negligence of both railway companies, and this charge, in view of the pleadings and evidence, was correct; but it practically conflicts with the special charge No. 2, as set out, and also the first paragraph of the general charge of the trial court as above stated. These two charges substantially instruct the jury that, in order for the appellant to make his case, the burden rested upon him to establish the negligence of the defendant—that is, that the St. Louis Southwestern Railway Company of Texas was guilty of the negligence charged—when, under the pleadings and evidence, the plaintiff would have been entitled to recover on the proof of facts tending to show negligence on the part of the St. Louis Southwestern Railway Company. The jury might have considered that the evidence was insufficient to have established the negligence of the appellee railway company, or that the negligence, if any, of that company was not the proximate cause of the death of appellant's wife, but may have considered that the evidence against the St. Louis Southwestern Railway Company was sufficient to show negligence which was the proximate cause of the death of Mrs. Hardin. We are of the opinion that these assignments are well taken, and, for the error in the respect pointed out, the judgment will be reversed.

The third assignment of error complains of the sixth paragraph of the general charge of the court, which also contained a statement that the negligence of the defendant aggravated the disease, when, as before stated, the charge should have been so framed as to submit the negligence of both railway companies; and in this respect paragraph 6 of the charge is erroneous.

There are some other objections to this charge. One is to the effect that the charge is without pleadings to support it. In answer to this, we simply state that we are of the opinion that it was permissible, under the general issue, for the railway company

to prove that the negligence, if any, did not hasten or cause the death of plaintiff's wife. There was evidence in the record, in our opinion, that justified the submission of this issue to the jury. We think the charge, other than in the error pointed out, was correct. Plaintiff's cause of action was, in the main, for damages resulting from the death of his wife. If, as a fact, at the time his wife sustained the injuries she was afflicted with a disease which would have caused her death, independent of the injuries sustained, as soon as she did die, and the jury believed that she did not die from the injuries, but from the disease, then, clearly, the jury would be authorized to find that the injuries were not the proximate cause of her death. Therefore it would follow that the plaintiff would not have sustained any damages for which he could recover by reason of the negligence alleged; that is, such damages as he seeks to recover, resulting from the death of the wife. Of course, the injuries sustained from the negligence may have caused the plaintiff to incur some expense with reference to the treatment of those injuries, for which the railway company would doubtless be liable.

The question presented under the fourth assignment of error will doubtless be corrected upon another trial. The appellant, under the evidence, was entitled to have submitted to the jury the injuries sustained by him personally, which the charge given in this case did not submit. Upon another trial the trial court will doubtless embrace this question in its charge.

We are inclined to the opinion that the evidence of the witnesses Belle Bunch and Mrs. Allie Hambrick was admissible. The declarations and statements of Mrs. Hardin concerning her condition were admissible as evidence against the appellant.

There was no error in the ruling of the court in declining to admit the testimony set out in the bills of exception under the appellant's 7th, 8th, 9th, and 10th assignments of error. The statements sought to be proven, made by Mrs. Hardin, were self-serving, and could not be admitted in favor of the plaintiff. They were not parts of the same statements that the court admitted the witnesses Bunch and Hambrick to testify to. Consequently they were not admissible as evidence to contradict these witnesses. Dr. Alton, the physician who examined her, it is true, testified as to the condition of Mrs. Hardin, the knowledge of which he obtained as the result of an examination; but the statements made by Mrs. Hardin as to how she was injured would not be admissible. So far as the evidence of the physician is concerned, the court makes this explanation: "The objection only went to the following answer: Mrs. Edna Hardin said she had taken cold on the train, caused by exposure before she reached Texarkana." And this is part of the excluded evidence which the

appellant claims the court erred in declining to admit. We find no error presented in these assignments.

We are of the opinion that appellant's eleventh assignment of error, as stated in his brief, but No. 14 in the transcript, is well taken. The belief or the opinion of the witness to the effect that Mrs. Brown and Mrs. Snyder would swear the truth was not admissible. The rule with reference to impeaching a witness is too well known to be repeated, and which was not observed by the trial court.

The thirteenth assignment of error is an attack upon the verdict of the jury as being contrary to the law and the evidence, which we need not consider, as we reverse the case upon other grounds.

For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

TEMPLE v. BRANCH SAW CO.*

(Court of Civil Appeals of Texas. May 31, 1905.)

1. JUDICIAL SALES — VALIDITY—VARIANCE AS TO DATE.

The fact that the date of a judicial sale as stated in the sheriff's deed varies from the date stated in the return indorsed upon the order of sale does not render the sale void.

2. TRESPASS TO TRY TITLE—PLEADING.

Where the petition in trespass to try title attacked the sheriff's deed under which defendant claimed on the ground that it was void, plaintiff was not entitled to relief on a showing that the deed was merely voidable.

3. JUDGMENT AGAINST DEFUNCT CORPORATION — COLLATERAL ATTACK.

A judgment against a corporation cannot be collaterally attacked on the ground that at the time it was rendered the corporation had ceased to do business and transferred its property to a trustee for the benefit of creditors.

Appeal from District Court, Cass County; P. A. Turner, Judge.

Action by T. L. L. Temple against the Branch Saw Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Chas. S. Todd and Geo. J. Armistead, for appellant. Figures & Pruitt, for appellee.

FISHER, C. J. This is an action of trespass to try title, in the usual form, by appellant against the appellee, for the land described in plaintiff's petition. The petition, in addition to the usual averments, contains this allegation: "The plaintiff's title to said land consists of a deed from the Atlanta Lumber Company, which is common source of title, to plaintiff, dated the 23d day of October, 1902; and defendant claims said land under a judgment, execution, and sheriff's deed, dated December 5, 1893, which proceedings, plaintiff alleges, are invalid and void on their face, and pass no title to defendant, as shown by the record thereof." Upon a trial the

*Rehearing denied June 28, 1905, and writ of error denied by Supreme Court.

court instructed a verdict in favor of appellee, upon which judgment was rendered.

The facts are as follows: The Atlanta Lumber Company is common source of title. The appellant holds under a deed from the Atlanta Lumber Company, executed and delivered to the appellant, Temple, of date October 23, 1902. Appellee's evidence of title is as follows: A petition in the suit of the Branch-Crooks Saw Company, against the Atlanta Lumber Company, No. 4,713, filed July 7, 1893; affidavit and bond in attachment, of date August 8, 1893, by the plaintiff in that suit against the property of the Atlanta Lumber Company. Writ of attachment was issued August 8, 1893, and the sheriff's return showed a levy upon the land involved in this suit, as the property of the Atlanta Lumber Company, on the 11th of August, 1893. On September 6, 1893, judgment was rendered foreclosing the attachment lien, the recitals of which judgment, substantially, are as follows: That the plaintiff appeared by its attorneys, and the defendant, having been duly cited, came not, but made default; that the plaintiff's demand being liquidated and proven by an instrument of writing for the sum of \$311, with interest, executed by the defendant, the court is of the opinion the plaintiff ought to recover. The judgment then proceeds to state that it is considered, ordered, and adjudged by the court that the plaintiff Branch-Crooks Saw Company, a corporation under the laws of the state of Missouri, do have and recover of and from the Atlanta Lumber Company, a corporation under the laws of the state of Texas, whose secretary and treasurer is D. J. Grigsby, the sum of \$311.08, with interest at the rate of 8 per cent. per annum from the maturity of said acceptance, with all costs of suit. And it further appearing to the court that the Atlanta Lumber Company has ceased to operate its business, and the effects of said company were turned over and delivered to T. L. L. Temple to pay the debts of said company, and the said Temple having been duly cited in this cause, and having failed to appear, the court is of the opinion that the plaintiff ought to recover of the defendant, T. L. L. Temple. It is therefore considered, adjudged, and ordered by the court that the plaintiff aforesaid do have and recover of and from T. L. L. Temple individually, the sum of \$311.08, with interest at the rate of 8 per cent. per annum from the maturity of the acceptance sued upon in this case, together with all costs in this behalf expended. Then the judgment proceeds to foreclose the attachment lien levied upon the land in controversy, and provides for an order of sale. Order of sale was issued on this judgment on the 10th of October, 1893, and the sheriff's return thereon shows that it came to hand on the 15th day of October, 1893, and was levied on the land in controversy on the 16th day of October, 1893; and, further, that the land was sold by him on the 7th day of November, 1893, and bid in

by the Branch-Crooks Saw Company for the sum of \$50. On December 5, 1893, the sheriff executed a deed to the Branch-Crooks Saw Company for the land in controversy. The deed recites that the sheriff, upon the 16th day of October, 1893, did levy upon and advertise for sale the land and premises described in the order of sale by giving public notice of the time and place of sale by causing an advertisement thereof to be posted at three public places in the county, one of which was the courthouse door of the county, for 20 days previous to the day of sale, and on the first Tuesday in December, 1893, within the hours prescribed by law, sold the land at public vendue in the county of Cass at the courthouse door thereof to the Branch-Crooks Saw Company for the sum of \$50. The return of sale indorsed by the sheriff on the order of sale is as follows: "Came to hand October 15th, 1893, and executed October 16th, 1893, by levying upon, seizing and taking into my possession the within described land; and further executed by advertising same to sell on the 7th day of November, 1893, and on that date was struck off to Branch-Crooks Saw Company for the sum of \$50, this being the highest bid for the same." It is stated in the brief of appellant that the 7th day of November, 1893, was the first Tuesday in the month. A deed of the Branch-Crooks Saw Company to Branch Saw Company, of date December 24, 1900.

Two assignments of error are presented in appellant's brief, which are as follows:

"(1) The court erred in overruling the plaintiff's objection to the admission of the sheriff's deed from I. H. Lanier, sheriff, to the Branch-Crooks Saw Company, because said deed showed on its face that it was made in pursuance of a sale of the land on the first Tuesday in December, whereas the return indorsed on the order of sale showed that the land was sold under said order of sale on the seventh day of November, and there is no evidence produced or offered to show that the sale under the order of sale, as shown by the return, was not in fact made as therein shown, nor was there any evidence offered or produced to show that the deed offered in evidence was made in pursuance of the sale under the order of sale, and the variance is material and fatal.

"(2) The court erred in directing a verdict for the defendant, because:

"First. The plaintiff showed a legal title and the right of recovery, unless the defendant proved a superior title; and the defendant failed to prove such a superior title, either legal or equitable.

"Second. The evidence introduced by the defendant in support of its claim of title, to wit, petition in the attachment suit of Branch-Crooks Saw Company v. Atlanta Lumber Company, and the judgment rendered in that case, showed on their face that the attachment proceedings and the judgment foreclosing the attachment lien were and are void, be-

cause it appears therefrom that at the time of the institution of said suit and the levy of said attachment, and the rendition of said judgment and the sale of said property, the said property was in the legal custody and control of an assignee or trustee for the benefit of all the creditors of the said Atlanta Lumber Company, to wit, in the hands of T. L. L. Temple, as such trustee, and was not subject to be seized by a writ of attachment.

"Third. Because the testimony shows many irregularities in the attempted judicial sale under which the defendant claims; that the amount bid thereon by the defendant was grossly inadequate, and that the sale ought to have been set aside as inequitable and voidable."

The court correctly admitted the sheriff's deed and the return indorsed upon the order of sale. It is true, there is no parol evidence in the record explaining the discrepancy between the date of sale as stated in the deed, and the date of sale as stated in the return. It is apparent that the sheriff made a mistake in stating the date of sale in either one of these two instruments, and we are inclined to the opinion that the return made upon the order of sale states the correct date at which the sale was made. That return is supposed to be the last official act of the sheriff in connection with the sale. He could not well have made the return and completed it so as to comply with the law until after the sale was actually made. But however, conceding that there is a discrepancy in the dates which cannot be explained upon this basis, we do not think that the sale would be void for that reason. The plaintiff's petition does not undertake to avoid the sale on the ground that it is voidable, but contends that the sale is absolutely void; and it is not framed with the view of obtaining the relief of the court in the event that the sale would be held to be merely voidable. Therefore we are of the opinion that the court committed no error in the ruling complained of.

These latter remarks will also, in the main, apply to the questions raised in the second assignment, especially the third question there presented. If there were irregularities in the sale, the petition should have been so framed as to raise these questions, which was not done.

It is admitted that the Atlanta Lumber Company is common source of title, and the facts in the record show that the appellee's title from that source is the oldest, and unless its title could be held to be void, it must, in view of the averments of the petition, prevail over that of the appellant, as the pleadings of the appellant are not framed so as to bring any issue into the case raising the question of appellee's title being merely voidable. Therefore we must hold that none of the grounds urged in the second assignment of error are well taken.

The second subdivision of that assignment presents a question which could not be raised

by the appellant in this case. It will be observed that in the judgment, as quoted in the findings of fact, against the Atlanta Lumber Company, the appellant, T. L. L. Temple, was a party thereto; and, if facts or conditions existed which would not have authorized a judgment in favor of the Branch-Crooks Saw Company against the Atlanta Lumber Company and against Temple, they should have been urged in that case. The judgment is not void upon its face merely by reason of the fact that the Atlanta Lumber Company had ceased to do business. Facts and circumstances might have existed which would have authorized the trial court in that case to have rendered judgment against the Atlanta Lumber Company, and against Temple as trustee of its funds and property, notwithstanding the fact that the Atlanta Lumber Company as a corporation had ceased to do business and its property had been transferred to Temple as trustee. If any circumstances existed which would have justified the court in declining to enter judgment against the Atlanta Lumber Company, they should have been urged by the defendants in that case, which the record shows was not done; and we are of the opinion that that judgment is not subject to the collateral attack now urged against it, for the reasons stated in the assignment.

We find no error in the record, and the judgment is affirmed. This conclusion relieves us of the necessity of passing upon the appellee's cross-assignments of errors.

Affirmed.

LATIMER et ux. v. ST. LOUIS SOUTHWESTERN RY. CO.

(Court of Civil Appeals of Texas. June 17, 1905.)

AFFIDAVITS—POWER OF FOREIGN NOTARY.

Under the express provisions of Rev. St. 1895, art. 7, subd. 2, an affidavit may be made before a notary public in another state.

Error from District Court, Franklin County; P. A. Turner, Judge.

Action by J. W. Latimer and wife against the St. Louis Southwestern Railway Company. There was judgment for defendant, and plaintiffs bring error. The writ of error was dismissed, and plaintiffs in error moved for a rehearing. Rehearing granted, and motion to dismiss overruled.

Wilkins & Vinson and R. E. Davenport, for plaintiffs in error. Glass, Estes & King, for defendant in error.

RAINEY, O. J. On a former day of this term we sustained a motion to dismiss the writ of error without written opinion, because the affidavit in lieu of a writ of error bond was made before a notary public in the state of Arkansas. This holding was based on the case of *Jenks v. Jenks*, 47 Tex. 220. Upon considering a motion for a re-

hearing, we have concluded that our former holding was error. The case of *Jenks v. Jenks*, though correct under the law then existing (1877), should not be followed, because since then the law has been changed, and now authorizes the making of affidavits before a notary public in another state. Rev. St. 1895, art. 7, subd. 2.

The motion for rehearing is granted, and the motion to dismiss is overruled.

LONGINO et al. v. WESTER.

(Court of Civil Appeals of Texas. June 14, 1905.)

VENDOR AND PURCHASER — FIXTURES—FENCING MATERIALS.

Timber cut from land and piled thereon for the purpose of building a fence does not pass on sale of the land.

Appeal from Palo Pinto County Court; W. E. McConnell, Judge.

Action by H. A. Longino and others against J. H. Wester. From a judgment for defendant, plaintiffs appeal. Affirmed.

H. E. Bradford, for appellants. J. W. Crudington, and W. H. Perine, for appellee.

FLY, J. Appellants sued appellee to recover 14,000 cedar pickets, of the value of \$700, and \$50 for pickets converted and used by appellee. The pickets were sequestered by appellants. A trial by jury resulted in a verdict and judgment for appellee. The pickets were cut by G. L. Dalton, who piled them in a certain place, to be used in fencing land that he afterwards sold to appellants. Land adjoining that which Dalton had sold appellants and the pickets were afterwards sold to appellee.

It is the general rule that chattels not attached to the land do not pass by a conveyance of it. *Griffin v. Jansen* (Ky.) 39 S. W. 43. In the case cited it was held that counters, meat racks, and an ice box used in grocery business and meatshop did not pass to a purchaser of the real estate where they are not mentioned in the deed or attached to the realty. In the case of *Peck v. Brown*, 5 Nev. 81, it was held: "Unless the right to the timber cut passed to the respondent by his patent, he had none, and it could only pass as a fixture on or appurtenance to the realty; but timber felled by the act of man, or wood cut, is personal property." See, also, *Devlin on Deeds*, § 1204, and authorities cited. A consideration of those cases shows that, even though the timber or other material had been cut or prepared with a view to attach it to the soil, it does not become a part of the realty unless actually attached thereto. *Carpenter v. Lewis*, 6 Ala. 682; *Cook v. Whitting*, 16 Ill. 480; *Harris v. Elliott*, 10 Pet. 25, 9 L. Ed. 333; *Leonard v. White*, 7 Mass. 6, 5 Am. Dec. 19. In the case of *Woodman v. Pease*, 17 N. H. 282, which is cited by *Devlin* in support of

his text, it is said: "But a chattel that is fit to be annexed to the freehold, and has been brought upon it with an intention on the part of the possessor to annex it, does not become a fixture unless actually annexed or placed in the position in which it is intended to be used, and in which it is adapted for use. These principles are so obvious, and admit of illustration so diversified and so familiar, that it is unnecessary to adduce authority or argument to sustain them. Their application to this case is very plain. The stone was brought into the yard by Peabody for the purpose of being devoted at a future time to the finishing of the house he had built. He intended to annex it to the house and make it a part of it. In that respect it was like bricks, lime, lumber, or other materials to be used in building. So long as they remain unannexed to the house they continue to be chattels, and assume the character of the realty, and become assimilated with the land by the process, whatever it may be, which prepares them for and places them in their positions to be used and enjoyed with the structure or with the soil." In this case the posts or pickets had been cut and placed on the land by Dalton to be used in building a fence. They were not so used, and were chattels at the time Dalton sold the land to appellants. The deed to the land did not pass the title to the pickets. In the absence of a special agreement in regard to the pickets, they remained the property of Dalton, and he had the right to sell them to appellee.

The charge of the court in regard to what was conveyed by the deed was more favorable to appellants than they were entitled to. No matter if the posts had been cut off the land bought by appellants, the moment they were severed from the soil they became personalty, and did not pass by a deed to the land, although they may have been cut to build a fence on the land. The charge fully submitted the question as to whether there was any special agreement as to the posts.

The judgment will be affirmed.

CHICAGO, R. I. & T. RY. CO. v. JONES.*

(Court of Civil Appeals of Texas. May 20, 1905.)

1. OPINION EVIDENCE—EFFECT OF INJURIES.

In an action by a husband for injuries to his wife, he may testify from his actual knowledge, derived from personal observation, as to the effect on the wife of her efforts to work, without qualifying as an expert.

2. RAILROADS — INJURIES TO PERSONS NEAR TRACK—EVIDENCE—SUFFICIENCY.

In an action for injuries alleged to have been occasioned by steam emitted from defendant's engine frightening plaintiff's horse, being driven by his wife along the highway adjacent to defendant's road, evidence held to sustain a finding that steam was emitted at

*Rehearing denied June 24, 1905, and writ of error denied by Supreme Court.

the time, and that defendant was negligent in regard thereto.

8. SAME—EXCESSIVE DAMAGES.

A verdict for \$6,375 in favor of a husband for injuries to his wife was not excessive where it appeared that she had been permanently injured, and suffered from traumatic neurosis, affecting her nervous system directly, and preventing her from performing her usual household duties, and that she was a strong woman, 39 years old, at the time of her injuries.

Appeal from District Court, Jack County; J. W. Patterson, Judge.

Action by T. J. Jones against the Chicago, Rock Island & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

N. H. Lassiter, Robert Harrison, and Stark & Groner, for appellant. Nicholson & Fitzgerald, for appellee.

CONNER, C. J. For the second time this case appears before us. On the first appeal the judgment in appellee's favor was reversed because of objectionable argument on the part of his counsel. See 81 S. W. 60. This appeal is from a judgment in the sum of \$6,375 awarded to appellee by the verdict of the jury as damages for personal injuries sustained by his wife.

The evidence shows that at the time alleged in appellee's petition his wife, together with a little son, was driving westward along a road adjacent to the right of way and railroad track of the appellant company; that one of appellant's trains proceeding eastward approached, and when about opposite appellee's wife emitted a loud blast of steam, which frightened the horse which she was driving, and caused him to run away, as a result of which the injuries complained of in the petition were received. The evidence sufficiently supports the verdict of the jury to the effect that this blast of steam was unnecessary, and constituted negligence as alleged. Such further statement of the facts as may be necessary will be made in connection with our disposition of the assignments of error.

While appellee was upon the stand testifying as a witness, he was asked the following question: "Please state what effects there are, if any, from any effort she [appellee's wife] makes at work?" to which the defendant objected "because said testimony was hearsay, irrelevant, and only the opinion of the witness, and he not an expert," which objections were overruled by the court, and the witness answered: "If she works to amount to anything at all, it affects her side. It makes her side hurt so to work, and makes her nervous, she has to lie down. She cannot work but a few minutes until she is so nervous she has to lie down." To all of which the appellant objected, and the matter thus stated is made the ground of the first assignment of error. We feel entirely unable to appreciate the force of the objections made to either the question or answers quot-

ed. The objections, as quoted from the bill of exception, appear to relate to the question alone; but, if construed as also relating to the answers, we see nothing in them. It was not necessary that the witness should be an expert in order to enable him to observe the actual results of an injury. The witness did not here attempt to repeat any language of his wife, but, for aught that appears to the contrary, was testifying upon one of the material issues in the case from actual knowledge derived from personal observation.

The second, third, fourth, fifth, sixth, and seventh assignments of error are equally untenable. Indeed, they are so obviously not well taken that we decline to discuss them seriatim, but now and here overrule each and all without further notice.

The only assignments that have occasioned us any hesitation are the eighth and ninth. It is insisted under the eighth assignment that appellant's motion for a new trial should have been granted, because the verdict of the jury is against the great preponderance of the evidence, in that the same shows that there was no steam emitted from the engine; and in the ninth it is insisted that the judgment is excessive. The evidence shows that the train in question was approaching a small station along appellant's railway, and the train crew testified that they intended to stop this train at the station to take on mail; that it was downgrade from the whistling board, which was something more than a quarter of a mile from the station; that the steam had been cut off at the whistling board, and the train was rolling into the station of its own momentum. The testimony tends to show that the weather was lowering and foggy; that the smoke of the engine settled toward the ground and blew toward the horse that became frightened; and it is appellant's contention that this was the cause of the horse's being frightened, and that no negligence whatever appears. The testimony on behalf of the appellee, however, is to the effect that the horse that appellee's wife and son were driving was a very gentle one, and accustomed to the usual noises made by locomotives; that the road upon which they were traveling had long extended alongside of the railroad track at the station in question; that just as they were opposite the engine a very loud blast of steam proceeded from the side of the engine, at which her horse became frightened and ran away, and appellee's wife was thrown out, sustaining the injuries complained of. Appellee's evidence tended to show that the blast of steam was perhaps not that usually made by "whistling" or "popping off steam," but a blast made by "blowing off steam" beneath the engine. Several witnesses testified that the noise made by the engine and steam on this occasion was unusual and very loud. The engineer testified that it was not necessary to blow off steam at the station, and no reason or apparent reason therefor is shown.

The evidence is clear that appellee's wife was traveling along the usual and only road upon which she could travel, and that appellant's employes must have known of the long continued use of this road by the public. So that we think the verdict to the effect that a loud blast of steam frightened the horse mentioned, and that appellant was guilty of negligence in this particular, is amply supported by the evidence.*

On the issue of excessiveness in the judgment we have had more hesitation, but have finally concluded that we cannot declare it to be excessive. Appellee's evidence is to the effect that at the time of the injury his wife was a strong woman, 39 years old, having a life expectancy of about 28 years, able to do all her housework and help her husband in the field; that she was picked up on the day of the injury, after having been thrown from the buggy, in an unconscious condition, with her head bruised and bleeding, and her whole side down to her feet bruised and in bad condition; that she then weighed 150 pounds, but has since lost 30 or 35 pounds of flesh; that since her injury she has not seen a well day; that she has suffered every day since she was injured; that she is substantially unable to perform her household duties or to pick cotton as she formerly did; that her menial services were worth to appellee \$15 per month prior to her injury, and substantially nothing since; some \$20 worth of medicine was reasonably and necessarily administered. The attending physician testified that he had been a practicing physician for 30 years; that he had been treating Mrs. Jones for more than a year, and made several careful examinations; that she was suffering from traumatic neurosis, which was often fatal; that this trouble affects the nervous system directly, and the rest of the system indirectly; that Mrs. Jones' injuries were permanent; and that he almost knew this fact, the one feature so confirming him in this opinion being the fact that Mrs. Jones was constantly losing flesh. As stated, we think we must sustain the judgment. See *M. K. & T. Ry. Co. v. Nail* (Tex. Civ. App.) 58 S. W. 165; *Railway Co. v. Randall*, 50 Tex. 261; *Railway Co. v. Elkins* (Tex. Civ. App.) 54 S. W. 931, and authorities therein cited.

It is ordered that the judgment be in all things affirmed.

McKINLEY v. FRIO COUNTY.*

(Court of Civil Appeals of Texas. May 31, 1905.)

CERTIORARI—NATURE OF REMEDY—ENFORCEMENT OF OFFICIAL DUTY.

Certiorari will not lie to compel a county clerk to transmit to the district court a transcript of proceedings in connection with the opening of a road.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 5, 33-35.]

*Rehearing denied June 28, 1905.

Appeal from District Court, Frio County; E. A. Stevens, Judge.

Action by W. W. McKinley against Frio county. From a judgment dismissing the action, plaintiff appeals. Affirmed.

W. A. H. Miller and Magus Smith, for appellant. Maney & Spann, for appellee.

FLY, J. This is an appeal from a dismissal of a suit for damages arising from a road being opened across the land of appellant. In the record there appears an original petition that was filed in the district court, and from which it would seem that the suit was an original one in the district court for \$1,000, alleged to have accrued by reason of a public road being opened up by the commissioners' court across appellant's land. That petition was filed on May 17, 1904. On November 29, 1904, appellee filed a general demurrer and general denial, and on the same day the general demurrer was sustained by the court, and the cause dismissed. Up to the time of the dismissal of the cause nothing had been filed in the district court that indicated that the cause was appealed from the commissioners' court, but the pleadings indicated an original suit for \$1,000. On December 2, 1904, after the demurrer to the petition had been sustained, appellant applied to the district court for a writ of certiorari, in which application it was alleged that the commissioners' court had appointed a jury to assess the damages for a road opened across appellant's land; that the damages had been assessed by the jury at \$500, but that the amount had been reduced by the commissioners' court to \$200; that appellant had appealed to the district court and that no transcript had been sent up by the county clerk. Appellant prayed for a writ of certiorari commanding the county clerk to transmit to the district court a transcript of all proceedings in connection with the road, as well as all the original papers. Appellee moved the court to dismiss the application for certiorari because the cause had been dismissed, and no transcript from the lower court had been filed in the district court. The motion was sustained. This appeal is perfected from the last order of dismissal.

In article 4693, Sayles' Ann. Civ. St. 1897, it is provided that the owner of land, in case he is not satisfied with the assessment of damages made by the commissioners' court, may appeal as in cases of appeal from justice's court. In appeals from the last-named court the party appealing shall within 10 days from the date of the judgment file a bond in double the amount of the judgment. The filing of the appeal bond perfects the appeal. Upon the filing of the appeal bond it is made the duty of the justice of the peace to make out a true and correct copy of all the entries on his docket, and certify to it, and transmit the same, with a certified copy of the bill of costs and the original

papers, to the county clerk. If practicable, the transcript should be transmitted to the county clerk on or before the first day of the next term of the court. In this connection it may be said that a writ of mandamus will be awarded to compel the justice of the peace to send up the papers required by statute. *Railway v. Dyer*, 2 Willson, Civ. Cas. Ct. App. § 312. No appeal bond seems to have been on file in the district court approved by the county clerk, and no effort was made to have it put on file, although counsel for appellant swore that he had deposited an appeal bond with the county clerk on May 14, 1904. What that bond contained does not appear in the record. The application for the writ of certiorari to compel the county clerk to make out a transcript was properly denied. Writs of certiorari are granted to perfect imperfect records, but they cannot perform the office of writs of mandamus. They can make certain that which was uncertain, but they cannot create. Such a writ may also serve the purposes of appeal, as provided in title 15, Sayles' Ann. Civ. St. 1897, but it cannot be invoked to accomplish what appellant sought to accomplish by it. The record in this case shows that appellant had filed an original suit for damages in the district court, and to all intents and purposes had abandoned the appeal from the commissioners' court, no reference to such appeal being made in the petition. A general demurrer was sustained to that petition, and then for the first time, over six months after the commissioners' court had acted, it was made known to the court through the medium of an application for a writ of certiorari to compel the county clerk to make out a transcript, that an appeal had been attempted to the district court.

There is no error in the judgment of the district court, and it is affirmed.

TEXAS & P. RY. CO. v. ARNETT.

(Court of Civil Appeals of Texas. June 10, 1905.)

1. CARRIERS—CONTRACTS TO FURNISH CARS—EVIDENCE—SUFFICIENCY.

Evidence that a railroad's agent, when applied to on October 30th to furnish cars, accepted the order, and said that he would have the cars ready by the 1st of November, if possible, but did not promise definitely to do so, was insufficient to establish a contract to furnish the cars on the 1st of November.

2. SAME—PLEADING—VARIANCE.

Where a petition alleged the breach by a railroad of a contract to furnish cars on a specific date, it was error to submit to the jury the issue, raised only by the evidence, of a negligent delay in furnishing cars.

3. DAMAGES — MARKET VALUE—EVIDENCE—HEARSAY.

Testimony of market value of cattle at a certain place, based on information received from others, is hearsay and incompetent.

4. SAME—NECESSITY OF PLEADING.

In an action against a railroad for failure to furnish cars for the shipment of cattle ac-

cording to contract, there can be no recovery for horse hire made necessary by the holding of the cattle during the delay, where such item is not pleaded.

Appeal from Martin County Court; Bailey Anderson, Judge.

Action by G. M. and W. T. Arnett against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Ellis Douthitt, for appellant. R. N. Grisham, for appellees.

SPEER, J. This is a suit by appellees against appellant to recover damages in the sum of \$793 for alleged breach of contract to furnish four cars on November 1, 1903, for the shipment of 120 head of cattle from Stanton, Tex., to Los Angeles, Cal. The trial resulted in a verdict and judgment in favor of appellees for the amount sued for.

The case must be reversed because of the error of the court in submitting to the jury the issue whether or not appellant agreed to furnish the cars on November 1st, since there is no evidence in the record which would justify the submission of such issue. The testimony relied upon by appellees is that of G. M. Arnett, who testified as follows: "I made the order for cars in question on the 30th day of October, 1903. I told D. W. Kyle (appellant's agent) that I wanted four cars for the shipment of my cattle to Los Angeles, California. He accepted my order. I do not remember what he said, but think he remarked, 'I will furnish them if I can.' When I talked to Mr. Kyle in ordering the cars, he told me that he would have the cars according to my order if he could. He did not tell me that there was a shortage in cars at the time. He did not promise definitely to have the cars for me by the 1st of November, but only said he would have them for me if he could." Kyle testified that he did not promise to furnish the cars on any particular day. This evidence, we think, is entirely insufficient to establish a contract to furnish cars on November 1st.

The court also erred in submitting to the jury the question whether or not appellant negligently delayed furnishing cars on appellees' order. No such case was made by the pleadings, which, as before stated, alleged a contract to furnish cars on a specific date. There is much evidence tending to show negligence, but this can not help the matter. The case pleaded was not proved, and that proved was not pleaded.

The court should not have permitted the witnesses Arnett and Norred to testify as to the market value of the cattle in Los Angeles, Cal., based upon information received from what others at that place told them about it. This was pure hearsay, and should have been excluded upon appellant's objection. *Southern Pacific Ry. Co. v. Maddox* (Tex. Sup.) 12 S. W. 815; *Texas & New Orleans Ry. Co. v. White* (Tex. Civ. App.) 62

S. W. 183; Cameron Mill & Elevator Co. v. Anderson (Tex. Civ. App.) 78 S. W. 971. Without evidence as to the market values of cattle at the place of destination, the court would not, of course, have any basis for the submission of the proper measure of damages in the case.

On another trial the court should not submit separately the item of horse hire necessary to the holding of the cattle during the delay, since such item was not pleaded, but should only submit those items which were both pleaded and proved.

While the evidence seems to have established that appellees were deprived of the benefits of a sale of their cattle previously entered into with one Bliss of Los Angeles, of which contract appellant had notice, yet the court seems not to have submitted this matter for the consideration of the jury in estimating appellees' damage, but by the charge in effect limited them in their recovery by the market value of the cattle at Los Angeles.

Reversed and remanded.

PITTSBURG PLATE GLASS CO. v. ROQUEMORE et al.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. ACCOUNTS — INTRODUCTION IN EVIDENCE — INSUFFICIENCY.

A verified account, attached as an exhibit to the petition, is properly excluded from evidence where it does not indicate the items thereof, nor their nature, so that it cannot be told therefrom whether it refers to matters that may be proved by a sworn account under the statute or not.

2. SAME — PREPARATION FOR AGENT — USE AGAINST PRINCIPAL.

A verified account made out against an agent of an undisclosed principal, and attached as an exhibit to the petition, is evidence only against the agent, and cannot be used against the principal on the disclosure of him by the agent.

3. PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL—ACTIONS—EVIDENCE.

In an action against an agent of an undisclosed principal and the principal, testimony of the agent that he bought the goods on his own account, but really bought them for the principal, whom he did not disclose because by buying the goods in his own name he could get them at a lower figure, was competent, and sufficient to make a case both against the agent and against the principal.

4. TRIAL — OFFERS OF PROOF—TIME OF MAKING.

An offer of competent evidence sufficient to establish plaintiff's case should not be excluded because made after plaintiff has rested and the court is in the act of writing a peremptory instruction for defendant.

5. SAME—DISCLOSURE OF PRINCIPAL—ACTIONS AGAINST AGENT AND PRINCIPAL—ELECTION OF JUDGMENT.

Where suit is brought against the agent of an undisclosed principal, and the agent discloses his principal, who is thereupon brought in as a party, and plaintiff establishes a case both against the agent and against the principal, he must elect which of the two he will ask judgment against.

88 S.W.—29

Appeal from Potter County Court; Lon D. Marrs, Judge.

Action by the Pittsburg Plate Glass Company against O. G. Roquemore and others. From a judgment for defendants, plaintiff appeals. Reversed.

Robert E. Cofer, and L. C. Barrett, for appellant. Turner & Boyce, for appellee.

JAMES, C. J. Appellant sued Roquemore, alleging a sale to him of goods, wares, and merchandise of the value of \$399.75, and referring to a verified account made out against him, and attached as an exhibit as a part of the petition. Roquemore answered by general denial, and by special plea alleging that, if plaintiff sold him the goods, he bought them, not for himself, but for Lightburne & Co., a partnership composed of S. Lightburne and others, naming them; that he was engaged as an architect and superintendent for them in reference to a certain building; that he was acting solely by employment of said firm, and bought the goods at their special instance and request, and that he did so because, being a professional architect and builder, he was able to buy same cheaper than he could in the name of Lightburne & Co., etc.; that said goods were delivered to said firm of Lightburne & Co., and by them appropriated to their sole use and benefit; and that they promised him that he would be held harmless on account of the purchase price of said goods, and that they are therefore liable to him; and prayed that they be made parties, and that he have judgment over against them, etc. Plaintiff filed a supplemental petition, whereby it adopted the allegations of Roquemore's aforesaid plea, and alleged that, the allegations thereof being true, he (Roquemore) was acting in making the purchase for and on behalf of Lightburne & Co., etc., and they became liable to pay plaintiff for the same, and prayed judgment against the members of said firm as well as against Roquemore. Lightburne & Co., in addition to demurrers, pleaded general denial, the statute of two-years limitations, and statute of frauds.

We do not deem it necessary to discuss the action of the court upon the demurrers, as our views will sufficiently appear from a discussion of the action of the court upon the evidence. The court refused to allow plaintiff to introduce in evidence the verified account. In this, we think, the court did not err, the account in itself not indicating the items nor their nature; and hence it could not be told therefrom that it had reference to matters that could be proved by a sworn account under our statute. In any event, the account, if properly prepared and sworn to, could only have been used as evidence against Roquemore. Plaintiff, however, offered to prove by Roquemore as follows: That the money sued for was due and owing by him; that he got the goods; that he bought them

on his own account, and that he really bought them for Lightburne & Co., but did not disclose that fact to plaintiff; that he bought the goods for Lightburne & Co., because by buying them in his own name he could get them cheaper than he could have done had he let it know he was buying them for some one else. Also that he (Roquemore) had admitted to plaintiff that he owed the money sued for. The court refused to permit this proof to be made, and peremptorily directed the jury to find for defendants. The testimony was clearly admissible, and would have been sufficient to make a case against Roquemore. It was also proper and sufficient to make a case against Lightburne & Co. Hence the court erred in refusing to admit it and in giving the peremptory instruction. It made no difference that plaintiff had rested its case, and that the court was in the act of writing the peremptory instruction, when plaintiff requested to be allowed to make such proof, which we infer from the bill of exceptions was the reason why the court so ruled. The judgment will therefore be reversed, and the cause remanded.

In view of another trial, we may properly refer to the case of *Heffron v. Pollard*, 73 Tex. 100, 11 S. W. 185, 15 Am. St. Rep. 764, and the principle there decided. As the pleadings in this case were drawn, Lightburne & Co., if liable at all, were liable as undisclosed principals. In such a case plaintiff could not recover judgment against both Roquemore and Lightburne & Co. for the debt, but, if plaintiff should succeed in making proof of undisclosed principal as offered, it would have to elect which of the two it would ask judgment against.

Reversed and remanded.

McFARLAND v. GULF, C. & S. F. RY. CO.*
(Court of Civil Appeals of Texas. June 10, 1905.)

1. RAILROADS—FIRES ALONG RIGHT OF WAY—PROXIMATE CAUSE.

Where the employes of a railroad company negligently allow sparks from a locomotive to fall on buildings so as to destroy them, the negligence is the proximate cause of the loss of the property.

2. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for damages from the destruction of property by fire communicated by defendant's locomotive, evidence held not to justify submission to the jury of the question whether plaintiff was guilty of contributory negligence.

3. SAME—EVIDENCE—PREVIOUS FIRES.

Where, in an action against a railroad company for damages caused by the burning of a barn by fire alleged to have been communicated by defendant's locomotive, defendant's evidence tended to prove that the only locomotive which could have caused the fire was in good repair and fitted with the most approved spark arrester, evidence that some one of defendant's locomotives had caused a fire a few days before

that sued for was inadmissible, there being nothing to show that the two fires were caused by the same locomotive.

4. SAME—CARE OF ENGINEER.

In an action against a railroad company for damages caused by a fire alleged to have been communicated by one of defendant's locomotives, the engineer in charge of the locomotive which it was alleged caused the fire testified that his engine did no hard puffing at the point where the fire originated, and could not have caused the fire. Held, that evidence that he was a cautious engineer, very careful about allowing sparks to escape, was irrelevant.

5. APPEAL—CURING OF ERROR.

Error in the admission of irrelevant evidence is cured by the subsequent admission, without objection, of similar evidence.

Appeal from Fannin County Court; T. C. Bradley, Judge.

Action by O. S. McFarland against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

J. G. McGrady, for appellant. Thurmond & Steger, for appellee.

TALBOT, J. Appellant, McFarland, sued appellee to recover damages for the destruction of his barn, and personal property situated therein, alleged to have been caused by fire started from sparks negligently permitted to escape from appellee's engine. Appellee pleaded the general issue, contributory negligence, and specially that it was operating, at the time and place where the fire occurred, engines properly constructed and equipped with the best appliances in use for preventing the escape of fire, and that said engines and appliances were in good repair and condition, and carefully and skillfully handled, as regards the escape of fire, by competent, skillful, and experienced engineers. The case was tried before a jury, and a verdict and judgment rendered for appellee, from which appellant has appealed.

1. The court, at the request of appellee, charged the jury as follows: "Plaintiff cannot recover in this case unless he proves by a preponderance of the evidence that all or a part of the property mentioned in his petition was destroyed through the negligence of defendant or its agents or employes, and that such negligence, if any, was the proximate cause of the loss of said property." This charge is assigned as error. The ground of objection, as stated in the assignment, is that "the undisputed facts showed that, if the property was destroyed by the negligence of defendant or its employes, such negligence was the proximate cause of the loss, and it was error to submit the question of proximate cause to the jury." If appellee's agents and employes negligently permitted sparks to escape from its engine, and the same fell upon appellant's barn and destroyed it, such negligence was necessarily the proximate cause of the loss of his property, and, under the holdings of our Supreme Court in the cases of *Railway Co. v. McCoy*,

*Rehearing denied June 24, 1905.

90 Tex. 284, 38 S. W. 36, *Railway Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756, and *Culpepper v. Railway Co.*, 90 Tex. 627, 40 S. W. 386, we think the said charge error and should not have been given. *Railway Co. v. Tonahill* (Tex. Civ. App.) 41 S. W. 875.

2. The following charge of the court is assigned as error: "If you believe from the evidence that plaintiff failed to exercise ordinary care to prevent his property being destroyed by fire, and if you further so believe that such failure of plaintiff, if any, was a proximate cause of the loss of his property, then you will find for defendant, no matter how negligent you may believe the defendant to have been." Appellant contends that the evidence did not raise the issue of contributory negligence on the part of appellant, and that it was error for the court to instruct the jury on that question. We have carefully examined the testimony, and are clearly of the opinion that this contention should be sustained. Appellant's barn, according to the uncontroverted evidence, was situated about 200 feet from appellee's railroad track, and, in so far as the evidence shows, he was using it in the usual and ordinary way. The testimony does not show any such condition of the barn itself, or exposure of the inflammable material situated therein, as authorized a finding that he was guilty of such negligence in failing to maintain and protect his property from the probable escape of fire from passing engines, as would defeat his right of recovery, if otherwise entitled to do so. There is no pretense that appellant was not justified in building his barn where situated, and in placing his hay and other personal property therein. Such contention, if made, would be wholly untenable, and, as said in *Railway Co. v. Crabb*, 80 S. W. 408, 10 Tex. Ct. Rep. 17, "The rule that the owner of property adjacent to a railroad must exercise ordinary care in the management thereof to protect it from fire does not require him to discontinue the ordinary beneficial use of such property, although such use might increase to some extent the hazard from fire." Only such use was appellant making of his property in this instance, so far as disclosed by the record. That the doors of the barn may have been open just a short time before the fire was discovered, and appellant had permitted other parties to place property in the barn and gave them access thereto, as shown by the evidence, was not inconsistent with the use appellant was authorized to make of said barn, and was insufficient to raise the issue of contributory negligence. It does not appear that by reason of the doors being open, or from any other cause, the hay or any other combustible material stored in the barn was exposed in such a way as to render its ignition from sparks of fire emitted from appellee's engines probable. Nor do we think the evidence tends to show that appellant was negligent in respect to the saving of his personal prop-

erty, situated in the barn, after the fire was discovered, and hence the court erred in that paragraph of his charge attacked by appellant's sixth assignment of error, wherein appellant's right to recover damages for personal property burned is limited to such property only as could not have been rescued by the exercise of ordinary care.

3. There was no error, in our opinion, in the exclusion of the testimony of the witness Skelton to the effect that, a few days prior to the burning of appellant's barn, sparks emitted from one of appellee's engines set fire to a pile of shucks about 100 feet from appellee's railroad track in Ladonia, Tex. The undisputed evidence showed that engine numbered 201, pulling an extra freight train, was the only engine that could possibly have set fire to appellant's barn. Appellee did not allege, nor did the evidence offered by it tend to show, that all of its engines at the time appellant's property was destroyed were in good repair. There was testimony offered tending to show that all of its engines were provided with spark arresters of the same pattern, but proof that such arresters were in good condition and repair at the time of the fire complained of was limited to a few which had been recently inspected, including No. 201, and their respective numbers were given. The bill of exception reserved to the court's action in excluding the evidence mentioned shows that the witness did not know what engine set fire to the shucks, and there was no evidence whatever from any other source tending to show that the engine Skelton saw sparks escape from and set fire to the shucks was the engine charged to have fired the barn in question, or either of those recently inspected. Nor was there any testimony tending to show the condition of the spark arrester of the engine that set fire to shucks, or the manner in which it was handled at such time. We think the rule laid down in the case of *Railway Co. v. Home Ins. Co.* (Tex. Civ. App.) 70 S. W. 999, on motion for rehearing, and in the case of *Texas Midland Railroad v. Moore et al.*, 74 S. W. 942, 7 Tex. Ct. Rep. 926, to the effect that, where the engine is identified and could have been the only one which caused the fire complained of, the only pertinent inquiry is as to the construction, condition, and operation of that particular engine, and that in such case evidence of fire set out by other is inadmissible, is the correct one. Especially do we think such rule applicable to the facts of this case. *Shearman & Red. Neg.* (5th Ed.) § 675.

We are of the opinion that the court erred in permitting the witness Boyde to testify, over the objections of appellant, that the engineer in charge of the locomotive claimed to have set fire to appellant's barn was "a very competent and cautious engineer; that he was cautious and careful, in operating his engine, with reference to preventing the escape of fire or sparks or cinders." Appel-

lant offered testimony tending to show that after the train pulled by engine No. 201 stopped at Ladonia, and just before the fire was discovered, it was started again to do some switching, and, as it did so, loud puffing from its exhaust was heard. The engineer in charge testified on the trial, and stated that his engine "did no hard puffing, and made no loud noise from its exhaust, while at Ladonia. I operated said engine on said occasion as best I knew. It was impossible for it [the barn] to have caught from my engine as steam was shut off a mile back, and no sparks were being thrown." Neither the competency of the engineer nor his credibility was in issue, and evidence that he was a cautious engineer and in the habit of exercising care and caution in the operation of his engine to prevent the escape of sparks was inadmissible, under the facts, to show that on the occasion in question he prudently managed and controlled his engine. *Ry. Co. v. Johnson*, 92 Tex. 380, 48 S. W. 568; *Mayton v. Sonnesfield* (Tex. Civ. App.) 48 S. W. 608. We think, however, the error in the admission of this testimony was cured by testimony of a like character admitted without objection, but deem it best, inasmuch as the case will have to be reversed on other grounds, to express our views on the question, that a repetition of the error may not occur upon another trial.

For the reasons indicated, the judgment is reversed, and cause remanded.

GULF, C. & S. F. RY. CO. v. HARBISON.*

(Court of Civil Appeals of Texas. May 24, 1905.)

1. DAMAGE TO CROPS AND REALTY—VERDICT—EXCESSIVENESS.

In an action against a railroad for injury to crops and realty by overflows, plaintiff testified that he had 70 acres in cotton in each of two years in question, which would have made a bale to the acre, and his part was half; that his tenant was to be at all expense of raising, gathering, and marketing; that cotton was worth 7 or 8 cents per pound at the time of the alleged destruction of his crops; that a bale of cotton weighs 500 pounds; that he would have received from the land seven or eight tons of cotton seed, worth from \$12 to \$16 per ton; that he only received two or three little mud bales; that his land was in good condition and in a good state of cultivation prior to the overflow; that the overflow covered it with mud and drift, and filled up his ditches; that it cost him at least \$250 to put it back in the condition it was prior to the first overflow after that overflow, and would cost the same to clear up and open the ditches; that he hadn't done this since the last overflow. *Held*, that a verdict for plaintiff for \$500 was not excessive.

2. RAILROADS — CULVERTS — INJUNCTION — SUFFICIENCY.

Under Sayles' Ann. Civ. St. 1897, art. 4436, providing that in no case shall any railroad construct a roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof, a mandatory injunction command-

ing a railroad to remove a dam, and ordering it to construct all necessary culverts and sluices in its embankment across a certain creek bottom as the natural lay of the land adjacent thereto may require for the necessary drainage thereof, is not objectionable as failing to point out specifically and show the railroad what additional sluices and culverts it would be necessary to make to comply with the judgment of the court.

3. OPINION EVIDENCE — QUALIFICATION OF WITNESS.

Witnesses who were not shown to have known anything as to the effect on the natural flow of the water of a stream by the construction of an embankment adjacent thereto, nor whether there was any difference in the volume or velocity of the water as it flowed over plaintiff's land before and after the construction of the embankment, were not qualified to give their opinions on the subject.

4. WATERS—OVERFLOW—DAMAGES.

In an action against a railroad for injury to crops and realty by overflows alleged to have been caused by insufficient drainage, where the plaintiff was not seeking to recover on the ground that the sediment had injured his land, it was immaterial that the sediment would not tend to injure his land, but would increase its value.

5. SAME—EVIDENCE—ADMISSIBILITY.

In an action against a railroad for injury to crops and realty by overflow of a stream in which it had constructed a dam, evidence that after the institution of the suit the defendant removed a portion of the dam, that after its removal an overflow of the stream higher than ever before known had occurred, and that the water passed off of plaintiff's land and the stream got within its banks sooner than would have been the case, had the dam been in the stream, was admissible for the purpose of showing the difference in the action of the water during overflows with the dam in the creek and with it out, and that the part remaining obstructed the flow of water, and contributed to injuries caused by the overflow.

6. SAME — OBSTRUCTION — LIABILITY — MEASURE OF RECOVERY.

The mere fact that an overflow of an upper riparian owner's land would have occurred in the absence of a dam in the stream, and an embankment negligently constructed adjacent thereto, does not excuse the wrongdoer from liability for the additional damage to the riparian owner's crops and realty caused by insufficient culverts or openings to permit the water naturally flowing in the stream to pass off in its natural way, resulting in the accumulation of water above the obstructions flowing across the land in greater volume and with greater speed, and remaining on the land longer than it would, had the obstructions not been there.

7. APPEAL—ASSIGNMENTS OF ERROR—BRIEFS — SUFFICIENCY.

Where 23 pages of appellant's brief were devoted to the statement under its first assignment of error, which embraced practically all of the evidence in the record, subsequent assignments of error, followed by no other statement than a reference to the statement under the first assignment will not be considered, in view of rule 81 for the Courts of Civil Appeals (67 S. W. xvi), requiring each proposition under an assignment to be followed by a brief statement in substance of such proceedings or part thereof contained in the record as will be necessary and sufficient to explain and support the proposition.

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Action by F. Harbison against the Gulf, Colorado & Santa Fé Railway Company.

*Rehearing denied June 23, 1905.

From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant. Hale, Allen & Dohoney, for appellee.

EIDSON, J. This suit was originally filed in the Eighth Judicial District, Delta county, and by agreement same was transferred to the Sixty-Second Judicial District, in Lamar county. The suit was brought by the appellee to recover damages for injuries to crops and realty by reason of two overflows of Sulphur creek, occurring in September 1902, and July, 1903; it being alleged that appellee's land was caused to overflow and the crops to be destroyed by reason of insufficient culverts and openings, and by reason of a high dump or embankment erected by the railroad company under and along its tracks crossing said creek; it being charged that the railway company was guilty of negligence in the premises. Appellee alleged in substance that he owned about 77 acres of land in Sulphur bottom, in Delta county, just below appellant's railroad; that appellant constructed a dump or embankment for its roadbed about 8 or 10 feet high across Sulphur bottom, a distance of about 1½ miles; that it put a dam in Sulphur for the purpose of storing up the water for its use, and in the construction of its roadbed and embankment it built two culverts in the bottom, one on the Lamar and one on the Delta county side of the creek, but that said culverts were too small, and not sufficient to admit the passage in its natural way of the water that flows down said bottom during overflows; that the aforesaid dam had caused the channel of the creek to fill up with mud and drift, and prevented the creek from carrying off the water in its natural way, and caused it to overflow the bottom; that, when the creek overflowed, the obstructions caused by dam and embankment, without sufficient culverts and openings, caused the water to accumulate and back up above the railroad, and forced it through the culvert in a strong stream, onto and across appellee's land, and destroyed his crops, and covered his farm with mud and drift, and filled up his ditches, to his damage, and that by reason of the obstructions and insufficient openings the water was accumulated and held above said embankment, and an unnatural current was created, that washed and damaged his land and crops, and large quantities of water were thereby run upon appellee's land, that but for such obstructions and insufficient openings would not have run there. Appellant answered by general demurrer and general denial. The case was tried before a jury, and resulted in a verdict and judgment in favor of appellee in the sum of \$500. Further judgment was entered requiring the railway company to remove from the bed and channel of Sulphur creek the dam which remained therein.

Appellant presents in its brief first what it

claims to be fundamental error, and contends that the judgment rendered herein is and was an absolute nullity, and that the court never acquired jurisdiction of the subject-matter in dispute, and that no proper or legal judgment could be or was rendered, because the act of the Legislature creating the Sixty-Second Judicial District was and is unconstitutional and void. The question raised by this assignment was decided adversely to appellant's contention in the case of *Railway Co. v. Hall* (Tex. Sup.) 85 S. W. 786.

By its first assignment of error, appellant insists that the verdict of the jury is not supported by the evidence. We are of the opinion that there is testimony in the record tending to show, and from which the jury was authorized to find, that the dam in the channel of Sulphur creek, and the embankment along through the bottom of said creek, and the insufficient openings in the embankment caused at least a portion of the damage suffered by appellee. The testimony tended to show that the water did not pass off in its natural way, and that although appellee's land would have been overflowed, had there been no dam or embankment there, his injuries were greatly increased by reason of the water being caused to stand on his crops longer than it would have otherwise, and on account of the water flowing through the culverts more rapidly over his land than it would have in the absence of such embankment and dam, and thereby washing his land and filling up his ditches.

Appellant's second assignment of error complains of the verdict of the jury upon the ground that the amount found in favor of appellee is excessive. We do not agree with appellant in this contention. Appellee testified that he had 70 acres in cotton both in 1902 and 1903, which would have made a bale to the acre, and his part was half; that his tenant was to be at all expense of raising, gathering, and marketing; that cotton was worth 7 or 8 cents per pound at the time of the alleged destruction of his crops, and that a bale of cotton is 500 pounds; that he would have received from said land seven or eight tons of cotton seed, worth from \$12 to \$16 per ton; that he only received two or three little mud bales; that his land was in good condition and in a good state of cultivation prior to the overflow; that the overflow covered it with mud and drift, and filled up his ditches; that it cost him at least \$250 to put it back in the condition it was prior to the first overflow after that overflow, and it will cost the same to clear up and open up the ditches; that he hadn't done this since the last overflow. We are of the opinion that the jury were justified, in view of this testimony of appellant, in connection with the other testimony tending to show the difference in the effect of the overflow upon appellee's lands and crops after the construction of the embankment and dams by appellant,

and what would have been the effect of such overflow in the absence of such dam and embankment, in finding that appellee's crop and land were damaged to the extent of \$500, the amount of the verdict.

Appellant's third assignment of error complains of the action of the court in rendering judgment on the verdict of the jury, enjoining appellant from further obstructing and interfering with the natural flow of the water in said bottom, and from further impeding, obstructing, or interfering with the drainage, etc., and ordering that a mandatory writ of injunction be issued to the appellant, commanding it to remove the portion of the dam remaining, and ordering it to construct all such necessary culverts and sluices in its embankment across said Sulphur creek bottom as the natural lay of the land adjacent thereto may require for the necessary drainage thereof. Appellant's grounds of complaint are that the verdict and finding of the jury are without evidence to support them, and that the judgment is too vague, ambiguous, and uncertain, in that it does not point out specifically and show the appellant what additional sluices and culverts it would be necessary to make in order to comply with the judgment of the court. Article 4436, Sayles' Ann. Civ. St. 1897, provides as follows: "In no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof." The statute imposes upon a railroad company the duty of first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof, before it has the right to construct its roadbed, or, rather, complete the construction of its roadbed. This being true, if it fails to construct sufficient culverts and sluices for the necessary drainage of the land over which its roadbed is being constructed as the natural lay of the land requires, and damage to the property of others results from such failure, an injunction will lie to compel such railroad company to construct the necessary culverts or sluices; and in the event the railroad company has constructed a dam across the channel of a stream over which its road passes, and such dam creates a nuisance by diverting the water from its natural channel and causing it to overflow and injure the lands of adjacent proprietors, an injunction will lie in favor of such proprietors against the railway company to compel the removal of such dam. *I. & G. N. R. Co. v. Davis* (Tex. Civ. App.) 29 S. W. 483; *Railway Co. v. Tait*, 63 Tex. 226; *Clark v. Dyer*, 81 Tex. 342, 16 S. W. 1061; *Sullivan v. Dooley* (Tex. Civ. App.) 73 S. W. 84; *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994. And as the statutory provision imposes upon the railroad company the absolute duty to construct sufficient culverts or sluices for the necessary drainage of the land according

to the natural lay thereof, it is the duty of the railroad company to ascertain what is necessary to accomplish this purpose, and it does not devolve upon those who have been injured by the railroad company's neglect of this statutory duty to show it how to perform that duty. The jury having found that the portion of the dam remaining and the embankment and culvert cause and will cause to appellee injury in the future, as complained of by him, and there being evidence to support such finding, there was no error in the action of the court below in decreeing and directing a mandatory injunction requiring the appellant to remove such dam, and to construct the necessary culverts or sluices.

Appellant's fourth assignment of error complains of the action of the court in permitting appellee, over its objections, to testify to the number, length, and depth of ditches on his premises, and as to the expense necessary to have them cleaned out and put in same condition as they were prior to the overflow, on the ground that there was no allegation in appellee's petition as to the number, length, and depth of same, or what would be the cost of digging same prior to the overflow. Appellee alleged in his petition "that by reason of said overflow of September 19, 1902, his ditches on said land were filled up, and his land badly washed and damaged, to his further damage in the sum of \$150; that by reason of said overflow of July, 1903, plaintiff's land was badly washed and damaged and covered over with mud and driftwood, and his ditches on said land filled up, to his further damage in the sum of \$2,000." This was sufficient to admit the proof objected to, in the absence of a special exception, and there was no such exception interposed by appellant to said pleading.

By its fifth assignment of error, appellant complains of the action of the court below in excluding from the jury the answers of the witnesses Hiram Gross, Dan Sales, and Tom J. Carter to the following questions: "From your knowledge of the country, both before and after the railroad was built, and from your knowledge of the embankment, dam, and culvert, and railroad across the bottom, would any damage by wash to Harbison's land have been caused by the railroad dam and embankment in September, 1902, and July, 1903?" The answers of witnesses being: "I think not." "That is my opinion." "I don't know." "I don't see how it could." Appellant's contention under this assignment being that where it is shown that witnesses are familiar with the location complained of, and have observed the same for many years prior to the date of the alleged injury, and are in a position, from such observation and experience, to have an opinion concerning the effect on the locality of a railroad embankment and dam, it is competent to prove such opinion by such witnesses.

The opinions of these witnesses would have been admissible, had they stated the facts upon which their opinions would be based, and had it appeared from such facts that they were qualified to give an intelligent opinion with respect to the matter inquired about. While it appears from appellant's bill of exceptions to the action of the court in excluding the answers of the witnesses above named that they lived on and near Sulphur creek, and owned lands in its bottom for a number of years prior to the construction of appellant's railroad embankment and dam, and lived on and near said creek and owned land in its bottom since the construction of its railroad embankment and dam, and were acquainted with the history of the stream prior to the construction of the railroad and subsequent thereto, and had noted and observed the effect of overflows on lands of appellee and adjacent lands both before and after the defendant's railroad was built, it does not appear that they were sufficiently familiar with the embankment and dam or the length or height thereof, or the area of the water ways, the drainage area, or the character or size of the culverts or openings in such embankment, or the capacity thereof to carry off the water of an overflow, to give an intelligent opinion as to whether or not said embankment and dam or culvert caused any damage by wash to appellee's land. There is nothing in the bill of exceptions to indicate that these witnesses knew anything as to the effect of the embankment on the natural flow of the water, or knew whether there was any difference in the volume or velocity of the water as it flowed over appellee's land before and after the construction of the railroad embankment; hence we are of opinion that the court did not err in the action complained of under this assignment.

There was no error in the action of the court complained of in appellant's sixth assignment of error. The appellee was not seeking to recover on the ground that the sediment had injured his land, and therefore it was not material that such sediment would not tend to injure his land, but would increase its value. In the case of *Austin & Northwestern Railroad Company v. Anderson*, 79 Tex. 434, 435, 15 S. W. 486, 23 Am. St. Rep. 350, the Supreme Court say: "The defendant complains because the court refused a special charge asked to the effect that in case the jury should find the land and crops were injured by the water passing through the culverts and sluices, but should also find that such water was less injurious to the whole of the land and crops than it would have been if the roadbed had not been constructed, and it had overflowed according to the natural lay of the land, the verdict should be for defendant. Such a charge should not have been given. The act of so constructing the embankment and culverts was wrongful, and it could not be made

right by such a consideration. Such a comparison of detriments and betterments is not applicable to cases like this. It might be in a proceeding to condemn land for railroad purposes."

Appellant's seventh assignment of error complains of the action of the court in permitting plaintiff to show by several witnesses that since the institution of this suit the appellant removed a portion of the dam complained of from Sulphur creek, and that since said dam had been removed, and on or about the 4th day of June, 1904, subsequent to the time complained of in appellee's petition, there was an overflow of Sulphur creek which was higher than any previous overflow of said creek known to said witnesses, and that, with a portion of the dam taken out, said overflow of the 4th of June, 1904, passed off of appellee's land and the creek got back in its banks in from 12 to 14 hours, and that this was a much shorter time for said creek to subside and get within its banks than would have been the case if said dam had been in said creek. Appellant's ground of objection to said testimony is that the removal of the dam being an act of appellant subsequent to the injuries complained of, and being sought to be used by appellee as an admission on the part of appellant that its dam caused the injuries to appellee, and said overflow of 1904 not having been shown to have occurred under the same conditions as the previous overflow, and being subsequent to the overflows complained of by appellee, it was irrelevant and not admissible. In our opinion, the testimony complained of was admissible for the purpose of showing the difference in the action of the water during overflows with the dam in the creek and with it out, and for the purpose of showing that the part remaining obstructed the flow of the water, and contributed to injuries caused by the overflow; and it was properly limited by the court in its charge to the jury, and they were instructed not to consider it as an admission of negligence upon the part of appellant. In the case of *Railway v. Dunlap et al.* (Tex. Civ. App) 26 S. W. 655, which was a suit for damages against the railway company for the negligent construction of an embankment which was alleged to have caused plaintiff's land to be overflowed, the court say: "The evidence of the cutting by defendant of its embankment during the overflow of 1891 was admissible, not for the purpose of showing that it thereby admitted that it was negligent in constructing its road, but simply to aid in determining the effect which the embankment had in holding the water and causing the overflow of the land." And in *Railway Company v. Anderson et al.* 61 S. W. 425, 2 Tex. Ct. Rep. 3, which was also a suit for damages on account of overflow of plaintiff's premises caused by obstruction allowed to remain in ditch on appellant's right of way, the court uses this

language: "Appellant's first assignment of error predicates error upon the ruling of the trial court in permitting appellees to prove, over the objections of appellant, that the appellant removed the obstruction in said ditch about the 15th of August, and that after said obstruction was removed the water ran off appellee's premises. We are of the opinion that the trial court did not err in admitting this testimony. Appellees alleged in their petition that the overflow of their premises was caused by the obstruction of the ditch, and that as soon as said obstruction was removed the water ran off. The issue in the case was not whether or not the obstruction existed, but whether or not it was the cause of the overflow of appellees' premises. It would certainly have been permissible for appellant to have shown on this issue that, after the obstruction of the ditch had been removed, water continued to accumulate upon appellees' premises, and thereby demonstrate that said obstruction was not the cause of the overflow; and we think it was equally permissible for the appellees to show that the removal of the obstruction caused the water to recede from their premises. We do not think the admission of the testimony contravenes the well-established rule that proof of subsequent repairs is not admissible for the purpose of proving prior negligence. As above stated, the evidence was not admitted for the purpose of showing negligence, but to show that the condition of the ditch was the cause of the overflow of appellees' premises."

Appellant in its eighth assignment of error complains of the fifth paragraph of the general charge of the court, which is as follows:

"The court further instructs you that if you believe from the evidence that since the time of the overflow alleged in plaintiff's petition the defendant has cut the dam, if any, placed by it in the channel of Sulphur creek, that the act of cutting the same, if it was cut, must not be construed by you as an admission on the part of the defendant that said dam, embankment, and culverts caused any or all of the injuries complained of by plaintiff; but if you should find from the evidence that since the institution of this suit the defendant has removed a portion of said dam from the channel of said creek, and that a portion thereof still remains in said channel, and that the portion of said dam, if any, and said embankment and culvert, causes and will cause to plaintiff injury in the future, as complained of by him, then you will so say in your verdict."

We are of the opinion that the above paragraph is a correct enunciation of the law as applied to the pleadings and evidence in the case. *Railway Co. v. Davis* (Tex. Civ. App.) 29 S. W. 433; *Railway Co. v. Dunlap*, supra; *Railway Co. v. Anderson*, supra.

Appellant's ninth assignment of error complains of the action of the court in giving

to the jury special charge No. 2 asked by appellee, which is as follows:

"Even if you should believe from the evidence that the overflows alleged in plaintiff's petition would have passed over and on to plaintiff's land and crops if the defendant's embankment and dam had not been there, still, if you believe from the evidence that by reason of said dam and embankment, or either, or by reason of the culverts or openings in said embankment being insufficient, if they were insufficient, to permit the water naturally flowing there to pass off in its natural way, and if you believe that by reason of such obstructions, if any, the water was caused to accumulate above defendant's road, and flow across plaintiff's land in greater volume and with greater speed, and remain on said land longer than it would have without such dam and embankment, and thereby caused the damage complained of, or any part thereof, you will find for plaintiff for such additional damage."

In view of the pleadings and evidence in this case, we are of the opinion that it was proper for the court to give the above charge. *Albers v. Railway Co.* (Tex. Civ. App.) 81 S. W. 828.

Appellant's assignments of error from 10 to 17, inclusive, each submitted as a proposition, are not in compliance with the rules of the court, in that there are no statements, as required by such rules, subjoined to said assignments, and therefore same will not be considered. The only statement given under any of these assignments of error is a reference to the statement under its first assignment of error, and that statement embraces practically all of the evidence in the record; and in order for us to ascertain what evidence, if any, there is in the record applicable to any of these assignments of error, it would be necessary for us to read the entire statement under appellant's first assignment of error, which covers 23 pages of its brief. We do not think that the rules of this court contemplate that any such labor should be imposed upon this court. Rule 31 for Courts of Civil Appeals (67 S. W. xvi); *King v. Summerville*, 80 S. W. 1050, 10 Tex. Ct. Rep. 478; *Galloway v. Floyd*, 81 S. W. 805, 10 Tex. Ct. Rep. 517.

There being no reversible error pointed out in the record, the judgment of the court below is affirmed.

Affirmed.

GULF, C. & S. F. RY. CO. v. WETHERLY.*

(Court of Civil Appeals of Texas. May 31, 1905.)

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Action by J. R. Wetherly against the Gulf, Colorado & Santa Fé Railway Company.

*Rehearing denied June 23, 1905.

From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant. Hale, Allen & Dohoney, for appellee.

FISHER, C. J. The questions of fact and law raised in this case are substantially the same as those passed upon in the case of Gulf, Colorado & Santa Fé Railway Company v. F. Harbison (recently decided by this court) 88 S. W. 452, and in which the ruling of this court is against the propositions urged by the appellant.

We find no error in the record, and the judgment is affirmed.

Affirmed.

GULF, C. & S. F. RY. CO. v. OATES.

(Court of Civil Appeals of Texas. June 28, 1905.)

Appeal from Lamar County Court; John W. Love, Judge.

Action by A. T. Oates against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant. Hale, Allen & Dohoney, for appellee.

KEY, J. This case is quite similar to Railway v. Harbison, 88 S. W. 452, and Railway v. Wetherly, 88 S. W. 456, recently decided by this court; and, for the reasons stated in the opinion in the Harbison Case, the judgment in this case is affirmed.

Affirmed.

EL PASO & S. W. RY. CO. v. VIZARD.*

(Court of Civil Appeals of Texas. May 24, 1905.)

1. PERSONAL INJURIES—PLEADING.

A petition alleging that plaintiff fell with great force and struck his back and spine on some ties, by reason of which he was seriously and permanently cut, bruised, and wounded, internally and externally, on his back, spine, legs, hips, and head; that his kidneys and bladder, together with the nerves and muscles controlling the same, were seriously injured and affected; that he is a cripple for life, is confined to his bed, and unable to walk without assistance; and that he believes that his injuries are serious and permanent—states the damages which plaintiff has sustained with sufficient particularity.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 410.]

2. DEPOSITIONS—NOTICE—SUFFICIENCY.

The copy of the notice and interrogatories, required by Rev. St. 1895, art. 2274, to be served on the adverse party or his attorney of record before the issuance of a commission to take depositions need not be certified by the clerk of the district court who makes the same.

3. INJURY TO SERVANT—INSPECTION BY MASTER.

Rev. St. Ariz. 1901, para. 2538, 2767, declaring the common law to be in force in that

territory, and making corporations liable for injuries to servants, caused by the negligence of fellow servants of whose incompetency or negligence the corporation has had previous notice, do not change the common-law rule requiring the master to inspect and examine instrumentalities furnished by him, and making him responsible for the negligence of an inspector to whom he intrusts the duty of making inspection.

4. SAME—NEGLIGENCE—QUESTION FOR JURY.

Whether an inspector was negligent in inspecting cars, or whether he negligently failed to make an inspection, are questions of fact for the jury, notwithstanding testimony of the inspector that he made a proper inspection.

5. SAME—INSTRUCTIONS.

In an action against a railroad for injuries to a brakeman who fell from the side of a car because of the giving away of a defective hand railing, a charge to find for defendant if plaintiff attempted to board the car and ride at some place other than the stirrup and grab-iron provided for that purpose, and if his failure to do so was negligence, and such negligence caused or contributed to his injury, or if he was negligent in the manner in which he attempted to get on the car, and such negligence contributed to his injury, or if he attempted to catch the railing while the car was in motion, and attempted to hold himself by the rear end thereof and by placing his foot on some part of the truck, and in so doing was guilty of negligence, and such negligence contributed to his injury, was confusing and misleading, in that plaintiff's actions in the particulars referred to, if negligent, necessarily contributed to his injury, and whether they did so contribute or not should not have been submitted to the jury as a question of fact.

6. SAME—INSPECTION BY SERVANT.

A railroad brakeman is under no duty to inspect a car on which he is working, in order to ascertain whether parts thereof, such as hand rails, are unsafe for his use.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 710, 713, 714, 718.]

7. SAME—ASSUMPTION OF RISK.

The mere knowledge by a servant of a danger does not charge him with assumption of the risk thereof, unless he understood and appreciated such risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-581.]

8. SAME—QUESTION FOR JURY.

Whether a railroad fulfilled its duty of inspecting cars by properly inspecting them on the day before injury to a brakeman was a question of fact, where the car in question had been moved from one place to another between the inspection and the injury, and it was shown that nuts on the car might become loose in running that distance.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by H. D. Vizard against the El Paso & Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is a suit by appellee to recover damages for personal injuries alleged to have been caused by the negligence of appellant while he was engaged in its employ as a brakeman on its road at Osborne, Ariz. He alleged that, while in the discharge of the duties of his employment, he fell from the side of a water car by reason of the negligence of defendant in maintaining thereon

*Rehearing denied June 14, 1905, and application for writ of error dismissed by Supreme Court for want of jurisdiction.

a defective hand railing which gave way in his effort to board and hold on thereby the car in question. After interposing eight special exceptions, which will be noticed in our opinion, the defendant answered by a general denial and pleas of contributory negligence and assumed risk. The exceptions were overruled, and the trial of the case before a jury resulted in a verdict in favor of the plaintiff for \$9,000. From the judgment entered on the verdict, this appeal is prosecuted.

Patterson, Buckler & Woodson, for appellant. Patterson & Wallace, for appellee.

NEILL, J. (after stating the facts). The first eight assignments of error are directed against the action of the court in not sustaining defendant's special exceptions to plaintiff's petition. The substance of these exceptions is that the petition does not describe the physical injuries and suffering of plaintiff therefrom with sufficient particularity.

In his original petition his injuries and the effect thereof are thus described: "Plaintiff avers and charges that when said hand rail or hand hold pulled loose and gave way he was thrown and fell with great force and violence, and struck his back and spine on the ends of some ties and cribbing, which was built near the tracks at this place, on which was situated a water tank; that on account of the fact of striking on the ends of some ties he was then thrown and fell to the ground, and by reason of said fall, together with striking his back on the sharp end of some railroad ties and on the ground and other hard substances, he was greatly, seriously, and permanently injured in his back, spine, legs, head, and internal organs, and rendered a cripple for life; that by reason of the aforesaid injuries he is now confined to his bed, unable to walk, and he has reason to believe, and does believe, and here alleges, that said injuries are permanent; that on account of the aforesaid injuries he has suffered and will continue to suffer during the remainder of his life great bodily pain and mental anguish, has paid out and incurred large sums of money for medicine and medical attention, which sums were reasonable and necessary, and that his ability to earn a living, on account of the aforesaid injuries, has been greatly impaired, and will so continue impaired during the remainder of his life."

And in his trial amendment he further describes them as follows: "That when said hand rail or hand hold pulled loose and gave way he was thrown and fell with great force and violence, and struck his back and spine on the end of some ties or cribbing, built and maintained by defendant near the track, at the place where said accident occurred; that when he fell and was thrown from said car, and after his back and spine had come in contact with the aforesaid ties or

cribbing, he then was thrown and fell to the ground, and by reason of his fall and great weight, together with striking his back and spine on the ends of said ties or cribbing and other hard substance as he fell to the ground, he was seriously and permanently cut, bruised, and wounded, both internally and externally, in and on his back, spine, legs, hips, and head; that also in said fall, and by reason of the bruises, injuries, and wounds received on his back, spine, and legs, his kidneys and bladder, together with the nerves and muscles by which the same are controlled, were seriously and permanently injured and affected; a more specific allegation of his injuries to his back, spine, legs, head, hips, kidneys, and bladder, plaintiff is now unable to specify, other than that by reason of said injuries received at said time he is now a cripple for life; that on account of said injuries, and more especially the injuries to his back, spine, legs, bladder, hips, and kidneys, he is now confined to his bed, unable to walk without assistance; that he has reason to believe, and does believe, and here alleges, that the aforesaid injuries to his back, spine, legs, hips, kidneys, and bladder are serious and permanent, and will continue serious and permanent the remainder of his life."

We think the allegations thus recited (especially those in the trial amendment) conform to the rule in cases of this character, which requires the plaintiff to state the particular damage which he has sustained with sufficient particularity to inform the defendant of the facts upon which he intends to rely for recovery. This is all that could be required of plaintiff in this case. *T. & P. Ry. Co. v. Curry*, 64 Tex. 87; *Campbell v. Cook*, 86 Tex. 632, 26 S. W. 496, 40 Am. St. Rep. 878; *Southern Pac. Co. v. Martin* (Tex. Sup.) 83 S. W. 676.

It is to be observed that there is no contention on the part of defendant, as was in the case last cited, that the allegations were not sufficiently specific to authorize the introduction of all the evidence offered by plaintiff to prove them; but the complaint is as to the sufficiency of the petition as against the exceptions urged. The allegations described, if possible, with more minutiae plaintiff's physical injuries and consequent sufferings than is done in the case of *Southern Pacific Co. v. Martin*, supra. And in that case the Supreme Court remarked that "the petition entered with a remarkable particularity into the statement of the various injuries which the plaintiff claimed to have received in the accident, which were sufficient in number and character to justify, if true, the statement that he was 'bruised and lacerated from head to foot.'" However, notwithstanding the minutiae with which Martin's injuries were described in his petition, the court held that evidence of a certain injury, not eo nomine mentioned in the petition, was erroneously admitted, and

for that reason, not because of any defect in the petition, reversed the judgment rendered in his favor. Without pausing to criticize or comment upon such holding of the Supreme Court in that case, it may be, in view of another trial, proper to suggest that, while we believe every syllable of evidence introduced in the instant case by plaintiff as to his injuries was authorized by his pleadings, it might be well for plaintiff by an amendment to allege and describe with as much minutiae as possible the injury to his sciatic nerve, evidence of which was introduced upon the trial.

The defendant moved to quash the depositions of the witness R. A. Eubank, taken by plaintiff, upon the ground that the commission was issued without any legal return showing the services of notice to take such depositions. It appears from the record that the plaintiff filed with the clerk of the district court, in which this case was pending, notice of his intention to apply for a commission to take the answers of the witness Eubank to interrogatories attached to said notice, in compliance with the provisions of article 2274, Rev. St. 1895; that upon the day such notice and interrogatories were filed the clerk of the court made copies thereof and issued his precept, and placed it, together with said copies, in the hands of the sheriff, requiring him to serve the same upon the defendant or its attorney of record, as required by the article referred to; and that such copies of the notice and interrogatories were served by the sheriff upon the defendant as required by law, by delivering such copies, together with a true copy of the precept, to its local agent in El Paso county. The real objection urged by defendant in its motion to quash the depositions is that the copy of the notice of plaintiff's intention to apply for a commission to take the answers of the witnesses to the interrogatories attached was not certified to by the clerk of the district court who made such copy, as well as the copy of the interrogatories, and delivered the same with the precept to the sheriff for service. There is no force in this objection, for the law does not require that the copy of such notice served on the adverse party should be certified to by the clerk. Service of a copy was all that was required, and there is no contention on the part of defendant that it was not served with a true copy thereof, as is shown by the sheriff's return on the precept. Therefore the court did not err in overruling defendant's motion to quash the depositions.

As we will reverse the judgment on other assignments, it will be unnecessary, if not improper, in view of another trial, to discuss the twelfth assignment of error, which complains of the court's refusing to grant defendant's motion for a new trial upon the ground that the verdict is excessive.

To understand the next assignments, and what we shall say in disposing of them, it

will be necessary to briefly state some of the evidence pertinent to them. It will be observed from the statement of the nature of the case that the accident from which plaintiff claims he was injured occurred at Osborne, Ariz. On the day of its occurrence he was a brakeman on a freight train, which picked up a water car on a side track at that place. It was an ordinary flat car with a large metallic tank, such as is ordinarily seen and used on railroads, securely fastened thereon. On each side of the car were seven wooden standards about three feet long, through which were bored holes about six inches from the top ends, through which an iron rod about three-fourths of an inch in diameter extended from one end of the car to the other. The distance from this rod from the ground was about seven feet. The rod was fastened at each end on the outside of the standards by iron nuts screwed thereon. The evidence tends to show that the nut of the end of the rod at the southwest corner of the car, as it stood upon the track at the time of the accident, was off. There is a conflict in the testimony as to the office or use of this rod; some of the witnesses testifying that its purpose was to enable trainmen or brakemen to mount and hold onto the car, and that it was ordinarily used for such purpose, and, when in proper fix, it was reasonably safe for such use; others testified that it was intended for no such purpose or use, and that such use would be fraught with exceeding danger, and its only office was to furnish a hand hold for trainmen in passing from one car to another when the train was in motion. This car, as all water cars on defendant's road, had a stirrup on the southeast corner, as it then stood on the track, and one on the northwest corner diagonally opposite. The stirrup extended down from a foot to 16 inches from the platform at the corner, and at the right end of each corner mentioned there was a grab-iron on the end of the car just to the right of the stirrup, and one also on the standard just to the left of the stirrup. There was testimony to the effect that the proper and usual way for a brakeman or trainman in getting on the car was to catch hold of the grab-iron and put his foot in the stirrup so as to hold himself on. And there was testimony to the effect that plaintiff should have pursued this method of getting on the car. But, according to his testimony, after the water car was picked up, and as it passed him moving easterly, he caught hold of the rod before mentioned at the southwest corner and placed his foot on the journal, which is a part of the truck, and, just as he pulled himself up, the rod pulled loose from the standard, and he was thrown, and fell backward on the end of some ties or cribbing. Defendant's car inspector testified that, on the afternoon of the day before the accident, he inspected the car in question at Douglas, and put a new

washer and nut on the southeast corner, and, with that exception, there was nothing whatever wrong about the car; that, his attention being directed to the car on the afternoon of the day after he inspected it, he found the hand rail at the southwest corner of the car a little swagged, and the nut off of its end.

Paragraph 2533, Rev. St. Ariz. 1901, is as follows: "The common law as now prescribed and understood, shall in its application be followed and practiced by the courts of this territory, so far as the same may not be inconsistent with this 'title.'" And paragraph 2767, adopted in March, 1901, is as follows: "Every corporation doing business in the territory of Arizona shall be liable for all damages done to any employee in consequence of any negligence of its agents or employees to any person sustaining such damage, provided such corporation has had previous notice of the incompetency, carelessness or negligence of such agent or employee." In the fifth paragraph of its charge the court instructed the jury that the car inspectors employed by the defendant company were not the fellow servants of plaintiff, but that the acts or omissions of such car inspectors, if any, would be the acts or omissions of the defendant company. The defendant by its attorneys requested the court to instruct the jury that, under the provisions of paragraph 2767 of the Revised Statutes of Arizona, plaintiff and defendant's car inspectors were employes of defendant at the time of the accident, and, if plaintiff was injured through the negligence of any car inspector of defendant, to return a verdict in its favor. The giving of the fifth paragraph in the court's general charge, and the refusal to give defendant's special charge above referred to, are assigned as errors.

At common law the master is personally bound from time to time to inspect and examine all instrumentalities furnished by him, and to use ordinary care, diligence, and skill to keep them in good and safe condition. The duty of inspection is affirmative, and must be continuously fulfilled and positively performed. It being a duty devolving upon the master personally, it cannot be by him delegated to any agent, so as to relieve him from personal responsibility. A car inspector is the master's alter ego, and his failure to exercise ordinary care in inspecting and examining instrumentalities furnished by him to his servants with which to do their work is negligence of the master, and not the negligence of a fellow servant. *Shearman & Redfield, Neg. §§ 194a, 204, and 205.* Though plaintiff and defendant's car inspector were each employes of the defendant, it is not believed that it was the purpose or intention of paragraph 2767, Rev. St. Ariz. 1901, above quoted, to abrogate the common-law principles referred to by exempting the master from the consequence of

the failure of an employe to use ordinary care in the performance of a duty which is personal to the master and he is bound to perform. But we think that the evident purpose of the statutes was simply to abrogate the common-law doctrine of a fellow servant, and hold the master, when a corporation, liable for the consequences of the negligent act of a fellow servant, of whose incompetency, carelessness, or negligence such corporation had previous notice. The case of *Gila Valley, G. N. & R. Co. v. Lyon* (Ariz.) 71 Pac. 957, relied upon by counsel for defendant, is not in conflict with the views we have expressed. It does not undertake to construe the statute in question, but is simply a case where a servant of a railway company was injured by the negligence of a fellow servant in failing to discharge a duty not personal to the master. Therefore we overrule appellant's thirteenth and fourteenth assignments of error.

The logical sequence of our ruling on the last two preceding assignments is that, if the hand hold gave way because the nut had come off its end, and its absence was due to the negligent failure of defendant's inspector to properly inspect it, appellant would be liable to plaintiff for any damages sustained as the proximate result of such negligence, unless he himself was guilty of contributory negligence. The question as to whether there was a negligent inspection, or a failure to inspect, was one of fact for the jury, notwithstanding the inspector testified that he made the proper inspection; for the jury may have not, in the light of the facts and circumstances, believed such testimony. Therefore the court did not, as is complained in the fifteenth assignment, err in submitting such question of fact to finding of the jury.

One of the principal issues in the case was whether the defendant was guilty of negligence in attempting to get on the car by catching the hand rail and placing his foot on the journal or some part of the trucks, instead of using the stirrup and grab-irons on the southeast corner of the car. Upon this issue the testimony is so conflicting as to make it very sharp and difficult to determine on which side the truth lies. In submitting it, the court, in the tenth paragraph of its charge, instructed the jury as follows:

"If you believe from the evidence that said water car was equipped with a stirrup and hand hold near one of its ends upon which plaintiff boarded it, and that the said hand hold or grab-iron was affixed to one of the upright posts supporting the aforesaid hand rail, but that the plaintiff attempted to board said car or hold the side of same and ride at some place other than at said stirrup and grab-iron, if any, and that the plaintiff, in boarding said car and catching hold of the side of same to ride, should have done so by using the said stirrup and grab-iron situated upon said upright post, if

any, and that his failure so to do was negligence on his part, and that such negligence, if any, caused or contributed to cause his injury, then and in that event your verdict should be for the defendant. If you believe from the evidence that the plaintiff attempted to get aboard or catch upon the side of the said water car while the same was moving, and that he was thrown or fell to the ground and was injured, but further believe from the evidence that in attempting to catch upon the side or get aboard of said car in the place or in the manner he attempted so to do, if he so did, that it was negligence on his part, and that such negligence, if any, proximately contributed to cause his injury, if any, then and in that event your verdict must be for the defendant. If you believe from the evidence that the plaintiff could have caught hold of the engine mentioned in the evidence, or either of the box cars behind same, or the right hand of the first corner of the water car, as the same approached him, or the right hand of the corner of the rear box car as the same approached him, and that a person of ordinary prudence, so situated as he was, would have so gotten a position upon the cars mentioned in the evidence, and that a person of ordinary prudence would not have attempted, as the plaintiff did, if he did, to catch the railing of the rear end of the water car while the same was in motion, and attempted at the same time to hold himself by the use of the rear end of said hand rail, and by placing his foot upon the journal box or some other part of the truck, and that the plaintiff in so doing was guilty of negligence, and that such negligence, if any, proximately caused or contributed to cause his injury, then and in that event your verdict should be for the defendant."

The objection urged by appellant to this part of the charge is that, if the plaintiff was guilty of negligence in the matters submitted, such negligence necessarily, as is shown by the undisputed evidence, proximately contributed to his injuries, and the submission to the finding of the jury whether such negligence of plaintiff, if he was guilty of it, proximately contributed to his injury, was confusing and misleading, and calculated to destroy the effect of the court's charge as to contributory negligence, and submitted an issue not made by the evidence, authorizing the jury to say arbitrarily that plaintiff should not be held to the consequences of his own negligence. In view of the unbroken line of the decisions of the appellate courts of this state, we deem it unnecessary to discuss the assignments of error which raise this objection to the portion of the charge just quoted, it being sufficient to refer to the opinions to demonstrate that the objection is well taken. *T. & P. Ry. Co. v. McCoy*, 90 Tex. 285, 38 S. W. 36; *G., C. & S. F. Ry. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756; *Culpepper*

v. I. & G. N. Ry. Co., 90 Tex. 634, 40 S. W. 386; *Ebert v. G., C. & S. F. Ry.* (Tex. Civ. App.) 49 S. W. 1105; *G., U. & S. F. Ry. v. Bryant* (Tex. Civ. App.) 66 S. W. 808; *G. H. & S. A. Ry. v. Hubbard* (Tex. Civ. App.) 70 S. W. 112; *G., C. & S. F. Ry. v. Hill* (Tex. Civ. App.) 70 S. W. 103; *G., C. & S. F. Ry. v. Powell* (Tex. Civ. App.) 84 S. W. 671.

The court did not error in refusing to instruct the jury, at defendant's request, that it was plaintiff's duty to assist the conductor in inspecting the water car, and that if by the exercise of ordinary care the plaintiff would have discovered the unsafe condition of the end of the hand rail and that the nut was off, and that if through his failure to inspect and examine the car before he attempted to use the hand rail he was injured, to find for the defendant. The following quotation from *Peck v. Peck*, 87 S. W. 248, 12 Tex. Ct. Rep. 785, demonstrates the fallacy in the requested charge: "In *Railway v. Hannig*, 91 Tex. 350, 43 S. W. 508, for instance, a charge was given, in substance, that plaintiff could not recover for the master's negligence 'if he could have known these facts by the use of ordinary care,' which might have meant to the jury that plaintiff was required to make some inquiry to learn of the danger which the master's negligence had created. In commenting on this charge, this court used this language: 'We understand the law to be that, when the servant enters the employment of the master, he has the right to rely upon the assumption that the machinery, tools, and appliances with which he is called upon to work are reasonably safe, and that the business is conducted in a reasonably safe manner. He is not required to use ordinary care to see whether this has been done or not. He does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or, in the ordinary discharge of his own duty, must necessarily have acquired the knowledge. (Citing *Bonnet v. Railway*, 89 Tex. 72, 33 S. W. 334; *Railway v. Bingle*, 91 Tex. 287, 42 S. W. 971.)' If this needed any elaboration, it was furnished by the reference to the cases cited in that opinion, from which is seen that a servant must be treated as having 'necessarily acquired knowledge' of those dangers, although arising from the negligence of the master, which were obvious and open to him in the doing of his work; which, in other words, ordinarily prudent persons would have learned under like circumstances, in the rendering same service." The principle is well settled that a master who seeks to escape liability to his servant on the ground that he assumed the risk as a part of his contract must lay the foundation for the defense by proving that he understood the risk, and that the mere knowledge of a danger will not preclude him from recovering unless he appreciated the risk. *Southern*

Pacific Co. v. Winton (Tex. Civ. App.) 66 S. W. 477; Bonn v. G. H. & S. A. Ry. Co. (Tex. Civ. App.) 82 S. W. 808; Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 469, 31 Am. St. Rep. 537. To have given special charge No. 7 requested by defendant would have been to ignore this principle.

Special charge No. 8 requested by appellant was directly upon the weight of the evidence, in that it declared that, if the water car was inspected in the afternoon of February 21, 1904, or before it left Douglas on the morning of February 22, 1904, by defendant's inspector, and he exercised ordinary care in the inspection, and failed to discover the absence of the nut, the verdict should be for defendant. It was for the jury to say, notwithstanding such an inspection may have been made at Douglas, whether, in view of the testimony of the inspector that a nut, though securely fastened, might work off in running a car the distance from Douglas to Osborne, another inspection should have been made after it reached there before plaintiff was put to work on the car. And it could not be assumed as a matter of law that such inspection as was made, though ordinary care may have been exercised in making it, at Douglas, was sufficient, and relieved defendant from any further inspection between the time it was made and the occurrence of the accident.

We deem it unnecessary to discuss the remaining assignments of error, but will say that we believe none of them is well taken.

On account of the errors indicated in the tenth paragraph of the court's charge, the judgment is reversed and the cause remanded.

ALEXANDER et al. v. McGAFFEY.*

(Court of Civil Appeals of Texas. April 5, 1905.)

1. CARRIERS — ELEVATOR—INJURIES TO PASSENGERS—PLEADING.

Where, in an action for injuries to a passenger by the fall of an elevator, the petition, after specifically alleging wherein the elevator and its appurtenances were defective, alleged that as the proximate result of such defects—specifically naming a number of them, and among them the negligence of the defendant in failing to keep the elevator and its appurtenances, or their respective parts, in repair—added the phrase, "and by reason of the other negligence herein alleged" the elevator on a specified date fell with great force while plaintiff was a passenger, seriously and permanently injuring her, such allegations were sufficient to allege the causal connection between the acts of negligence specified and the injuries complained of.

2. PERSONAL INJURIES — PLEADING—SPECIFICATIONS.

Where, in an action for injuries, the uncontroverted evidence showed that the only injuries sustained by plaintiff, and on which she sought a recovery, were internal and invisible, her allegation that she was seriously and per-

manently injured in her womb and ovaries, causing prolapsus of the uterus and menstrual derangement, impairing the sexual organs, and her kidneys and urinary organs, causing her to suffer great physical and mental pain, etc., was not subject to exception for indefiniteness.

3. SAME—EARNING CAPACITY—PREJUDICE.

Where no evidence was offered of any sum that plaintiff would have been capable of earning in the future, because she was steadily growing more perfect in her profession, had she not been injured, defendant was not prejudiced by the overruling of a special exception to so much of her petition as alleged that she was earning \$50 per month at the time of her injury; that she was steadily becoming more proficient, and would in a short time, not specified, but for the injuries, have been capable of earning a greater sum, not stated.

4. TRIAL—STATEMENT OF COURT.

Where, in an action for injuries by the fall of an elevator, on plaintiff's examination of a juror on his voir dire with reference to his examination of the elevator, defendant objected to such examination in the presence of the other jurors, a remark by the court, in the hearing of the entire panel, that he thought the jurymen had sense enough to know that the statement made by the witness in answer to such questions was not evidence, and, if defendant's counsel thought they did not have sense enough to know, the court would give them instructions, was not objectionable.

5. APPEAL—PREJUDICE.

Where the power by which an elevator was operated was changed after plaintiff had sustained injuries by a fall thereof, and a witness testified that at the time of the accident the elevator was set to run at a speed of 150 feet per minute, and that there was no change with respect to the elevator or its operation after the accident, until the substitution of power, defendant was not prejudiced by the sustaining of objection to a question with reference to the speed at which the elevator was set to run.

Appeal from District Court, Dallas County: Richard Morgan, Judge.

Action by Annie B. McGaffey against C. H. Alexander and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This was a suit brought by Annie B. McGaffey, through her next friend, Chas. N. McGaffey, against C. H. Alexander and C. H. Beauchamp, for damages on account of personal injuries alleged to have been sustained by Annie B. McGaffey while a passenger on an elevator owned and operated by appellants in an office building known as "North Texas Building," situated on Main street, in the city of Dallas. Annie B. McGaffey, having become of age pending this suit, filed an amended petition, by leave of the court, on April 28, 1904, alleging that she had arrived at her majority, and dropped the name of her next friend from the petition. For cause of action, she, in substance, alleged: That she arrived at her majority on the 12th day of March, 1902. "That defendants were common carriers of passengers by elevator in said building on the 13th day of December, 1901. That on the date last aforesaid the said elevator was neither safe, nor reasonably safe in this: that it was negligently and improperly constructed without stops, brakes, resters, safeties, or grabs to catch going up or down, and was generally constructed in an unsafe

*Rehearing denied June 28, 1905, and writ of error denied by Supreme Court.

and unsubstantial way. That the defendants negligently and improperly permitted and allowed the said elevator, and the pump, tanks, and water power connected therewith, to become out of repair, in this: that the elevator was run by power derived from a steam pump, tanks, cylinders, pistons, and other mechanical devices, whose condition controlled the condition and safety, to some extent, of the elevator; that the bolts and screws of said elevator, steam pump, and mechanical devices were not properly or regularly tightened; that they were permitted to run with their screws and bolts loosened or lax; that the throttle valve of the engine was out of repair; that the automatic governor of the engine was out of repair, and would not control or regulate the speed of said engine; that the stops, brakes, resters, safeties, or grabs of said elevator were out of repair and would not work; that the operation of said stops, brakes, resters, safeties, or grabs was obstructed, and that they were so fastened that they would not and could not operate and perform the functions for which they were intended, and would not and could not stop the elevator when it fell; was constructed so that the controller cable, by means of which the operator raised and lowered the elevator at will, wrongfully, negligently, and improperly run through a groove or V-shaped slide, so that the said controller cable was not free to pass up and down as it should do, so that the turnbuckle thereon became wedged and caught, thereby interfering with the operation of the cable of the elevator, and stopping the cable in its movement up and down, and thereby rendering it impossible for an inexperienced operator to control said elevator; was so constructed that the turnbuckle was wrongfully, negligently, and improperly attached to and made a part of the said controller cable at a point where the said controller cable should be smooth and even, where it runs through a groove or V-shaped slide wrongfully, negligently, and improperly provided, so that the said turnbuckle on the said controller cable became wedged and caught, thereby stopping said cable from operating, and rendering it impossible for an inexperienced operator to control said elevator. That the defendants wrongfully, negligently, and improperly employed inexperienced and incompetent servants to manage, control and operate said elevator. That the said defendants wrongfully, negligently, and improperly employed an inexperienced and incompetent boy to run said elevator between the hours of 12 m. and 1 o'clock p. m., while the regular elevator man was at luncheon, and that said accident and said damage to the plaintiff occurred while the said elevator was being operated by said elevator boy. That the said operator of said elevator and engineer in control of said engine were incompetent, inexperienced, and unskillful in the matter of running elevators and engines, and that they and each of them were incompetent

to perform their respective duties, and were grossly negligent and careless in the performance of their said duties. That the motive power of said engine was, by the said negligence of the said engineer, permitted to give down and become insufficient to hold said elevator in the operation thereof. That the said engine and elevator were old, rickety, and out of date for the purposes for which they were used. That as the direct and proximate result of the negligence of said defendants and their servants in fastening and obstructing the brakes, stops, resters, safeties, or grabs as aforesaid, and of the negligent and improper construction of said elevator and engine as aforesaid, and the negligence of the defendants and their servants in improperly and negligently locating the turnbuckle on the said controller cable at the point of the groove or V-shaped slide aforesaid, and the negligence of the defendants and their servants in failing to put the said turnbuckle where it could operate freely up and down, and the negligence of the defendants and their servants in not loosening the said turnbuckle from the said groove or V-shaped obstruction when the elevator commenced to fall, and the negligence of the defendants in failing to keep said elevator and engine or their respective parts in repair as aforesaid, and the negligence of the defendants in employing inexperienced and incompetent servants as aforesaid, and the negligence of the defendants' servants in operating said elevator and engine as aforesaid, and the negligence of the defendants in not providing safe, or reasonably safe, safety devices, and by reason of other negligences herein alleged, the said elevator on, to wit, the 13th day of December, 1901, fell with great force, violence, and speed from the fourth floor of said building to the first floor thereof, a distance of about 100 feet, while the said Annie B. McGaffey was a passenger thereon, seriously and permanently injuring her, the said Annie B. McGaffey in her womb, ovaries, causing prolapsus of the uterus, causing menstrual derangement, impairing the sexual organs, injuring and impairing her kidneys and urinary organs, causing her to suffer great physical and mental pain, and seriously and permanently injuring her in her back and spine and in her hips, and in all other parts and organs of her body, both internally and externally, and seriously and permanently injuring her in her nervous system, causing the said Annie B. McGaffey to suffer great physical and mental pain, destroying her health, making her practically an invalid, destroying and impairing her capacity to earn money in her profession as a stenographer or otherwise, greatly impairing her nervous system, making it reasonably certain that she will continue to suffer great physical and mental pain and be an invalid and be incapacitated to earn money or to labor or to enjoy good health during all the balance of her natural life, by reason of all which she has been dam-

aged in the sum of \$25,000; that the plaintiff was gradually growing more perfect and competent as a stenographer and shorthand writer at the time of the accident, and would have continued to do so, but for said accident, and she has had to abandon said profession as the result of said accident. The plaintiff further shows to the court that she was a stenographer, shorthand reporter, and typewriter, and followed her occupation as such at the date she was injured as aforesaid, and was on said date in the employ of Gilbert H. Irish, an attorney at law, as his office stenographer, and the said Irish has his law office on the fifth floor of the said North Texas Building, and she performed her duties as such stenographer in the office of the said Irish, on the fifth floor of said building, and at the time of said accident (the falling of said elevator) she got upon said elevator and became a passenger thereon at the fifth floor of said building for the purpose of going to the ladies' toilet room for the fourth and fifth floors of said building, which is located on the second floor, and which is provided by the said defendants for the ladies of both of said floors (she expecting to go there and wash her hands, preparatory to leaving her said place of business, and go home for the day), and the said elevator fell as aforesaid while she was upon the same, and without any want of ordinary care upon her part. Plaintiff further represents and shows to the court that the said Annie B. McGaffey was at the time she received the injuries aforesaid earning in her business aforesaid the sum of, to wit, \$50 per month, and she was all the time steadily improving and becoming more perfect in her said profession, and would after a short time, but for the injuries aforesaid, have been capable of earning, and would have earned a greater sum per month than the sum of, to wit, \$50 per month; that by reason of the injuries aforesaid, and the condition aforesaid resulting therefrom, she has become unable to follow her said occupation or to earn the sum of, to wit, \$50 per month, or any part thereof, and her capacity to follow her said profession has been destroyed by the negligence of the defendants for all time." Appellants answered by general and special exceptions and general denial. The case was tried before a jury, and resulted in a verdict and judgment in favor of appellee in the sum of \$1,200.

Finley, Knight & Harris, for appellants.
Gilbert H. Irish and Marcus M. Parks, for appellee.

EIDSON, J. (after stating the facts). Appellants' first and second assignments of error are as follows:

"First. The court erred in overruling defendants' special exception to the petition of plaintiff, No. 2, as contained in defendants' amended original answer, as follows: 'Defendants specially except to said petition

wherein it is alleged that the bolts and screws of said elevator, steam pump, and mechanical devices were not properly or regularly tightened; that they were permitted to run with their bolts and screws loosened or lax—for the reason that it is not alleged that such condition, if it existed, caused or contributed to cause the accident complained of herein. Wherefore defendant says that such plea is insufficient in law, and of this prays the judgment of the court.'

"Second. The court erred in overruling defendants' special exception to the petition of plaintiff, No. 3, as contained in defendants' amended original answer, as follows: 'Defendants specially except to all that part of said petition wherein it alleges that said engine and elevator were old and rickety and out of date, for the reason that it is not alleged that such condition, if it existed, caused or contributed to cause the accident complained of herein. Wherefore defendant says such plea is insufficient in law, and of this prays the judgment of the court.'

We do not agree with the contention of appellants. The petition of appellee, after alleging specifically wherein and in what manner the elevator and its appurtenances were defectively constructed and out of repair, alleged that, as the proximate result of such defects—specifically naming a great many of them, and among them the negligence of the defendants in failing to keep said elevator and its appurtenances, or their respective parts, in repair, as aforesaid—added the phrase "And by reason of the other negligences herein alleged, the said elevator, on, to wit, the 13th day of December, 1901, fell with great force, violence, and speed from the fourth floor of said building to the first floor thereof, a distance of about 100 feet, while the said Annie B. McGaffey was a passenger thereon, seriously and permanently injuring her, the said Annie B. McGaffey," etc. These allegations are amply sufficient to allege the causal connection between the acts of negligence specified in appellants' exceptions and the injuries complained of.

Appellants' third, fourth, fifth, and sixth assignments of error are addressed to the action of the court below in overruling special exceptions Nos. 4, 5, 6, and 7 to appellee's petition. These exceptions assail the sufficiency of plaintiff's petition upon the ground that it does not set forth with reasonable clearness and certainty the nature and extent of the injuries alleged to have been sustained by appellee. These assignments of error should be sustained, were it not that the uncontroverted testimony shows that the only injuries sustained by appellee, and upon which she sought a recovery, were internal and invisible, and therefore, it was impracticable to have given a more specific description of their nature or extent; and, while it might have been more accurate

pleading to have so alleged in her petition, the action of the court in overruling said exceptions, in view of the evidence, was harmless.

Appellants' seventh assignment of error complains of the action of the court in overruling his special exception to that part of plaintiff's petition which alleged that plaintiff was earning \$50 per month, and that she was at that time steadily improving and becoming more perfect in her profession, and that she would in a short time, but for the injuries aforesaid, have been capable of earning and would have earned a greater sum per month than \$50, for the reason, as alleged in said exception, that said pleading does not state how long it would have been before she would have been earning a greater sum than \$50 per month, and because it does not state how much greater sum than \$50 per month she would have earned in the future, but for such accident; nor does it allege when she would have been capable of earning such greater sum. The action of the court complained of in this assignment, if error, was harmless, in view of no evidence being offered on the trial of any sum that appellant would be capable of earning by reason of the fact that she was steadily growing more perfect in her profession.

Appellants' eighth assignment of error is as follows: "The court erred in his remarks made before the regular panel of jurors for the week from which the jury in the case was necessarily to be selected, and from which it was selected, with reference to the examination of the juror J. N. Oram by plaintiff's counsel, and objection made thereto by defendants' counsel, as shown by bill of exceptions No. 1." Appellants' proposition under this assignment is as follows: "The remarks of the court were wholly gratuitous, discourteous, and calculated to prejudice the jurors against counsel for appellants, and thereby cripple their efforts in behalf of appellants in the defense of the suit, and therefore prejudicial and hurtful to appellants in the trial of the cause." It appears from appellants' said bill of exceptions that while counsel for plaintiff was examining the juror Oram, who was one of the regular panel, in the presence of the other jurors of the panel for the week, from which the jury to try the case was required to be selected, plaintiff's attorney propounded certain questions to said juror with reference to the examination by him of the elevator involved in this suit, and elicited from him answers as to conditions which he found to exist, to which questions and answers, in the presence of the other jurors of the panel for the week, counsel for the defendant objected upon the ground that the witness was making statements with reference to material matters in the case in the presence of the panel of jurors from which the jury would be selected, and that this was improper and prejudicial to defendant. Upon coun-

sel stating the objection, the judge of the court remarked in the presence and hearing of the entire panel for the week from which the jury to try the case was to be selected, and was in fact selected, that he thought the jurymen had sense enough to know that the statements made by said Oram in answer to questions propounded to him by said counsel touching his qualifications were not evidence, and, if counsel for defendants thought they did not have sense enough to know, the court would give them instructions, to which remarks and comments of the judge counsel for defendants excepted. There was no error upon the part of the court below in the matter complained of by this assignment. The examination of the juror was proper, and there was no necessity for the other members of the panel to be retired. The trial of a case would be unreasonably retarded if all of the panel of a jury except the juror being examined on his voir dire should be required to retire every time the juror being examined was interrogated in reference to facts material to the case. We think the intelligence of the average juror is of a sufficiently high order to justify the court in assuming that no prejudice would result to the parties to the suit by the other jurors of the panel bearing the examination of such juror on his voir dire; and we do not think the remarks of the court were intended to, or had the effect to, prejudice appellant in the trial of the case, or in any way injuriously affect the efforts of his counsel in his behalf during the progress of the trial.

Appellants' ninth and tenth assignments of error, which are presented together, are as follows:

"(9) The court erred in sustaining the objection urged by plaintiff's counsel to the question propounded to the witness J. W. Glasgow in reference to the speed for which the elevator in question was set to run, as shown by bill of exceptions No. 2.

"(10) The court erred in the remarks and comment made by the court with reference to the question propounded by plaintiff's counsel to the witness J. W. Glasgow with relation to the speed for which the elevator in question was set to run; the effect of said remarks and comments being that the matter of speed for which the elevator was set to run was wholly immaterial in the case, as shown by bill of exceptions No. 2."

It does not appear from appellants' said bill of exceptions to what time the question asked this witness related. It appears from the bill of exceptions that there was a change in the operation of the elevator after the accident—that electric power was substituted for hydraulic. The elevator was operated by hydraulic power at the date of the accident, and continued to be so operated for some time thereafter, when electric power was substituted for hydraulic; and this witness operated the elevator after such substitution, as well as before. It does not appear

from the bill of exceptions that the question sought to elicit from the witness the rate of speed the elevator was set to run while it was being operated by hydraulic power. In view of the evidence in the record relating to the manner of operating the elevator at the time of the accident, we do not think it would have been admissible to show the rate of speed it was set to run when being operated by electric power. For this reason, there was no error in the action of the court in excluding this testimony. And further we are of the opinion that, if it was error to exclude this testimony, such error was harmless, in view of the testimony of appellant that the elevator at the time of the accident was set to run at a speed of 150 feet per minute, in connection with his testimony and that of the witness Glasgow to the effect that there was no change with respect to the elevator or its operation after the accident, until the substitution of electric for hydraulic power.

With respect to the matters complained of in the tenth assignment of error, it does not appear from the bill of exceptions that the remarks of the court objected to were made in the presence or hearing of the jury, so that they could have been in any manner affected thereby.

The other assignments of error presented in appellants' brief relate to the refusal to give special charges asked by them, and to alleged error in the general charge of the court. In view of the pleadings and evidence in this case, we are of the opinion that none of these assignments is well taken, and therefore overrule them.

The testimony in the record supports the allegations of negligence against appellants, as contained in appellee's petition, and also supports the allegations as to the injuries sustained by the appellee, and the amount of the verdict of the jury is sustained by the evidence.

Finding no reversible error in the record, the judgment of the court below is affirmed.

RAY v. PECOS & N. T. RY. CO. et al.
(Court of Civil Appeals of Texas. June 14, 1905.)

1. PLEADING—TRIAL—AMENDMENT.

A pleading indorsed a "trial amendment," setting up the same matters that had been pleaded in a supplemental petition, to which a demurrer had been sustained, and not containing the necessary averments to make it an amended petition, cannot be considered as a trial amendment.

2. SAME—MOTIONS—NECESSITY OF WRITING.

A motion attacking a pleading filed as a trial amendment should be in writing, so as to preserve the exceptions contained therein.

3. APPEAL—HARMLESS ERROR.

The court's striking out a pleading was not injurious to the person presenting it, where he was allowed to prove the matters alleged therein.

4. TRIAL—REMARKS OF COURT—PREJUDICE.

Remarks by the court, in the jury's presence, on request for time to prepare a bill of exceptions, that it doubted that it was intended by the Legislature that a jury trial should be delayed by repeated demands for time to prepare a bill of exceptions, was not prejudicial to plaintiff, where, after an examination of the statute, it was further stated that he was entitled to the time, if it was desired.

5. SAME — ARGUMENT OF COUNSEL—ALLOWANCE OF TIME.

Where no objection was made to the allowance of time for argument, and plaintiff's counsel argued for 35 minutes of the hour allowed him, and then closed, stating he did not have sufficient time to argue, without requesting more time, plaintiff cannot complain that the time was unequally distributed.

6. BILL OF EXCEPTIONS — PREPARATION BY COURT.

Where a party is dissatisfied with the bill of exceptions prepared by the court, he should present his bill prepared as prescribed by Sayles' Ann. Civ. St. 1897, art. 1899, and in the absence of such a bill the appellate court must accept the bill prepared by the court.

7. MASTER AND SERVANT—FELLOW SERVANTS.

Where plaintiff was injured by an engine striking timber lying on the track, and it appeared that the timber was left there by plaintiff and others engaged in the same work and working to the same purpose at the same time and place and in the same grade, the issue of fellow servants was properly submitted to the jury.

8. SAME—INJURIES — NEGLIGENCE — EFFICIENT CAUSE.

Where plaintiff was injured by an engine striking a timber lying on the track, and the employees of defendant company were negligent in running the engine against the timber, it was liable if plaintiff was not negligent in failing to remove the timber from the track, though the negligence of plaintiff's employer or that of its employees other than plaintiff may have concurred with its negligence in producing the results.

9. SAME — INSTRUCTIONS — OMISSION OF ISSUES.

Where plaintiff was injured by an engine striking a timber lying on the track of defendant company, a requested instruction, though defective in not limiting the recovery to the company whose employees were operating the engine, was sufficient to direct the court's attention thereto, and made it incumbent to charge in reference thereto.

10. SAME—CONTRIBUTORY NEGLIGENCE—NEGLECT OF MASTER.

Where a servant is not guilty of contributory negligence, and his master is guilty of negligence which is the proximate cause of injuries, it is liable, though the negligence of fellow servants may have concurred in producing the result.

11. SAME—PROXIMATE CAUSE.

The proximate cause of an injury is not necessarily the last cause, or the one nearest the injury, but such act wanting in ordinary care as actively aided or concurred in producing the result; and hence where plaintiff was injured by an engine of defendant company striking a timber lying on its track, and left there by plaintiff and other employees of another company, if it required the agency of the fellow employees of plaintiff and defendant company to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of the act of the fellow servants will not exculpate the other agency, because it would still be the efficient cause of the injury.

12. SAME—ASSUMPTION OF RISK.

Where plaintiff was injured by an engine striking timber lying on the track, which was left there by plaintiff and others engaged in moving a heavy boiler between two tracks, the leaving the timber lying on the rails was not a risk ordinarily incident to the employment, and was not assumed.

Appeal from District Court, Potter County; Ira Webster, Judge.

Action by A. B. Ray against the Pecos & Northern Texas Railway Company and others. From a judgment for defendants, the plaintiff appeals. Reversed.

L. C. Barrett and W. E. Gee, for appellant. Madden & Truelove, for appellees.

FLY, J. Appellant sued the Pecos & Northern Texas Railway Company and the Ft. Worth & Denver City Railroad Company to recover damages arising from personal injuries alleged to have been inflicted upon him through the negligence of the two railway companies. Appellees answered by general and special exceptions and by pleas of general denial, contributory negligence, assumed risk, and that appellant was injured through the negligence of a fellow servant. The trial resulted in a verdict and judgment for appellees. This is a second appeal, the result of the first being reported in 80 S. W. 112.

The first assignment of error seeks to have the action of the trial court in striking out a trial amendment filed by appellant, upon an oral motion of appellees, during the course of the trial, reviewed. It appears from a bill of exceptions, prepared by the court in lieu of one prepared by appellant, that some days before the trial began the court had sustained a demurrer to a supplemental petition filed by appellant, and he was granted leave to amend. He then filed a paper indorsed "Trial Amendment," and afterwards, when the case was called for trial, appellees orally objected to the pleading being used, for the reason that the same matters set up therein had been pleaded in the supplemental petition to which a demurrer had been sustained, and that, this having occurred several days before the trial began, the matters should have been set up in an amended pleading, and not in a trial amendment. The court ordered the pleading stricken from the records of the cause. By consent of appellees the supplemental petition, to which the exception had been sustained, was read to the jury as a part of the pleadings in the cause. The matters pleaded in the supplemental petition were practically the same as those contained in the trial amendment, the main difference being that the injuries are set out more specifically in the trial amendment than in the supplemental petition. The pleading was not a trial amendment, and did not contain the necessary averments to constitute it an amended petition; and neither was it a supplemental petition, as it was not a reply to any matters set up in the an-

swers of appellees. It had no place as a pleading among the papers of the case. Strictly speaking, however, the motion attacking it should have been in writing, so as to preserve the exceptions contained therein. The action of the court, however, could not have injured appellant, because he was allowed to prove all matters desired by him, and its absence could not have affected the result of the trial.

There is no basis for the contention that appellant was not allowed sufficient time during the trial to prepare bills of exception, nor for the complaint that the court "stated in a fretful tone, in the presence and hearing of the jury, that he would give the judge (meaning counsel) a whole hour to prepare his bill." The bill of exceptions prepared by the court states that during the trial certain evidence was presented by appellant, and on objection was excluded by the court, and appellant excepted, and asked leave to retire to prepare a bill of exceptions. Appellees objected to a delay of the trial for that purpose, and stated that they did not believe the statutes authorized such delay. The court then asked for a copy of the statutes, at the same time remarking, in the presence of the jury, that he doubted that it was intended by the Legislature that a jury trial should be delayed by repeated demands for time to prepare bills of exception. After an examination of the statutes the court stated to appellant's counsel that he was entitled to have sufficient time in which to prepare his bills of exception, and if he desired to take the time he would be permitted to do so. Doubtless the remarks of the trial judge should have been omitted, but it is not clearly shown that they were of such a character as to prejudice the cause of appellant with the jury. This disposes of the second, third, fourth, and fifth assignments of error.

The sixth assignment of error claims that the court erred in not giving appellant's counsel more than twenty-five minutes in which to present his case to the jury and in allowing appellees two hours in which to address the jury. That assignment is not supported by the bill of exceptions prepared by the court. It is therein stated that the court limited the argument of the cause to one hour to appellant, and the same time to each of the defendants. No objection was made to that arrangement. Counsel for appellant, after arguing the law of the case for 35 minutes to the court, remarked that he did not have sufficient time to argue the case as he would like to the jury, but did not request more time. After the argument was closed, and without having requested further time, appellant's counsel excepted to the action of the court in limiting the time for the argument. It is clear that there is no merit in the assignment. The court had the authority to limit the time of the argument within reasonable bounds, and it is not made to appear that his discretion was abused in

this cause. There is nothing in this record from which the inference can be drawn that appellant was injured by limiting the argument of his counsel. If counsel objected to the action of the court, he should have done so at the time, and requested more time.

The seventh assignment of error complains of the court excluding certain portions of his closing argument from the jury. It appears that counsel was telling the jury what the Supreme Court had held in certain cases, and appellees objected to his argument, in answer to which the court stated to the jury that it would be governed by the law given by the court. The bill of exceptions does not state what the argument was, and is too meager for this court to ascertain whether appellant was deprived of any right or not. It may be said in this connection that all of the bills of exception prepared by counsel were rejected by the trial judge, and others prepared and signed by him. Appellant asserts that the bills were not fairly prepared, and yet he made no effort to have such as he desired prepared and brought to this court. In article 1369, Sayles' Ann. Civ. St. 1897, the manner of obtaining bills of exceptions when a party is dissatisfied with those filed by the judge is fully prescribed. In the absence of bills prepared in the manner provided in that article, appellate courts will be compelled to accept the bills of exception prepared by the court.

There was testimony raising the question of fellow servants, and the court did not err in submitting that issue to the jury. The evidence showed that appellant was hurt by an engine striking a piece of timber lying on the track that had been left there by appellant or his fellow servants in disobedience of orders of the foreman. There was evidence going to show that McElligott and Miller were fellow servants of appellant; that they, with appellant and others, were engaged in moving a boiler by placing it on timbers and rolling it on them; that this was being done between two railroad tracks; and that all were engaged on the same piece of work at the same time and place, and were of the same grade, and were working to a common purpose. *Railway v. Howard*, 97 Tex. 513, 80 S. W. 229. The facts of this case show that appellant was an employé of the Pecos & Northern Texas Railway Company, and with others was engaged in removing a large iron boiler from one point to another in the yards of the employer in the town of Amarillo. Timbers were used as rollers upon which to move the boiler. One of those timbers was left in such a position that it was on or very near a switch track. An engine operated by the employés of the Ft. Worth & Denver City Railway Company was propelled along the track, struck the timber, and threw it around so that it came in contact with the leg of appellant and injured him. There was evidence to the effect that appellant's foreman ordered him and

others, who were his fellow servants, to remove the timber from the track before the engine struck it. Appellant, however, denied receiving any such order, and claimed to have been engaged at the time in other work. If the Ft. Worth & Denver City Railway Company was guilty of negligence in running its locomotive against the piece of timber, and appellant was struck and injured thereby, it would be liable for damages, if appellant was not guilty of contributory negligence in not removing the timber from the track, no matter if the negligence of the other railway company, or that of its employés other than appellant, may have concurred with its negligence in producing the result. The fact that the employés of the Pecos & Northern Texas Railway Company, whose negligence may have been a concurring cause in producing the result, were the fellow servants of appellant, would have no effect in relieving the Ft. Worth & Denver City Railway Company of the effect of its negligence, which concurred with the negligence of the fellow servants in producing the result. It would not exonerate the latter company from the effects of its negligence any more than it would exonerate the master from his negligence which concurred with the acts of fellow servants of the injured party in causing the injury. So it was held by the Court of Civil Appeals of the Second Supreme Judicial District on the former appeal of this case. That court said: "If appellee was himself free from negligence, and there was negligence on the part of the engine crew—who were not fellow servants with appellant under our statute—that proximately resulted in injury, the master whose servants the operatives of the engine were is liable even though there may also have been concurring and contributory negligence of persons other than appellant, fellow servants of appellant though they may have been." That decision stated the law of this case, so far as the Ft. Worth & Denver City Railway is concerned, and should have been followed by the trial judge. Not only was that phase of the case completely ignored, although presented by the evidence, but when it was called to the attention of the court by a special charge requested by appellant the charge was refused, and no response made to the suggestion therein contained. That charge, though defective in not limiting the recovery to the railway whose employés were operating the engine under the facts therein stated, was sufficient to call the attention of the trial judge to that phase of the case, and made it incumbent on him to give a charge embodying the law as given by the higher court. This matter is presented by assignments of error. If, under the facts of this case, appellant was not guilty of contributory negligence, and his master, the Pecos & Northern Texas Railway Company, was guilty of negligence which was the proximate cause of the injuries to

appellant, it would be liable, although the negligence of fellow servants may have concurred in producing the result. This is a rule too well settled, not only in Texas, but all over the American Union, to require discussion. *Railway v. McClain*, 80 Tex. 85, 15 S. W. 789; *Railway v. Sweeney*, 14 Tex. Civ. App. 216, 36 S. W. 800; *Railway v. Swinney* (Tex. Civ. App.) 78 S. W. 547; *Stringham v. Stewart*, 100 N. Y. 516, 8 N. E. 575; *Railroad v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Maupin v. Railway*, 99 Fed. 40, 40 C. C. A. 234; *McCoy v. Railway* (Va.) 37 S. E. 788. As said in the *McClain* Case, first above cited: "This was a correct view of the law, for it is well settled that where the master is shown to be guilty of culpable negligence toward an employe he cannot escape liability from his negligence in producing the injury by showing that another servant is also a joint tortfeasor with him, or is guilty of negligence that assisted the master in injuring his fellow servants."

The proximate cause of an injury is not necessarily the last cause, or the one nearest the injury, but such act, wanting in ordinary care, as actively aided or concurred in producing the result. An act may be a proximate cause, without being the sole cause, the only requirement being that it is a concurring cause such as aided in producing the injuries. *Shippers' Compress Co. v. Davidson* (Tex. Civ. App.) 80 S. W. 1032. So, in the present case, if it required the agency of the fellow servants of appellant and the Ft. Worth & Denver City Railway Company to produce the result, or if both contributed thereto as concurrent forces, the presence or assistance of the act of the fellow servants will not exculpate the other agency, because it would still be the efficient cause of the injury. In other words, if the negligence of the fellow servants would not have caused the injury without having been aided by negligence on the part of those operating the engine, the master of the operatives would be liable. And if the injuries would not have occurred but for negligence on the part of the Pecos & Northern Texas Railway Company, either in a failure to have the timber removed or in not keeping a watch for the engine, it would be liable; the liability of either or both of the railways depending always upon the nonexistence of contributory negligence on the part of appellant.

On the question of "assumed risks," which is used throughout the charge of the court in the same connection with "contributory negligence," it may be said that it is the well-settled rule that a servant assumes all the ordinary risks which are naturally and reasonably incidental to his employment. This rule is based on the presumption that a person who enters a certain service appreciates the dangers normally incident thereto, and by accepting such employment impliedly

relieves his employer from responsibility for such injuries as may result from such risks, the consideration for such implied agreement being the wages he receives. No risks, however, are the ordinary incidents of an employment which are caused by the negligent act or omission upon the part of the master, and the servant assumes the risk of injury only as to those matters which arise after the exercise of care and diligence on the part of the master. The servant does not assume risks arising from the negligence of the master. Applying these rules to the facts of this case, and we do not think the question of assumed risk figures therein. The service engaged in was moving a heavy boiler along between two tracks. Leaving the timbers used for that purpose lying on one of the rails was not a risk ordinarily incident to the employment, and could not have been assumed by the servant.

The questions presented are few and simple. If appellant, although free of fault on his part, was injured through the negligence of his fellow servants alone, he cannot recover. If he was free from negligence, however, and was injured through the negligence of one or both of the railway companies, acting alone or concurrently with the negligence of the fellow servants of appellant, or with each other, then one or both would be liable as the case might be.

The brief in this case is full of reflections and strictures on the fairness and impartiality of the judge who tried this cause, and it is only through consideration for the rights of appellant, which might be jeopardized by the unauthorized conduct of his attorneys, that the briefs have not been stricken from the record in this case. Courts are organized for the enforcement of the laws and the dispensing of justice, and the presumption must prevail that they are engaged in complying with their duties, and no good end will ever be subserved by attacks upon them by those who are looked upon as officers thereof, either for the particular client represented or the general public. Appellate courts have been organized to pass upon and review the actions of trial courts, and not to consider attacks by aggrieved counsel, on the trial courts, and a due respect for the representative of justice on the trial bench, as well as for the higher court, should be sufficient to prevent attacks upon the fairness and integrity of the trial judge. Attacks of this character can serve no good purpose, but tend to lower the high standing of the legal profession, to whom the judiciary must look for counsel, guidance, and support, and to weaken the bonds of the law and create a disrespect for it and those chosen to dispense it.

The judgment will be reversed, and cause remanded to be tried on the law as herein enunciated.

FEATHERSTONE et al. v. BROWN et al.*
(Court of Civil Appeals of Texas. June 28, 1905.)

1. APPEAL—STATEMENT OF FACTS—SPECIAL VERDICT—JUDGMENT—CONCLUSIVENESS.

Under Rev. St. 1895, art. 1331, relating to special verdicts, and providing that on appeal an issue not submitted and not requested by a party shall be deemed as found by the court in such manner as to support the verdict, if there is evidence to sustain the finding, where the record contains no statement of facts, a judgment on special issues, submitted to the jury, subjecting certain property to a lien, is conclusive on appeal, though the verdict does not affirmatively state that a lien existed, and the issue was not submitted to the jury.

2. SPECIAL VERDICT—JUDGMENT.

A special verdict finding that when plaintiff acquired a note in which the consideration was expressed at \$750 he had no knowledge that the consideration was less than stated, and took it at the request of defendants' agent, based on representations that the amount for which defendants were liable was correctly stated on the face of the note, was a sufficient basis for a judgment declaring a lien on certain property for the amount for which the note was given, though there was a finding that the true consideration of the note was less than stated on its face.

3. MECHANICS' LIENS—INDORSEMENT—JUDGMENT.

A judgment in favor of a transferee of a note, executed for material and labor furnished, for the face amount thereof, was proper, though the special verdict found that the value of the materials and labor performed in the construction of the improvement was less than the sum stated in the note.

4. APPEAL—ISSUES PRESENTED.

Where there are no statements of fact in the record, and no finding that property involved was a homestead, the appellate court cannot consider that issue.

5. SPECIAL VERDICT—STATUTES—VALIDITY.

Rev. St. 1895, art. 1331, authorizing the court to enter judgment in the absence of a finding by the jury on special issues, is constitutional.

Error from District Court, Johnson County; Nelson Phillips, Judge.

Action by W. B. Featherstone and another against E. Y. Brown and others for an accounting to ascertain the amount owing defendants, and to determine whether or not there was a lien on certain property to secure payment of the amount due. Judgment for defendants, and plaintiffs bring error. Affirmed.

Davis, Odell, Sellars & Plummer, for plaintiffs in error. J. F. Henry, for defendants in error.

FISHER, C. J. W. B. Featherstone and his wife, Mrs. S. S. Featherstone, commenced this suit against E. Y. Brown and W. F. Ramsey in the district court of Johnson county January 1, 1904, and alleged that in the year 1897 they bought two acres of land from A. H. Yeager near the city of Cleburne for \$50 cash and \$50 on credit, which was deeded to them, and that they erected on said lot one frame house of four rooms and two galleries, which cost them \$750 in cash,

and which was the separate property of Mrs. S. S. Featherstone, and that said \$50 cash paid on said land was also her separate property, and that said land and house was their homestead.

(2) They also allege that during the summer of 1898 they purchased from C. B. Stratton and Charles Hoshour lot No. 4 in block A of the Hoshour Addition, for the sum of \$300, from W. H. Stratton, as agent of C. B. Stratton and Charles Hoshour, on a credit, and that they sold said two acres of land to A. H. Yeager, but reserved said house, and employed W. H. Stratton to move said house from said two acres to lot No. 4 in block A of the Hoshour Addition for the sum of \$120, and that said W. H. Stratton canvassed, papered, and painted said house for them, and that they moved into said house as their homestead, not acquiring any other homestead while said house was being moved to said lot No. 4.

(3) They also allege that after they took possession of said lot No. 4 and moved into said house on lot No. 4, C. B. Stratton and Charles A. Hoshour deeded lot No. 4 to W. B. Featherstone, August 29, 1898, the consideration expressed in the deed being \$750 cash, and one note for \$750 due six months from date, with 10 per cent. interest per annum, executed by W. B. Featherstone, and that said lot was only valued at the sum of \$300, which they agreed to pay for said lot, and that the increased value of said lot consisted in the value of said house and the improvements made to the same, and that they did not sell said house to W. H. Stratton or to C. B. Stratton and Charles A. Hoshour, and that they, as husband and wife, or singly as individuals, made no written contract or agreement, and acknowledged the same, as required by law, to constitute a sale of said house, as the separate property of the said Mrs. S. S. Featherstone or as their homestead, to the said Stratton and Hoshour, or to give the said Stratton and Hoshour a lien on their homestead to secure the payment of moving said house to lot No. 4, or making any improvements on said house after it was moved to lot No. 4.

(4) They also allege that on September 1, 1898, they secured a loan from the Standard Savings & Loan Company of Dallas, Tex., with its principal offices in Detroit, Mich., for \$750, due on or before 114 months from date, with 10 per cent. interest per annum from October 1, 1898, interest payable monthly on the last business day of each month, providing a default in any monthly installment of interest for six months after the same becomes due should mature said loan and make the full amount payable at the election of the holder of the same, which said contract was evidenced by note executed by W. B. and S. S. Featherstone to the said Standard Savings & Loan Company, which said loan was made for the benefit of C. B. Stratton and Charles Hoshour for the pur-

*Writ of error denied by Supreme Court.

pose of paying them the said sum of \$750 on said note executed to them by W. B. Featherstone, and that said money obtained from said company was applied to the payment of the said sum of \$750 mentioned in said note executed by W. B. Featherstone to the said Stratton and Hoshour.

(5) They also allege that they executed and delivered to F. W. McGuire a trust deed on said lot No. 4 to secure the payment of said sum of \$750 they were due the Standard Savings & Loan Company, to be paid on or before 114 months from date, with 10 per cent. interest per annum from October 1, 1898, said interest to be paid monthly to secure the payment of said note to said company, authorizing said company to have said land sold by said trustee should W. B. and S. S. Featherstone make default in the payment of any installment of interest on said note for six months after the same became due and payable at the election of the holder of said note. They also allege that W. H. Stratton was the agent of said company in the city of Cleburne, in Johnson county, Tex., and that through him they secured said loan from said company, and that W. H. Stratton knew that said loan included more than the purchase price of lot No. 4, which was the sum of \$300, and that said house was their homestead, and that they had no other homestead in this state, and that said C. B. Stratton and Charles A. Hoshour had no valid lien upon said lot or on said house for any improvements made to said house, or for moving the same from said two-acre lot.

(6) They also allege that on January 25, 1901, they had made default and failed to pay the monthly installment of interest on said note to said company for six months after said interest became due, and at the election of said company, which was then the holder of said note, said company matured the same and had made the full amount thereof due and payable under said contract, and that on January 25, 1901, E. Y. Brown purchased from said company said note against them, and, to secure himself for the amount of money he claimed to have paid said company for said note, required W. B. Featherstone and Mrs. S. S. Featherstone to execute and deliver to him their promissory note for \$881, with 10 per cent. interest per annum from date, due January 25, 1903, and also 10 per cent. additional as attorney's fees in case said note should be placed in the hands of an attorney for collection when the same matured, and also required them to execute and deliver to W. F. Ramsey a trust deed on lot No. 4, with power to sell the same in case they failed to pay said note for \$881 when the same matured; and W. B. and S. S. Featherstone also allege at the time they executed said note to E. Y. Brown he required them to advance to him the sum of \$67 as interest on said note for the first year, and then to execute said note drawing interest at the rate of 10 per

cent. per annum, and that said 10 per cent. interest per annum was in addition to the said sum of \$67 paid said E. Y. Brown as interest on said sum of \$881, which was more than 10 per cent. interest per annum on said sum of \$881, which said interest mentioned in said note was usurious and void. W. B. and S. S. Featherstone also allege that on January 25, 1902, they paid E. Y. Brown \$97 on said note as interest, which was usurious interest collected by him on said note, and that in connection with the \$67 and \$97, the same being usurious interest, he became liable to pay them double the amount of said sums, which they plead as a set-off as against any amount they might owe him on said note.

(7) They also allege that E. Y. Brown has no lien on said house to secure the payment of said note for \$881, interest, and attorney's fees, and that he has no lien on said lot except for the sum of said \$300, which they agreed to pay the said Stratton and Hoshour of the purchase price of said land, less the said sums of \$67 and \$97 usurious interest they paid on said sum. W. B. and S. S. Featherstone also allege that the debt they were owing the Standard Savings & Loan Company was matured at the time E. Y. Brown purchased the same, and said company had notice it had no valid lien on said house and had no valid lien on said lot, except for the said sum of \$300, the purchase price of said lot; and that defendant E. Y. Brown took said claim from said company subject to all the equities existing between them and said company, and subject to all defenses they had against said claim in the hands of said company.

(8) They also allege that they are still residing upon said lot No. 4 as their homestead, and that they have acquired no other homestead in this state, and that the sale of said lot would cloud their title to homestead and injure its sale, and damage them \$1,500.

(9) They also allege that about June 8, 1901, under a verbal contract made with W. H. Bryant, he made certain improvements and additions to said house on block 4, and to furnish the material and work for which they agreed to pay him \$400 on June 8, 1902, and that after said material was furnished and improvements made to said house they executed to said Bryant a note for \$400, with 10 per cent. interest, for said material and improvements, and also gave him what purported to be a mechanic's lien on said lot and house to secure the payment of said \$400 and interest, and that said W. H. Bryant assigned and transferred said note to E. Y. Brown; but they also aver that said E. Y. Brown has no lien on said house and lot to secure the payment of said note, because said W. H. Bryant purchased the material and made said improvements under a verbal contract, and not under a written contract, and the same was not acknowledged by W. B. Featherstone and his wife, S. S. Feather-

stone, as required by law to give and fix a lien on their said homestead, to secure the payment of said note for \$400. They also aver that said mechanic's lien is a cloud upon their title to their lot and house, and damages them in the sum of \$500, and that the said E. Y. Brown has been notified that he has no lien on said lot and house to secure the payment of said \$400 and interest on the same, and he refuses to commence suit to foreclose his said pretended lien on said house and lot, and is now fraudulently attempting to sell said house and lot under the said deed of trust executed to the said W. F. Ramsey to secure the payment of said note for \$881, interest, and attorney's fees mentioned in said note, subject to the said pretended mechanic's lien for \$400 executed to the said W. H. Bryant, which would damage W. B. Featherstone and his wife Mrs. S. S. Featherstone in the sum of \$1,500.

(10) They allege in the original petition that W. F. Ramsey had advertised said lot and house to sell the same under the trust deed to secure the payment of said sum of \$881, interest, and attorney's fees, and that under said original petition the said W. F. Ramsey and E. Y. Brown were restrained by injunction to sell said lot and house under said deed of trust; and in said original and amended petition they pray the court to have an account stated and made between E. Y. Brown and themselves, to ascertain what amount, if any, they are owing E. Y. Brown on said claim of \$881, and also whether or not he has any lien on said house to secure the payment of said amount, and also for the court to decree that the said E. Y. Brown has no lien on said house or lot to secure the payment of said \$400 on said pretended mechanic's lien, and also to decree that the said E. Y. Brown has no lien on said house and lot to secure the payment of the said note of \$881, interest, and attorney's fees, except the sum of \$300, which said amount W. B. Featherstone and S. S. Featherstone agreed to pay the said Stratton and Hoshour as the original contract price for said lot No. 4.

Other than demurrers, the answer of defendants contains a general denial, and the following averments:

"(5) And the defendant E. Y. Brown, further answering herein for himself, represents and shows to the court that on or about the 25th day of January, 1901, at the special instance and request of plaintiffs; made to him through W. F. Ramsey, who was then acting in the matter as their solicitor and agent, he advanced to plaintiffs the sum of \$881, to take up and discharge the debt then owing to the said Standard Savings & Loan Company by the plaintiffs, as represented by them to this defendant through said agent and solicitor, W. F. Ramsey, with the distinct understanding and agreement that the lien then held by said company to secure the debt due them should be kept alive to secure this defendant in the payment of the money so

advanced by him; that, in pursuance of this understanding and agreement, the plaintiffs did on the 25th day of January, 1901, execute and deliver to him their certain promissory note of \$881 for the amount so advanced by this defendant, due in two years from date, with interest at the rate of 10 per cent. per annum from date, with 10 per cent. attorney's fees if placed in the hands of an attorney for collection, or, if suit was brought on same after maturity, and said plaintiffs at the same time also executed and delivered to the said W. F. Ramsey, as trustee for the benefit of this defendant, their certain deed of trust on said lot No. 4, as set out and described in plaintiffs' petition, to secure the payment of said note.

"(6) And this defendant would further show to the court that, at the time he advanced to the plaintiffs the \$881 as aforesaid, he had no notice of, nor any reason to suspect, any infirmity or vice in the lien on the land as made to him, or in the lien held by the loan company, or by virtue of the purchase-money note, or that said defendants or either of them pretended to have, or had, any homestead right or claims superior to the liens conveyed to him, and evidenced by the instruments made to him and the records of Johnson county; that it (if) there was any claims or homestead right in defendants, or either of them, to the property so pledged, which he does not admit but especially denies, then he says the plaintiffs did not give him any notice of same, but by their acts and conduct in soliciting him to advance the money to take up the debt to the loan company, and in executing the note and deed of trust to secure the money so advanced by this defendant, they unlawfully and fraudulently concealed and covered up from defendant their homestead claims, and any claim or defense to the debt due the loan company, or to the note given for the purchase money of said lot. And this defendant further says that he advanced the \$881, as aforesaid, at the solicitation of plaintiffs, and at their special instance and request, in good faith, without notice of any defense to the note for the purchase money, or the note in the hands of the loan company, relying upon the representations and acts of the plaintiffs; and that by said solicitations and acts of the plaintiffs in concealing from him their said defenses to said note they deceived the defendant as to their defenses against said notes, and fraudulently and wrongfully induced him to advance the money to pay them off; wherefore he says the plaintiffs are now estopped in equity and good conscience from setting up and claiming their pretended homestead right or claims in said property as against this defendant.

"(7) And, for further answer, the defendant says that it is true, as alleged in plaintiffs' petition, that they did on or about the 8th day of June, 1901, enter into a contract with W. H. Bryant to make certain improvements

and additions mentioned in plaintiffs' petition, for which they agreed to pay him, the said Bryant, the sum of \$400, due on January 8, 1902, and that said contract was in writing, and duly signed and acknowledged by the plaintiffs, and recorded as the law directs; that said written instrument or contract was recorded in Book 4, pp. 211 and 212, of Mechanic Lien Records of Johnson county; but defendant specially denies that said contract was entered into and signed and acknowledged after the work was done and the material was placed on the said lot, and that no lien was fixed thereby on said homestead as set out in plaintiffs' petition. For this reason, defendant alleges the facts to be that some time previous to the date of the written contract the plaintiffs entered into a verbal agreement with the said W. H. Bryant to erect and make certain improvements on the said lot to the value of about \$900, he, the said Bryant, to do the work and furnish the material at his own cost and expense; that by said agreement the work and material was to be paid for by the plaintiffs in cash as the improvements advanced, and that, after about \$500 worth of the work and improvements were put up and paid for, the plaintiffs informed the said Bryant that they were out of money and could make no more cash payments on said contract; that the said Bryant then declined and refused to proceed further with the work, unless he was made secure by a lien on the property for the work and material thereafter to be furnished and done; that the plaintiffs then entered into the contract and agreement in writing with the said W. H. Bryant, signed and acknowledged as required by law, to fix and secure a mechanic's lien upon the homestead as set out in plaintiffs' petition; that after said contract so entered into was signed, acknowledged, recorded as aforesaid, the said W. H. Bryant, in pursuance of same, furnished the material, work, and labor to complete said improvements and additions, to the value of \$400; that all the material, labor, and work for which said \$400 note was given to secure was put on said lot after said contract was executed and recorded as aforesaid.

"And this defendant further shows that, at the time said written contract was entered into and said mechanic's lien was created, the plaintiffs executed and delivered to the said W. H. Bryant, or order, their certain promissory note for said \$400, with 10 per cent. interest thereon from date, due and payable on or before 12 months from the date thereon, and 10 per cent. on the amount due as attorney's fees, if placed in the hands of an attorney for collection, or suit was brought on same after maturity; that the payment of said note was secured by the said mechanic's lien on said property; that on, to wit, the 10th day of June, 1901, the said W. H. Bryant, for a valuable consideration paid to him by this defendant, transferred and indorsed said note to this defendant, and this

defendant is now the legal and equitable owner and holder of said note; that the whole of said note is now due and payable, save and except one year's interest on same, which has been paid, but to pay the balance due on same or any part thereof, though often requested so to do, the plaintiffs have, and do now, wholly failed and refused to pay, to defendant's damage in the sum of \$800; that, by reason of plaintiffs' failure and refusal to pay said note, defendant has been compelled to place same in the hands of an attorney for collection and bring suit on same, to his further damage in the sum of \$150.

"And, further answering herein, this defendant represents and shows to the court that if it be true, as set out in plaintiffs' petition, that the work was done and the material furnished to make the improvements on said lot No. 4 before the signing, acknowledging, and filing of said contract, which he does not admit but specially denies, then he says the plaintiffs should not be allowed to urge said defense or defeat the lien on said lots by reason of said facts, for he says he purchased said note in good faith before maturity, paying a valuable consideration for same, without any notice of any defect or defense against said mechanic's lien; and he further represents and shows to the court that if said mechanic's lien is defective for reasons set forth in plaintiff's petition, which he does not admit but denies, then he says the plaintiffs willfully, wrongfully, and fraudulently, and with the intent to deceive and mislead other parties who might purchase said note, executed the same and acknowledged and recorded said contract and mechanic's lien, and that this defendant was thereby deceived and misled, and that, relying upon the truthfulness of the facts set forth in said instruments and records, he purchased said note in good faith, and without notice, as aforesaid, of any hidden defect in said lien and note; wherefore he says plaintiffs are estopped from now setting up said defense against them. And this defendant further shows to the court that said note for \$881 is now due and unpaid, except the interest for one year, and, though often requested to do so, the plaintiffs have heretofore, and do now, wholly fail and refuse to pay the balance due, or any part thereof, to his damage in the sum of \$1,200. He further shows that by reason of said failure to pay said note he has been compelled to place same in the hands of an attorney for collection and to bring suit thereon, to his further damage in the sum of \$250."

The case was submitted by the trial court to the jury upon the following special issues:

"First. Was the house that was moved from the Yeager two-acre block to said lot No. 4 in block A of the Hoshour Addition the separate property of the plaintiff S. S. Featherstone?

"Second. Did the note executed by W. B. Featherstone and wife to Stratton and Hoshour for \$750, and referred to in the deed from Stratton and Hoshour to W. B. Featherstone, express or represent the true consideration, or the true amount agreed to be paid, for said lot 4 in block A of the Hoshour Addition in that transaction?

"Third. If you answer the last above question in the negative, then state what portion of the amount of said note referred to in said question represented the actual or true amount agreed to be paid for said lot in said transaction? If you answer question No. 2 in the affirmative, you need not answer this question.

"(2) In connection with the succeeding question No. 4, the court instructs you as follows: Notice to a duly authorized agent is notice to his principal, and notice to an authorized agent of the Standard Savings & Loan Company would be notice to said company. If, however, an agent ceases to act in good faith for his principal, and enters in collusion with another person for the purpose of practicing in the interest of such person a fraud or imposition upon his principal, the agent would not be regarded as the agent of his principal in such transaction, and his knowledge in reference to matters relating to such transaction would not bind or be notice to his principal with reference thereto. So, in this case, if you believe from the evidence that the said W. H. Stratton was at the time in question the duly authorized agent of the Standard Savings & Loan Company, but shall further believe from the evidence that at such time he entered into collusion with the plaintiff W. B. Featherstone to have the said \$750 note executed by Featherstone and wife to Stratton and Hoshour express other than the true consideration or amount agreed to be paid by Featherstone and wife for said lot 4, if the same did express or represent other than the true consideration for said lot, for the purpose of inducing his company to advance upon said note the amount thereof as stated in its face, and for the purpose of practicing a fraud or imposition upon said company in such transaction, and in such transaction he did not act in good faith for his principal, then in such event the said Stratton would not be in law considered as having acted as the agent of said company, and notice or knowledge acquired by him in reference to matters to which such collusion, if there was any, related, would not be binding upon said company, and would not be notice to said company in reference to such matters. On the other hand, if from the evidence you believe that at such time the said Stratton was the duly authorized agent of said company, and that in said transaction he acted in good faith for said company, and without any collusion with the plaintiff W. B. Featherstone to practice a fraud or imposition upon said company with reference to the consideration

for said lot as expressed in said note, then any knowledge acquired by him in the course of his business in reference to such transaction would be binding upon said company, and would constitute notice to said company. Observing the foregoing instructions, if you have answered foregoing question No. 2 in the negative, you will answer the following question:

"Fourth. Did the Standard Savings & Loan Company of Dallas, Tex., at the time it took up and paid off the said \$750 note above referred to, have actual notice that the true consideration for said lot No. 4, in the sale of the same by Stratton and Hoshour to plaintiff W. B. Featherstone, was other than the amount stated in the face of said note?

"Fifth. Had the \$750 note executed by the plaintiffs herein to the Standard Savings & Loan Company matured at the time that the defendant E. Y. Brown made the loan in question to the plaintiffs for which they executed and delivered to him the note for \$881 in question?

"Sixth. At the time the defendant E. Y. Brown made the loan in question to the plaintiffs for which they executed him their said \$881 note, and he took up the said \$750 note due said loan company, did he do so in good faith, and without actual notice of the true consideration of said lot 4 agreed to be paid by the plaintiffs in the transaction of its purchase from Stratton and Hoshour being other than the amount stated in said note?

"Seventh. Was there any contract or agreement entered into by and between the plaintiff W. B. Featherstone by which, upon the said note for \$881, the said E. Y. Brown, with intention on his part to do so, was to charge or receive as interest more than 10 per cent. per annum upon the principal of said note?

"Eighth. If you answer the foregoing question 7 in the affirmative, what amount of interest in excess of 10 per cent. per annum on the principal of said note was the said Brown to charge or receive by such agreement?

"Ninth. What amount as interest has been paid by the plaintiffs to the said E. Y. Brown on said \$881 note?

"Tenth. What is the value of said lot 4 at this time, with improvements thereon?

"Eleventh. What is the value of lot 4 without such improvements?

"Twelfth. Were the material and labor contemplated to be furnished and performed under the mechanic's lien contract in question entered into by and between plaintiff, and for which their \$400 note was executed in favor of W. H. Bryant, furnished and performed, and said contract performed, after the execution thereof?

"Thirteen. If you have answered the last above question in the affirmative, you need not answer this question, but if you have answered the same in the negative, you will then answer this question: What was the reasonable value of said mechanic's lien

contract as determined by the value of the material and labor that were furnished and performed thereunder, and of the services of the said W. H. Bryant in the supervision of and attending to the work in the completion of said house at the time thereof, after the execution thereof?

"Fourteenth. Did the plaintiff W. B. Featherstone in his negotiation with W. F. Ramsey in regard to procuring the note due said loan company to be taken up, or securing the money with which to take up the same, by any conduct, acts, or representations on his part induce the said W. F. Ramsey to believe that the amount of said note represented the true consideration agreed to be paid by the plaintiffs in the original purchase of said lot No. 4?

"Fifteenth. If you have answered question No. 14 in the negative, you need not answer this question. If you have answered same in the affirmative, you will then answer this question: Was such acts and conduct or representation upon the part of plaintiff W. B. Featherstone, referred to in the foregoing question, done or made by him, knowingly, for the purpose of inducing the same W. F. Ramsey to believe that the amount of said note as stated in its face represented the true consideration for said lot 4, or the true amount agreed to be paid for same in the transaction of his purchase aforesaid, and for the purpose on his part of inducing such person whom the said Ramsey might procure to take up said note, or from whom he might procure a loan for that purpose, to act thereon in making such loan?

"Sixteen. If you have answered foregoing questions Nos. 14 and 15 in the affirmative, did the defendant E. Y. Brown, in making the loan in question for which plaintiffs executed to him their note for \$881, act and rely upon such acts or conduct or representation of the plaintiff W. B. Featherstone, if any, as done or had by said plaintiff in the negotiation by plaintiff with the said Ramsey, or made to him by said plaintiff in such negotiation?

"Seventeen. For whom was the said W. F. Ramsey acting in the acts done by him, or part performed by him, in the negotiation of the loan procured by plaintiffs from the said E. Y. Brown?"

The answer of the jury to the questions propounded is as follows: "Question 1. Yes. Question 2. No. Question 3. \$300. Question 4. Yes. Question 5. Yes. Question 6. Yes. Question 7. No. Question 8. —. Question 9. \$88.10. Question 10. \$2,500. Question 11. \$1,000. Question 12. No. Question 13. \$300. Question 14. Yes. Question 15. Yes. Question 16. Yes. Question 17. Plaintiffs. Special instruction No. 1, requested by defendant. Yes."

The trial court, upon the verdict of the jury, rendered judgment substantially as follows: In favor of E. Y. Brown against W. B. Featherstone for the sum of \$1,192.50,

with 10 per cent. interest per annum on said note for \$881, and also for \$489.50, with 10 per cent. interest per annum, on said note for \$400, and that the said E. Y. Brown had a lien on lot No. 4 mentioned, as against the said W. B. Featherstone and S. S. Featherstone, to secure the payment of \$1,192.50 and interest, and also had a lien on said lot and improvements against W. B. Featherstone to secure the payment of \$334.18 of the said \$489.50, with 10 per cent. interest per annum on said sum of \$334.18, and foreclosed said lien on said lot and improvements on same against W. B. Featherstone and S. S. Featherstone, and ordered said lot and improvements sold to satisfy said lien, and also rendered judgment against W. B. Featherstone and S. S. Featherstone and their sureties for all cost in favor of E. Y. Brown and W. F. Ramsey, and also dissolved the writ of injunction which had previously been issued in this cause.

There is no statement of facts in the record. The judgment of the court established the amounts due by Featherstone, and foreclosed the lien against him and his wife, the plaintiff in error, on the property described in the judgment, for the amounts therein stated.

It is insisted in plaintiff in error's first proposition, under her thirteenth, fourteenth, fifteenth and sixteenth assignments of error, that the judgment was unauthorized, because the verdict of the jury did not find that any sum was due or owing the defendant in error Brown, and that a lien existed against the property in controversy. It is true that the verdict does not affirmatively state that a lien existed, nor was the issue submitted to the jury, but the trial court doubtless, from the evidence before it, reached the conclusion that Featherstone was liable for the amounts for which judgment was rendered, and that a lien existed against the property for the amount stated in the judgment. There are no facts in the record by which we can test the correctness of the judgment in this respect. Therefore, in view of article 1331 of the Revised Statutes of 1895, we must take the action of the trial court as conclusive upon this question.

There are some other propositions presented under these assignments, wherein it is contended that the verdict of the jury did not authorize the foreclosure of a lien on the property in question for a sum greater than \$600, and that the judgment of the court was contrary to the verdict in this respect. With reference to the \$750 note, the jury did find that the true consideration was \$300, but there is a finding to the effect that the defendant in error Brown, when he acquired the note, had no knowledge that the consideration was less than stated in the face of the note, and that he took up the note at the request of the agent of the plaintiff in error, based upon representations substantially to the effect that the amount for

which the plaintiffs in error were liable was correctly stated in the face of the note. This issue of estoppel was presented in the charge of the court, and a finding of the jury thereon was favorable to the defendant in error, and we think his finding was sufficient basis for the judgment.

We are also of the opinion that the court correctly rendered judgment in favor of the defendant in error on the \$400 note in controversy. It is true that, in answer to the twelfth and thirteenth questions propounded, the jury stated that \$300 was the reasonable value of the material and labor furnished by Bryant and the services performed by him in the completion and erection of the improvements. The trial court in its judgment did not foreclose the lien on the property as to this item to the full extent of \$400, the amount stated in the note. But, however, we cannot see that error was committed in entering the judgment upon this item, or, in view of the fact that there is no evidence in the record, we could not say that error would have been committed if the court had rendered judgment foreclosing the lien for the full amount stated in the note. As said before, the note was executed for \$400, and the plaintiffs in error would be liable to Brown for the full amount of the note, although it exceeded the reasonable value of the material and labor furnished by Bryant in the construction of the premises.

Whatever homestead question there might have been in the case, if any, that was developed on the trial of the case below, which would throw light upon and tend to explain the twelfth and thirteenth questions propounded and the verdict of the jury in response thereto, cannot be considered and passed upon on this question, or any other that arises in the case, because there is no finding of the jury or trial court in favor of the plaintiffs in error that the property in question was their homestead, and, there being no statement of facts in the record, we are not in a condition to pass upon any question that might be suggested in the brief of plaintiff in error on the homestead issue.

It is intimated in the seventh proposition under these assignments of error that the statute in question which authorized the court to enter judgment, in the absence of a finding by the jury upon special issues, is unconstitutional, and that the power of the court in rendering the judgment is only limited to the facts actually found and established by the verdict. We will not undertake to discuss this question, but dispose of it merely with the statement that the statute in question is not subject to the constitutional objection urged against it.

There are some objections to the action of the court in refusing to render judgment in accordance with the theory of the plaintiff in error, which are in effect disposed of by what has been said upon the other questions discussed.

There are also some assignments complaining of the action of the court in refusing to submit certain issues to the jury. There being no statement of facts in the record, we are not in a position to say whether error was or not committed in refusing these charges.

Judgment affirmed.

DE BARRERA v. FROST et al.*

(Court of Civil Appeals of Texas. May 24, 1905.)

1. WIFE'S SEPARATE PROPERTY—COMMUNITY PROPERTY—MORTGAGES—RECEIVER.

In a suit by a wife to cancel a deed of trust given by husband and wife on her separate property, the court having canceled the deed of trust and appointed a receiver, a contention that it was error to authorize the receiver to collect the rents to the exclusion of plaintiff, on the ground that the husband having ceased to contribute to the collection of the rents, and having been deprived of his statutory power to manage the property, the rents became the separate property of the wife, was without merit.

2. SAME—DURATION OF RECEIVERSHIP.

Where a wife sued to cancel a deed of trust given by her and her husband on her separate property to secure his debt, it was not error, in appointing a receiver, not to limit by the decree the receivership to the period during which the marriage relation might continue.

3. SAME—RENTS.

The deed of trust having, by its terms, been a charge on the rents, and the decree having canceled the deed of trust only in so far as it affected the wife's separate property, it was proper to appoint a receiver to collect the rents.

4. WIFE'S SEPARATE PROPERTY—MORTGAGE—RIGHT TO EXTEND—HUSBAND'S AUTHORITY.

A husband has no authority to extend any indebtedness secured by a mortgage on the wife's separate property.

5. SAME—EXPRESS AUTHORITY FOR EXTENSION.

A deed of trust given by a husband and wife on her separate property to secure his note, provided that any extension might be made, or any part of the security released, without altering or diminishing the lien in favor of any junior incumbrancer, etc., or any other persons acquiring any interest in the property. *Held*, that such provision contemplated only subsequent incumbrancers or purchasers, and did not authorize the husband to extend, and deprive the wife of any rights she might have by reason of an extension not participated in by her.

6. SAME—HUSBAND'S INSOLVENCY—DISCHARGE OF SECURITY.

The insolvency of a husband does not affect the rule that a contract of extension of his debt, not participated in by the wife, discharges her property, which stands as security for the debt.

7. SAME.

Where a new agreement between a debtor and creditor is that the debtor shall pay, at the end of a period agreed on for an extension, precisely the same sum due at the time the agreement was entered into, the surety is nevertheless released.

8. WIFE'S SEPARATE PROPERTY—MORTGAGE—SURETSHIP.

Sayles' Ann. Civ. St. 1897, art. 2970, provides that a wife may contract debts for ex-

*Rehearing denied June 22, 1905.

penses incurred for the benefit of her separate property. *Held*, that where a husband became liable for borrowed money by giving his note therefor, and he and the wife gave a deed of trust on her separate property, but some of the money was applied to satisfy tax liens on that property and for other purposes for the benefit of the wife's separate estate, and the mortgage, by its terms, secured liens on lands acquired by the wife as her separate estate, as to such portions of the debt the wife was not a surety, and hence was not released by the husband's extensions of the debt not participated in by her.

Appeal from District Court, Bexar County; A. W. Seeligson, Judge.

Action by Julia Cadena de Barrera against T. C. Frost and others. From a judgment in favor of defendants, plaintiff appeals. Reversed on cross-assignments.

Geo. C. Altgelt, for appellant. Ball & Ingram, for appellees.

JAMES, C. J. Appellant sued to cancel a deed of trust, alleging that she joined her husband, Juan E. Barrera, in the deed of trust on her separate property to secure T. C. Frost in the payment of a note due him by her husband, and claiming that her property was discharged by reason of four different extensions granted her husband without her knowledge or consent. The defendants were T. C. Frost and J. T. Woodhull, the latter being the trustee. Mr. Frost having died, his independent executrix became a party.

The defenses set up were various: (1) That there had been no extensions, but only indulgences. (2) If any extension, the same was at the instance of plaintiff, through her agents, and the payments of interest were made out of plaintiff's funds, with her knowledge and consent. (3) That the extension, if any, was procured by plaintiff's husband, who had the right to extend same without releasing plaintiff's property. (4) That by such extension, if any, the indebtedness was not augmented or increased, in that the amount due at the expiration of the extension was exactly the amount previously due, and therefore there was no damage to plaintiff. (5) That by the terms of the deed of trust it was contemplated that the indebtedness could and might be extended by the husband. (6) That her husband was and is insolvent, and payment of the note could only be made out of the property of plaintiff, and therefore an extension did not affect the matter. (7) That \$4,000 of the \$5,000 note for which the deed of trust sought to be canceled was given was secured by previous deeds of trust on plaintiff's same property, and, the husband being insolvent, the same, being an incumbrance upon her property, was her debt, and the novation or extension of such debt merging it into the \$5,000 note was for the benefit of and to protect plaintiff's property from foreclosure under said pre-existing deeds of trust, and the liens thereof were carried forward and de-

fendant subrogated to the same, and therefore plaintiff was not in fact, as to \$4,000 of the \$5,000 note, a surety for her husband, but same was a first and primary charge against plaintiff's property; and that the additional amount, making the note \$5,000 (with exception of \$3.44), was used to pay interest upon said previous \$4,000 debt and taxes upon said property; this making the entire debt plaintiff's debt except \$3.44, and in truth and in fact the \$5,000 mortgage was for the protection of plaintiff's property, and for her own use and benefit. (8) That \$1,500 of the amount included in said \$5,000 note had been previously evidenced by two notes for \$750 each, dated February 11, 1893, secured by a mortgage executed by plaintiff and her husband, which lien has been carried forward in all succeeding mortgages; and that plaintiff's husband then owned a half interest in said property, and afterwards, on June 18, 1894, he conveyed his interest to plaintiff, and recited in the conveyance that it was subject to said deed of trust of February 11, 1893, and, aside from any subrogation arising from said debt and lien being carried forward from time to time, plaintiff having acquired said interest subject to said debt, the property became charged therewith, and to that extent it was her separate debt and liability, and the extension, if any, would not discharge the property, etc. (9) By way of cross-bill defendant interpleaded the husband and sought a foreclosure of the mortgage lien. (10) Defendant set up the transfer and assignment of the rents of the property contained in the deed of trust sought to be canceled, alleging said rents to be community property, and prayed that, in the event the property should be held to be released, the receiver heretofore appointed herein be continued with authority to collect the rents and lease the property, with such further powers as the court might see fit to give him from time to time.

On the trial the court gave decree for plaintiff, canceling the deed of trust so far as the property was concerned, gave judgment against Juan E. Barrera, her husband, for the amount due on the note, and continued the receivership on account of the rents, defining the receiver's powers and duties, and decreeing that the receivership and the receiver be subject at all times to the control and direction of the court, until otherwise ordered, or until the said indebtedness be satisfied, etc. Mrs. Barrera has appealed, and complains of the action of the court concerning the receivership. Her propositions are:

1. The application for the appointment of a receiver was insufficient in law, because it was not shown that T. C. Frost did not have an adequate remedy at law, but, on the contrary, it appears from the application that there was an adequate remedy at law by suing out a writ of sequestration. This we

have already considered and discussed on an appeal from the order appointing the receiver. *De Berrera v. Frost*, 77 S. W. 637. This disposes of the first, fifth, and sixth assignments.

2. That the mortgage deed provided a remedy by giving notice to the tenants of the property, and such remedy was exclusive, and after giving notice Frost had an adequate remedy at law by suit against the tenants, it not being alleged that such tenants were insolvent, or colluded with plaintiff. This was also disposed of in the opinion mentioned.

3. In order to entitle Frost to a receiver, it was necessary that he should allege that the property whereon he claimed a mortgage was probably insufficient to discharge the debt, or allege in direct terms that his mortgage had been discharged, or the property released from the mortgage by reason of the extension, so that he might rely solely upon his claim for a lien on the rents. So far as the temporary appointment of the receiver was concerned, that matter has been finally adjudicated. As to the final decree on the subject, the effect of the cancellation of the deed of trust was to release all the property there was from the lien, leaving Frost only the bare rents as security, and these rents only for such uncertain time as the marital relation between plaintiff and Juan E. Barrera is not dissolved by death or otherwise, they being community property only during the existence of such relation. The right of defendant to a receiver in respect to the rents without the allegations contended for is sustained by reasons given on the former appeal, and we see no occasion to say more on the subject.

4. That the mortgage provided the remedy of giving notice to tenants of the property, which remedy was exclusive and, in addition to the reasons stated in the second proposition above, Frost had an adequate remedy at law by suit against the tenants, it not being alleged that the property is probably insufficient to pay the debt, and it not being alleged in direct terms that the mortgage had been discharged, or said property released from its operation. By this last reason, we take it, is meant that defendant should have admitted that the property was discharged, and that defendant was not entitled to a receiver for the rents while contending that the mortgage on the property existed. We see no force in this reason. The seventh assignment of error, under which this proposition is made, is based on an overruled exception to the application for a temporary receiver, the matters relating to which were finally settled in the appeal from such appointment. The appeal now taken can affect only matters which concern the final decree.

Appellant's eighth and ninth assignments are that the court erred in appointing a receiver, and authorizing him to take charge

of the property, and to rent same and collect the rents to the exclusion of plaintiff, and in not rendering an unqualified judgment for plaintiff canceling the deed of trust. Appellant's view, as expressed in a proposition, is that, after her husband ceased to contribute to the collection of the rents, and after he was deprived by the court of his statutory power to manage the property in question, the rents became her separate property. Also that the rents are her separate property, and cannot be subject to her husband's debts against her will, while her husband contributes nothing to the earning and collection of such rents. We think it useless to discuss these propositions. The community character of rents and revenues derived from the wife's separate estate has become settled in this state, and the rule is not affected by such contingencies. The relation between husband and wife may be such as to enlarge her powers or restrict his over their community property, but the nature of the property itself remains the same during marriage. We therefore overrule the assignments.

The eleventh and twelfth assignments of appellant complain of the decree in not in terms limiting the receivership to the period during which the marriage relation might continue between plaintiff and her husband. There are other contingencies that would require the termination of the receivership before the dissolution of such relation. The court retained jurisdiction of all matters pertaining to the receivership and its continuance, and it was not necessary to forestall and provide in the decree the time limit of the receivership.

Under the tenth assignment it is insisted that after the cancellation of the deed of trust there was no basis for the receivership, because appellee was a simple creditor only, and it was error to appoint a receiver at the suit of a simple creditor who has lost her lien. This loses sight of the fact that the deed of trust was, by its terms, a charge or lien on the rents. The decree canceled the deed of trust only in so far as it affected the property which was the separate property of the wife.

Appellee presents a number of cross-assignments.

We overrule the first contention, which is that the husband has authority to extend any indebtedness secured by a mortgage on the wife's separate property, he having control and management of such property.

Also the second, which is that by the terms of the deed of trust it was contemplated that he might exercise the power of extending the note, it being specially stipulated thereon that any extension or extensions should not impair or relinquish the lien. The provision which this has reference to reads as follows: "It is agreed and understood that any extension or extensions may be made in the payment of said above-described

indebtedness, or any part thereof, or any amount of sums paid out or expended under the provisions hereof, or any part of the security herein described may be released without in any wise altering or diminishing the force, effect, or lien of this instrument in favor of any junior incumbrancer, mortgagee, or purchaser, or any other person or persons hereafter acquiring any lien upon, or interest in, or title to said above-described property or any part thereof, or any such extension or extensions shall be binding upon all junior incumbrancers, mortgagees, purchasers, or any other persons hereafter acquiring any lien upon, or interest in, or title to said above-described property or any part thereof, and this instrument shall continue and remain a prior lien and charge notwithstanding any such extension or extensions, release or releases." We think it is clear that this had in contemplation only subsequent incumbrancers or purchasers, and was intended to cut them off from claiming rights by reason of any extension or release, but was not designed to give the husband the power to extend, and thereby deprive the wife of any right she might have by reason of an extension not participated in by her.

We also overrule the proposition that the insolvency of the husband would affect the rule that a contract of extension of his debt, not participated in by the wife, discharges her property, which stands as surety for such debt.

We likewise overrule the proposition that, where the new agreement is that the debtor should pay at the end of the period agreed upon for the extension precisely the same which was due at the time the agreement was entered into, the surety would not be released. This is based upon the fact that the interest on the sum due at the date of the extension (\$5,000) was paid in advance. Whether paid in advance or contracted to be paid in the future, it was a consideration for the contract of extension made by the husband in reference to the debt.

Other cross-assignments we must sustain.

The court would not allow defendant to plead or prove that a certain portion of the indebtedness was for money advanced and used to pay taxes on her separate property. It seems to us clear that for such sums her separate property would, under our statute, be charged primarily, and not as surety, and hence her property would not be discharged from such part of the debt by reason of the extension. For the same reason the property would be liable, and not be affected by the extension, as to that part of the indebtedness which may have represented the original of the successive deeds of trust—the one given February 11, 1893. This deed of trust was for \$1,500, interest, etc., and was given on the same property by both husband and wife. It appears that at that time the husband owned an undivided half interest in

the property. These conditions existing, he, on June 18, 1894, conveyed same to plaintiff, the deed expressly providing that the conveyance thereof was subject to the said deed of trust. On May 12, 1896, they gave to T. C. Frost & Co. another deed of trust on the property for \$500. On December 17, 1897, plaintiff and her husband executed a new deed of trust upon same property securing said three notes and also a new note for \$2,000, which deed of trust provided that the two previous mortgages should not be in any wise released or impaired, but should remain in full force and effect, and that this mortgage should be a further and continuous security therefor. The deed of trust in question was executed December 1, 1899, and recited that \$4,000 of the amount was for the purpose of taking up and discharging the said four notes mentioned in the deed of trust of December 17, 1897, and that it was intended and specially agreed and understood that as to said \$4,000 T. C. Frost shall be subrogated to the liens and all the rights, privileges, and benefits existing securing said four notes, and that it was expressly understood and agreed that not only the liens secured by the mortgage of December 17, 1897, but that the liens secured by said other two mortgages shall be perpetuated, extended, and continued herein, and that said T. C. Frost shall be subrogated to the liens and all rights, benefits, and privileges inuring or secured under said three deeds of trust. The principle invoked by plaintiff can have no application where the debt extended was her own debt, or a debt primarily chargeable to her separate estate. For such debt her estate would not stand in the attitude of a surety. The original debt of \$1,500 (two notes of \$750 each) was a lien on the property, one-half of which at that time was the wife's separate property and one-half the separate property of the husband. She afterwards, while that debt and lien were in full force, acquired his half, accepting a deed of gift from him, which expressly gave her that half subject to the debt. Thus when it came to her hands it was charged with the debt, and that half, as between her and her husband, became liable primarily for the debt. To him, or to that debt, it did not stand as surety. It stood between him and the debt. The lien of that deed of trust was, by the very terms of the succeeding deeds of trust incorporating the very debt, not extinguished, but continued. Under these circumstances we think that an extension that would discharge plaintiff's property, which stood merely as surety for the debt extended, would have no such effect as to said half interest in the property on that part of the indebtedness which was carried into the later deeds of trust as embodying the original notes for \$1,500.

Article 2970, Sayles' Ann. Civ. St. 1897, provides: "The wife may contract debts for

necessaries furnished herself or children and for all expenses which may have been incurred by the wife for the benefit of her separate property, and for such debts suit may be brought in the manner provided in article 1201." This article relates particularly to simple debts incurred by the wife or by her authority. She may, without reference to her husband, contract for such purposes, or authorize her husband or some one else to contract for same; and for such debts she may be sued, and the judgment satisfied out of her separate estate. Except as to her homestead, she may, if joined by her husband, mortgage her property for any purpose, even for his personal debts. In this case she executed with her husband the several deeds of trust on the property in question, each for a note signed by him alone. The mortgage placed a lien on the property. In so far as that note represented his individual or separate indebtedness, her property stood as surety. But some of the money contracted for in the transaction was alleged to have been applied to satisfy tax liens on the very property, and for other purposes claimed to be for the benefit of the wife's separate estate. The husband, of course, became liable for all such sums, because he gave his note for all the money; but, properly speaking, if applied for the benefit of her estate, such sums were not for himself personally. By giving the lien as security for such note, she herself charged her property with all such sums as were applied for the benefit of her separate estate. In so far as the debt consisted of such sums, her property was not incumbered merely as surety for the debt of another. Her husband may have contracted for such sums, and, had she not given the mortgage in connection with them, she would not have been liable, unless it were shown that she had authorized them to be contracted. But here she gave the mortgage charging this property with such sums, and the question of this particular property being charged therewith was settled by her own act. The only question is, did the extension operate to exonerate the property from that much of the debt? and we are of opinion that it did not.

Being of the opinion that, notwithstanding plaintiff's right to have the deed of trust in question canceled as to her property in so far as the debt extended by the husband was his debt in the sense that her property was merely surety therefor, we conclude that this would not be the effect of such extension upon so much of the \$5,000 note as represented the indebtedness evidenced by the first deed of trust, and as to any and all sums that were applied for the benefit of her separate estate. Defendant should have been permitted to plead and prove accordingly, and therefore the judgment is reversed, and the cause remanded; and, this reversal being on cross-assignments, the costs of this appeal are adjudged against appellant.

BALDWIN v. TRAVIS COUNTY.*

(Court of Civil Appeals of Texas. June 21, 1905.)

1. COUNTIES — POWER TO CONTRACT—NOTICE TO DELINQUENT TAXPAYERS — PUBLICATION — LIABILITY OF COUNTY.

Gen. Laws 25th Leg. p. 138, c. 103 (Delinquent Tax Act) § 15, declaring that, where the owner of land subject to sale for delinquent taxes is a nonresident or his name is unknown, such owner shall be cited and made a party by a notice which shall be published in some newspaper in the county or in an adjoining county, for which publication a certain fee may be "attached," gives the county no authority to contract to pay the cost of publication of the notice.

2. SAME—RATIFICATION.

As the commissioners' court of a county has no power to contract to pay the cost of publication of a notice to nonresident taxpayers, it cannot ratify such a contract when made by the county attorney.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, § 185.]

8. SAME—ESTOPPEL.

In an action against a county on a contract alleged to have been made with the county attorney and ratified by the commissioners' court, but which was such that the commissioners' court had no power to make it, the county could not be estopped from setting up this defense.

Appeal from District Court, Travis County; G. W. Allen, Special Judge.

Action by A. C. Baldwin against Travis county. From a judgment for defendant, plaintiff appeals. Affirmed.

James & Yeiser and John E. Shelton, for appellant. Brady & Caldwell, for appellee.

EIDSON, J. This suit was brought by the appellant against the appellee upon an account alleged to be due him for the publication of a number of citations against the unknown owners of various tracts of land situated in Travis county, Tex., upon which the taxes were delinquent for various years, the total amount alleged to be due for the services of appellant for publishing said citations in his paper, the Travis County Democrat, being \$2,319.37. The court below sustained the general demurrer of appellee to appellant's petition, and dismissed the suit. Appellee's petition, omitting formal parts, is as follows:

"Plaintiff further represents that heretofore, to wit, long prior to the rendition of the services hereinafter set forth, the said county of Travis was desirous of complying with the law, and of having its county attorney institute tax suits for the foreclosure of the tax liens existing in favor of the state of Texas and county of Travis upon divers and sundry tracts of land situated in said county, and upon which the taxes due to said county and state were owing by persons unknown to the commissioners' court and county judge and county attorney of Travis county, and therefore could not be sued and served with citation in such suits personally, so that judgments might be obtained fore-

*Writ of error denied by Supreme Court.

closing the aforesaid tax liens, as well as upon all tracts of land the owners of which were known.

"Plaintiff further alleges that, in consideration of the foregoing, the commissioners' court of Travis county, Tex., entered an order in writing in the minutes of said court authorizing and directing the county attorney of Travis county, Tex., to proceed to institute and prosecute tax suits for the foreclosure of the aforesaid tax liens upon all of the real property in Travis county, Tex., upon which the taxes were then delinquent, a copy of which said order is hereto attached, marked 'Exhibit A,' and made a part of this petition.

"Plaintiff further alleges that a copy of this order was prepared by the county clerk of Travis county, Tex., and was served upon County Attorney Henry Faulk, who was at that time the duly elected and qualified county attorney of Travis county, Tex.

"Plaintiff alleges further that thereafter the aforesaid county attorney proceeded to institute tax suits in accordance with said order against all delinquent taxpayers whose names and residences could be ascertained by him, and who could therefore be personally served with citation in said suits, but said county attorney neglected and failed to institute such tax suits against the delinquent real estate of unknown owners whose names could not be ascertained, and who could not therefore be served personally with citation in any suits which he might file against them.

"Plaintiff further alleges that thereafter the commissioners' court of Travis county, Tex., on several occasions insisted that the county attorney should proceed with such tax suits, and urged him to do so, protesting against his negligence and failure to perform the duties required of him by law, and thereupon the aforesaid county attorney informed the commissioners' court of Travis county, Tex., that it would be necessary to incur on the part of Travis county a considerable expense for the publishing of citations by publication against unknown owners of the lands upon which taxes are delinquent, and that if the said court insisted upon him instituting said suits, and was willing to incur said expense, he, the aforesaid county attorney, would at once proceed to file said suits and to publish said citations in accordance with the law, and prosecute said suits to a final judgment, and thereupon he was directed by the aforesaid commissioners' court to proceed with the institution and prosecution of said suits.

"Plaintiff further alleges that thereupon the aforesaid county attorney at once proceeded to prepare and file his petitions in said tax suits, which are more particularly set forth in the accounts hereinafter described by their numbers on the district court docket of Travis county, and proceeded to ascertain at what price he could have

said citations in said suits published, and after negotiating with several publishers of newspapers in Travis county, Tex., he directed his assistant, J. M. Patterson, to let the contract for publishing same to plaintiff at the statutory price of two and one-half cents (2½c.) per line for each insertion of said citations in the Travis County Democrat, a weekly paper published in Travis county, Tex., by plaintiff; and, acting under the said instructions of the county attorney, his assistant, J. M. Patterson, did thereupon let said contract verbally to plaintiff at the aforesaid price, and reported same to the aforesaid county attorney, who thereupon ratified and confirmed his act in letting said contract as aforesaid.

"Plaintiff further alleges that thereafter the said assistant to the county attorney, J. M. Patterson, appeared before the commissioners' court and informed said court that the county attorney was proceeding with the institution of said tax suits against unknown owners, and was proceeding to publish the citations in same as required by law, and that it had come to the notice of the county attorney, and himself as his assistant, that the descriptions of a number of the tracts of land upon which the taxes were delinquent, as set forth in the assessment rolls, were insufficient to support a valid judgment of foreclosure, and requested the said commissioners' court to instruct him and the county attorney whether or not they should proceed to institute suits and publish the citations in cases where such descriptions were insufficient, and thereupon said commissioners' court stated to said J. M. Patterson that the prosecution of such suits, even though the description might be insufficient, would probably have the effect of causing the owners, when they discovered the cloud cast upon their titles by said suits, to pay off any judgment which might be rendered in same, and therefore the said court directed and instructed said J. M. Patterson to proceed with said suits and the publication of citations therein, regardless of the insufficiency of said description, and the said J. M. Patterson and the said county attorney thereupon proceeded to institute suits upon all of the delinquent tracts, and caused the citations therein to be published, without, however, at any time informing plaintiff that the said descriptions in any of said citations were insufficient, and, so far as plaintiff knows and plaintiff here alleges, none of said descriptions are insufficient.

"Plaintiff further alleges that thereafter, when he had published citations in sundry and divers suits in the Travis County Democrat, by reason of which Travis county became indebted to him in the sum of ——— dollars for said publication, a list of which said suits by number of the docket, as instituted in the district court of Travis county, Tex., together with the amount due for

the publication of same, is hereto attached, marked 'Exhibit B,' and made a part of this petition, was in due course of business, under the regulation prescribed by law, presented to the commissioners' court of Travis county, Tex., as a claim for allowance and payment under his contract, and was approved by the county attorney and his assistant, and said account was thereupon ordered paid by the commissioners' court of Travis county, Tex., and the same was in due course of business paid by proper warrant on the county treasurer of said county, which said warrant was presented to the said county treasurer, and was by him received and paid.

"Plaintiff further alleges that after the payment of the aforesaid account, relying upon the acts and conduct of the commissioners' court of Travis county, Tex., in the approval and payment of the above said account, without any notice whatsoever from said commissioners' court or any one else that said court claimed or would claim that the said county attorney had not been authorized by them to make the aforesaid contract with plaintiff under which he was then publishing said citations, said plaintiff proceeded to continue the publication of such citations in the suits which are set out hereinafter in the accounts here sued on in the said Travis County Democrat, and did publish all of the said citations in full compliance with his contract made and entered into with the county attorney as aforesaid, and during each week of the publication of said citations the said plaintiff mailed to each of the members of the said commissioners' court a copy of said newspaper containing the publication of all of said citations; and plaintiff charges that thereby, as well as by the notice given to said court by the said county attorney and his assistant, J. M. Patterson, each of the members of said court knew, or by the exercise of ordinary diligence could have known, that said citations were being published by plaintiff under his contract, and each of the members of said court failed at any time to give plaintiff any notice that said court claimed that the county attorney had no authority to make any contract with plaintiff for the publication of said citations, and failed to inform plaintiff that said court would attempt to repudiate any contract which said county attorney may have made, and failed to notify plaintiff that Travis county would not pay for the publication of same, and thereby, by the payment of said claim and by the silence of said court and the failure of its members to notify plaintiff, the said plaintiff was induced to continue the publication of said citations under and in accordance with his said contract, and said court thereby ratified said contract and are estopped to deny same.

"Plaintiff further alleges that acting under the aforesaid contract, relying upon the

acts and conduct and silence of the said commissioners' court ratifying said contract as aforesaid, the said plaintiff has published, in full compliance with the law and with his said contract, citations in the Travis County Democrat in all the suits set out in the statements which are hereto attached, which have been presented to the commissioners' court of Travis county, Tex., the aforesaid statements showing the number of each case, with the number of lines in the citation therein set out in said statement immediately above the number of cause, and that under plaintiff's contract for the publication of said citations plaintiff was to receive the sum of two and a half cents ($2\frac{1}{2}$ c.) per line for each insertion of publication of same; and that, acting under said contract, plaintiff did publish each of said citations, amounting in the aggregate to thirty thousand and nine hundred and twenty-five lines one time for three successive weeks in said Travis County Democrat, at the contract rate of two and one-half cents ($2\frac{1}{2}$ c.) per line for each publication, making the total contract price due plaintiff for said publication the sum of two thousand three hundred and nineteen dollars and thirty-seven cents (\$2,319.37), and thereafter, when the publication of said citations had been fully completed under said contract, the said plaintiff presented said accounts in the form of claims to the commissioners' court of Travis county for its approval on January 1, 1903, and after such presentation, on, to wit, the 12th day of February, 1903, the said commissioners' court, in regular open session, examined said claims and rejected same, all of which will appear from the two said claims, together with their rejections which are hereto attached, marked 'Exhibits C and D,' and made a part of this petition, and Travis county has refused and still refuses to pay same or any part thereof.

"Wherefore, in consideration of all the foregoing, plaintiff alleges that the county of Travis has become liable to pay plaintiff the said sum of money as shown by said accounts, to wit, \$2,319.37, the same being payable and due on the 31st day of December, 1902, with interest on the same from said date at the rate of 6 per cent. per annum, for which plaintiff prays judgment against said county, as well as for all costs for suit and general relief.

"Plaintiff further alleges that prior to the 1st day of January, 1903, the said plaintiff, acting by and under the direction and instruction of the said county attorney of Travis county, Tex., acting by and through his assistant, J. M. Patterson, did, for the benefit of Travis county, publish citations in suits for taxes due on divers and sundry tracts of land situated in Travis county, in accordance with the law requiring the publication of such citations in all cases where the owners of real estate upon which taxes are delinquent are unknown, the said publi-

cation being made in the Travis County Democrat, a weekly paper published by plaintiff in Travis county, Tex., one time for three successive weeks, in full compliance with the law.

"Plaintiff further alleges that the reasonable value of the services rendered by plaintiff in the publication of said citations for three said several weeks as aforesaid in said newspaper by said plaintiff was at the time of said publication, and is now, the sum of two and one-half cents per line for each weekly publication of said citations, being the amount allowed by law, and that the aggregate number of lines of all of said citations published by plaintiff was and is thirty thousand nine hundred and twenty-five lines, and that the aggregate cost of the three publications was and is seven and a half cents per line, making the total amount due for said three several publications, at said rate of two and one-half cents per line, the sum of two thousand three hundred and nineteen dollars and thirty seven cents (\$2,319.37), all of which more fully appears from the aforesaid accounts hereinbefore referred to and attached to this petition as exhibits and made a part hereof.

"Wherefore plaintiff says that by reason of his having performed the services hereinbefore set out at the instance and request of the county attorney of Travis county, Tex., for the benefit of Travis county, in accordance with the law, the said defendant, Travis county, has become liable to pay plaintiff the reasonable value of same, to wit, the sum of two thousand three hundred and nineteen dollars and thirty-seven cents (\$2,319.37), with interest thereon from the 1st day of January, 1903, at the rate of 6 per cent. per annum.

"Plaintiff further alleges that the foregoing services were rendered by him to Travis county prior to the 1st day of January, 1903, and that by reason thereof Travis county became liable to pay him the reasonable value of same, to wit, the sum of two thousand three hundred and nineteen dollars and thirty-seven cents (\$2,319.37), and that plaintiff on the 1st day of January, 1903, presented to the commissioner's court of said county his claims for said amount due him as aforesaid, which said claims are attached hereto and have been heretofore referred to, and that thereafter the said commissioners' court rejected both of said claims, and has refused and still refuses to pay plaintiff for said services rendered by him as aforesaid, or any part thereof.

"Plaintiff therefore prays that defendant be cited to answer this petition, and that upon a final hearing he have judgment for the amount due him as hereinbefore set out by Travis county, with interest on same, together with all costs of suit, and for such other relief, both general and special, as plaintiff may show himself entitled to."

Appellant, by his assignment of error, and

various propositions thereunder, contends that his petition sets up a good cause of action upon an express contract and an implied contract and quantum meruit. If the petition alleged a good cause of action upon either an express contract or an implied contract or quantum meruit, it was error for the court below to sustain the appellee's general demurrer to same and dismiss the suit.

The first question presented for our consideration and determination is whether the appellee had the power or authority to make the contract set up in appellant's petition. The provision of the statute relied on by appellant as conferring such authority upon appellee is found in the delinquent tax act, chapter 103 of the General Laws of the Twenty-Fifth Legislature, p. 138, and is section 15 thereof, and reads as follows: "Sec. 15. Wherever the owner of any lands or lots returned delinquent or reported sold to the state, or that may hereafter be reported sold or returned delinquent for the taxes due thereon for any year or number of years, are non-residents of the state, or the name of the owner or owners of said land or lots be unknown, then upon affidavit setting out that the owner or owners are unknown to the attorney for the state, and after enquiry cannot be ascertained, said parties shall be cited and made parties by notice in 'the name of the state and county directed to all persons owning or having or claiming any interest in the following described land delinquent to the state of Texas and county of ——— for taxes, towit (here set out description of the land as contained on the assessment roll, and such further description obtainable in the petition) which said land is delinquent for taxes for the following amounts, \$——— for state taxes and \$——— for county taxes, and you are hereby notified that suit has been brought by the state for the collection of said taxes, and you are commanded to appear and defend such suit at the ——— term of the district court of ——— county and state of Texas, and show cause why judgment shall not be rendered condemning said land (or lot) and ordering sale and foreclosure thereon for said taxes and costs of suit,' which notice shall be signed by the clerk and shall be published in some newspaper published in said county one time a week for three consecutive weeks. If there is no newspaper published in the county, then notice shall be given by publication in a paper in an adjoining county. A maximum fee of 2½ cents per line (seven words to count a line) for each insertion may be attached for publishing the citation as above provided for. If the publication of such citation cannot be had for the compensation provided for in this section, then publication of the citation herein provided may be made by posting a copy at three different places in the county, one of which shall be at the courthouse door. * * * There is no language in this provision affirmatively requir-

ing or authorizing the county to pay the expense of publishing the citations, and, in our opinion, none which could properly be construed as requiring or authorizing the county to pay same. We are inclined to the view, as suggested by counsel for appellee in their brief, that the word "attached," used in the provision quoted above, is a clerical error, and the word "taxed" was intended to be used. The use of the word "attached," in the connection it is employed in the provision quoted, appears to be improper and inapt, in that it does not appear to definitely express or convey the meaning or idea evidently intended by the Legislature, which was to include the expense of publishing the citation in the costs of the suit. The word "taxed" would definitely and distinctly express and convey this idea and intention, and, in our opinion, the word "attached," used in said provision, should be read "taxed"; and, in our opinion, said provision provides for the payment of the expense of publishing such citations by taxing and collecting the amount as a part of the costs in the suit. Hence we conclude that this provision of the statute does not authorize the county to pay or make contracts for the payment of the expense of publishing the citations mentioned therein. And we are strengthened in this opinion by the fact that, in section 5 of the act of which section 15 above quoted is a part, it is expressly provided that the county shall pay for the publication of the delinquent tax record. The fact that the Legislature provided in another section of the same act that the county should pay for the publication of the delinquent tax record, the purpose of which was to give notice to all parties who were delinquent in the payment of their taxes (non-residents and unknown owners included) of such fact, the amount of their taxes, the land upon which same was due, etc., shows that the question of the payment by the county of the expense of publishing notice to delinquent taxpayers was considered, and the fact that after such consideration they provided for payment by the county of the expense of publication of the delinquent tax record, and did not provide for payment by the county of the expense of publication of citation to nonresident and unknown owners of lands upon which the taxes are delinquent, shows that it was not the legislative intention that the county should be liable for such last-mentioned expense. County commissioners' courts have no power or authority, except such as is conferred upon them by the Constitution or statutes of the state. We have been unable to find any constitutional or statutory provision conferring general or special authority upon commissioners' courts to contract for or provide for the payment by the county of expenses of the character sued for in this case. *Bland v. Orr*, 90 Tex. 492, 39 S. W. 558; *Mills County v. Lampasas County*, 90 Tex. 606, 40 S. W. 403; *Bryan v.*

Page, 51 Tex. 532, 32 Am. Rep. 637; *Nichols v. The State*, 11 Tex. Civ. App. 327, 32 S. W. 452; *Payne v. Washington County*, 25 Fla. 798, 6 South. 881; *Heney v. Pima County (Ariz.)* 14 Pac. 239.

Appellant's contention that appellee is liable on the ground that the commissioners' court ratified the contract made by the county attorney and his assistant is not sound, for the reason that the said court could not bind appellee by the ratification of a contract it was not authorized to make because not within any power conferred on it by the Constitution or laws of the state. *Boydston v. Rockwall County*, 86 Tex. 234, 24 S. W. 272; *Nichols v. The State*, supra; 1 *Dillon on Municipal Corporations*, § 463, and note; 19 *Am. & Eng. Ency. Law*, 471; 1 *Beach on Pub. Cor.* § 696. And a county cannot be held liable in an action upon an implied contract or quantum meruit, unless the commissioners' court was authorized to make the contract sought to be implied, or on which the quantum meruit is based. *City of San Antonio v. French*, 80 Tex. 578, 16 S. W. 440, 26 Am. St. Rep. 763; *Penn v. City of Laredo (Tex. Civ. App.)* 28 S. W. 636; *Peck v. City of Hempstead (Tex. Civ. App.)* 65 S. W. 653; 1 *Dillon on Municipal Corporations*, §§ 459, 460. There being no liability upon a contract not within the scope of the authority of the commissioners' court, the county cannot be estopped from setting up the question of authority to make such contract as a defense to an action upon same. 2 *Dillon on Municipal Corporations*, 935, 936.

We are of opinion that the court below did not err in sustaining appellee's general demurrer to appellant's petition and dismissing his suit, and the judgment of the court below is therefore affirmed.

Affirmed.

McLAIN et al. v. GARRISON et al.*

(Court of Civil Appeals of Texas. May 17, 1905.)

1. DEED—ESTABLISHMENT AS WILL.

Under Rev. St. 1895, art. 5335, requiring that a will, if not wholly written by the testator, shall be attested by two witnesses, an instrument in the form of a deed, not written by the grantor, and attested by one witness, cannot be established or probated as a will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 280-283.]

2. SAME — TAKING EFFECT AT GRANTOR'S DEATH.

Under Rev. St. 1895, art. 632 (556), providing that an estate of freehold or inheritance may be made to commence in futuro by deed or conveyance in like manner as by will, an instrument practically in the form prescribed by statute for a deed, containing all the elements of a deed, and concluding with the usual habendum, tenendum, and warranty clauses, but reciting, "This deed is to take effect at my death and not before," is not testamentary in character, but is a deed.

*Rehearing denied June 23, 1905, and application for writ of error dismissed by Supreme Court for want of jurisdiction.

Appeal from District Court, Hill County; Nelson Phillips, Judge.

Trespass to try title by Mrs. B. J. Garrison and others against John B. McLain and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Derden & Killough and Vaughan & Works, for appellants. Wear, Morrow & Smithdeal, for appellees.

FISHER, C. J. As the heirs of John M. McLain, deceased, who died intestate, the appellees brought this suit in trespass to try title against the appellants John B. and H. N. McLain and Mrs. Katherine Flora McLain and Mattie Lou McLain, to recover certain lands described in deeds executed by John M. McLain on the 11th day of January, 1898, to the appellants. On the 11th day of January, 1898, John M. McLain executed to John B. McLain and H. N. McLain, each, deeds conveying the lands therein described, which instruments were by the trial court construed to be testamentary in character, and in view of this fact the jury were instructed to return verdict against John B. and H. N. McLain in favor of appellees. Also on the 11th day of January, 1898, John M. McLain executed to the appellants Mrs. Katherine Flora McLain and Mattie Lou McLain a deed conveying to them the lands described, which instrument the court held to be a deed, and accordingly instructed a verdict in favor of appellants Katherine and Mattie McLain.

The question as to the construction of these instruments is the principal, if not the only, one presented in this appeal. The appellants contend that the two first instruments mentioned are not testamentary in character, but are deeds, and were so intended to operate as deeds by the grantor, John M. McLain. The appellees, by cross-assignment, contend that the instrument executed by John M. McLain to Mrs. Katherine Flora McLain and Mattie Lou McLain is also testamentary in character, and is not a deed, as held by the trial court. The two instruments first mentioned are in words as follows:

"The State of Texas, County of Hill. Know all men by these presents that I, John M. McLain of the county of Hill and the state aforesaid, for and in the consideration of the sum of one dollar and love and affection to me paid and secured to be paid by H. N. McLain, my son, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said H. N. McLain an undivided half interest in four hundred and three acres of land, more or less, of the county of —, State of —, all that certain tract of land being a part of the Joseph McGee survey in Hill county, Texas, meted and bounded as follows: [Here follows description by metes and bounds] containing 403 acres of land more or less. This

deed is to take effect at my death and not before.

"To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging unto the said H. N. McLain, and his heirs and assigns forever, and I do hereby bind my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said H. N. McLain, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

"Witness my hand at home in Hill County, this the 11th day of January, A. D. 1898. John M. McLain."

"The State of Texas, County of Hill. Know all men by these presents that I John M. McLain, of the county of Hill and state aforesaid, for and in consideration of the sum of one dollar and love and affection to me paid and secured to be paid by John B. McLain my son, as follows: Have granted, sold and conveyed, and by these presents to grant, sell and convey unto the said John B. McLain an undivided one-half interest in 403 acres of land, more or less, of the county of Hill, state of Texas, all that certain tract of land being a part of the Jos. McGee survey in Hill County, Texas, meted and bounded as follows: [Here follows description of land by metes and bounds] containing 403 acres of land more or less. This deed is to take effect at my death and not before.

"To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging unto the said John B. McLain and his heirs and assigns forever.

"And I do hereby bind my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said John B. McLain and his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

"Witness my hand at home in Hill County this the 11th day of January, A. D. 1898. John M. McLain."

The deed from John M. McLain to Katherine Flora McLain and Mattie Lou McLain is as follows:

"The State of Texas, County of Hill. Know all men by these presents that I, John M. McLain, of the county of Hill and State aforesaid, for and in consideration of the sum of one dollar and love and affection to me paid and secured to be paid by Catherine Flora McLain and my daughter, Mattie Lou McLain, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Catherine Flora McLain and Mattie Lou McLain of the county of Hill and State of Texas, all that certain tract or parcel of land being a part of the Jos. McGee and Wesley Young surveys meted and bounded as follows: [Here follows description of land by metes and bounds] contain-

ing 102 acres of land, 54 acres of which is in the McGee survey and about 48 acres in the Young survey.

"Also one tract commencing at stake marked A on the plat of tract No. 1; thence north 60 east 1786 varas to a stake for corner; thence south 30 ——— 765 varas to a stake for corner of the McGee survey; thence south 60 west, 1344 varas to a stake for corner of the McGee survey, marked B; thence north 60 west 884 varas to the stake marked A, the place of beginning, containing 212 acres of land more or less.

"To have and to hold after my death and not before to said Catherine Flora McLain during her lifetime or widowhood, and in either event to then revert to my daughter, Mattie Lou McLain; if the said Mattie Lou McLain should die without leaving any bodily heirs, then the property conveyed in this deed is to revert to my two sons, John B. McLain and H. N. McLain, one-half to each and their children forever, the above described premises together with all and singular the rights and appurtenances thereto in any wise belonging unto the said Catherine Flora McLain and Mattie Lou McLain as stated above, and I do hereby bind my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Catherine Flora McLain and Mattie Lou McLain as stated above, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

"Witness my hand at home in Hill County, this the 11th day of January, A. D. 1898. John M. McLain."

Each of these instruments was witnessed at the request of the grantor by only one witness, by the name of W. N. Collier; each was acknowledged in the form required by the statute before B. E. Wells, notary public, on the 11th day of January, 1898; and each was filed for registration in the county clerk's office on the 14th day of January, 1898, and duly recorded on the 17th day of January, 1898, in the deed records of Hill county.

Of course, it is conceded that, in determining the effect to be given to these instruments, the intention of the maker, as gathered from the face of the documents, is the question of primary importance. The evidence in the record is to the effect that these instruments were not written by the grantor, John M. McLain, but were prepared by Wells. They are only attested by one witness. Therefore, in view of articles 5335 and 5336 of the Revised Statutes of 1895, they could not be established or probated as wills. Therefore, if they are held to be testamentary in character, they could be given no effect, and their execution was a useless and idle ceremony. It is reasonable to suppose that the maker of these instruments intended to accomplish some purpose by their execution, and that they should be given some effect as determining and fix-

ing the rights of the parties thereto. He and the party that framed the instruments must have known that they could not be effective as wills, for the requirements of the law which were necessary to be observed in order to create documents of a testamentary nature were not complied with; and such provision of the law, it is reasonable to suppose, they were familiar with. Now, assuming that the maker intended to accomplish some purpose by the execution of these instruments, and further observing the rule that, where the language of the documents admits of it, they should be most strongly construed against the maker in cases of doubt or uncertainty, the question is suggested, what construction, from the language used, would be reasonable and consistent as indicating the intention of John M. McLain in the execution of these instruments?

Eliminating the words, "This deed is to take effect at my death and not before," the instruments are practically in the form prescribed by the statute for what is sufficient to constitute a deed. The language employed contains all the elements of a deed. It grants and conveys to the grantee the interest described, and concludes with the usual habendum, tenendum, and warranty clauses. The only words that indicate that it was not the intention to pass a present interest are those quoted, and from this language it appears that the maker called the instrument a "deed," which shows evident intention that it should have effect as a deed or as a conveyance of the land; and we are of the opinion that it was the intention by the language used to merely reserve an interest in the property during the lifetime of the grantor, and that the deeds should only become effective to disturb this right at his death.

Article 632 (556) of the Revised Statutes of 1895 provides that an estate of freehold or inheritance may be made to commence in futuro by deed or conveyance, in like manner as by will. This was construed and applied in *Chrisman v. Wyatt et al.* (Tex. Civ. App.) 26 S. W. 759; and the court in the case of *Jenkins v. Adcock* (Tex. Civ. App.) 27 S. W. 22, had before it an instrument for construction somewhat similar in its terms to those we are called upon to construe. The instrument, in addition to the language usually contained in deeds, after naming the grantee, stated, "have granted, sold and conveyed, to take effect at my death, and by these presents do grant, bargain and sell to the said Nancy R. Adcock," then goes on and describes the land, and further states, "And at my death my interest in said land and premises is by these premises conveyed to my sister Nancy R. Adcock, to have and to hold," etc. The court in that case construed the instrument to be a deed. The well-considered case of *Wilson v. Carrico*, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213, is strongly in point, and aptly illustrates our views upon the question under consideration. Indiana has a statute

very much similar to ours, which authorizes an estate to be created which may commence in futuro. The strong similarity between the deed there under consideration and those in controversy here, together with the pertinency of the opinion, induces us to set it out in full:

Action in ejectment by appellant to recover certain real estate and to quiet title thereto. The error assigned is that the court erred in sustaining a demurrer to appellant's complaint. A condensed statement of the facts as they appear in the complaint is as follows:

"That on November 18, 1867, one Bazzle Carrico was the owner in fee simple of certain described lands situated in Sullivan county, Indiana. On that day he and his wife, Frances, duly executed to one Elza Carrico a deed for the real estate sought to be recovered in this action; said deed being as follows, to wit:

"This indenture witnesseth that Bazzle Carrico and Frances Carrico, his wife, of Sullivan County in the state of Indiana, convey and warrant to Elza Carrico, of Sullivan County, in the state of Indiana, for the sum of one hundred and fifty dollars, the following real estate, in Sullivan County, in the State of Indiana, to wit: the northeast quarter of the northeast quarter of section 31, township seven, north of range eight west, with the exception of ten acres off the east side of the forty acres, containing thirty acres, more or less. The above obligation to be of none effect until after the death of the said Bazzle Carrico and Frances Carrico, then to be in full force. In witness whereof, the said Bazzle Carrico and Frances Carrico have hereunto set their hands and seals, this 18th day of November, 1867.

"Bazzle Carrico. [Seal.]

her
"Frances X Carrico. [Seal.]
mark.

"State of Indiana, Sullivan County—ss.: Before me, Benson Usrey, a justice of the peace in and for said county, this 18th day of November, 1867, came Bazzle Carrico and Frances Carrico, and acknowledged the execution of the annexed deed.

"Witness my hand and official seal. Benson Usrey, J. P. [Seal.]"

"This deed was recorded in a few days after its execution in the recorder's office of Sullivan county, Indiana. On March 9, 1870, Elza Carrico and wife conveyed the land in controversy, by a warranty deed, to appellant, for and in consideration of the sum of two hundred and fifty dollars (\$250), and they provided in this deed that the land was conveyed subject to the life estate of Bazzle and Frances Carrico. This deed was also acknowledged and recorded. Bazzle Carrico died on September 6, 1872, and his wife, Frances, died on January 11, 1892. Other facts not necessary to be considered in the determination of this case are omitted.

"We are informed by the briefs of the par-

ties that the trial court held the deed void upon the ground that in its character it was testamentary. The learned counsel for the appellant denies that the deed is in any respect testamentary, and insists that by it there was a conveyance of the premises therein described to the grantee, and that the subsequent and questionable clause therein contained was intended by the grantor as a reservation or postponement of the full use and enjoyment of the realty by the grantee until after the death of the grantors; that after the demise of each of these the deed in question was to be in full force, or, in other words, that the complete enjoyment of the use and occupation of said land by the provision of the clause in controversy was postponed until after the death of Carrico and wife, and was then fully to vest in the grantee. Upon the other hand, the learned counsel for the appellee say that they do not controvert but what the instrument in question was intended by the parties as a deed, and not as a will, and concede that it has all the formalities of the former. But they contend that it was the evident purpose and intent of the grantor to reserve all the estate which he intended to convey, and that the deed was not to take effect until after the death of himself and wife, and that hence it must be held to be testamentary in its character, and therefore void, for the reason that it is not executed in accordance with requirements of the statute on wills. The instrument in question calls for a judicial construction, and in this the court must seek for, and be guided by, the intention of the grantor. And this intention must be deduced and arrived at by consideration of all of its parts, and in this construction we must observe and adhere to the rule that this deed, in both the granting part and clause under consideration, must be construed most strongly against the grantor and in favor of the grantee.

"It was a principle recognized by the feudal law that there should always be a known owner of every freehold estate, and that the title thereto should never be in abeyance. Hence at common law a freehold to commence in futuro could not be conveyed, for the reason that the same would be in abeyance from the execution of the conveyance until the future estate of the grantee should vest. Under the statute of this state a freehold estate may be created to commence in futuro (section 2959, Rev. St. 1881; section 3379, Rev. St. 1894); and hence the common-law principle above stated has been entirely abrogated. This deed is in the statutory form, and in the granting part accords with the provisions of section 2927, Rev. St. 1881 (section 3346, Rev. St. 1894), and contains what are by law made operative words of conveyance, and in effect transfers all the estate or interest of the grantors in the lands in suit to the grantee. The terms 'convey and warrant,' when given their legal purport or acceptation, fully indicate an intention to convey a present estate to the grantee and

defend the title thereto, and in no way is it apparent or to be inferred from these words that the grantors intended to devise the real estate in question. The instrument was acknowledged and recorded in like manner as are other deeds. Therefore we fail to recognize anything which signifies that it was intended to serve the purpose of a will. The question then arises, what was the purpose intended to be served by the inapt expression, namely, "To be of none effect until after the death of said Bazzle Carrico and Frances Carrico, then to be in full force." It is evident that the drafting of the indenture in question was not skillfully performed, and that thereby it very closely approximates to what may be termed the 'danger line,' by which a judicial construction might result in adjudging the deed to be a nullity.

"While it may be said in regard to the point under consideration that the authorities 'fight on both sides' of the question, however, we find that in the later decisions the courts are inclined to uphold a deed of this character, if, upon a reasonable interpretation of all its parts, it can be said that the grantor did not intend to create, or, in other words, execute, that which must be construed and held to be void. In construing written instruments, courts frequently do—and properly, too—give to an expression a meaning different from that which it ordinarily bears, in order to import sense into it, and make it speak that which, upon an inspection of the whole, the parties really intended that it should. We find that there is no ambiguity in the granting clause of the deed in the case at bar, and consequently we are left free to effectuate the intention of the grantor expressed in the subsequent clause or condition. The grantors had, as we have seen, by operative words, clear and significant, conveyed an interest or fee in present to the grantee. Having done this, they could not, in legal parlance 'blow hot and cold,' or, in other words, reserve or take back that which they had granted. In the case of *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678, the instrument in contest was in the form of a deed, and in the granting clause, by its terms, 'did convey and warrant to Williams after my decease and not before.' This court held that the phrase 'after my decease and not before' did not make the deed testamentary, but was meant and operated to show that the grantee's use and enjoyment of the realty would not begin under the deed until after the death of the grantor. In the case of *Cates v. Cates*, 135 Ind. 272, 34 N. E. 957, the deed therein in controversy was also in the statutory form, but contained the following reservation: 'The grantor Prior Cates hereby expressly excepts and reserves from this grant all the estate in said lands, and the use, occupation, rents and proceeds thereof unto himself during his natural life.' This court in that case, upon a full review and consideration

of many authorities upon the question involved, held that such an instrument must be construed as conveying a present interest in the real estate, the full enjoyment of which was postponed until after the grantor's death. In the case of *White, Adm'r, v. Hopkins*, 80 Ga. 154, 4 S. E. 863, cited in *Cates v. Cates*, supra, the deed contained this clause or condition: 'The title to the above described tract of land to still remain in the said Lemuel Hopkins [grantor] for and during his lifetime, and at his death to immediately vest in the said Lewis Hopkins [grantee].' It was held by the Supreme Court of Georgia in that case that an absolute title was by this deed conveyed to the grantee; that it passed a present interest in the land, and took effect immediately, and after its execution it was irrevocable by the grantor. In *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610, the deed contained the following: 'The condition of this deed is such that I hereby reserve all of my right, title and interest in the aforesaid described pieces of land, with all the buildings thereon during my natural life.' It was held by the court that this condition, read in the light of the grant, was to be interpreted as a reservation of the same measure of use thereafter as tenants for life as the grantor had before enjoyed as its owner. In *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705, the condition was: 'Reserving all the right, title and interest in and unto the above named land,' etc., 'for and during my natural life.' In *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. 563, the deed contained the following clause: 'And the deed shall go into full force and effect at my death.' The court held this deed to be a valid one, conveying a present title to the grantee, with the right of possession and use postponed until the grantor's death. In *Wyman v. Brown*, 50 Me. 139, the deed was as follows: 'This deed not to take effect during my lifetime—to take effect and be in force from and after my death.' This was held to be valid. In the case of *Abbott v. Holway*, 72 Me. 298, the instrument contained this clause: 'This deed is not to take effect and operate as a conveyance until my decease.' This was held to be a good and valid conveyance. In *Shackelton v. Sebree*, 86 Ill. 616, the deed contained covenants of warranty, and also this clause: 'This deed not to take effect until after my death—not to be recorded until after my decease.' This instrument was held operative as a deed, and not intended as a testamentary disposition of property. These authorities—most of them, at least—were cited with approval by this court in *Cates v. Cates*, supra.

"It is a settled rule that in the interpretation of an instrument, where the terms employed are ambiguous or susceptible of more than one meaning, the court will consider the subsequent acts of the parties to ascertain how they understood it, and as in-

dicating what construction they placed upon it. *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62, 24 N. E. 539, and cases there cited; *Lyles v. Leasher*, 106 Ind. 382, 9 N. E. 865. However, while it is proper to resort to this rule to show a practical construction by the parties, still, after all, the intention must be determined from the words of the instrument. The manner in which this deed was treated by the parties in this case, as it appears, is briefly as follows: It was executed in 1867 for a valuable consideration, and duly recorded. In 1870, during the lifetime of the grantors, for a valuable consideration, the grantee sold and conveyed the land to the appellant, subject to the life estate of the former. This deed was also recorded. *Bazle Carrico* died in 1872, two years and over after the conveyance to the appellant. *Frances*, his wife, died in 1892, nearly twelve years after this second conveyance; and not until after her death, so far as it is disclosed, was this deed called in question. These subsequent acts of the grantors, in suffering the deed to be placed upon record, and in permitting the land to be sold and conveyed by their grantee to the appellant, subject to their life estate, are incompatible with the contention of appellee, and hostile to the theory now advanced and advocated by him. In *Broom's Maxims*, star page 540, in translating a fundamental maxim of the law, it is said: 'A liberal construction should be placed upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties.' Applying the reason and the principle as laid down by the authorities cited, and guided by the rule of construction that the clause in controversy must be construed most favorably to the grantee, we cannot hold that the grantors intended that this obligation was to be null and void, but we are constrained to decide that it conveyed a present interest in the real estate to the grantee, the full enjoyment of which was by the subsequent clause intended to be postponed until after the death of both of the grantors. By so holding we carry into effect the intention of the parties, and we fail to recognize wherein this construction works an injury or injustice to any one. This interpretation, we think, will simply carry out the intention of *Carrico* and his wife, and give protection to the rights of a purchaser, acquired on the faith of their deed and their acts. The conclusion we have reached renders it unnecessary to consider the repugnancy, if any, existing between the grant and the exception. However, when such does exist, it is well settled that the latter is void. See cases cited in *Cates v. Cates*, supra. It therefore follows that the court erred in sustaining the demurrer to the complaint."

We have reached the conclusion that the trial court erred in the construction placed upon the two deeds first mentioned in the

opinion, but correctly construed the instrument executed to *Katherine Flora McLain* and *Mattie Lou McLain*. We are of the opinion that all three instruments are not of a testamentary nature, but that they were intended as deeds. In view of the fact that there is some question in the case as to the delivery of these instruments, we are not prepared to reverse and render. Therefore the judgment will be reversed, and the cause remanded.

Reversed and remanded.

LEWIS v. HOUSTON ELECTRIC CO.

(Court of Civil Appeals of Texas. June 2, 1905.)

1. CARRIER AND PASSENGER—WHEN RELATION BEGINS.

When a person desiring to become a passenger on a street car stations himself at a place where the cars are accustomed to receive passengers, and signals or calls to the motorman of an approaching car to stop the car, and such signal is seen by the motorman, and the car slows up, an acceptance of the offer to become a passenger will be implied from the act of the motorman; and such person is entitled to be regarded as a passenger while in the act of getting on the car, though he attempts to board the car before it comes to a full stop, and irrespective of whether the motorman intended to stop the car for the purpose of allowing him to get on.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 988, 989.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

The attempt of a passenger to board a street car while it is in motion is not contributory negligence, as matter of law.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1399.]

3. APPEAL — HARMLESS ERROR — INSTRUCTIONS.

In an action for injuries to a passenger, where the court charged that plaintiff was required to prove that the injuries were caused by the failure of the defendant's employes to use ordinary care, and failed to give a charge defining negligence as between a carrier and a passenger, or stating the degree of care required of a carrier for the protection of a passenger, defendant's contention that the error was harmless, because the undisputed evidence showed that defendant's servants failed to use any care whatever to prevent the injury, and therefore, if the jury had found plaintiff's statement of the circumstances under which he was injured was true, they must have found in his favor, notwithstanding any error in the charge, was untenable.

4. INJURY TO PASSENGER — CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for injuries to a passenger, where plaintiff's evidence did not show negligence on his part, as matter of law, the burden was on the defendant to establish its plea of contributory negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1399.]

5. APPEAL — ASSIGNMENTS OF ERROR—BRIEFS—RULE OF COURT.

Where some assignments of error are not discussed in appellant's brief, and those discussed are permitted to retain their original numbers, instead of being consecutively numbered, as required by rule 29 for the Courts of Civil Appeals (67 S. W. xv), but are discussed

in the same order as if they had been consecutively numbered, there is a mere technical violation of the rule, which is insufficient to require the court to refuse to consider the assignments.

6. SAME.

Where assignments of error discussed in appellant's brief are followed by statements containing no reference to the pages of the record for verification, as required by rule 31 for the Courts of Civil Appeals (67 S. W. xvi), but otherwise sufficient, there is a mere technical violation of the rule, which is insufficient to require the court to refuse to consider the assignments.

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by C. P. Lewis against the Houston Electric Company. From a judgment in favor of the defendant, plaintiff appeals. Reversed.

Hume, Robinson & Hume, for appellant. Baker, Botts, Parker & Garwood, for appellee.

PLEASANTS, J. This is a suit by appellant against appellee to recover damages for personal injuries. The appellee company operates an electric street car line in the city of Houston, and between that city and Houston Heights, a suburb thereof. Plaintiff alleges in his petition that he was injured on August 29, 1903, by the negligence of defendant's employes; the circumstances under which he was injured being thus stated: "That on or about said date the plaintiff, desiring to take passage to said city by said line, and with the purpose of doing so, and being prepared to pay his fare therefor, signaled and called to a car thereof, and to the motorman of said car, whereto was attached another car, called a 'trailer,' returning from said Houston Heights, to stop where the defendant's track for incoming cars crossed the track of said Houston & Texas Central Railroad Company; it being usual and customary for the cars of said line to stop or slow at that place for the receipt of passengers. That thereupon the said cars were checked, and while passing over said crossing in slow motion, and as, from said checking and slowing, he believed, for the purpose of admitting him thereto, the plaintiff, with due care, took hold with his hand of the stanchion or the handhold thereof of the trailer, and stepped on the running board thereof, and was about to enter and seat himself therein, when said cars were, by the defendant and its servants and agents operating them, suddenly, violently, and negligently jerked and driven forward, and thereby and by reason thereof the plaintiff was shaken and torn from his hold of hand and feet, thrown to the ground, his body caught and dragged by the car along and over the cross-ties and the track for a distance of sixty feet, his left arm cut, mashed, and severed from his body by the wheels of the car, his ribs broken, wrenched, and dislocated, and his head, body and limbs, members and organs, bruised and lacerated

in every part." The defendant answered by general demurrer, general denial, and pleas of contributory negligence, in which it is averred, in substance, that plaintiff was injured while lying in an intoxicated condition by the side of defendant's track, obscured from the view of the operatives of the car, or, if he was not injured while so lying near the track, he was injured while attempting to board defendant's car at a place where said car did not stop to receive passengers, and without giving any notice to the operatives of said car of his desire to become a passenger thereon. The trial in the court below, by a jury, resulted in a verdict and judgment in favor of the defendant.

It is unnecessary to set out the evidence at length; it being sufficient to say that there is sufficient evidence to support the allegations of the petition, and there is also evidence sufficient to establish the averments of defendant's pleas of contributory negligence.

The accident in which appellant was injured occurred near his residence, in Houston Heights, and near the point at which the street car track crosses the track of the Houston & Texas Central Railroad Company. He testified as follows: "I went through the house and out of the front door, and went across the little path that leads from my gate to the H. & T. C. Railroad track; that being the place I had been in the habit of getting on the Houston Electric Company's street car. I went there for the purpose of getting on that car. When the car got up pretty close to the Central tracks, I heard the two bells to go ahead, and then I yelled to the motorman to stop. He was probably eight or ten feet from me, and I threw up my hand and I yelled to him to stop. I thought the motorman was looking at me, as his face was turned towards me. I think he must have seen me as he came over the railroad track. When I yelled to the motorman, he turned off the power, and the car came over the Central tracks very slowly. It was pulling a trailer, a rear car, and as the trailer came over, and just about the time the car was off the tracks—probably three or four feet from it—they threw on the power, and the car pulled out; but in the meantime, before they threw on the power, I had caught ahold of the car, and had my foot on the running board. The extra speed thrown on it pulled my feet from under me, and I went down. That is the last I remember until after my arm was off. I was going to ride on the car. I had the money to pay my fare." On cross-examination he testified: "When I left the house I took the path and went to where the street car line crosses the Houston & Texas Central Railroad. I went straight down the H. & T. C. tracks and saw the car coming. It was probably seventy-five feet from me. I was standing on the left-hand side of the track, from seven to nine feet from the H. & T. C. track, on the

side towards town. The H. & T. C. crosses the street car line diagonally at that place. When I gave the signal to the motorman, the car was right at the Central Railroad tracks—the motor car. It had not begun to cross over. The motorman had his hand on the brake, and was looking sideways, towards me. I believe he saw me. There was nothing to keep him from seeing me. There was a man on the front end of the car with the motorman, on the left-hand side of the motorman, and probably two feet from him. The front car was an open summer car. The car did not come to a stop before it crossed the H. & T. C. tracks. It checked up coming across the railroad track, after I gave the signal. The front car came on across. I made no effort to get on the front car. The trailer then came on across. I was standing about nine feet from the H. & T. C. track. I made an effort to get on the trailer about the second seat from the front, as well as I remember. I was on the left-hand side. As well as I remember, I caught ahold of the trailer with my right hand. It was going slow. I stood upon the running board. I do not think I got both my feet on the running board. I had one hand ahold of the car, and one foot in midair, and they threw on the power and gave the car a sudden jerk, and I fell. Don't know whether I fell to the ground. After my head struck I don't remember anything about it. I was unconscious after that. It was good dusk or dark at the time. I gave the signal to the motorman by throwing up my hand and hollering to him. I told him to stop. I say he was looking at me and saw me. I was not under the influence of liquor at the time." There was testimony from other witnesses to the effect that appellee's cars were frequently stopped for the purpose of receiving passengers at the place at which appellant says he attempted to board the car on this occasion.

The first assignment of error presented in appellant's brief assails the charge of the court on the ground that it instructs the jury that, to entitle plaintiff to recover, he must prove by a preponderance of the evidence that his injury was caused by the failure of the defendant's employés to use ordinary care in the operation of the car by which he was injured.

Paragraphs five and six of the charge are as follows:

"(5) The plaintiff is required by law to prove the negligence by him alleged by a preponderance of the evidence, in order to entitle him to recover.

"(6) 'Negligence,' as used in this connection, means the want of, or failure to use, ordinary care. By 'ordinary care' is meant that degree of care which an ordinarily prudent person would use under the same or similar circumstances to prevent injury and accident."

No instruction defining negligence as be-

tween a carrier and passenger, or stating the degree of care required of a carrier for the protection of a passenger, was given the jury.

It is clear from this statement that the charge complained of required appellant to prove that his injuries were caused by the failure of appellee's employés to use ordinary care, and it is unnecessary to cite authority to sustain the proposition that a carrier owes its passengers the duty to exercise that high degree of care to prevent injury to them which a very careful, prudent, and competent person would exercise under like circumstances. It follows that, if the pleading and evidence raise the issue of whether appellant sustained the relation of passenger to the appellee carrier at the time he was injured, the charge contains an affirmative misstatement of the law, which will require a reversal of the judgment of the trial court. From the evidence offered by the appellant, before set out, the jury were authorized to find that he left his home with the intention of taking passage on appellee's car to the city of Houston, and, in furtherance of this intention, he took a position near appellee's track at a place where it was accustomed to stop its cars for the purpose of receiving passengers; that when the car, on its way to the city, approached the appellant, he called and signaled to the motorman to stop; and that the motorman saw his signal, or heard his call, and slowed the car down, and the appellant, being prepared and willing to pay his fare, and believing that the car was being stopped for the purpose of taking him on as a passenger, attempted to board it, and, while so doing, was injured. The pleading supports these facts, and, if they are true, appellant was, in contemplation of law, a passenger at the time he received his injuries; and appellee was charged with the duty of using that high degree of care to protect him from injury which a very careful, prudent, and competent person would have used under like circumstances. It may often be difficult to determine just when the relation of carrier and passenger begins, and what acts of the parties are necessary to create such relation, but there are certain well-established general principles by which the facts of each particular case must be tested. The relationship may arise before the person desiring to become a passenger actually gets on the conveyance of the carrier, and it may continue after he leaves the conveyance, but it can only be created by contract between the parties, expressed or implied. From the nature of the business conducted by street car companies, no express contract of carriage is made with the great majority of those who ride on their cars, and the essential elements of the contract—the offer and its acceptance—must ordinarily be implied from the acts of the parties: When a person desiring to become a passenger upon a street car stations himself at a place where the cars are accustomed to receive passengers, and signals or calls

to the motorman of an approaching car to stop the car, and such signal is seen by the motorman, and the car halted, an acceptance of the offer to become a passenger will be implied from the act of the motorman in stopping the car, and such person will be regarded as a passenger while he is in the act of getting upon the car. If in such case the person desiring to become a passenger attempts to board the car before it comes to a full stop, he is not necessarily guilty of contributory negligence; and if the speed of the car was slackened to such an extent as to lead him to believe that it was being stopped to allow him to get on, and a person of ordinary care would have so believed, and have attempted to get upon the car, he should be regarded as a passenger while making such attempt.

It is immaterial that the motorman may not have intended to stop the car for the purpose of allowing the passenger to get on. If the latter was at a place where passengers were usually received, and gave the usual signal, which was seen by the motorman, and he thereupon slackened the speed of the car to such an extent as to lead a person of ordinary care to believe that he was thereby invited to become a passenger, such relationship would be created; the motorman not giving any warning that the car was not being stopped for the purpose of receiving passengers. Under such circumstances, the carrier would not be heard to say it had not given an implied acceptance of the offer to become a passenger.

It is a universal rule of law that one cannot disclaim responsibility for the consequences which usually and naturally result from his acts. If the appellant, in the exercise of ordinary care and prudence, could assume that the act of the motorman in checking the car was in response to his signal, and for the purpose of allowing him to board it, in acting upon such assumption and attempting to get on the car he had the right to rely upon the performance by the motorman of his duty to use that high degree of care to protect him from injury which the law requires a carrier to exercise for the safety of its passengers. In other words, if the act of the motorman, who had seen appellant's signal, reasonably induced appellant to believe that he was accepted as a passenger, while so believing he was entitled to protection as such.

The case of *Conner v. St. Ry. Co.*, 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 177, announces the rule which we think should apply to all cases of this character. We quote from that opinion the following: "Being at the usual place where passengers were taken up, and having given notice to the person in charge of the car that he desired to be taken up, it was the plain duty of the driver or person in charge either to afford him reasonable opportunity to enter the car, or to notify the plaintiff, either by continuing the rapid pace, or in some other way, that he would not be tak-

en. Instead of giving any sign that he would not be taken, the speed of the car was slackened, so that it was moving slowly when he attempted to get on. Having received the signal, and slowed up in a manner to invite the plaintiff to get on, it was a clear act of negligence in the driver or person in charge not to observe the plaintiff, if he did not observe him, and, while he was getting on the car, in a manner in which the defendant usually received such passengers, to cause the car to be 'jerked' forward, as the jury found."

The view of the law above expressed finds support in the following authorities: *Maxey v. St. Ry. Co.* (Mo. App.) 68 S. W. 1064; *Maguire v. St. Ry. Co.* (Mo. App.) 78 S. W. 838; *Pfeffer v. St. Ry. Co.* (Super. Buff.) 24 N. Y. Supp. 490; *St. Ry. Co. v. Spahr* (Ind. App.) 83 N. E. 446; *St. Ry. Co. v. Duggan* (Ill. App.) 4 Am. Elect. Cas. 409; *Corlin v. St. Ry. Co.* (Mass.) 27 N. E. 1000.

Appellee contends that, if it be conceded that the charge was erroneous in its statement of the degree of care required of the employes of the company, such error was harmless, because the undisputed evidence shows that they failed to use any care whatever to prevent the injury, and therefore, if the jury had found that appellant's statement of the circumstances under which he was injured was true, they must have found in his favor, notwithstanding the error in the charge. We cannot agree with appellee in this contention. The jury might have concluded that the act of the motorman in increasing the speed of the car before appellant had succeeded in his attempt to board it was not, under the circumstances, a failure to use ordinary care, since that act could not be held negligence as a matter of law.

The second assignment of error presented complaints of the following paragraph of the charge:

"If you believe from the preponderance of the evidence that it was usual and customary for defendant's cars to stop or slow up at the crossing of defendant's line over the tracks of the H. & T. C. R. Co., in Houston Heights, and believe that on August 29, 1903, plaintiff signaled or called to the motorman of defendant's car to stop at said crossing for the purpose of taking passage on said car, and was prepared to pay his fare, and that in pursuance of said signal the car was checked for the purpose of admitting plaintiff as a passenger, and that, while in slow motion, the plaintiff, with due care, took hold of the handhold on the trailer and stepped on the running board, and that when plaintiff was about to enter said trailer the servant or servants of defendant in charge of said car suddenly and violently and negligently started the car forward, and that by reason of such negligence of defendant's servants, if you find they were negligent, plaintiff was thrown from the car and injured, and believe said injury was caused by the negligence of defendant's servant or servants in charge

of the car, plaintiff is entitled to recover; and, if you so find the facts to be, you will find for plaintiff."

We think two of the objections urged to this charge are valid. As we have before stated, the purpose of the motorman in checking the car was immaterial, if by that act appellant, under all the circumstances, was justified in believing that he was invited to get on the car; and appellant's right of recovery ought not to have been made to depend on whether the motorman checked the car for the purpose of receiving him as a passenger. The charge is further objectionable in that it places upon appellant the burden of showing that he was not guilty of contributory negligence in attempting to board the car under the circumstances disclosed by the evidence. It is only in cases in which the allegations of the petition or the evidence of plaintiff show negligence on his part, as a matter of law, that the burden is upon him to refute the charge of contributory negligence, and appellant's evidence does not bring this case within that class. *Ry. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; *Pares v. Ry. Co.* (Tex. Civ. App.) 57 S. W. 301; *St. John v. Ry. Co.* (Tex. Civ. App.) 80 S. W. 235.

Appellee objects to our consideration of the foregoing assignments on the ground that, as presented in appellant's brief they are not in conformity with the requirements of rules 29 and 31 (67 S. W. xv, xvi). The specific objections urged to the assignments are that they are not numbered from first to last in their consecutive order, and that the statements thereunder contain no reference to the pages of the record by which they can be verified. The first assignment presented in the brief is assignment No. 3 and the next is assignment No. 6. Assignments Nos. 1, 2, 4, and 5 are not presented. It thus appears that while the assignments presented follow each other in numerical order, in the sense that the first numbered is first presented, they are not numbered consecutively, as required by the rule. The evident design and purpose of the rule is to avoid the confusion and loss of time which would often occur in considering a brief which treated the first assignment last, and the last first, or presented the assignments so out of their regular order as to require an unnecessary expenditure of time on the part of the court whenever it became necessary to revert to any particular assignment presented in the brief. The statements under these assignments contain no reference to the pages of the record for verification, but the statements are full, and appellee raises no question as to their accuracy. While this court has repeatedly held that a mere reference to the record for the statement supporting a proposition advanced under an assignment is not sufficient, and in such case the assignment will not be considered, it has never been held, so far as we are aware, that an assignment followed by a full

statement, the accuracy of which is not questioned, would not be considered because no reference was made to the record. These slight, technical violations of the rules, if objection was made at the proper time, would be sufficient ground to require the offending party to rebrief the case, but the court is not required to refuse to consider an assignment because of any technical violation of the rules. The primary purpose and object of the rules is to promote the dispensation of justice, and incidentally to aid in the dispatch of the business of the court by an orderly presentation of questions raised for determination, and any method of enforcing them which would defeat this primary purpose should not be adopted by the court. Under this view of our duty in the premises, we have decided that the assignments should be considered. We cannot understand, however, why able and experienced counsel familiar with the rules should fail to fully comply with them.

We do not think it necessary to discuss the remaining assignments presented in the brief. If they show any error, it is not such as is likely to occur upon another trial.

Because of the errors in the charge before indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

GRIFFIN v. HARRIS et al.*

(Court of Civil Appeals of Texas, May 27, 1905. On Rehearing, June 24, 1905.)

1. HOMESTEAD — SALE—COUNTY COURT RECORDS.

Where land of a lunatic on which he resided as head of a family was sold to pay debts, the question as to whether the purchaser acquired a good title is not controlled by the fact that the records in the guardianship proceeding failed to show that the property was adjudged a homestead, but depends on whether the property was in fact the homestead of the lunatic when it was ordered sold.

2. SAME—PROPERTY SUBJECT TO HOMESTEAD.

A tenant in common is entitled to a homestead in the land to the extent, of his interest, not exceeding 200 acres; and, if the joint tract exceeds 200 acres, he may claim his interest in the entire tract as a homestead to the extent of 200 acres.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 121, 122.]

3. SAME—WAIVER OF EXEMPTION.

Where a person was the head of a family, residing on land owned by him jointly with others, cultivating it, and owned no other land when he was adjudged a lunatic and the land sold, the fact that the court required the guardian to place the land on the inventory, as required by Rev. St. 1895, art. 1965, and failed to set it aside as a homestead, as required by article 2046, did not have the effect of waiving the homestead exemption and making it liable for the debts of the estate.

4. SAME—SALE TO PAY DEBTS—TITLE OF PURCHASER.

Under Const. art. 16, § 50, protecting the homestead from forced sale for the payment of debts, the county court has no power to order

*Writ of error denied by Supreme Court.

a sale of the homestead to pay the ordinary debts of the estate, and hence a purchaser under such an order acquired no title, though he had no knowledge that the property was homestead.

Error from District Court, Fannin County; Ben. H. Denton, Judge.

Action by J. W. Harris against J. P. Griffin and others. From a judgment for plaintiff, the defendant Henry M. Griffin, by his guardian ad litem, brings error. Reversed.

J. W. Donaldson, for plaintiff in error. Thurmond & Steger and Richard B. Semple, for defendants in error.

BOOKHOUT, J. This suit was instituted by J. W. Harris, against J. P. Griffin and others, to recover a one-sixteenth interest in 328 acres of land situated in Fannin county, and for partition. A trial before the court without the intervention of a jury resulted in a judgment for plaintiff for the land sued for, and a decree for partition, and appointing commissioners to partition the land. From this judgment Henry M. Griffin, by his guardian ad litem, prosecutes a writ of error.

Conclusions of Fact.

Henry M. Griffin and Alice M. Griffin were married on November 14, 1900, and as the fruits of such marriage they have one child, about 3 years old. Henry M. Griffin inherited through his mother, Mary Jane Griffin, deceased, a one-sixteenth interest in the 328 acres of land described in the petition. After his marriage he and his wife moved upon this 328 acres and lived in a house situated thereon, and cultivated about 20 acres of the land the first year, and about 40 acres the second year, they so lived thereon. He had thereon his farming tools, plows, cultivators, and household and kitchen furniture. The house was not on the tract cultivated, but was on the 328 acres. The remainder of the land was owned, one-half by J. P. Griffin, the father of Henry M., and the balance, seven-sixteenths, by his brothers and sisters. Henry M. Griffin, while so living upon the land, was by the proper authorities of Fannin county adjudged a lunatic on October 8, 1902, and sent to the State Lunatic Asylum at Austin, where he has since been, and is now, confined. His wife, Alice M. Griffin, was appointed guardian of the estate of Henry M. Griffin, and duly qualified as such.

On October 10, 1902, said guardian filed her first inventory and list of claims, which showed that said estate owned the following property, to wit: One horse, worth \$25; one buggy, worth \$50; one saw, worth \$2; another saw, worth 50 cents; one square, worth 50 cents—said property alleged in said inventory to be the community property of said lunatic and his wife, Alice M. Griffin. Said list of claims consisted of one note for \$320, dated July 17, 1902, bearing 8 per cent. per annum interest from

date; one note for \$211.10, given by W. S. Church, dated July 21, 1902, secured by chattel mortgage on crops; and \$85.70 in money, being community property of Alice and Henry M. Griffin. On June 18, 1903, one C. L. Parr, alleging that he had an established claim against the estate of said lunatic, applied to the county court of Fannin county to require Alice M. Griffin, guardian of the estate of Henry M. Griffin, lunatic, to place on her inventory of said estate the one-fourteenth of said 328 acres, which interest said application stated that said Henry M. Griffin owned in said 328 acres. On July 2, 1903, Alice M. Griffin filed her answer to said application of C. L. Parr, and resisted such application, alleging that said interest of said Henry M. Griffin in said 328 acres was one-sixteenth thereof, that it was the homestead of herself and the minor child of herself and Henry M. Griffin, about two years old, and was their homestead when said lunatic was taken to the lunatic asylum. The county court sustained the application of C. L. Parr, and by its judgment rendered July 6, 1903, ordered said one-sixteenth of said 328 acres placed on said guardian's inventory. Said judgment was complied with by said guardian filing said additional inventory on July 8, 1903, which was approved by said court. On September 1, 1903, said guardian, Alice M. Griffin, applied to said county court for an order to sell said one-sixteenth of said 328 acres of land, stating that C. L. Parr held a judgment against said lunatic for \$114.40, rendered by justice court of Precinct No. 8 of said Fannin county, with interest at 8 per cent. from April 6, 1903: that there were other debts owing by the estate; and that costs would be increased by creditors forcing such sale, unless the application was granted. On October 13, 1903, the court made an order directing the guardian to sell at public or private sale, as she might deem most advantageous to said estate, for cash, said one-sixteenth of said 328 acres.

On December 28, 1903, said guardian reported to said county court that she had sold said one-sixteenth of said 328 acres to J. W. Harris at private sale for \$401 in cash, which sale was on the 7th day of January, 1904, confirmed by said county court, and deed was ordered made by said guardian to plaintiff for said one-sixteenth of said 328 acres, which she did on the 8th day of January, 1904.

Henry M. Griffin owned no land, except his interest in this 328 acres. The \$401 paid by J. W. Harris for the land was its fair market value, and this money was paid by the guardian on debts owing by the lunatic, Henry M. Griffin, except a small sum still in possession of such guardian.

J. W. Harris, in purchasing the property from the guardian, acted in good faith. While he did not know that Henry M. Grif-

fin claimed the property as his homestead, he did know that he lived thereon with his family at the time he was adjudged a lunatic.

Opinion.

The learned trial judge was of the opinion that, as the records of the county court did not show that the land was the homestead of the lunatic, the county court had jurisdiction to order the sale of said land, and that such sale and the confirmation thereof passed title to the purchaser. The county court records did not affirmatively show that the land was not the homestead of Henry M. Griffin. The question as to whether the purchaser, under the facts of this case, acquired a good title, is not controlled by the fact that the records in the guardianship proceedings failed to show that the property was the homestead of the lunatic. As we understand it, the test is, was the property the homestead, in fact, of the lunatic at the time it was ordered sold, and at the time the sale was confirmed? It is clear that Henry M. Griffin was entitled to a homestead in the land. It is held that a tenant in common is entitled to a homestead in land, owned jointly by himself and others, to the extent of his interest, not to exceed 200 acres. *Clements v. Lacy*, 51 Tex. 150.

It is further held that, where a tenant in common owns jointly with others a tract in excess of 200 acres, he is entitled to claim his interest in the entire tract as homestead to the extent of 200 acres. *Jenkins v. Volz*, 54 Tex. 636; *Lewis v. Sellick*, 69 Tex. 379, 7 S. W. 673.

Nor do we think it can be seriously contended that such interest was not at the time Henry M. Griffin was adjudged a lunatic, his homestead. He was the head of a family and lived on the land, and had cultivated 20 acres of the land for nearly 2 years. He owned no other land. He had his farming tools and implements thereon; also his kitchen and household furniture.

When it was sought to have the county court to require the guardian to inventory said land as part of the estate of the lunatic, she resisted, upon the ground that it was the homestead of herself and minor child. By the terms of the statute the guardian was bound to return a full inventory and appraisement of the property of the estate. Rev. St. 1895, art. 1965. And upon complaint in writing, by any one interested, setting forth that error has been made in the inventory, and pointing out such error, and citing the guardian to show cause why it should not be corrected, the court, upon hearing, was authorized to correct the same. Rev. St. 1895, art. 1976. The fact that the court ordered the guardian to correct her inventory by including the land therein did not adjudicate or determine that the property was not the homestead of the lunatic's fam-

ily. It was proper to include the homestead in the inventory, and the fact that it was homestead furnishes no good reason for not including it therein. That the court failed to perform its full duty and set aside this property as the homestead at the first term of court after the inventory and appraisement were filed, as required by the statute (Rev. St. 1895, art. 2046), did not have the effect of waiving the homestead exemption and making it liable for the debts of the estate. We think it clear under the facts the property was the homestead of Henry M. Griffin at the time he was adjudged a lunatic and when it was sold by the guardian. *Parr v. Newby*, 73 Tex. 468, 11 S. W. 490; *Orockett v. Templeton*, 65 Tex. 136.

The Constitution of the state (article 16, § 50) protects the homestead from forced sale for the payment of all debts. Under this prohibition of the Constitution, the county court is deprived of the jurisdiction or power to order a sale of the homestead to pay the ordinary debts of the estate. *Yarboro v. Brewster*, 38 Tex. 418; *Hamblin v. Warnecke*, 31 Tex. 91; *McCloy & Trotter v. Arnett*, 47 Ark. 445, 2 S. W. 71. The county court not having the power to order the sale, no title passed to the purchaser at a sale made in pursuance of such order. The order was a nullity, and it is immaterial whether the purchaser had knowledge of the fact that the property was the homestead or not. Having purchased under a void order, he took no title. *Withers v. Patterson*, 27 Tex. 500, 501, 86 Am. Dec. 648.

It follows from these remarks that the trial court erred in rendering judgment for J. W. Harris, defendant in error, and in not rendering judgment for the plaintiff in error, for an undivided one-sixteenth of the 328 acres of land. The judgment is reversed and here rendered for plaintiff in error, Henry N. Griffin, and his guardian ad litem, for a one-sixteenth interest in the 328 acres of land described in the petition. The decree of the district court for partition is not disturbed further than as stated above, but will be carried out by that court. The regular guardian is entitled to the possession and use of the land here recovered by plaintiff in error.

Opinion on Rehearing.

Henry M. Griffin's interest inherited through his mother in the 328 acres of land was one-sixteenth, or 20½ acres. The year he was adjudged a lunatic he was cultivating 40 acres of the 328 acres, an excess of 19½ acres over the interest owned by him. For this excess he paid rent to his father. The records of the probate court in the matter of the guardianship of Henry M. Griffin showed that when the motion was made to require the guardian to inventory this land the guardian resisted, setting up that it was the homestead of herself and child. The estate of the lunatic, excluding the homestead

from the assets, is, and always has been, insolvent. When J. W. Harris purchased the property he knew that Henry M. Griffin lived upon the land with his family, and had his household and kitchen furniture, tools, and farming implements thereon, and that he owned no other homestead. J. W. Harris is the father of the guardian, Mrs. Griffin.

The statement in the opinion that "the county court records did not affirmatively show that the land was not the homestead of Henry M. Griffin" is liable to be misunderstood. By this we meant to say that the records did not show that the question of homestead vel non had been passed upon by that court. It is true the court ordered the guardian to inventory the property, but this did not affirmatively adjudge that it was not the homestead. The records did show that the guardian, at the time the motion to require it to be placed on the inventory was heard, claimed and pleaded that it was the homestead of herself and child. The record in this respect is similar to that passed upon in *Hamblin v. Warnecke*, 31 Tex. 94, and it was there held that the records of the county court showed the property was homestead. It was shown on the trial that the land had been in the possession of J. P. Griffin, the father of Henry M. Griffin, since the purchase by J. W. Harris, and that the rent of the property during such time was of the value of \$80, and J. W. Harris recovered judgment for that amount. In the opinion nothing was said as to rents, but the judgment was here rendered for appellant for the land and \$80 rent.

The motion for rehearing is overruled.

WOOD v. TEXAS COTTON PRODUCT CO.*

(Court of Civil Appeals of Texas. May 20, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS CURING ERROR.

An instruction, in an action for injuries to a servant, that when the master employs a minor to perform dangerous or hazardous work it is the master's duty to explain the proper manner of performing the work, etc., "unless the dangers and risks are patent and obvious to persons of like age and intelligence" of the minor, objectionable in limiting the master's duty to instruct to latent dangers, was cured by a special charge that if the jury found that the driftpin used by plaintiff's son, by which he was injured, had become defective and unsuitable, and that defendant's superintendent knew, or by the exercise of reasonable care ought to have known, of such defect, and plaintiff's son, while using such pin, was injured by reason of its defective condition, plaintiff was entitled to recover, unless the son, considering his age and experience, knew and appreciated the peril and danger of striking the pin when he did.

2. SAME—DUTY TO INSTRUCT—OBVIOUS DANGERS—INEXPERIENCED EMPLOYE—ISSUES.

Where, in an action for injuries to a servant caused by a defective driftpin used by him,

plaintiff alleged that the pin when in proper condition was adapted to the use and purpose intended, and if the pin had been suitable, and the head thereof surrounded with soft or malleable iron, particles would not have been thrown therefrom nor the injury occurred, plaintiff was not entitled to object to certain instructions on the theory that the work in which the servant was engaged was dangerous of itself, and that defendant was bound to warn such servant, who was a minor and inexperienced, though the danger was obvious.

3. SAME.

Where plaintiff alleged negligence in that a certain tool was defective and unsuitable, by reason of which his son was injured while using the same, a charge presenting conjunctively the propositions of negligence in furnishing plaintiff's son with such defective tool, and the failure to warn him of the dangers and risks incident to the work, was proper.

4. TRIAL—INSTRUCTIONS—APPLICABILITY TO PROOFS.

Where, in an action for injuries to plaintiff's son while attempting to work with a defective tool furnished him, there was no evidence that he was attempting to perform work for defendant which was outside the scope of his employment, it was error for the court to charge that, if he was performing work outside the scope of his employment when he was injured, he assumed the risk and plaintiff could not recover.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Action by W. T. Wood against the Texas Cotton Product Company. From a judgment for defendant, plaintiff appeals. Reversed.

Templeton & Harding, for appellant. Harry P. Lawther and Skinner & Supple, for appellee.

TALBOT, J. This action was brought by the appellant to recover damages for loss of the services of his minor son, S. D. Wood, and for medical and other expenses incurred, on account of personal injuries alleged to have been inflicted upon his said son while engaged in the service of appellee, through its negligence. The petition alleged, in substance, that during the fall of 1902 appellee was in Ellis county, operating a gin and compress known as the "Round Bale system," ginning and compressing cotton with extensive and complicated machinery, and in such work employed the 19 year old son of appellant, whose work was to weigh bales of cotton, sample, number, and check the same, making duplicates, keeping book records, and to assist in keeping the press in repair in case of break down, or from other causes should it fail to work. That to compress said bales the cotton is wound around a core pin, which is driven out by placing a driftpin made of steel against the end and striking the driftpin with a hammer. That the work of removing the core pin was no part of the regular work of the son of appellant, but that he was subject to the regular orders of the appellee. That on October 11, 1902, the employé whose duty it was to remove the core pin was absent, and the minor son of appellant was directed to perform that work by appellee, of the dangers of which

*Rehearing denied June 24, 1905.

the minor was ignorant, and in attempting to perform the same he struck the driftpin with the hammer in the usual way, when a scale or particle flew off and struck him in the eye, destroying the sight, and greatly impaired the other eye. That the said son was without knowledge of the dangers attending the striking together of such metals, and of the probability of scales and particles flying therefrom, all of which was known to appellee, and it failed to give any warning to said son, or to instruct him how to avoid the danger. That it knew of his minority and inexperience. That the driftpin was defective, battered, and worn, and was an unsuitable tool with which to perform the work, which was known to appellee. That a driftpin is manufactured for that purpose, and, when in proper condition, is adapted to the use and purpose aforesaid, and is safe. That it is tempered to a high degree, and is very brittle, and, to protect the head against particles flying off when hit, the hammer is surrounded with a more malleable metal, and when in this condition it is safe, and no danger results from striking it with a hammer. That had said pin been surrounded with a more malleable or soft iron, as it should have been, or had the said pin been a proper and suitable pin, the particles would not have been thrown off, and the said S. D. Wood would not have received the injury that he did. That the pin struck by the said son had no band or cap on the head of same, and at that time he did not know that one was necessary, but supposed the pin safe and well adapted to the work at the time he struck it. That its dangerous and defective condition was known to appellee. That, by reason of negligence of appellee, appellant was damaged \$597.10. The appellee answered by general denial, assumed risk, and contributory negligence. There was a trial by jury, resulting in a verdict and judgment for appellee, from which this appeal is prosecuted.

Appellant's first assignment of error complains of the following paragraph of the court's charge: "When the master employs a minor to perform work which is dangerous or hazardous to the person of such minor, it is the duty of the master or employer to explain to such minor the proper manner of performing such work, and also to explain to such minor the dangers and hazards to his person incident to the performance of such work, and how to avoid such dangers unless the dangers and risks incident to such work are patent and obvious to persons of like age and intelligence of such minor." It is contended that the duty to warn an inexperienced minor is not limited, as a matter of law, to only dangers which are not patent; that though the danger may be obvious and patent, yet the master should warn and instruct how to avoid it. The rule of law applicable to the question, we think, is clearly expressed by

our Supreme Court in the case of the Texas & Pacific Ry. Co. v. Brick, 83 Tex. 598, 20 S. W. 511. That was a suit to recover of the railway company damages for personal injuries alleged to have been inflicted upon a minor by the servants of John C. Brown, as receiver of the company's property, and in that case the court said: "The plaintiff being a minor, it was the duty of the receiver, through his agents, to instruct him as to the dangers of the employment. That was the primary obligation. But if the plaintiff at the time of his employment knew of the nature and extent of the danger, and his judgment was sufficiently mature to appreciate the risk, or if subsequently he became aware of the fact and extent of the danger, and had the discretion to properly weigh his liability to injury from it, the receiver became absolved from the responsibility arising from the failure to give the instruction. That he knew that there was some danger is not disputed; but whether, under all the facts, his discretion was sufficiently developed at the time of the injury, considering his knowledge and experience, to appreciate the extent of the risk, was not a question of law, but a question of fact, which was properly left to the determination of the jury." It is difficult to conceive how any person to whom the dangers and risks incident "to any given employment are" patent and obvious can fail to appreciate the risk, or properly weigh his liability to injury from it; but if it be conceded that the paragraph of the court's charge assailed is defective in that respect, still we think the error was cured, and all danger of injury to appellant by reason thereof averted, by a special charge given at the request of appellant, which reads as follows: "In connection with the main charge, you are further instructed that if you believe from the evidence that the driftpin used for knocking out the core from the bale of cotton had become out of repair and defective, and had become an improper and unsuitable pin to use for the purpose for which it was intended, and by reason of its condition was unsafe and dangerous, and that G. F. Warner, the defendant's superintendent, knew, or ought to have, by reasonable care, known, of the defective condition of said pin, if it was defective, and you further believe that S. D. Wood was acting within the scope of his employment when he struck said pin, and that particles were thereby caused to fly from said pin on account of its defective condition, going into the eye of said S. D. Wood, causing an injury, then plaintiff in this case would be entitled to recover, unless you further believe that S. D. Wood, considering his age and experience and all the other circumstances in the case, knew and appreciated the peril and danger of striking said pin when he did."

The court, in different paragraphs, charged the jury as follows:

"When the servant or employé has been supplied with a tool or instrument with which to perform his work by his master or employer, and such tool or implement is not reasonably safe for use by the servant or employé in performing the work assigned him, and it is obvious or patent to such servant that such tool or implement is not reasonably safe for use in his work, then it is the duty of the servant or employé to refrain from using such tool or implement; and if a servant or employé uses a tool or implement which he knows is not reasonably safe for use in his work, then he assumed the risk of injury from the use of such tool."

"The jury are instructed, if they believe and find from the evidence that the drift rod which S. D. Wood was using at the time he was injured (if he was) was then and there a reasonably safe instrument or tool for the use intended, then it would be the duty of the jury to find a verdict for the defendant, as the risk of S. D. Wood in that event would be assumed risk."

These charges are complained of and made the basis of appellant's second and seventh assignments of error respectively. Under the first-quoted paragraph, it is insisted that in case of an inexperienced minor it is not true, as a matter of law, that he assumes the risk even of an obvious danger; that the duty of the master is to warn of danger, the extent thereof, and how to avoid it. Under the second, the proposition is advanced that even though a tool may be safe and suitable, yet if the work be dangerous, the duty exists to warn the servant, and especially is this true when the servant is a minor, ignorant of the danger, and without experience; that in such case the failure to warn may be negligence, regardless of the reasonable safety of the tool itself.

We are of the opinion that, in view of appellant's pleading, neither of these assignments is well taken. The appellant did not allege and seek to recover on the ground that the work being performed by his son when injured was, by reason of its nature and character, necessarily dangerous, without reference to whether or not the driftpin was defective; that if the driftpin had not been defective as alleged, yet by striking the same with the hammer scales would form thereon and fly therefrom; and that appellee was guilty of negligence in failing to inform appellant's son of those facts, and of the danger he might encounter in doing the work. On the contrary, it is alleged that the driftpin, "when in proper condition, is adapted to the use and purpose" intended; that had said pin been surrounded at its head with a more malleable or soft iron, as it should have been, or had the said pin been a proper and suitable pin, the particles would not have been thrown off, and the said S. D. Wood would not have received the injury that he did. Appellant's case as made by his pleadings, succinctly stated, is that his

minor son, inexperienced, as appellee knew, was furnished a defective tool with which to perform certain work; that the performance of such work with such a tool was dangerous; and, without warning of the dangers incident thereto, appellant's son was directed to perform it. The defense was that the tool was not defective; that, if it was defective, such defect, together with the dangers and risks incident to its use in doing the work at which appellant's son was engaged when injured, was patent and obvious to one of his said son's age and discretion, the extent and nature of which he was fully capable of appreciating and understanding. There was evidence tending to the establishment of this defense, and we think the charges complained of authorized under the pleadings and testimony, and as applicable thereto state correct propositions of law. If, under the pleadings in this case, the tool was defective, and the performance of the work assigned appellant's son with such an implement was dangerous, and by reason of his youth and inexperience he was incapable of knowing and appreciating the nature and extent of the dangers and risks to which he was exposed in doing such work, and the same had not been explained to him, and the defective condition of said pin the efficient cause of the injury, a prima facie case authorizing a recovery by appellant was established. But, on the other hand, notwithstanding appellant's son's minority and inexperience, if the driftpin in question was reasonably safe, or if it was not reasonably safe for use, and the defect or condition rendering it unsafe was obvious or patent to appellant's son, and, knowing that such instrument was not reasonably safe for use in the work assigned him, and so knowing, he used it and was injured, we think, with such knowledge, and under the case made by the pleadings, he must be held to have assumed the attendant risk of such use.

We think there is no reversible error pointed out in that paragraph of the court's charge attacked by appellant's fifth assignment. There was no controversy as to many of the facts grouped in this paragraph of the charge, and the error in requiring the jury to find the existence of all of them before authorized to return a verdict in favor of appellant was harmless, and the jury could not have been misled thereby. That portion of the charge presenting conjunctively the propositions of negligence in furnishing appellant's son with a defective tool with which to do the work, and the failure to warn him of the dangers and risks incident to such work, was correct, as the case stood under the pleadings and proof. Appellant's contention that he was entitled to recover upon proof either that the driftpin was defective, or that appellee failed to warn his son, S. D. Wood, of the dangerous character of the work, cannot be sustained. As stated by counsel for appellee, appellant neither pleaded nor proved danger in

the work, disassociated from the alleged defective driftpin. The danger to be warned against was the use of such pin, and, of necessity, the language of the charge must be in the conjunctive; for if the driftpin was not defective there was no danger, according to the case made by the pleadings, against which to be warned.

Appellant assigns as error the following paragraphs of the court's charge, viz.:

"It is the duty of the servant to refrain from doing any part of the master's work which has not been assigned to him by the master or his agent, or contemplated within the scope of his employment by the master."

"The jury are further instructed that, if they believe from the evidence that when S. D. Wood was injured (if he was) he was attempting to perform work for defendant which was not a part of his duties or work nor within the scope of his employment, then it would be the duty of the jury to find for the defendant upon the ground of assumed risk."

The objection urged to these charges is that the issue presented therein is not raised by the evidence. This objection is well taken, and requires a reversal of the judgment. The record fails to disclose any testimony that would authorize a finding that appellant's son, when injured, was attempting to perform work for appellee which was not a part of his duties or outside the scope of his employment. It has repeatedly been held reversible error to submit in a charge to the jury an issue not made by the evidence, unless it is clear that the jury were not misled thereby. *Andrews v. Smithwick*, 20 Tex. 111; *Railway Co. v. Gilmore*, 62 Tex. 391; *Railway Co. v. Wisenor*, 66 Tex. 674, 2 S. W. 667; *Railway Co. v. McCoy*, 90 Tex. 264, 38 S. W. 36; *Railway Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756. The evidence did not conclusively show that appellant was not entitled to recover, and we think it cannot be said the charge was not misleading. The question was not only presented and submitted as an issue in the case in the paragraphs of the charge quoted, but a repetition of it is found in another paragraph thereof, and there is such apparent stress laid upon it by these instructions that there can be no doubt of its prejudicial effect upon the rights of appellant. In the case of *Railway Co. v. Wisenor*, supra, it is said: "A sound proposition of law upon a supposed state of facts which there is no evidence to support, when given in charge, is calculated to mislead the jury, and is reversible error."

Such assignments of error as have not been discussed do not, in our opinion, disclose any reversible error, or, if they do, such error is not likely to occur upon another trial.

For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

TEXAS CENT. RY. CO. v. MILLER et al.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. APPEAL—ASSIGNMENT OF ERROR.

A proposition under an assignment of error foreign to the assignment will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2997-3000.]

2. TRIAL—INSTRUCTIONS—CONSTRUCTION AND EFFECT AS A WHOLE.

Error cannot be assigned on a portion of a paragraph in a charge severed from the preceding part of the paragraph, which, when read as a whole, correctly states the law.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3013; vol. 46, Cent. Dig. Trial, §§ 703-708.]

3. CARRIAGE OF LIVE STOCK—DAMAGES DURING TRANSPORTATION—INSTRUCTIONS—OMISSIONS—REQUESTS TO SUPPLY.

An instruction in an action against a carrier for damages to a shipment of cattle alleged by the shipper to have been made under a verbal contract, and alleged by the carrier to have been made under a written contract, that unless there was an agreement as to rates of freight charges before the cars were placed and loaded plaintiff could not recover anything because of such charges, was correct as far as it went, and if it did not go far enough, in that it failed to state that if the oral contract was superseded by the alleged written one, plaintiff would not be entitled to recover anything by reason of the oral contract, defendant should have asked a special charge supplying the omission.

4. TRIAL—INSTRUCTIONS—WITHDRAWING EVIDENCE.

It is not error to refuse a requested charge withdrawing from the jury an essential element of an oral contract supported by the evidence of a party.

5. CARRIAGE OF LIVE STOCK—CONTRACT OF SHIPMENT—CONFLICTING CLAIMS—INSTRUCTIONS.

Where, in an action against a carrier for damages to a shipment of cattle, alleged by the shipper to have been made under an oral contract and by the carrier to have been made under a subsequent written contract, plaintiff showed facts as to the written contract which defeated it as a contract, a charge that the oral contract was not in force was properly refused as being on the weight of evidence.

6. SAME—INITIAL CARRIER—LIABILITY UNDER THROUGH CONTRACT.

A carrier contracting to deliver a shipment of cattle at a place designated within a certain time is liable to the shipper for damages on its own or connecting carrier's lines.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 950, 951.]

7. SAME—MEASURE OF DAMAGES.

A carrier failing to deliver a shipment of cattle within the time agreed on is liable to the shipper for the damages sustained by his failure to receive the market value of the cattle, occasioned by the breach of the carrier's agreement, and in determining such damages the shrinkage of the cattle occasioned by the carrier's failure to deliver within the agreed time is to be considered.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 920-922, 963, 964.]

8. EVIDENCE—KNOWLEDGE OF WITNESS.

It is not error to permit a witness to testify from his own knowledge as to what the freight rates between two points are, where he testifies that he knows it because he has paid it a number of times.

9. APPEAL—ERROR IN ADMISSIBILITY OF EVIDENCE — ASSIGNMENT OF ERROR — SUFFICIENCY.

Where the statements under assignments of error relating to the admissibility of testimony do not show what objections to the testimony were urged, the assignments will not be considered.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 3010-3012.]

10. CARRIAGE OF LIVE STOCK—LIABILITY OF INITIAL CARRIER—PROOF OF FREIGHT CHARGES—ADMISSIBILITY OF EVIDENCE.

In an action against an initial carrier for damages to a shipment of cattle the receipts from the connecting carrier to the shipper's consignee showing the freight paid are admissible as showing the freight charges.

Appeal from Eastland County Court; S. A. Bryant, Judge.

Action by P. J. Miller and another against the Texas Central Railway Company and another. From a judgment for plaintiffs against the Texas Central Railway Company, it appeals. Affirmed.

Earl Conner and Clark & Bolinger, for appellant. D. G. Hunt and J. R. Stubblefield, for appellees.

NEILL, J. The appellee P. J. Miller sued appellant and the Missouri, Kansas & Texas Railway Company to recover damages to a shipment of cattle alleged to have been made under a verbal contract from Mathews Switch to Ft. Worth, Tex., via Waco. The appellant and the Missouri, Kansas & Texas Railway Company answered, denying the alleged verbal contract, and pleaded specially that the shipment was made under a written contract limiting each's liability to its own line of railway. The appellant also impleaded the Missouri, Kansas & Texas Railway Company, which, it alleged, received the cattle in good order from appellant at Waco for transportation to their destination, and that, if they were damaged, such damages were occasioned by said railway; and asked that, in event judgment should be rendered against appellant, it have judgment over against the Missouri, Kansas & Texas Railway Company for a like amount. The case was tried before a jury, and the trial resulted in a judgment in favor of Miller for \$200, and also in favor of the Missouri, Kansas & Texas Railway Company.

Conclusions of Fact.

The evidence is reasonably sufficient to show that on the 24th day of August, 1903, the appellant, for itself and the Missouri, Kansas & Texas Railway Company, through its duly authorized agent, verbally agreed with plaintiff to transport without delay 99 head of his cattle from Mathews Switch, Shackelford county, Tex., to Ft. Worth, Tarrant county, Tex., via Waco, and deliver the same to plaintiff's consignee, for the same rate of freight per car as the Texas Pacific Railway Company would charge from Abilene, Tex., to Ft. Worth, and that they should reach their destination at about the same

hour of the same day they would if loaded at Abilene and transported over the Texas & Pacific Railway; that plaintiff delivered said cattle to appellant in compliance with said verbal contract at Mathews Switch at 3 p. m. on August 25, 1903, and that appellant negligently delayed the transportation of said cattle to Waco, where they were delivered to the Missouri, Kansas & Texas Railway Company, which, on account of the negligent delay of appellant, never delivered them to appellee's consignee at Ft. Worth until 3 p. m. on August 26, 1903, which was too late for the cattle to be sold advantageously on the market that day; that, had it not been for such negligence of appellant, the cattle would have been delivered to appellee's consignee at Ft. Worth at between 6 or 8 o'clock on that morning, which would have been the time of their delivery had they been shipped from Abilene over the Texas & Pacific Railway Company's road; that by reason of such negligent delay the cattle were damaged in their market value and by shrinkage or loss of flesh in the sum of \$200, which amount appellees lost on account of such negligence on the sale of his cattle at Ft. Worth.

Conclusions of Law.

1. The third assignment of error, which is the first insisted upon, complains of the first paragraph of the court's charge. We will not consider the first and second propositions under this assignment, because they are foreign to it. The third proposition advanced, to say the best of it, is far-fetched. The portion of the paragraph of the charge, upon which the assignment is predicated, is detached from the preceding portion in order to give it an entirely different construction than from what would be given the paragraph as a whole. In other words, the detached portion, which is complained of, is dependent upon what precedes it for its true meaning. Severed, as it is, from its antecedent by the assignment of error, it is not proper to predicate error upon it. When the paragraph is considered as a whole, it correctly states the law upon the phase of the case which it presents.

2. The fifth assignment of error complains of the third paragraph of the court's charge. The proposition asserted under it is that "a charge is erroneous which authorizes a recovery against a railway company when the undisputed facts fail to show that any damage was sustained to the plaintiff while on the line of said railway, when said railway company has by written contract limited its liability to its own line." This proposition is based upon the false hypothesis that the undisputed facts fail to show that any damage was sustained to the cattle while on the line of appellant's railway. As shown by our conclusion of fact, the evidence does show damage to the cattle on appellant's line of railroad; and this disposes of the proposition. The second proposition under this as-

shipment is that the paragraph referred to "is erroneous in that it shifts the burden of proof upon the appellant to prove that there was no oral contract, when the burden of the case should rest upon the plaintiff to establish the oral contract by a preponderance of testimony." A charge must be taken and construed as a whole. When this is done, it is seen that the question as to whether or not the contract of shipment was oral was properly submitted to the jury by the preceding paragraph, and that the matters submitted in the paragraph complained of were only intended by the court to be considered by the jury, in the event they determined there was no verbal contract between the parties.

3. The next assignment of error complains of the sixth paragraph of the charge, which is as follows: "Unless you believe there was an agreement as to rates of freight charges to be paid before the cars were placed and loaded, the plaintiff would not be entitled to recover anything because of such charges." We cannot perceive how appellant was injured by this portion of the charge. It is good as far as it goes. If it does not go far enough, in that it fails to inform the jury that if, from the evidence, they believed the alleged oral contract was entirely superseded by the alleged written one plaintiff would not be entitled to recover anything by reason of the oral agreement—if there were such an agreement—as to the freight charges, appellant should have asked a special charge supplying the omission.

4. Our conclusions of fact dispose of the tenth assignment of error adversely to appellant.

5. The court did not err in refusing to give appellant's special charge No. 2. To have given it would have been, in effect, to withdraw from the jury the question of shipment under the alleged oral contract, or rather to have excluded from the jury an essential element of such contract, which was appellant's undertaking by it to deliver the cattle in Ft. Worth early in the morning of August 28th. It was only in the event that the jury should find there was no oral contract, the special charge should have been given.

6. Special charge No. 7, the failure of which to give is made the subject of the seventeenth assignment of error, is upon the weight of evidence, in that it assumes the alleged oral contract was not in force, and that the rights of parties were to be determined by the alleged written contract. As to the written contract, plaintiff alleged facts and circumstances which would, under the decisions of this state, absolutely defeat it as a contract of shipment. Therefore, the court did not err in refusing to give such special charge.

7. For the same reason the court did not err in giving the tenth special charge requested by appellant. If the facts and circumstances alleged were such as to defeat the

alleged written contract, then the question of damages rests upon appellant's violating the oral one, and the written one has nothing to do with it. Under the oral contract there was no limitation of the damages to appellant's own line of railroad. Under it appellant contracted that they should be delivered at Ft. Worth within a certain time; and whatever damages were occasioned plaintiff by its failure to perform this contract it was liable to plaintiff for, whether it occurred on its own line or elsewhere.

8. As we have before intimated, the liability of appellant under the oral contract was not limited to such damages as occurred by reason of its negligence on its own line of railway from Mathews Switch to Waco. Hence the court did not err in refusing to instruct the jury, at appellant's request, if they believed from the evidence that the defendant Texas Central Railway Company used that degree of care, caution, and prudence as a reasonably careful, cautious, and prudent man would have exercised under like or similar circumstances in handling and transporting plaintiff's cattle from Mathews Switch to Waco, Tex., and with ordinary care, to return a verdict in its favor.

9. The nineteenth assignment of error, which complains that the court nowhere in its charge defined negligence, cannot be sustained; for it is shown by the supplemental transcript that the court defined negligence in a special charge prepared and given at the instance of appellant.

10. The same proposition is advanced under the twentieth assignment of error as under the seventeenth, and it is likewise disposed of.

11. The substance of special charges Nos. 16 and 19, the refusal of which to give is made the subject of the 22d and 23d assignments of error, was given by the court in special charge No. 15 (found in the supplemental transcript), and correctly states the rule as to the measure of damages.

12. The propositions made under the assignment which complains of the court's giving special charge No. 2 at the instance of plaintiff cannot be sustained, for such special charge is not merely a repetition of the first paragraph of the court's main charge. If it was found that the appellant agreed to ship and deliver the cattle within the time alleged by plaintiff, then the undisputed evidence shows that it breached the agreement. From which it follows that defendant was liable to plaintiff as damages on account of his failure to receive the market value of the cattle, occasioned by the breach of such agreement. And in determining such damages the shrinkage of the cattle occasioned by appellant's failure to deliver them within the time agreed upon was a matter to be considered by the jury. The evidence is undisputed that plaintiff received less than the market value of his cattle, and hence the court did not err in assuming such fact as proven in its charge.

13. The court did not err in giving, at the request of the Missouri, Kansas & Texas Railway Company, special charge No. 1, which is as follows: "There being no evidence of delay of the cattle in controversy on the line of the railroad of the Missouri, Kansas & Texas Railway Company of Texas, and no allegations in the pleadings of a delay on the said railroad, and there being no claim that the Missouri, Kansas & Texas Railway Company of Texas had collected and received for its own use and benefit a greater amount of freight charges than that allowed by law, you are instructed to return a verdict for the Missouri, Kansas & Texas Railway Company of Texas;" for the undisputed evidence warranted the court in so charging the jury.

14. The court did not err in permitting the witness Drahn to testify from his knowledge as to what the freight rates from Abilene to Ft. Worth were, for as to this freight rate he testified that he knew it because he had paid it a number of times.

15. It does not appear in the statements under appellant's thirty-fifth and thirty-seventh assignments of error what objections were urged to the testimony of plaintiff P. J. Miller, which is made the subject of these assignments. Therefore they will not be considered.

16. The receipts from the Missouri, Kansas & Texas Railway Company to the Ft. Worth Live Stock Commission Company, plaintiffs' consignee, showing the amount of freight paid for the shipment of cattle, were properly admitted in evidence as showing the freight charges.

There is no error assigned which requires a reversal of the judgment, and it is therefore affirmed.

CITY OF EL PASO v. COFFIN.*

(Court of Civil Appeals of Texas, June 7, 1905. On Rehearing June 28, 1905.)

1. EMINENT DOMAIN — PROCEEDINGS — DAMAGES — INSTRUCTIONS — REPETITION.

In a suit to condemn land for a park opposite a union depot, the fact that the court had already charged with reference to the same matter did not render an instruction that Const. art. 1, § 17, provided that no person's property should be taken for or applied to a public use without adequate compensation being made, unless by consent of such person, and that defendant was entitled to recover full compensation, which is the market value of the property as defined to the jury in general charge, and requiring the jury to consider such instruction in conjunction with the general charge on market value, erroneous, as calculated to unduly impress the jury with the fact that defendant was to receive the full market value of the property.

2. SAME.

Where, in condemnation proceedings, the jury were specially charged that defendant was entitled to recover the market value of the property on a specified date under the instructions as to market value given in the general charge, which was to the same effect, an objection that a certain paragraph of the main charge was silent as to the time when the value was to be estimated, and was therefore calculated to make

the time of the trial the basis of such estimation, was unsustainable.

3. SAME—MARKET VALUE—SURROUNDING CIRCUMSTANCES—FUTURE DEVELOPMENT.

In a condemnation proceeding, an instruction authorizing the jury in arriving at the market value of the property on the date the proceedings were instituted, to consider conditions surrounding the property at that time, its location with reference to business, the demand for property at that time, including any increase or development thereof that might then have been reasonably expected in the immediate future, was correct.

4. SAME—USE OF OTHER LAND—CONSIDERATION.

Where, at the time all of defendant's land in the vicinity was taken by a city for a park, certain railroads had acquired other property near by and commenced the construction of a union station thereon, and the proceedings by the railroads to acquire such land were separate from the proceedings by the city to acquire the land in question, the jury was entitled to consider the construction of such depot in arriving at the value of defendant's land.

On Rehearing.

5. COURTS—JURISDICTION.

Const. art. 5, § 16, providing that the county court shall not have jurisdiction of suits for the recovery of land, refers to suits for the trial of title to land, jurisdiction of which is vested in the district courts by article 5, § 8, and hence section 16 does not deprive county courts of jurisdiction of condemnation proceedings.

Appeal from El Paso County Court; Jos. U. Sweeney, Judge.

Condemnation proceedings by the city of El Paso against C. O. Coffin. From a verdict awarding defendant \$19,937.51 for land taken, plaintiff appeals. Affirmed.

D. Storms, R. O. Walsh, Beall & Kemp, and Richard F. Burges, for appellant. M. W. Stanton, for appellee.

JAMES, C. J. On November 15, 1902, the city council of the city of El Paso enacted an ordinance which recited that the railway companies operating or building railroads into the city have agreed on plans for a union passenger depot, and that it was necessary that certain streets and parts of streets and certain alleys should be closed by the city and others opened for the public use, and which ordained that certain streets, etc., be abandoned, etc., and granting the railway companies the right to close and use the same for railway purposes after certain abutting property shall have been acquired by said companies within the limits named, etc. Also, among other things, the city agreed and bound itself to acquire by condemnation or otherwise the north one-half of the west one-half of block 171, according to the map of Campbell's Addition to the city of El Paso, "provided the said Union Depot Company agrees and does keep and maintain the same as a public park for the use and benefit of the people of El Paso." Also, that "the company hereafter to be organized for the purpose of maintaining the said proposed new union passenger depot and each railroad now operating in the city of El Paso

*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

shall have 90 days from and after the passage and approval of this ordinance within which to file with the city council their acceptance of the terms and conditions of this ordinance." Acceptance was shown to have been duly filed. On December 3, 1903, the council adopted a resolution reciting that by the ordinance of November 15, 1902, the city agreed to open a certain new street, and also to acquire, by condemnation or otherwise, the north half of the west half of block 171 of Campbell's Addition, being lots 12 to 17, inclusive, "provided the Union Depot Company maintains the same as a public park; and whereas, in order to open up said street and park, it is necessary to take certain tracts of land for which the city desires to make just compensation: Therefore, resolved that the city attorney be and is authorized to make certain offers to the owners for the property, and, in the event that the owners refuse to accept said offer, that he be, and is hereby, directed to institute proceedings against the owners so refusing to condemn said land," as set forth in section 148 of the charter. On August 4, 1904, an ordinance was enacted reciting that offers had been made to the owner of said six lots for same, which had been rejected, and "the amount of compensation for same cannot be agreed upon; and whereas, proceeding for condemnation of same has been filed by the city attorney before the county judge in cause No. 2,274, styled 'The City of El Paso against C. O. Coffin': Now, therefore, such action by the city attorney is hereby ratified, and he is hereby authorized to prosecute such matter." On September 12, 1904, a resolution was passed providing that in the above proceeding the mayor be authorized to pay to Coffin the amount of compensation awarded against the city by the commissioners in said cause, or deposit the money in said court subject to the order of defendant, and also the costs, and, in addition thereto, to deposit a further sum equal to the amount of the compensation awarded by said commission, and authorizing the mayor to execute a proper bond conditioned for the payment of any further costs which may be adjudged against the city either in said court or on appeal, and to take any further legal action for and on behalf of the city that he may deem proper, and that the city take immediate possession of the land sought to be condemned upon the payment or deposit of the money, and that a proper warrant be drawn for such sums. The award of the commissions was \$3,747.66, and the proper deposit was made by the city on October 6, 1904. The defendant appealed, and on the appeal a jury awarded him \$19,937.51, and from the judgment of the county court the present appeal is prosecuted.

In addition to the facts involved in the foregoing statement, is the fact, which we think is of some importance, that prior to October 6, 1904, the date of the deposit, the

lands for the site of the Union Depot had by purchase been acquired by the railway companies or the Union Depot Company. This was undisputed, and it also appeared from uncontradicted testimony that early in October, or at least a few days after October 6, 1904, work was begun by contractors grading the depot grounds. The testimony of Mr. Patton, who was connected with the Union Passenger Depot as engineer and superintendent of construction, was that he went to look over the ground, and decided where he would locate the building, and scaled the building according to the architect's plans. He did not know the exact time when the grading began upon the property. It began some time in the early part of October, but he could not give the exact date. During the month of October he cross-sectioned the ground in front of the building. The work of grading was begun by the contractor the next day after he did the cross-sectioning in front of the depot, and Mr. Powers was doing the grading. Mr. Look, a witness, testified that he could not give the exact time they began grading and began the work of constructing the depot, but it was soon after the 6th day of October, 1904. We state the above as showing what the testimony showed the conditions to be on October 6, 1904, and that it appeared that the railways at that time had acquired title to their grounds, had plans for their depot building, had made contract for grading their grounds, and that the work of construction was in the act of beginning. The tract of land comprising the six lots sought to be condemned was separated from the depot grounds by a street. The taking in this case was of all the land defendant had in the locality.

Opinion.

The motion filed by appellee to dismiss the appeal for want of an appeal bond is overruled by force of the charter provision.

We are unable to see, considering the real issue in the case, anything calculated to affect the result in what is assigned as error by assignments Nos. 11, 12, 25, and 27. The correctness of the judgment depends upon the correctness of the court's charge in reference to what the jury might consider in arriving at the market value of defendant's property on October 6, 1904, the date of the taking. Assignments are so framed as to question not only the charge in this respect, but the admission of testimony in conformity with the idea embodied in the charge, and these assignments, therefore, present and depend upon the same question.

The charge was as follows: "As to the law applicable to this case, you are instructed that: The measure of damages to which defendant is entitled * * * is the full market value of lots 12 to 17, inclusive, in block 171, and you will return a verdict for the defendant in the amount so found by you, and return a verdict for the plaintiff for the

land in controversy. In estimating the value of property taken for public use, it is the market value of the property which is to be considered. You are instructed that the market value of property is a price which it will bring when it is offered for sale by one who desires but is not obliged to sell it, and is bought by one who is under no necessity of having it, and in this estimate you will not consider that this proceeding is pending to take said property by condemnation. In determining the value of property, all of the uses to which it may be applied, and for which it was adapted on October 6, 1904, are to be considered, and not merely the condition that it is in at the time, and the use to which it is then applied by the owner. You are further instructed that the damages cannot be measured by the value of the property to the party condemning it, nor by its need of this particular property. You are further instructed that in ascertaining the market value of said property on the 6th day of October, 1904, you should consider the condition of the property at that time, its locality with respect to business and demand for property at that time, and any increase or development thereof that might have been reasonably expected in the immediate future at that time. In ascertaining what the market value of the property involved in this controversy was on the 6th day of October, 1904, you should consider the conditions then existing at said time, but you would not be authorized to consider speculative or merely possible contingencies, and you would not be authorized to consider any evidence as to speculative values."

The court also gave a special instruction, requested by defendant, which stated that under the statutes of this state, when the whole of a person's real estate is condemned as in this proceeding, the damages to which he is entitled is the market value thereof in the market in which the same is located, and, further, "that the Constitution of the state of Texas (article 1, § 17) provides that no person's property shall be taken for or applied to a public use without adequate compensation being made, unless by consent of such person, and that defendant is entitled in this proceeding to recover full compensation, which is the market value of said property as the said term is defined to you in the general charge of the court; and this instruction in reference to the value of the property you will take and consider in conjunction with the general charge of the court upon market value."

In reference to the last-named special charge, it is assigned as error that the reference to the constitutional article was erroneous, because the court had already instructed the jury in reference to the same matter, and the reference to the Constitution on the subject was calculated to unduly impress the jury with the fact that defendant was to receive the full market value of the prop-

erty, by repetition of the injunction contained in the general charge. This, we think, cannot be regarded as error. A court may commit error to the prejudice of a party when it, by its charge, gives undue prominence to a fact or to an issue. But we have yet to learn that a rule or principle of law which a jury is bound to observe can be too well impressed upon them.

The first assignment is without merit. The charge of the court must be read or construed as a whole, and the jury were expressly told in a special instruction that defendant was entitled to recover the market value of the property on the 6th day of October, 1904, under the instructions as to market value given in the general charge. The main charge was the same in effect. Hence the complaint that certain paragraphs in the main charge did not state the time when the value was to be estimated, being silent thereon, was calculated to make the time of the trial the basis for estimating the damages, is not well founded.

There are many assignments complaining of the main charge, based upon the idea that it permitted or authorized the jury to consider any increase or development of the property by the construction of the Union Depot, or, as otherwise expressed, was calculated to induce the jury to believe that they could fix a valuation upon the property contingent upon the construction of such depot upon it, and that said property might be used for storehouses after the completion of the depot, and also expressed thus: Because it authorized them to consider values attaching to said property by reason of the building of the Union Depot upon it. The depot, however, was not to be built upon this property. The force of appellant's proposition lies in the charge authorizing the jury to take into consideration the construction of the depot in the immediate vicinity of this property as an element entering into the market value of this property on October 6, 1904.

It must be admitted, from a fair reading of the charge as above copied, that it does nothing more than instruct the jury, in arriving at the market value on October 6, 1904, to consider the conditions surrounding the property at that time, the charge specifying its locality with reference to business and demand for property at that time existing, including any increase or development thereof that might then have been reasonably expected in the immediate future. This is the correct rule, as held by this court in *Sullivan v. Ry. Co.*, 68 S. W. 745; *Allen v. Ry. Co.*, 25 S. W. 826.

We see no reason why, under the proven facts and circumstances of this case, the jury were not warranted in concluding that the completion and use of this depot adjoining the property in question were on October 6, 1904, assured facts to occur in the immediate future, and based on conditions then in

progress pointing directly to such completion and use, in such manner as to directly have effect upon the market value of the property in question at that time. To have excluded such consideration, and to have confined the jury to the condition the property was in at the time, and the use to which it was then applied by the owner, independent of its value as then affected by such consideration, would have been error.

We think there was no error in the charges on the measure of damages as ordinarily controls in this class of cases. But a question arises, which is strongly and ably urged by appellant's counsel, and which grows out of the circumstance as counsel put it, that the land of appellee was a part of the land designated to be taken and condemned in carrying out the project of a union depot in the city of El Paso, and to give safe and convenient ingress thereto and egress therefrom, the parts to be done by the city and by the railway companies and Union Depot Company, respectively, being correlative and interdependent, as evidenced from the ordinance. We understand the contention to be, in effect, that the condemnation in question should be viewed as if this property, and the ground acquired by the railways for the depot, were being simultaneously, or by one proceeding, condemned for depot purposes. Either this, or that the taking of appellant's lots was a part and parcel of the original plan of improvement, as from the ordinance it will be seen that the building of the depot and the opening of the street and the park were dependent and conditioned one upon the other, and the ordinance and the acceptance of same constituted an agreement binding on all. It is held generally, in cases presenting the appropriate facts, that, where a person's entire property is included in one general proceeding of condemnation for a particular purpose, it is not permissible to consider that purpose, or the results thereof, in estimating the owner's compensation. The reasons for this rule are apparent. To permit it would be to take into consideration the condemnation proceeding itself as a factor, which is not allowed. Further, it is evident in such a case that the taking, and the effect on the value from such taking, would be concurrent, and such increase would not exist when the taking occurs. The person's property is taken and is absorbed in the purpose for which it is taken, and to allow him a compensation based on the value which the property would have had if not taken would be giving it a status it could not possibly have had in the very nature of the act. The reasoning of the Supreme Judicial Court of Massachusetts is appropriate here (though not its decision, as that was controlled by a statute): "Its real value for use is not increased until the change in its surroundings comes. If the expected improvement involves the taking of the land by the right of eminent domain, the value of the land taken will

never be enhanced by the improvement, for the taking precludes the probability of ever using it under improved conditions." *May v. City of Boston*, 32 N. E. 902. Such, we think, would be the case here if this property and the other property acquired as a depot site were being condemned by the railway companies simultaneously in a common proceeding. But the property is not being condemned by the railway companies, nor is it being condemned for its purposes. Furthermore, at the time at which the law requires this property to be valued, the companies had already acquired the property to be used for their purposes. The case of the city could have no better footing than would have been the case had the railway companies, after acquiring the grounds for the erection of their depot, proceeded to condemn this property as additional grounds. The case of *Ry. v. Brugger* (Tex. Civ. App.) 59 S. W. 558, is, we think, an authority on this state of case. If not directly in point, the decision is not consistent with any other theory than that the steps already taken by the railway companies towards establishing their depot on the adjoining site, in so far as they indicated with reasonable probability such establishment in the immediate future, should have been considered in fixing the value of the plaintiff's property on the date of its taking. And such is the necessary result of the rule stated in *Sullivan v. Ry. Co.* (Tex. Civ. App.) 68 S. W. 745. See, also, *In re Condemnation of Certain Land* (R. I.) 33 Atl. 523.

It is true the original ordinance, the provisions of which were accepted by the railway companies, contemplated, and, we shall say, stipulated for, the acquisition of defendant's land by the city for a public park, and, when acquired, that it should be kept in order by the said companies or the Union Depot Company. This, we think, is not a factor in respect to the rights of defendant. His constitutional right in this involuntary proceeding, as further defined by our decisions, was to be awarded the value of this land at the time it was taken, and this time is not to be referred back to a previous time, when the taking was first contemplated or decided upon by the city.

The assignments of error do not establish error, and the judgment is affirmed.

On Rehearing.

The appellant contends that the county court can have no jurisdiction of condemnation cases, by reason of section 16, art. 5, of the state Constitution, which provides that said court shall not have jurisdiction of suits for the recovery of land. Section 3, art. 5, vests the jurisdiction of all suits for the trial of title to land in the district courts, and we think the reference to suits for the recovery of land in section 16 meant suits for the trial of title to land. The question was before the Court of Appeals, and it

held that the statute giving the county court jurisdiction over condemnation cases was not unconstitutional, for reasons expressed in the opinion found in *Gulf, C. & S. F. Ry. Co. v. Tacquard*, 3 Willson, Civ. Cas. Ct. App. § 141. The question does not appear to have been directly raised and decided in the Supreme Court, but that court has made rulings which are entirely inconsistent with the correctness of the position assumed by appellant. See *Ry. v. Polndexter*, 70 Tex. 98, 7 S. W. 316; *Ackerman v. Huff*, 71 Tex. 317, 9 S. W. 236; *Galv. Wharf Co. v. Ry. Co.*, 72 Tex. 454, 10 S. W. 537. The question being a constitutional one and plainly fundamental, it could not have been overlooked in the above and other cases which involved it. We cannot consent to certify to the Supreme Court a question thus practically settled, and one with regard to which no member of this court entertains any doubt.

The other questions referred to in the motion for rehearing are, we believe, correctly disposed of by the opinion filed.

The motion is overruled.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. HARKEY.*

(Court of Civil Appeals of Texas. May 24, 1905.)

1. CONTINUANCE—AFFIDAVIT—VERIFICATION.

The verification to an affidavit for continuance by the attorney of the party, stating that the matters set forth therein are true, to the best of his knowledge, information, and belief, is insufficient.

2. DAMAGES—EXCESSIVENESS—PERSONAL INJURIES.

In an action for injuries, the evidence showed that plaintiff was 32 years of age; that prior to receiving the injuries he was a stout, able-bodied man, earning from \$1,000 to \$1,500 a year, and that since he received the injuries he had not been able to earn half so much. He testified that he received a violent fall, which mashed in his side and bruised his back and right leg; that he was confined to his room and unable to work for five or six weeks; that his wounds prevented him from sleeping at night. A physician testified that he found plaintiff's right side sunken and shorter than the other, the muscles atrophied, and that when standing erect his right shoulder was lower than the left; that the two lower ribs on that side were driven in and down, and there was a tender spot over his spine and also over the two ribs; that from plaintiff's statement as to the pain he suffered there must be an adhesion on the inside or something torn loose; that complications might arise which would necessitate an operation; and that the injuries were permanent. *Held*, that a judgment for plaintiff for \$2,000 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 372, 375, 378.]

3. DEPOSITION—MOTION TO QUASH—TIME FOR MAKING.

Under Sayles' Rev. Civ. St. 1897, art. 2289, providing that objections to depositions shall be made and determined at the first term of court after the deposition has been filed, and not thereafter, a motion to quash a deposition, when made after announcement of ready for trial is too late.

*Rehearing denied June 23, 1905, and writ of error denied by Supreme Court.

4. SAME—QUESTION OF FACT.

A motion to quash a deposition on the ground that it was not returned as required by law, in that the envelope on which it was returned showed neither the postmark, place from which it was sent, nor that it was sent by the postmaster, raises a question of fact for the determination of the court, on which it was authorized to receive testimony outside of what was shown by the deposition itself or the indorsement on the envelope.

5. CARRIERS—NEGLIGENCE—PRESUMPTION.

The derailment of a passenger train at a time when the track and train are under the control of the carrier raises a presumption of negligence on the part of the carrier.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1288.]

6. SAME—INJURIES TO PASSENGER—BURDEN OF PROOF.

Where a passenger train is derailed at a time when the track and train are under the control of the carrier, it is incumbent on the carrier, in an action against it for an injury to a passenger resulting from the wreck, to show that the accident could not have been avoided by the exercise of the utmost care and foresight reasonably compatible with the prosecution of its business.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1288.]

Appeal from District Court, Cass County; A. P. Turner, Judge.

Action by Joe Harkey against the St. Louis Southwestern Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Glass, Estes & King, for appellant.
O'Neal & Allday, for appellee.

EIDSON, J. This suit was brought in the court below by appellee for \$2,000 alleged damages for personal injuries alleged to have been received by appellee while a passenger on one of appellant's trains during the month of October, A. D. 1902. The allegations of the petition are substantially as follows: That the car on which appellee was riding was derailed near Winfield, Tex., through the negligence of appellant and its agents; that at the time of such derailment appellee was thrown from his seat with great violence into the aisle of the coach in which he was riding, and thereby greatly injured. He alleged that his right leg, his back, and his right side were greatly bruised, lacerated, and mashed, and that he was also injured internally; that by reason of said injuries he was confined to his bed the greater part of two months, during all of which time he suffered great physical pain and mental anguish; that his said injuries are permanent, and that he still suffers intense pain from said injuries; that since said injuries he cannot sleep on his right side, and can scarcely lift anything of much weight; that before said injuries he was a stout, able-bodied man; that he is a farmer and stockman, and was earning from \$100 to \$150 per month, and that since his injuries he cannot earn more than one-third of said amount; that by reason of said injuries he was compelled to pay out \$50 for medicine and medi-

cal treatment. Appellant answered by general and special exceptions and general denial. The case was tried before the court without a jury, and judgment rendered in favor of appellee for the sum of \$2,000.

Appellant's first assignment of error complains of the action of the court below in overruling its application for a continuance of the case. Appellant's application, in our opinion, was not verified, as required by law. The oath to the application was made by appellant's attorney, and stated as follows: That he is the attorney for the above defendant, and that the facts set forth in the above motion are, to the best of his knowledge, information, and belief, true. Such an affidavit was held by this court in *Railway Co. v. Brown*, 75 S. W. 807, to be insufficient, and such holding is fully supported by the following authorities: *Graham v. McCarty & Brown*, 69 Tex. 323, 7 S. W. 342; *Spinks v. Matthews*, 80 Tex. 373, 15 S. W. 1101; *Pullen v. Baker*, 41 Tex. 419; *Wilson v. Adams*, 15 Tex. 324; *Railway Co. v. Pletsch*, 10 Tex. Civ. App. 575, 30 S. W. 1083. We are also of the opinion that the application does not show due diligence in endeavoring to procure the testimony of the absent witness.

By its fourth assignment of error, appellant contends that the amount of the judgment in favor of appellee is excessive. In view of the character and nature of appellee's injuries, we do not agree with appellant in this contention. The testimony shows appellee to be only 32 years old, and that prior to receiving the injuries he was a stout, able-bodied man, capable of doing considerable manual labor, and that he earned from \$1,000 to \$1,500 a year, and that since he received the injuries he has not been able to earn half so much. Appellee testified that in the accident he received a violent fall, that it jerked his side terribly, and mashed it in, and bruised his back and right leg; that he was confined to his room and unable to do any work for five or six weeks; that he suffered a great deal from his wounds; that they prevented him from sleeping at night; that frequently he had to sit up all night on account of his head, back, and side hurting him so badly. Dr. Davis, who examined him two days before the trial, testified that in measuring appellee's sides and hips he found his right side sunken and shorter than the other, the muscles atrophied, and that when standing erect his right shoulder was lower than the left; that the two lower ribs on that side were driven in and down, and there was a tender spot over his spine, and also over these two ribs; that, from appellee's statement as to the pain he suffered, there must be an adhesion on the inside or something torn loose, and that while nothing can be done now to relieve him, nature having performed the best cure possible, yet complications might arise hereafter that would necessitate an operation. He also testified that appellee's injuries were permanent.

This witness also testified that he had known appellee all his life, and that prior to the date that he alleged he received his injuries he was a stout, able-bodied man, but that since that date he had not been. Appellee's testimony with respect to his injuries and suffering was in many respects corroborated by that of his wife and other witnesses. In view of the character and nature of appellee's injuries, as shown by the testimony, we do not think the amount of the judgment is excessive.

Appellant's second assignment of error complains of the action of the court in overruling its motion to quash the deposition of J. M. Brown, a witness for appellee; appellant's contention under this assignment being that said deposition was not returned as required by law, in that the envelope in which the deposition of said witness was returned shows neither the postmark, place from which it was sent, nor was it sent by the postmaster. The envelope in which the deposition was returned to the court below is sent up in the record of the cause. There is an indorsement on the envelope showing that it was received from E. W. King, April 16, 1904, which is signed by E. C. Bryan, P. M. There is a stamp on the envelope, evidently made by the postmaster receiving the same, containing the following word, abbreviations, and figures: "Bryans. * * * Apr. 16, 1904, Tex.," which are very distinct. Just after the word "Bryans" are some indistinct impressions of letters. The letters M and two l's can be observed reasonably well, but at this time no letter can be distinguished between the M and the double l. The court, in approving appellant's bill of exceptions taken to the action of the court in overruling its motion to quash the deposition, states, by way of explanation of its action, that appellant did not make his motion to quash the deposition until after the parties had announced ready for trial, and that appellee objected to the motion being then considered, upon the ground that it was made too late; and the court further states that the deposition showed that it was taken by E. W. King, a notary public of Cass county. And the court also states in his explanation to said bill of exceptions that E. C. Bryan was the postmaster at Bryan's Mill post office, in Cass county, Tex., but does not state how that information was acquired, whether from the indorsements on the envelope or from extraneous proof. We are of the opinion that the action of the court should be sustained, upon the ground that the motion came too late after the announcement of ready for trial. *Sayles' Rev. Civ. St. 1897, art. 2239; Hill v. Smith (Tex. Civ. App.) 25 S. W. 1079; Ry. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808; *Coleman v. Colgate*, 69 Tex. 88, 6 S. W. 553; *Neyland v. Bendy*, 69 Tex. 711, 7 S. W. 497; *Ry. Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758. We are also of the opinion that the motion

raised a question of fact for determination by the court, upon which it was authorized to receive testimony outside of what was shown by the deposition itself or the indorsement on the envelope. *Garner's Adm'r v. Outler's Adm'r*, 28 Tex. 176.

By its third assignment of error, appellant insists that the testimony is insufficient to support the judgment of the court in that the derailment of the engine attached to the car on which appellee was riding at the time he received his injuries, and the derailment of a portion of said car, was not caused by any failure or neglect on the part of appellant of its employes, but that appellant had observed, used, and exercised the high degree of care required by law for the safety of appellee, and that, if he was injured at all, such injury was the result of an inevitable and inexplicable accident, which is one of the risks assumed by passengers, and which cannot be foreseen or avoided by carriers. We cannot agree to this contention of appellant. It appears from the testimony that appellee's injuries resulted from the derailment of appellant's train; that the tender in front of the engine was turned over on one side of the track, and the engine turned over on the other side, and the front wheels of the coach in which appellee was riding were derailed. Appellee testified that the end of the coach in which he was riding was knocked in, and that he was thrown into the aisle and injured; that when he got up the passengers were "holering 'Fire!'" and the coach was on fire. Appellant's master mechanic testified that he examined the engine and tender after they had been shipped to Tyler after the wreck; that to all appearances the trucks were in first-class condition; that the only thing he found broken about them was two brake beams and one brake rod; that it had been known that a brake beam would drop down and derail a car; that to the best of his recollection these brake beams were broken in two right in the middle, but they were still hanging intact with the hangers there for that purpose; that he did not think they could have caused the derailment of the engine. Appellant's roadmaster testified that, according to his recollection, the ties where the wreck occurred were in very fair condition; that he did not remember if any of them were broken in as many as three pieces. There may possibly have been a few right where the engine turned over. Appellant's foreman of the track repairing crew at the time of the wreck testified that there were a few of what some people would probably call rotten ties in the track, but not enough to cause any trouble; that there were no broken beams before the engine turned over, for he saw it before it was wrecked. He saw it up near Sulphur Springs, but did not examine it there to see about the beams; that they were short on sectionmen at the time of the wreck, and

that some of the foremen along about that time went out with one or two men to work the road; that some of them did not have over one or two men, and that it was impossible to keep a road up as old as that, with the sections as long as his was, where they furnished the foreman with only one or two men; the road cannot be kept up in first-class repair under these conditions; at that time he was allowed five men, according to his recollection; that he had three at work that day, and he thought he went out a few days with two men, and maybe he was out one day with one; that a part of the time he had only one or two men, and with that sort of a crew he would not say that he could do his full duty. Some of the ties that were broken under the engine were rotten ties. There were some rotten ties there, but he did not remember how many. Appellee testified that he noticed the condition of the track where the wreck occurred. After the wreck was over and they found the engineer and fireman and were taking them out, he went up the track probably 50 yards and sat down, and the conductor came up and took his name, and said he didn't see anything in the world to cause the wreck, and appellee said, "You don't? Well, here's what caused it," and he pulled the spikes out of the ties right there and let them drop back in the ties, and that, where they were sitting, appellee showed the conductor a tie rotted square in two; that he noticed the ties where the wreck occurred; they were broken into as many as three pieces, and a sound tie, when the trucks run over it, just goes up and down on them if they are sound; that he never saw a right sound tie break; the ties were broken in pieces; they were unsound, rotten ties. Appellee having shown that his injuries were received in an accident resulting from the derailment of appellant's train, it devolved upon appellant to adduce evidence to show that the accident could not have been avoided by the exercise of the utmost care and foresight on its part. In the case of *Railway Co. v. Lauricella*, 87 Tex. 279, 28 S. W. 277, 47 Am. St. Rep. 103, Chief Justice Gaines, delivering the opinion of the Supreme Court, uses this language: "It is a reasonable and sound doctrine that when a passenger is injured by an accident, such as the derailment of a train at a place where the track and train are entirely under the control of the company—that is to say, where they are not interfered with by any extraneous force—a presumption of negligence arises, and that, in order for the company to exonerate itself from liability for the injury, it must adduce evidence to show that the accident could not have been avoided by the exercise of the utmost care and foresight reasonably compatible with the prosecution of its business." See, also, *Ry. Co. v. Fales*, 77 S. W. 234, 8 Tex. Ct. Rep. 629; *Ry. Co. v. Suggs*, 62 Tex. 323; *Ry. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280.

11 L. R. A. 486, 23 Am. St. Rep. 845; Ry. Co. v. Thompson, 77 S. W. 439, 8 Tex. Ct. Rep. 760.

We are of opinion that the testimony as shown by the record is amply sufficient to support the judgment of the court below, and it is therefore affirmed.

Affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. BOYD.

(Court of Civil Appeals of Texas, June 7, 1905.
Dissenting Opinion, June 24, 1905.)

1. ARGUMENT OF COUNSEL—APPEAL TO SELF-INTEREST OF JURY.

Rules for District Courts 39 (67 S. W. xxiii) provides that counsel shall be required to confine the argument strictly to the evidence and to the argument of opposing counsel. In an action against a railroad for injuries to plaintiff in a collision with defendant's cars at a street crossing, plaintiff's counsel, in his argument to the jury, said: "The public is interested in a matter of this kind. If a man is injured under these circumstances * * * and gets only partial damages, then the public suffers, and the law is defeated to the extent that he fails to get full compensation." *Held*, that the argument that the public is interested in a matter of the kind not being warranted by the evidence, it was, in connection with the language of the sentence following, an unauthorized appeal to the self-interest of the jury, and to their duty as good citizens to protect the interest of the public by rendering a verdict in a large amount for plaintiff.

2. SAME—ARGUMENT NOT SUPPORTED BY EVIDENCE.

The language of the argument immediately following: "It looks like the railroad company is willing to let this state of affairs go on and fight the cases where they inflict injuries, rather than go to the expense of having a watchman on this street to protect the public"—implied that there were other instances of injuries to persons at the crossing where plaintiff was injured on account of defendant's failure to keep a watchman there, and, there being no evidence of such instances, the statement was a direct appeal to the jury on considerations other than the merits of the case.

3. REVIEW—BILL OF EXCEPTIONS—SUFFICIENCY OF PRESENTATION.

Rules for District Courts 41 (67 S. W. xxiii) provides that, when violations of rules as to arguments are not noticed and corrected by the court, opposing counsel may ask leave to present his point of objection. *Held*, that where appellant's bill of exceptions, which was properly approved by the judge, showed that appellant called attention to the language complained of, and duly objected thereto, this was sufficient to properly present the question raised by the objection for revision; it further appearing from the bill, as construed by the court, that the trial court did not sustain the objection.

4. SAME—PREJUDICIAL ERROR.

There being a sharp conflict in the evidence on the issue as to whether it was negligence on defendant's part not to keep a watchman at the crossing, it could not be said that the error in permitting the argument was not prejudicial.

5. SAME—PRESUMPTIONS.

It will be presumed that the bill of exceptions states all that occurred at the trial.

Key, J., dissenting.

Appeal from District Court, Bowie County; S. P. Pounders, Special Judge.

Action by William Boyd against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed.

E. B. Perkins and Glass, Estes & King, for appellant. Horace W. Vaughan and Randall & Wood, for appellee.

EIDSON, J. This suit was brought by appellee against appellant in the court below to recover damages for personal injuries alleged to have been received by appellee on the 13th day of June, 1903, through the negligence of appellant in a collision between a hack which appellee was driving and some cars which were being switched by appellant on one of its switch tracks on Oak street, in Texarkana, Tex. Appellant pleaded a general denial, and contributory negligence on the part of appellee. A trial before a jury resulted in a verdict and judgment for appellee in the sum of \$10,000.

Appellant's twelfth assignment of error complains of the action of the court below in overruling its motion for a new trial, based upon the ground that appellee's counsel, in his argument to the jury in his behalf, used language in violation of the rules of the courts of this state regulating arguments upon the trial of causes, and which language was not supported by the evidence in the case, and that same appealed to the self-interest of the jury as a part of the public, and enlisted in appellee's behalf the public interest, and aroused their prejudices against appellant, and appealed to the jury, upon considerations other than the merits of the case, to return a verdict for appellee. The language complained of by this assignment is as follows: "The public is interested in a matter of this kind. If a man is injured under these circumstances [on a street crossing by backing cars] and gets only partial damages, then the public suffers, and the law is defeated to the extent that he fails to get full compensation. It looks like the railroad company is willing to let this state of affairs go on and fight the cases where they inflict injuries, rather than go to the expense of having a watchman on this street to protect the public. Therefore I say the public is interested in a case like this." Rule 39 of the district courts (67 S. W. xxiii) provides that counsel shall be required to confine the argument strictly to the evidence and to the argument of opposing counsel, and rule 41, for said courts (67 S. W. xxiii) provides that the court will not be required to wait for objections to be made when the rules as to arguments are violated, but, should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. The argument that the public is

interested in a matter of the kind being tried and under consideration by the jury was not warranted by the evidence; and, in connection with the language, "If a man is injured under these circumstances and gets only partial damages, then the public suffers, and the law is defeated to the extent that he fails to get full compensation," was an unauthorized appeal to the self-interest of the jury, and to their duty as good citizens to safeguard and protect the interest of the public by rendering a verdict in a large amount in favor of the plaintiff. The jury are, in effect, told that, if they failed to render a verdict giving the plaintiff full compensation, they would be recreant in their duty, as good citizens, to the public, and that in consequence thereof the public would suffer. It is difficult to imagine a character of appeal that would address itself with greater force to the judgment and conscience of a jury than this. The language, "It looks like the railroad company is willing to let this state of affairs go on and fight the cases where they inflict injuries, rather than go to the expense of having a watchman on this street to protect the public," implies that there were other instances of injuries to persons at the crossing, where plaintiff received his injuries, on account of the failure of defendant to keep a watchman at this crossing, and, notwithstanding this, defendant was willing for such state of affairs to continue, and to litigate the cases brought against it for injuries received at this crossing, rather than go to the expense of putting a watchman there to protect the public. There was no evidence adduced at the trial tending to show that any one other than plaintiff had at any time received any injuries at this crossing through the failure of defendant to have a watchman there. This was a direct appeal to the jury to place the stamp of condemnation on such unfair and unjust dealing and conduct upon the part of defendant towards the public by rendering a verdict in favor of plaintiff in an amount sufficiently large to make it more to the interest of defendant to go to the expense of keeping a watchman at the crossing than that of litigating the suits brought against it for injuries received there. Appellant's bill of exceptions shows that it called the attention of the court below to the language of counsel complained of, and that it duly objected to such language, and the bill of exceptions is properly approved by the judge; and this, in our opinion, is sufficient to properly present the question raised by the objection for revision by this court. It will be assumed that the bill of exceptions states all that occurred, and it appears from the bill of exceptions, as we construe it, that the court did not sustain the objection, but permitted the objectionable argument. *St. Louis S. W. Ry. Co. v. Dickens* (Tex. Civ. App.) 56 S. W. 124.

In the case of *C. & T. Ry. Co. v. Langston*, 92 Tex. 709, 50 S. W. 574, 51 S.

W. 331, the Supreme Court, in speaking of an objectionable argument, uses this language: "Unless it can be said that this error did not prejudice the company, it was in law entitled to have the judgment reversed therefor. The objectionable argument was calculated to arouse and influence the jury in favor of plaintiff, and it must be held to have been so intended by counsel, that being the very purpose of the argument, and he having made it over the protest of the defendant. The action of the trial court in permitting it under the circumstances was in effect a permit to the jury to consider it."

In the case of *St. Louis S. W. Ry. Co. v. Lowe*, 86 S. W. 1059, 12 Tex. Ct. Rep. 938, which was a suit for injuries to plaintiff's wife, alleged to have resulted from the failure of the defendant to warm the waiting room at its depot, the court says: "It is made to appear by bill of exception that counsel for appellee in his closing argument used the following language: 'If you find such a verdict as you ought in this case, it will be wired all over this state to-night, and to-morrow smoke will rise from a thousand chimneys of railway depots where there is none to-day. This is the only way railroad companies can be made to keep their depots warm.' The remarks excepted to were not, so far as the record discloses, provoked or justified by any argument of opposing counsel, and were highly calculated to inflame the minds and arouse the prejudices of the jurors, to appellant's injury." The language used in that case was an appeal to the jury to find such a verdict against the defendant as would compel it in the future to keep its waiting rooms properly warmed, so as to protect the public from the cold and inclement weather.

In the case of *Hanna v. Railway Co.* (Tex. Civ. App.) 65 S. W. 493, which was a suit against the appellee, a railway company, for damages for operating its road on the street in front of plaintiff's premises, the whole court held that the argument of counsel for defendants to the effect that plaintiffs had not contributed anything to the railroad, and that they were not liberal, gave nothing for public good, and were impediments to progress, was improper, and its permission was reversible error. The majority of the court held that the argument of counsel to the effect that the indemnitors of the railroad company, who were impleaded in the suit for the protection of the railroad company, were public-spirited citizens and contributed means to secure the railroad, was improper, such facts being immaterial to any issue in the case, and could not legitimately be considered in determining the rights of the parties, and that the action of the court below in permitting such argument constituted reversible error. For a full collation of the authorities bearing upon the question under consideration, reference is made to the two opinions in that case, *supra*.

We cannot say that the appellant was not prejudiced by the argument complained of; in fact, we are inclined to the opinion that it was, in view of the sharp conflict in the evidence on the issue as to whether it was negligence on the part of the appellant not to keep a watchman at the crossing of the street where the injuries were received by appellee.

We have considered all the other assignments of error presented, and are of opinion that none of them are well taken.

For the error indicated above, the judgment of the court below is reversed, and the cause remanded.

KEY, J. (dissenting). The writer does not concur with his associates in holding that reversible error is shown by the twelfth assignment. The bill of exceptions upon which that assignment is based, omitting immaterial parts, reads as follows: "That upon the trial of this cause plaintiff's attorney C. B. Randell, in discussing the evidence, which showed that defendant had 19 or 20 switch tracks running across Oak street, in Texarkana, Tex., and that it did not maintain any watchman there to warn people of danger in traveling on said street and over the portion of same where its tracks crossed, and in arguing with the jury as to what their verdict should be, and in appealing to the jury to give plaintiff a large amount, said: 'The public is interested in a matter of this kind. If a man is injured under these circumstances and gets only partial damages, then the public suffers, and the law is defeated to the extent that he fails to get full compensation. It looks like the railroad company is willing to let this state of affairs go on and fight the cases where they inflict injuries, rather than go to the expense of having a watchman on this street to protect the public. Therefore I say the public is interested in a case like this.' Whereupon defendant's attorney called the court's attention to said language and objected to it, on the ground that it was improper, prejudicial, and out of the record, and should not be permitted, and excepted to its use and its being permitted to be made, and tenders this its bill of exceptions No. 4, and asks that it be approved and filed." It will be observed that the bill does not state what ruling the trial judge made, or that he failed to make any ruling in reference to the matter complained of. In this respect it seems to me that the bill is incomplete, and fails to present for review any action of the court below. In order to obtain a new trial on account of improper conduct on the part of opposing counsel, the law requires the complaining party to show that he exercised diligence by invoking corrective action of the trial judge while the trial was in progress. The rule on

the subject is stated in these words by a standard authority: "In order that a party may avail himself in an appellate court of an objection for misconduct of opposing counsel in the argument of a case, he must not only interpose a seasonable objection, as has just been stated, but he must then press the court to a distinct ruling, and, if dissatisfied therewith, enter an exception; otherwise, there is nothing presented for review." 2 Ency. Plead. & Prac. p. 755. The text stated by this high authority is well supported by numerous authorities cited in the footnote. The bill of exceptions in this case does not distinctly show what, if any, ruling was made by the court, nor does it show that the court failed to rule on the objection. In *Anderson v. Anderson*, 23 Tex. 642, the bill of exception did not specifically state that the evidence was tendered and that the court excluded it, but stated that the plaintiff "excepted to the ruling of the court in refusing to hear" certain evidence, and, although the Supreme Court conceded that it might be inferred from the language quoted that the evidence was offered by the plaintiff and excluded by the court, the bill of exception was held to be insufficient, Chief Justice Wheeler, speaking for the court, saying: "It is not stated that any such evidence was offered, and we have repeatedly decided that the bill of exception must show the particular ruling complained of. It ought distinctly to appear that the evidence was proposed at the proper time, and that the court refused to admit it." From the statement in the bill of exception in the case at bar, that the defendant excepted to the language complained of "and its being permitted to be made," it may, perhaps, be inferred that the court overruled the objections, and held that the language referred to did not exceed the scope of legitimate discussion; but such ruling is not otherwise made to appear. However, the language of the bill of exception, "being permitted to be made," is rather ambiguous, and the inference referred to is not necessarily the only one that might be deduced therefrom. The language quoted from the bill may have had reference to the fact that the court did not, of its own motion, interfere and prevent the use of the language complained of. Therefore it does not distinctly appear what, if any, ruling the court made in reference to the objection made to the argument, and the rule announced and applied in *Anderson v. Anderson*, supra, is believed to be applicable.

For the reasons stated, I conclude that the question held in the majority opinion to show reversible error is not properly presented for decision, and I express no opinion thereon. I concur in overruling all the other assignments of error, and believe the twelfth should also be overruled, and the judgment affirmed.

**ST. LOUIS EXPANDED METAL FIRE-
PROOFING CO. v. BEILHARZ et al.**

(Court of Civil Appeals of Texas. June 17, 1905.)

**1. JUDGMENTS—FOREIGN JUDGMENTS—PROOF
—EXAMINED COPIES.**

A judgment of a foreign state may be proved by a witness who has compared the copy offered in evidence with the original record entry thereof, or who has examined the copy while another person read the original.

**2. CORPORATIONS—FOREIGN CORPORATIONS—
TRANSACTION OF BUSINESS—INTERSTATE
COMMERCE.**

A foreign corporation, which, through a resident agent, makes a contract in the state to furnish labor and material for construction work, and in pursuance thereof sends laborers and employes, together with a superintendent, into the state, to perform the contract, engages in business within the state within Rev. St. 1895, art. 745, requiring foreign corporations to file their articles with and receive from the Secretary of State a permit to transact business in the state, and is not engaged in interstate commerce.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2520-2527.]

**3. JUDGMENTS—ACTIONS ON FOREIGN JUDG-
MENTS—IMPEACHMENT OF JUDGMENT.**

In an action on a judgment obtained by a foreign corporation in another state, defendant may show, in bar of recovery, and notwithstanding the provisions of the federal Constitution and act of Congress declaring that full faith and credit shall be given in each state to the records and judicial proceedings of every other state, that the cause of action merged in the judgment arose from a transaction entered into by the corporation in the state of the forum, without having had a permit to do business in that state.

**4. FOREIGN CORPORATIONS—PERMIT TO DO
BUSINESS—CHANGE OF NAME—EFFECT ON
PERMIT.**

A change in the name of a foreign corporation after it has obtained a permit to do business in the state does not affect the validity of the permit, so long as the change of name does not involve a change in the corporate charter, or in the character of the corporation's business or the management thereof.

**5. SAME—FORFEITURE OF PERMIT—EVIDENCE
—CERTIFICATE OF SECRETARY OF STATE.**

Rev. St. 1895, art. 749, makes the original permit or certified copies thereof evidence of compliance by a foreign corporation with the statutory requirements, and declares a certificate of the Secretary of State that the corporation named therein has failed to file its articles of incorporation evidence that it has not complied with the statute. Article 5243, as amended by Laws 1897, p. 168, c. 120, provides that any corporation which shall fail to pay the prescribed tax shall, because of such failure, forfeit its rights to do business in the state. *Held*, that a certificate of the Secretary of State that a permit granted to a foreign corporation has been forfeited for nonpayment of taxes is not evidence of such forfeiture.

6. SAME—ACTIONS—PLEADING AND PROOF.

A petition by a foreign corporation, based on a transaction which required it to have a permit to do business in the state, must allege, and the corporation must prove, that such permit has been granted.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Action by the St. Louis Expanded Metal Fireproofing Company against Theodore Beil-

harz and another. From a judgment for defendants, plaintiff appeals. Reversed.

Morris & Crow, for appellant. Etheridge & Baker, for appellees.

TALBOT, J. This is an action brought by appellant, the St. Louis Expanded Metal Fireproofing Company, a corporation created under the laws of Missouri, against Theodore Beilharz and Joseph Linz, upon a judgment rendered in favor of appellant in the justice court of the city of St. Louis, in the state of Missouri, against the said Beilharz as principal debtor and the said Linz as garnishee, for the sum of \$343.98, including interest and costs. The appellees pleaded the general issue, and specially, among other things, that appellant, upon all the dates mentioned in its petition, was a foreign corporation, and doing business in this state without having complied with its laws, and obtained a permit to transact business in said state; that they were never served with process in the suit in which the judgment sued on was obtained; that they never entered their appearance in said suit, and that, if any attorney appeared in said suit for or on behalf of either of them, such attorney was not authorized to do so. A trial was had before the court without a jury, and resulted in a judgment for appellees, from which appellant has appealed.

The trial court did not file conclusions of fact and law, and we are not advised of the grounds upon which the ruling made is based. The questions in the case are: (1) Was the judgment sued on sufficiently proved to authorize a recovery in favor of appellant upon it? (2) Was the business transacted by appellant in the state of Texas, out of which its original cause of action arose, of such a character as required a compliance by appellant with article 745 of the Revised Statutes of 1895 of the state, requiring a foreign corporation to file its articles of incorporation with and receive from the Secretary of State a permit to transact business in this state, or did the transaction constitute interstate commerce? (3) If not interstate commerce, and appellant had no permit to do business in this state, can these facts be shown in bar of appellant's right to recover on the judgment the basis of this suit? (4) Did appellant have a permit to transact business in this state?

In determining the first question, we do not find it necessary to decide whether or not the act of Congress relating to the authentication of domestic judgments applies to a judgment rendered in an inferior or justice court of another state. Very respectable authority may be found upon both sides of the question. Appellant did not rely alone upon that character of proof. An authentication of the judgment of a sister state in accordance with the provisions of the act of Congress is not the only method of proving such judgment when sued upon in the courts of an-

other state. This may be done by some witness who has compared the copy offered in evidence with the original record entry thereof, or has examined the copy while another person read the original; and when so proved such copy is admissible as an "examined copy," and is sufficient proof, *prima facie*, thereof. In the case at bar we have the testimony of James J. Spaulding, the justice of the peace by whom the judgment declared on was rendered, and of T. Percy Carr, the attorney for appellant, to the effect that they had examined the copy of said judgment and other papers attached to appellant's petition, which were introduced in evidence on the trial of this case, and had compared them with the original docket entries, and found that they were true copies of the same. This testimony was uncontradicted, and sufficient to authorize a judgment for appellant, unless for some other reason shown he was not entitled to recover. *Harvey v. Cummings*, 68 Tex. 599, 5 S. W. 513, and cases cited.

Upon the question whether the transaction out of which appellant's original cause of action arose came within the terms of article 745 of our statute or constituted interstate commerce, the evidence shows that appellant entered into a contract with appellee Theodore Beilharz in January, 1898, by which it undertook to furnish the material and labor and construct portions of a large building in the city of Dallas, known as the "Linz Building," in conformity with a contract then existing between the said Beilharz, as contractor, and Joseph Linz and Simon Linz, as owners; that in accordance with its contract with Beilharz appellant sent a large quantity of material to Dallas to be wrought into said building, and also sent a number of laborers and employes to do the work it had engaged to do, together with one Quigley to superintend the same; that it required approximately 12 months to complete said work, during the greater portion of which time the said Quigley resided in the city of Dallas, and, together with appellant's laborers, was engaged in said work as appellant's agent; that during the progress of said work the said Quigley, as the representative of appellant, employed labor and made various purchases of material from parties in Dallas, Tex., to enable him to carry on said work. The foregoing facts were established by the undisputed evidence. In addition thereto, appellee Beilharz and H. A. Overbeck, the supervising architect of said building, testified: "That in making said contract the said Theodore Beilharz and his attorney, A. P. Wozencraft, acted for and on behalf of the said Beilharz, and one J. J. Franklin acted for and on behalf of the St. Louis Expanded Metal Fireproofing Company. That the negotiations for said contract prior to the consummation thereof were carried on in the city of Dallas, and that said contract was consummated at the Oriental Hotel, in the said city of Dallas. * * * That at

the time of the making of said contract said J. J. Franklin was the resident agent and representative of the St. Louis Expanded Metal Fireproofing Company, and had been for several years prior thereto, and was for some time subsequent thereto. * * * That, while the agent and representative of said company, said Franklin was in Dallas a portion of his time, soliciting contracts for said company in Dallas and other points in the state of Texas." The only evidence tending to contradict the quoted testimony is the statement of appellant's secretary and treasurer, Harrison, "that the appellant never had a branch business or place of business in the state of Texas, and never had any authorized representative or agent located or doing business in said state," and his conclusion "that the only character of business which appellant ever transacted in Texas was that of ordinary interstate commerce." We think the undisputed facts show that the transaction in question was not of a character of interstate commerce, and that appellant's right to maintain this suit depends upon a compliance with the provisions of said article 745 of the Revised Statutes of 1895. If, however, we are mistaken in this, then we think the overwhelming weight and preponderance of the evidence, taken as a whole, establishes such conclusion. The case is clearly distinguishable on the facts from *Allen v. Tyson-Jones Buggy Co. and Miller & Co. v. Goodman*, reported in 91 Tex., pages 22 and 42, respectively (40 S. W. 393, 714, and 40 S. W. 718), and other cases in which it has been held that the transactions involved belonged to interstate commerce. Here it is not simply a case of the sale, by a corporation created by another state, of goods, and shipped into the state of Texas to the purchaser, but the prosecution by such a corporation in this state of its business as though it was operating in the state of its creation. The transaction involves the performance in the state of Texas by appellant, in its corporate capacity, of a contract for the construction of material portions of a building being erected in this state. By the terms of this contract, as we understand it, appellant did not sell to Beilharz directly the material shipped from St. Louis, Mo., and used in the construction of said building, but by the stipulations of said contract it obligated itself to furnish such material, together with the labor necessary for the completion of such portion of said building as it had engaged to construct, in conformity with the contract Beilharz had with the owners of said building, for which it was to receive a lump sum, not as pay for the material shipped from another state alone, but for the labor performed and material purchased in this state as well. Nor is it a case in which a single corporate act is performed by a corporation in a state other than that of its creation.

The next question is, if appellant's original

cause of action did not grow out of a transaction involving interstate commerce, and it had no permit to do business in Texas, was it permissible to show those facts in bar of appellant's right of recovery on its judgment which had been obtained in the state of Missouri, and upon which the suit is predicated? That this question should be answered in the affirmative we think is well settled by the opinion in the case of *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 82 L. Ed. 239, cited by attorney for appellees. The principle applicable, we think, to the present case, is aptly expressed in the following quotation from that case: "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules which regard the original claim as merged in the judgment and the judgment as implying a promise by the defendant to pay it do not preclude a court to which the judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." This doctrine, as we understand, is not affected by the provisions of the Constitution of the United States and the act of Congress by which it is declared, in effect, that "full faith and credit" shall be given in each state to the records and judicial proceedings of every other state. It is said in the case cited that those provisions establish a rule of evidence, rather than of jurisdiction. It is not a question of whether or not the merits of the claim upon which the judgment has been rendered may be inquired into, but whether, when suit is brought upon such judgment in this state, the court will inquire into the character of the original cause of action, and, if found to have been one that plaintiff could not have maintained a suit upon in this state in its original form, will deny his right to prosecute a suit upon it in its changed form. That a judgment rendered, after due notice or appearance of the defendant, in one state, is conclusive evidence, when proved in the court of another state, of the matter adjudged, is well settled. And in this connection we take occasion to say that the record in the present case shows personal service on appellee Lintz made in the state of Missouri, and an appearance by attorney on the part of both Bellharz and Lintz in the suit in which the judgment sued on was rendered, and there is no evidence to the contrary, or that said attorneys were not authorized to so appear.

This brings us to the question, did appellant have a permit to do business in Texas? We think so. It appears that appellant's original corporate name was the St. Louis Ornamental Iron Wire & Expanded Metal Company. Desiring to do business in Texas while operating under that name, it filed its

articles of incorporation with the Secretary of State of the state of Texas on February 21, 1896, and was granted a permit to do business for the period of 10 years. Some time thereafter its corporate name was changed by law to the St. Louis Expanded Metal Fireproofing Company, the name in which this suit is prosecuted. It does not appear that any other change was made in its charter, in the character of its business, or the management thereof. In so far as the record discloses, there had been at the time of the transaction out of which this suit grew and at the time of the trial in the court below no change in the stockholders, officers, or purposes of the corporation, as originally named. Clearly, we think, under these circumstances the permit granted to appellant under its old name inured to its benefit under the new name, and authorized it to transact business in Texas in its corporate capacity during the period covered in the performance of the contract with appellee Bellharz.

But it is contended that this permit was forfeited as provided by law on account of appellant's failure to pay the required franchise tax. This contention is not sustained by the record. There is no evidence, in contemplation of law, found in the record, of such forfeiture. We presume the evidence relied upon for the establishment of the forfeiture claimed is the certificate of Secretary of State, Curl, to the effect that the permit which was granted appellant under its corporate name of St. Louis Ornamental Iron Wire & Expanded Metal Company was forfeited in May, 1896, for nonpayment of franchise taxes for the year ending May 1, 1897, and said corporation has not revived said permit by payment of back taxes and penalties, etc. Article 749, c. 17, of the Revised Statutes of 1895, provides: "Either the original permit or certified copies thereof by the Secretary of State shall be evidence of the compliance on the part of any corporation with the terms of this chapter. A certificate of the Secretary of State to the effect that the corporation named therein has failed to file in his office its articles of incorporation shall be evidence that such corporation has in no particular complied with the requirements of this chapter." Article 5243i of said Revised Statutes, as amended by Laws 1897, p. 168, c. 120, provides that: "Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein, shall, because of such failure, forfeit its right to do business in this state, which forfeiture shall be consummated, without judicial ascertainment, by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporations, the word, forfeited," etc. In neither of these statutes, nor any other, so far as we are advised, is it provided that the certificate of the Secretary of State declaring that the

right of a corporation to do business in this state has been forfeited shall be evidence of such forfeiture. In the absence of such provisions, it must be held that such certificate is no evidence of that fact. It will be observed that the articles quoted expressly provide that a certified copy of a permit to do business by the Secretary of State shall be evidence of the compliance with the law requiring such permit; and also that a certificate of the Secretary of State that the corporation has failed to file in his office its articles of incorporation shall be evidence that such corporation has in no particular complied with the law. The Legislature having thus restricted the use of the certificate of the Secretary of State as evidence of matters pertaining to his office, the courts are not at liberty to extend the application of such statute to matters not expressly authorized thereby.

We think authority and jurisdiction in James J. Spaulding to render the judgment here sued upon, as the matter comes to us in the record, are sufficiently shown, and, having held that said judgment was sufficiently proved on the trial of this case to authorize a judgment in appellant's favor, and that appellant had a permit to do business at the date of the transactions involved in this controversy in this state, it follows that the judgment of the court below must be reversed. But we do not feel warranted in rendering judgment for appellant. Under the ruling made it appears that the case has not been fully developed, especially in respect to the forfeiture of appellant's right to do business in this state, as alleged by appellees.

Before concluding this opinion it is proper to call attention to the fact, in view of another trial, that appellant's petition does not allege a permit to do business in this state. It seems to be definitely settled that in the case of a corporation belonging to that class required by law to secure permits to do business in this state it must be both alleged and proved that such permit had been granted. *Taber v. Interstate B. & L. Ass'n*, 91 Tex. 92, 40 S. W. 954; *Huffman et al. v. Western Mortgage & Investment Co.* (Tex. Civ. App.) 36 S. W. 306.

The judgment of the court below is reversed, and cause remanded.

INTERNATIONAL & G. N. R. CO. v. GLOVER et al.

(Court of Civil Appeals of Texas, May 10, 1905.
On Rehearing, June 14, 1905.)

1. NEGLIGENCE — PETITION — ENUMERATION OF ACTS OF NEGLIGENCE—CAUSE OF INJURY.

A petition in an action against a railway company for negligently causing the death of a traveler at a highway crossing, which enumerates several alleged acts of negligence, and then alleges "that said acts of negligence were the direct and proximate cause of the death" of

decedent, "and that all of said acts contributed thereto," is not open to the objection that it fails to allege that the negligent acts enumerated produced the injury complained of.

2. APPEAL—REVIEW—HARMLESS ERROR.

Where the court did not submit to the jury the matter in plaintiff's petition specially excepted to by defendant, there was no error in overruling the exception.

3. ACTION FOR DEATH—PROOF OF DATE—SUFFICIENCY.

It is not necessary in an action for death by wrongful act that the proof be confined to the date alleged in the petition, and it is sufficient if the proof shows the identity of the transaction alleged and proved, and that the date proven is not so long prior to the institution of the suit as to show that the action is barred by limitations.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 74.]

4. RAILROADS — INJURY AT CROSSING — INSTRUCTIONS.

An instruction, in an action against a railway company for the negligent death of a traveler in a collision with an engine at a highway crossing, that if by reason of the failure to ring the bell and blow the whistle of the engine, as required by law, decedent was killed, defendant would be liable if decedent "used due diligence * * * as defined herein" to prevent the injury, is not open to the objection that the court failed to define what constitutes due diligence on decedent's part, where it gave a proper definition of negligence, and stated that it applied to both defendant and decedent, and gave defendant's requested charge that there could be no recovery if decedent failed to exercise ordinary prudence.

5. APPEAL—ASSIGNMENT OF ERROR—PROPOSITION—RELEVANCY.

A proposition under an assignment of error which is not germane to the assignment will not be considered.

6. TRIAL—REQUESTS FOR INSTRUCTIONS—INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.

Where a charge given at a party's request embraces the substance of another requested charge, the party cannot complain of the refusal to give the latter charge.

7. SAME.

It is not error to refuse a requested instruction covered by the instructions given by the court.

8. RAILROADS — HIGHWAY CROSSINGS—MUTUAL RIGHTS AND DUTIES OF TRAVELER AND RAILROAD.

The rights of a traveler on a highway crossing railroad tracks and of the company to operate trains are reciprocal, it being the company's duty to exercise the care of ordinarily prudent persons as to signals and lookout, and the traveler's duty to exercise the care a person of ordinary prudence would exercise to learn of the train's approach and avoid a collision.

On Rehearing.

9. DEATH BY WRONGFUL ACT—MEASURE OF DAMAGES—INSTRUCTIONS.

An instruction, in an action for death by wrongful act, authorizing a recovery of such sum as will allow plaintiffs such sum of money if paid now as will be a fair compensation to them "for the pecuniary loss sustained," and stating that allowance is not to be made by way of consolation for the death or for any sorrow and anguish, is misleading for failing to exclude damages for loss of society.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 116, 145.]

Appeal from District Court, Hays County;
L. W. Moore, Judge.

Action by Mary Glover and others against the International & Great Northern Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

S. R. Fisher and N. A. Stedman, for appellant. Jas. L. Storey and A. B. Storey, for appellees.

EIDSON, J. This is a suit by Mary Glover, the widow, and Robert, A. J., Elvie, Hallel, Lella, Charles, and Ada Glover, the minor children, of Charles Glover, deceased, against the International & Great Northern Railroad Company, to recover damages which it is alleged were sustained by them because of the death of the said Charles Glover, occasioned, as alleged, by the negligence of the agents and servants of appellant, in charge of an engine running over the railroad without a train attached, carelessly and negligently permitting same to come in collision at a public road crossing with a buggy in which were said Charles Glover, his son Robert, and his grandson, Walter Farmer. It was alleged that, while the said Glover was driving to and over the crossing, the agents and servants of the defendant in charge of the engine negligently and recklessly approached the crossing at great speed, and negligently, carelessly, and recklessly failed to ring the bell or blow the whistle on the engine; that appellant had negligently permitted a rank growth of weeds, brush, and grass to grow on the embankment on the east side of its road, so as to obstruct the view of people approaching said crossing from the east side of said track, and that it did so obstruct the view of the deceased; and that all of said acts of negligence were the direct and proximate cause of the death of the said Charles Glover, and that all of said acts contributed thereto. John Glover, Sarah Coffee, joined by her husband, Bona Coffee, Tina Phillips, joined by her husband, Geo. Phillips, and Ida Johnson, joined by her husband, Ollie Johnson, the said John, Sarah, Tina, and Ida being the adult children of the said Charles Glover, deceased, intervened, making themselves parties, and disclaimed any right to recover. Appellant answered by a general demurrer and special exceptions, a general denial, and a special plea of contributory negligence on the part of the said Charles Glover, proximately contributing to his death. There was a trial before the court and jury, resulting in a verdict and judgment in favor of appellant against the adult plaintiffs, and in favor of the widow and the minor children, the appellees herein, for \$6,663.00, apportioned thus: \$3,331.50 to Mary Glover, the widow, and \$3,331.50 to the seven minor children in equal shares. Appellant's first, second, and third assignments of error complain of the action of the court below in overruling its general demurrer and first and second special exceptions to appellees' petition.

Appellant's proposition under its first assignment of error is to the effect that appellees' petition enumerates several alleged acts of negligence on the part of appellant, its agents and servants, but, except as to the charges that the engine as it approached the crossing was being run at a reckless and dangerous rate of speed, and that the whistle was not sounded and the bell rung, as required by law, there are no averments that the alleged acts of negligence had aught to do with producing or causing the injuries resulting in the death of plaintiffs' decedent, and therefore, as to such acts, the petition failed to state a cause of action.

Appellees in their petition, after enumerating a number of alleged acts of negligence upon the part of appellant, including the allegations that it had negligently permitted a rank and high growth of weeds to grow upon its right of way and upon the high embankment upon the east side of its track, so as to completely hide from view any train or engine upon said line of railroad and approaching said crossing from the north, made this allegation: "And plaintiffs say that said acts of negligence were the direct and proximate cause of the death of said Charles Glover, and that all of said acts contributed thereto," which allegation referred and applied to each and all of the alleged acts of negligence. Appellant's proposition under its second assignment of error insists that the railroad company rests under no duty to a traveler on a public road intersecting or crossing a railroad to so construct and maintain its roadbed, tracks, and adjacent right of way that travelers going along the public road, while approaching the crossing, shall be able to see a train or engine a long distance from the crossing, a railroad company having the legal right to construct and maintain its road and run engines and trains thereover upon an embankment, or around a curve, or in a cut, and negligence cannot be predicated upon the mere fact that it may have constructed its railroad through a cut. While it is true a railroad company has the right to construct and maintain its railroad around a curve or in a cut, it is also true that if it permits weeds, brush, and grass to grow upon its right of way immediately adjoining its track to such a height and density as to obstruct the view of parties approaching a public crossing, and prevent them from seeing an engine or cars approaching such crossing, such permission might constitute negligence, and render it liable to injuries caused to such parties as a result of such negligence. The court did not submit to the jury the matter to which appellant's second special exception relates, hence there was no error in the action of the court in overruling said exception.

There was no error in the action of the court in refusing to give to the jury appellant's peremptory instruction to find in its favor. There was sufficient testimony to

authorize the submission of the case to the jury, and to support their findings that appellant was guilty of negligence, as charged in appellees' petition, and that the death of Charles Glover, the husband of appellee Mary Glover and father of the other appellees, was the proximate result of such negligence, and that the said decedent was not guilty of contributory negligence. It was not necessary that the proof be confined to the exact date alleged in the petition. If it showed the identity of the transaction alleged and proven, and the date proven was not so long prior to the institution of the suit as to show that the action was barred by limitation, it was sufficient. Hence we overrule appellant's fourth assignment of error.

Appellant's fifth assignment of error complains of the following paragraph of the charge of the court: "The law requires all companies operating their railroad trains to provide such locomotive engines with a bell and steam whistle, and that such whistle should be blown and such bell rung at a distance of at least 80 rods from the place where a public road shall cross a railroad track, and also that such bell shall be kept ringing until the engine shall have crossed such public road or stopped; and in this case, if you find from the evidence that those in charge of the engine of defendant failed to so blow the whistle and so ring the bell, as stated above should be done, and that such failure was negligence, and that, by reason of such failure to comply with the law, deceased was run over and killed, defendant would be liable for such damages as are caused proximately thereby, provided that you find that the deceased used due diligence and care, as defined herein, to prevent said injury, as the law of contributory negligence is herein defined." Appellant's ground of complaint against this charge is that the court had not previously in said charge advised, nor did it in any subsequent part of its charge advise, the jury as to what would constitute due diligence and care on the part of the deceased. In this appellant is not sustained by the record. The court gave in its general charge a proper definition of negligence, and stated that the same applied both to the plaintiff and the defendant; and in special instruction No. 4, given at the request of the defendant, the court instructed the jury that if the deceased Glover, prior to the time that he received the injuries alleged in plaintiffs' petition to have caused his death on defendant's track, in approaching and going upon the same, failed to exercise such care as an ordinarily prudent person would have exercised under the circumstances, they should return a verdict for the appellant; and, if the appellant desired a more specific instruction upon this point, it was its duty to request same, and, not having done so, it had no ground for complaint. The charge given by the court and complained of is a

correct enunciation of the law as applied to the pleadings and facts in this case. *Railway Co. v. Duelm* (Tex. Civ. App.) 23 S. W. 597; *Railway Co. v. Nixon*, 52 Tex. 18.

We overrule appellant's sixth assignment of error. Appellees' petition alleged, as an act of negligence on the part of appellant, the permission of weeds, brush, and grass to grow on its right of way to such a height as to obstruct the view on approaching the crossing, and, after enumerating this and other acts of negligence on the part of appellant, alleged that each and all of the acts of negligence alleged were the direct and proximate cause of the death of Charles Glover, and there was proof tending to sustain this allegation, which authorized its submission to the jury.

Appellant's second proposition under this assignment is not germane to the assignment, and therefore will not be considered.

What is said in reference to appellant's sixth assignment of error disposes of its seventh.

Appellant's eighth and ninth assignments of error are overruled. The sixth paragraph of the charge of the court is not upon the weight of evidence, and correctly states the measure of damages in this case. *Railway Co. v. McVey* (Tex. Civ. App.) 81 S. W. 991; *Id.*, 83 S. W. 34; *Railway Co. v. Brock* (Tex. Civ. App.) 90 S. W. 422; *Merchants' & Planters' Oil Company v. Burns* (Tex. Sup.) 74 S. W. 758.

Appellant's tenth assignment of error is not well taken. The charge complained of was proper to be given to the jury, in view of the evidence upon the issue to which it referred.

We overrule appellant's eleventh assignment of error. The court did not err in refusing to give to the jury appellant's special charge No. 2, because it gave to the jury, at appellant's request, its special charge No. 4, which is as follows: "It is the duty of every person about to cross over or go upon a railroad track or crossing to exercise ordinary care and prudence to protect himself from injury, and where injury results from a failure to exercise such care there can be no recovery, even if the defendant railroad company, its agents and servants, have likewise been guilty of negligence. If, therefore, you believe from the evidence that the deceased, Charles Glover, prior to the time that he received the injuries alleged in plaintiffs' petition to have caused his death on defendant's track, in approaching and going upon the same, failed to exercise such care as an ordinarily prudent person would have exercised under the circumstances, then you will return a verdict for the defendant, even if you believe from the evidence that the defendant, its agents and servants, were guilty of the negligence charged in the petition." Which directly applied to and covered the issue embraced in the special charge refused, though not specifically enumerating each circum-

stance relied on to show contributory negligence. *Railway Co. v. Gray* (Tex. Civ. App.) 71 S. W. 316; *Railway Co. v. Hartnett* (Tex. Civ. App.) 75 S. W. 809.

There was no error in the refusal of the court to give appellant's special instruction No. 3, as the issue to which it related was fully covered by the general charge of the court, and special charge No. 4 of appellant, given by the court.

Appellant's special charge No. 9 does not embody a correct principle of law. Hence the court below did not err in refusing to give said charge to the jury.

Appellant's fourteenth assignment of error is overruled. There was neither pleading nor evidence authorizing its special charge No. 12. *Railway Co. v. Bush* (Tex. Civ. App.) 34 S. W. 133; *Railway Company v. Cowser*, 57 Tex. 293; *Murray v. Railway Company*, 73 Tex. 2, 11 S. W. 125.

The court properly refused to give to the jury appellant's special charge No. 13, because, in so far as it embodied a correct principle of law as applicable to the facts in this case, it was embraced in the general and special charges given to the jury. The rights of appellant and deceased to the use of the public crossing were mutual, and their duties reciprocal; it being appellant's duty to exercise such care as to signals and lookout as might be expected of ordinarily prudent persons operating a railroad under like circumstances, and the duty of deceased to use such care as a person of ordinary prudence would have exercised under like circumstances to learn of the approach of a train and avoid a collision with it. *Esler v. Railway Co.* (Mo. App.) 83 S. W. 73; *Railway Co. v. Riddle's Adm'r* (Ky.) 72 S. W. 22; *Railway Co. v. Cummins' Adm'r* (Ky.) 63 S. W. 594.

The refusal of the court to give special charge No. 14, asked by appellant, was not error. There was no pleading nor evidence to authorize it, and the question was one of negligence vel non for the jury to determine, in view of all the surrounding circumstances, whether the operatives of the locomotive should have kept a lookout in approaching the public crossing for travelers on the public road intersecting the railroad at such public crossing. *Railway Co. v. Matherly* (Tex. Civ. App.) 81 S. W. 589; *Railway Company v. Cummins' Adm'r*, supra.

As already indicated, we are of the opinion that the verdict of the jury is supported by the evidence, and we do not think the amount thereof is excessive. Hence we overrule appellant's seventeenth, eighteenth, and nineteenth assignments of error. The judgment of the court below is affirmed.

Affirmed.

On Motion for Rehearing.

Appellant's ninth assignment of error contends that the court below erred in the sixth paragraph of its charge to the jury, in attempting to state the measure of damages

to be applied in this case. The paragraph of the charge complained of is as follows: "If from the evidence under the foregoing charge you find for plaintiffs, and you award them damages, then, in fixing the amount of your verdict, you will allow the plaintiff Mary Glover and her minor children, Robert, A. J., Elvie, Allie, Lella, Charles, and Ada Glover, such sum of money, if paid now, as will be a fair compensation to them for the pecuniary loss sustained by them in the death of Charles Glover; and you will separate or apportion in your verdict the sum, if any, you allow Mary Glover, the surviving wife, and the sums, if any, you allow to each of the minor children; and, as to the said adults, you will not find any sum, but will only consider the pecuniary loss, if any, to the said Mary Glover and her said minor children, by reason of the death of the said Charles Glover, if any; and you will not allow the plaintiffs anything by way of consolation for the death of said Charles Glover, or for any sorrow or anguish suffered by them as a result of the said death." In the original opinion in this case, this court held that the above-quoted paragraph of the court's charge correctly stated the measure of damages to be applied in this case. Since the rendition of that opinion, the Supreme Court, in the case of *I. & G. N. R. R. Co. v. McVey*, 87 S. W. 328, 12 Tex. Ct. Rep. 992, held the following charge: "If you find from the evidence, and under the charges of the court, for the plaintiffs, you will assess their recovery of damages at such amount, if paid now, that will fully compensate them for the actual damages, if any, sustained by them, as shown by the evidence, and such as is fairly proportioned to the injury sustained, if any; but you will not allow the plaintiffs anything by way of solace for the death of said Edward McVey, or for any sorrow or anguish suffered by them as a result of such death"—erroneous, upon the ground that it was misleading, in that it merely excluded a recovery by plaintiffs of any compensation for the grief caused by the death of the husband and the father, and did not exclude compensation for the loss of the society or companionship of the deceased, which in the opinion of some, if not all, of the jurors, may have constituted the most serious injury to the wife, at least. The court in that case say: "Such being the case, to exclude one improper element of damages, and not to exclude another, tends rather to aggravate than to alleviate the tendency of the charge to mislead. 'The mention of one thing is the exclusion of another' is a rule in the construction of written instruments. It is no less a rule of common sense, and one which suggests itself to the ordinary mind, when construing language, either written or spoken, to which it is applicable." The court in that case further said: "Now we think it apparent that, in the absence of some instructions in a charge of this character as to the damages which were to be estimated

and as to those which were to be excluded, a jury would be likely to give compensation both for the grief and the loss of society, caused by the death." It is true, the charge under consideration instructs the jury that in fixing the amount of their verdict they will allow plaintiffs such sum of money as will, if paid then, be a fair compensation to them for the "pecuniary loss" sustained by them in the death of the husband and father, and that they will only consider the pecuniary loss to plaintiffs by reason of the death of the husband and father; whereas the charge in the McVey Case instructs the jury to find in favor of plaintiffs damages in such amount as, if paid then, would fully compensate them for the "actual damages" sustained by them, thus using the words "actual damages," instead of the words "pecuniary loss," used in the charge under consideration. We do not think the use of the words "pecuniary loss," in the connection in which they are used, would distinguish this charge from that in the McVey Case with respect to its misleading effect upon the minds of the jury. While, by the use of the words "pecuniary loss" in the connection they are employed in the charge under consideration, the jury are instructed generally as to the proper measure by which the damages were to be estimated, still, as in the McVey Case, the court undertook to instruct the jury as to the damages to be excluded, and omits to exclude damages or compensation for the loss of the society or companionship of the deceased. The jury could with equal propriety in this case have regarded that damages for loss of the society or companionship of the deceased were included in the words "pecuniary loss," they not being embraced in the excluding part of the charge, as that same were included in the words "actual damages," used in the charge in the McVey Case, they not being embraced in the excluding part of that charge. In view of the holding in the McVey Case, *supra*, we are of opinion that the sixth paragraph of the court's charge, above quoted, was misleading, and therefore erroneous. The motion for rehearing is granted, and the judgment of affirmance heretofore rendered and entered is set aside, and the judgment of the court below is reversed, and the cause remanded.

Motion granted. Judgment below reversed, and cause remanded.

MORRILL v. BOSLEY et al.*

(Court of Civil Appeals of Texas. June 3, 1905.)

1. APPEAL—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

The verdict of the jury on conflicting evidence will not be disturbed on appeal.

*Rehearing denied June 24, 1905, and writ of error denied by Supreme Court.

2. FRAUDULENT CONVEYANCE—KNOWLEDGE OF AGENT—ESTOPPEL OF PRINCIPAL.

Where an agent, having knowledge of a simulated conveyance of a homestead by a husband and wife for the purpose of making a loan thereon, and without intention on the agent's part to deceive or defraud his principal, but while acting in her behalf, elected to make a loan of her money on the security of the land, the agent's knowledge of the simulated transaction was imputable to his principal, and she was estopped thereby.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 670-673.]

3. AGENT—CONSPIRACY TO DEFRAUD—QUESTION FOR JURY.

In an action involving the title to real estate, evidence examined, and *held*, that whether plaintiff's agent conspired with one of the owners of homestead property in making a loan of the plaintiff's money, taking the homestead as security with intent to deceive and defraud the plaintiff, was a question for the jury.

4. APPEAL—HARMLESS ERROR.

An action against a city and others to prorate taxes due the city on different parcels of land, alleged to be the property of plaintiff and defendants other than the city, by the answers of the individual defendants became also a suit to recover or quiet title to the property. The right of the city to recover its taxes and foreclose its lien on the property therefor was pleaded by all the parties, and the judgment recited, in effect, that it was admitted on the trial. The property was adjudged to belong to the individual defendants, and the city's lien for taxes was foreclosed on it as such. No judgment against plaintiff for taxes was rendered. *Held*, that any error in the failure of the jury to find and state in the finding as to the amount of taxes due the city was harmless as to plaintiff.

Error from District Court, Dallas County; T. F. Nash, Judge.

Action by Mrs. M. A. Morrill against J. R. Bosley and others. Judgment in favor of defendants, and plaintiff brings error. Affirmed.

Wendell Spence and Joseph M. Dickson, for plaintiff in error. Seay, Richardson & Seay, for defendants in error.

TALBOT, J. This suit, as originally instituted, was substantially an action by plaintiff in error against the city of Dallas and defendants in error J. R. Bosley and his wife, Ida C. Bosley, to prorate taxes due said city on different parcels of land, alleged to be the property of plaintiff in error and defendants in error, respectively, that had been assessed together for taxation; and to recover from the said J. R. Bosley his proportion of certain taxes which plaintiff in error had been compelled to pay on said property in order to be allowed to pay the taxes on the property alleged to be her own, and which had been assessed with Bosley's property. By the allegations of defendants in error it became also a suit to recover or quiet title to the property described in the petition.

The original petition alleged that on January 1, 1890, J. R. Bosley and wife were the owners of a lot fronting 100 feet on the southeast side of Live Oak street by 160 feet deep on Floride street, in Dallas, Tex.; that

on February 20, 1892, J. R. Bosley and wife conveyed, by general warranty deed, to W. J. Betterton, a lot 50 feet on Live Oak street by 110 feet deep, said lot being a part of the 100 feet by 160 feet, and being 50 feet northeast of Floride street (said lot so sold being hereinafter, for brevity, called the "Morrill Lot"); that the said Bosleys had ever since continued to be the owners of all of said 100 by 160 feet lot except said Morrill lot; that in the deed of said Morrill lot from Bosley and wife the consideration was recited to be \$1,550 paid, and one note for \$1,200 and one for \$500, to secure which the vendor's lien was expressly retained, the deed providing that the \$1,200 note was a first lien and the \$500 note was a second lien upon said Morrill lot; that by agreement of all parties the \$1,200 note was made payable to plaintiff, who paid the full amount thereof to the said Bosley and wife; that on February 20, 1892, as part of the same transaction, W. J. Betterton executed to Joseph M. Dickson, as trustee, a deed of trust on said Morrill lot to secure said \$1,200 note, authorizing a sale of said lot; that default was made in the payment of said \$1,200 note, and that on June 7, 1898, in compliance with the terms of the trust deed, which were alleged, the said trustee sold the Morrill lot, and the same was bought in by plaintiff, who received a deed therefor, and had ever since been the owner and in the possession thereof; that said entire 100 by 160 feet had been assessed together by the city of Dallas for taxation for the years 1890 to 1898, inclusive; that the city of Dallas had refused to prorate the taxes on said property for any of said period, and the other defendants had refused to pay any part of the taxes or make any agreement about them; that plaintiff had paid all the taxes for 1898; that the Morrill lot during said period was worth one-third the entire lot. The prayer was that the taxes for 1890, 1891, and 1892 be adjudged to be primarily a lien on that part of the 100 by 160 feet owned by the Bosleys, and that the taxes for 1893 to 1897 should be prorated, and adjudged primarily to be liens one-third on the Morrill lot and two-thirds on the remainder of the lot, and that plaintiff should have judgment against J. R. Bosley for two-thirds of the taxes for 1898, with foreclosure of lien.

The city of Dallas pleaded that the taxes for 1890 to 1897, inclusive, had been legally assessed and levied on the property, and prayed for judgment with foreclosure of tax lien.

The defendant J. R. Bosley and wife pleaded: (1) That on January 1, 1890, the property described in plaintiff's petition was the separate estate of Ida C. Bosley, and was the homestead of defendants in error. (2) That the instrument executed by them to W. J. Betterton, described in the petition, and purporting to be a deed to the Morrill lot, was merely a pretended conveyance executed

by them solely for the purpose of enabling them to procure a loan of \$1,200 on said lot. That said deed was not acknowledged privily and apart from her husband by Mrs. Bosley. That W. J. Betterton never paid the cash consideration recited in the deed, and never had any interest in the property. That the whole transaction was a scheme to fix a lien on their homestead for the \$1,200 note. (3) That they believed at the time of the execution of their deed to W. J. Betterton that they were borrowing money from Joseph M. Dickson, and that the said Dickson not only had notice of the fact that said transaction was entered into for the purpose of borrowing money on a homestead of defendants in error, but suggested that the papers be drawn as they were, and assured defendants in error that they could in this way give a valid lien for borrowed money on their homestead. (4) That plaintiff had full and complete knowledge of said facts. That, even if the lien was valid, it was agreed between the plaintiff and the Bosleys that if said land was ever sold under said deed of trust it should bring at least a sum sufficiently large to pay said lien and the \$500 note held by J. R. Bosley. (5) That the \$1,200 note had been paid: That on November 2, 1894, it was agreed by J. R. Bosley and plaintiff that Bosley had paid \$430. That it was also then agreed that from that time plaintiff should collect the rents on said property and apply them on the debt, and that the rents were \$18 per month. The plaintiff was notified to produce an account showing the amounts received. (6) That Ida C. Bosley was not examined privily and apart from her husband when she acknowledged the deed to W. J. Betterton, but that at the time she and her husband were together in the same room with the notary. (7) That the plaintiff had never had possession of the Morrill lot. The pleading closed with a prayer for the title and possession of the property.

The plaintiff filed her first supplemental petition on January 8, 1904. This consisted of a demurrer to the pleadings of the Bosleys, a general denial, a plea of not guilty, and pleas of the two and four years' statutes of limitations, and a special plea of the five years' statute of limitations. Plaintiff then specially pleaded the execution of the deed, note, and trust deed mentioned in her original petition, and the purchase by her of the Morrill lot at trustee's sale under the trust deed securing the \$1,200 note on June 7, 1898; that her deed to the lot was filed for record on June 10, 1898, and duly recorded in volume 224, page 365, Records of Deeds, etc., of Dallas county, Tex.; that on June 7, 1898, she took possession of the property by tenant, and thereafter held peaceable and adverse possession thereof to August 20, 1903, paying all taxes thereon, when defendants in error took forcible possession of said property; that the plaintiff bought said note for \$1,200, relying upon the truth of the re-

citals therein and in the said deed and trust deed, and without any knowledge whatever as to the alleged facts which the defendants Bosley allege made the lien of said note invalid; that she believed said property had been actually sold by the Bosleys to W. J. Betterton, as recited in said deed and note, and that, if she had known of the facts which defendants claim prevented said note from being a valid lien on said property, she would not have purchased said note; that in 1900, 1901, and 1902 plaintiff spent on said Morrill lot \$250 repairing the house and filling up said lot, all of which was done with the knowledge of the said Bosleys, and without their notifying plaintiff that they had any claim or interest in said lot. Plaintiff further averred that in buying said \$1,200 note she was represented by J. M. Dickson, and denied that the said Dickson, when said note was bought, had any knowledge whatever of any matters or facts which are now claimed by the said Bosleys to have made the lien securing said \$1,200 note invalid; but she says that, if the said Dickson did have any knowledge of any of said alleged facts affecting the validity of said lien, then plaintiff is not bound by or affected by such knowledge, because at that time plaintiff had given the said Dickson positive and absolute instructions not to lend any money or buy any notes or other obligations secured upon property which was a homestead of a man and wife in Texas, unless the same was amply secured by vendor's lien thereon; that, if the said Dickson had any knowledge or notice of any invalidity in said deed, note, or trust deed, it was not communicated to plaintiff, and, if the said Dickson had such knowledge or notice, then in buying said \$1,200 note he was acting thereon for the benefit of the said Bosleys and himself, in opposition to and in conflict with the interests of plaintiff. Plaintiff then prayed for judgment against the Bosleys for rent from August 20, 1903, and pleaded that the facts as alleged estopped defendants Bosley from denying her title.

The case was tried by a jury, to whom the case was submitted on a general charge. The jury returned a general verdict: "We, the jury, find for the defendants, J. R. Bosley and Ida C. Bosley." Upon this verdict the court entered a general judgment that the plaintiff take nothing, and also entered judgment in favor of the city of Dallas adjudging the amount of the taxes and foreclosing a lien on the entire lot in its favor. Plaintiff's motion for a new trial was overruled, and she brings the cause to this court for revision by writ of error.

We deduce from the evidence found in the record the following conclusions of fact, which we think the verdict of the jury embraces and which are justified by such evidence: Joseph M. Dickson acted as the agent of plaintiff in error, Mrs. Morrill, in making the loan or purchase of the \$1,200

note, and was authorized by her to do so. At the time such loan or purchase was effected, the property in controversy constituted the homestead of defendants in error Bosley and wife, and Dickson knew this fact. The conveyance from Bosley and wife to W. J. Betterton of said property was without consideration, and made solely for the purpose of securing the loan upon said homestead, and was not intended to convey title out of Bosley and wife; all of which was known to the agent, Dickson, at the time the loan in question was made. The action of W. J. Betterton in executing the said \$1,200 note and deed of trust upon the property in controversy to Joseph M. Dickson, as trustee, to secure the payment of said note, was taken solely for the benefit of the Bosleys, and this was known to Dickson. Plaintiff in error had no actual or personal knowledge that the property in controversy was the homestead of Bosley and wife, and when her agent bought the \$1,200 note she had never heard and did not know anything about the deed to Betterton not being an actual bona fide conveyance. There was nothing in either the deed from Bosley and wife to Betterton, the \$1,200 note, or the deed of trust executed and delivered to Dickson as trustee, to put a person on suspicion that the facts were not as recited. The \$1,200 note was not paid in full, and after advertising the same according to law the said Joseph M. Dickson, as trustee, sold the property in controversy under the terms of the said deed of trust on the first Tuesday in June, 1898, and the same was bought in by plaintiff in error for \$1,000, which amount was credited on said note; and she received a deed in due form from said Dickson, trustee, for said property. This trustee's deed was dated June 7, 1898, and recorded June 10, 1898, in the records of deeds of Dallas county, Tex., and plaintiff in error paid the taxes on the property in controversy—city, county, and state—for the years 1898 to 1903, inclusive. After the conveyance from Bosley and wife to Betterton and the purchase of the \$1,200 note by Mrs. Morrill, Bosley and wife, in person and through their tenants, remained in possession of the property in controversy; and if Mrs. Morrill, through her tenants or otherwise, had possession of said property for any length of time, such time was less than five years. In making the loan of Mrs. Morrill's money or in purchasing the \$1,200 note and taking a lien on the homestead of defendants in error the said Joseph M. Dickson had no intention to deceive or defraud his principal; nor was there any collusion between the said Dickson and J. R. Bosley or Bosley and wife to defraud Mrs. Morrill in the transaction in question. On the contrary, the said Dickson acted in good faith throughout the transaction in behalf of Mrs. Morrill, intending to secure the loan made by a valid lien on the property in controversy. After Mrs. Morrill purchased the property at the trustee's sale, and be-

fore this suit was instituted, she made improvements upon the same of the value of about \$250. These improvements were made with the knowledge of the Bosleys, and without any objection or express assertion on their part to plaintiff in error or to her agent of their claim to the property.

The proposition contained in and urged under appellant's first, second, third, and fourth assignments of error are, in substance, that the verdict of the jury and judgment rendered thereon are unsupported by the evidence, in that (1) the overwhelming weight of the evidence showed that neither plaintiff in error nor Joseph M. Dickson, her agent in the transaction in question, had any knowledge of any invalidity affecting the deed of conveyance from J. R. Bosley and wife to W. J. Betterton, or affecting the note for \$1,200 executed by Betterton, at the time plaintiff in error bought said note; (2) that when an agent of an investor, in violation of his principal's instructions, purchases a simulated vendor's lien note upon the homestead of a third party, in collusion with the latter, and conceals his knowledge from his principal, the principal will not be bound by the agent's secret knowledge. The undisputed evidence shows that the property in controversy was the homestead of defendants in error when the deed through which plaintiff in error claims was executed by them to W. J. Betterton, and such fact was well known to Mr. Dickson, plaintiff in error's agent. That such conveyance was without consideration, simulated, and made merely for the purpose of obtaining the loan, is amply supported by the testimony. The evidence does not show that the plaintiff in error had any personal knowledge of the simulated or colorable character of any of the transactions resulting in the loan or purchase by her of the \$1,200 note, but that Mr. Dickson, who negotiated the loan and purchase of the note for her, was fully authorized, subject to her approval, to make loans and investments for her, is undisputed. As to whether or not Mr. Dickson knew that the conveyance from J. R. Bosley and wife to W. J. Betterton was merely colorable, and not intended to convey the title of the property therein described, is conflicting. Dickson swears that he did not know that such was the character of said deed, but believed the same was a genuine conveyance, as shown upon its face. On the other hand, J. R. Bosley testified to a state of facts and circumstances showing that said deed was made by himself and wife solely for the purpose of securing the loan, without any intention on their part or the part of W. J. Betterton that the title to the property should thereby pass; and that the said Dickson was aware of these facts. Here, then, we have the testimony of two witnesses in direct conflict upon the issue involved. The one testified to a state of facts which would authorize a verdict in favor of the plaintiff in error, and the other to a state

of facts which would justify and support a verdict for the defendants in error. In such case it was the peculiar province of the jury to weigh the testimony and decide the question. This they did favorable to defendants in error, and under the settled rule of practice in this state we would not be warranted in disturbing their finding.

The next question presented is, does the evidence so conclusively establish that Joseph M. Dickson colluded with defendant in error J. R. Bosley to defraud his principal that his knowledge of the homestead character of the property in controversy and that the conveyance of the same to Betterton by defendants in error was merely colorable cannot be imputed to her? Plaintiff in error contends that the verdict of the jury must necessarily have been based upon the evidence adduced by defendants in error, and that such evidence requires this question to be answered in the affirmative. We do not concur in this contention. Proof that Dickson knew that defendants in error had conveyed their homestead to W. J. Betterton without consideration, and with no intent to convey the title, with a view of procuring a loan that they could not otherwise procure, was not sufficient to relieve Mrs. Morrill of the legal effect of such knowledge on Dickson's part. To have had that effect the evidence must further have shown collusion between the said Dickson and J. R. Bosley for the purpose of deceiving and defrauding her. If Dickson intended to defraud his principal in the transaction, then he ceased to represent her, and the law will not impute notice to her of the facts known to him. But although Dickson knew that the conveyance to W. J. Betterton was simulated, yet if, without any intention to deceive or defraud Mrs. Morrill, and acting in her behalf, he elected to make the loan in question, then his knowledge will be imputed to his principal, Mrs. Morrill, and she cannot escape the consequences of his acts. *Taylor et al. v. Flynt*, 77 S. W. 984, 8 Tex. Ct. Rep. 938; *Cooper v. Ford* (Tex. Civ. App.) 69 S. W. 487; *Campbell v. Crowley* (Tex. Civ. App.) 56 S. W. 373; *Building & Loan Ass'n v. Dailey* (Tex. Civ. App.) 42 S. W. 364; *Association v. Parham*, 80 Tex. 518, 16 S. W. 316. Joseph M. Dickson testified that in February, 1892, he had had large experience in the matter of the homestead laws of Texas, and knew such laws; that shortly before he bought the \$1,200 Betterton note J. R. Bosley told him that he (Bosley) had sold a piece of property on Live Oak street to W. J. Betterton; that he would get vendor's lien notes on the property for \$1,700, and wanted to know whether he (Dickson) could cash them; that he told Bosley if the title was good, and the property satisfactory, his aunt, Mrs. Morrill, would buy the notes; that he inquired about the value of the property, and took the matter up with Mrs. Morrill; that afterwards Bos-

ley called again, and he (Dickson) told him that Mrs. Morrill was willing to cash Betterton's note on the property for \$1,200; that Bosley expressed himself satisfied, and requested him (Dickson) to draw up the papers, which he did; that after the papers were drawn up he gave them to Bosley, who brought them back to him signed up, and that he (Dickson) did not speak to Betterton about the matter; that he never suggested to Bosley anything about deeding the property to Betterton, nor suggested any scheme to him about putting a loan on his homestead, and never fixed any such scheme in his life; that when he cashed the \$1,200 note Bosley told him that he had sold the property to Betterton, and he believed Bosley was acting in good faith, and believed the deed and note to be absolutely what they appeared to be; that when he went out to see the property, before the loan, Bosley told him it was his (Bosley's) homestead, and he (Dickson) knew it was such at the time of the loan, and that Bosley and his family were living on it. J. R. Bosley testified that he met Mr. Dickson on the street, and told him he wanted to borrow \$1,200 on his homestead on Live Oak street; that Dickson went out and looked at the property, and said he would let him (Bosley) have as much as \$1,200; that Dickson suggested to him that in order to get the loan he (Bosley) would have to make a deed to a third party, and suggested Mr. Betterton; that the \$1,550 recited in the Betterton deed as paid in cash was put in the deed in that way at Mr. Dickson's suggestion; that he (Bosley) did not then know that a man and wife could not give a straight mortgage on their homestead as security for a loan; that it was not true that he told Dickson that he had sold or contracted to sell his homestead to W. J. Betterton, etc. Now, while the above and other testimony in the record is, in our opinion, sufficient to support the jury's finding that the property in controversy was the homestead of Bosley and wife, and so known to Dickson, and that Dickson knew that the conveyance to Betterton was without consideration, and merely colorable, and intended solely for the purpose of securing a loan by defendants in error on their homestead, yet it does not necessarily imply that Mr. Dickson, in making the loan, had colluded with J. R. Bosley to defraud Mrs. Morrill. Whether or not Dickson had conspired with J. R. Bosley in making the loan, with the intent to deceive and defraud Mrs. Morrill, was an issuable fact under the evidence, for the determination of the jury. It was so regarded by the trial court, and by appropriate instructions submitted to the jury for their decision. By their verdict the jury have said that no such conspiracy was entered into, and no such intention on the part

of Dickson existed, and these conclusions are sustained by the evidence.

The court did not err in refusing to set aside the verdict and grant plaintiff in error a new trial on the ground that she had shown title to the property in controversy by limitation. Plaintiff in error never occupied the property herself, and whether the tenants in possession were her tenants or the tenants of Bosley and wife was a disputed issue. That issue was fairly submitted to the jury, and their finding in favor of defendants in error upon it, in view of the evidence contained in the record, is conclusive upon this court. Nor did the court err in refusing to submit the question of estoppel, invoked by plaintiff in error. The evidence, in our opinion, was not sufficient to authorize the submission of that question, and the court correctly declined to give the special instruction asked relating thereto.

Error is assigned to the verdict of the jury, in that no finding was made and stated therein as to the amount of the taxes due the city of Dallas and lien claimed upon the property in controversy to secure payment of the same. As has been seen, the verdict only disposed of the case as to the issues involved between plaintiff in error and J. R. Bosley and wife. Judgment, however, was rendered by the court in favor of the city of Dallas for the taxes claimed, with a foreclosure of its lien. That the verdict of the jury must find all the issues made by the pleadings and evidence, and in case of a suit for debt and to foreclose a lien, the court has no power to enter judgment of foreclosure of such lien, unless the jury, by their verdict, has made a finding to that effect, are correct propositions of law. *Ablowich v. Greenville Nat. Bank*, 95 Tex. 429, 67 S. W. 79, 881. In this case, however, there was never any controversy as to the right of the city of Dallas to recover its taxes and foreclose its lien on the property therefor. This right of the city was pleaded by all parties, and the judgment of the court recites, in effect, that it was admitted on the trial. If, however, it be conceded that it was a fact to be determined and stated in the verdict of the jury, still we are of the opinion the case should not be reversed. The property was adjudged to be the property of Bosley and wife, and the lien foreclosed on it as such. No judgment against plaintiff in error for taxes was rendered, and, as the property upon which the lien was foreclosed was recovered by defendants in error, Mrs. Morrill has no ground of complaint on account of the error pointed out. Such error was harmless, so far as she is concerned, and defendants in error have not complained of it in this court.

The judgment of the court below is affirmed.

SHELLEY v. NOLEN et al.*

(Court of Civil Appeals of Texas, Feb. 22, 1905. On Rehearing, May 3, 1905.)

1. BANKRUPTCY—FRAUDULENT CONVEYANCE—SUIT BY TRUSTEE.

Under Bankr. Act July 1, 1898, c. 541, § 70, subd. "e," 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], providing that the trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication, a trustee in bankruptcy may recover property alleged to belong to the community estate, and to have been conveyed to the bankrupt's wife prior to the bankruptcy act, and by her conveyed to defendants, pursuant to a conspiracy, begun before the enactment of the act, and continuing to the institution of the suit, to conceal it from the trustee, and avoid its being subjected to the payment of the bankrupt's debts.

2. EVIDENCE—DECLARATIONS OF BANKRUPT.

In a suit by a trustee in bankruptcy to recover property alleged to have been conveyed pursuant to a conspiracy to defraud his creditors, testimony is admissible that the bankrupt stated to witnesses that the property in controversy was his, and that he placed it in his wife's name to prevent his creditors from subjecting it to the payment of debts.

3. WITNESSES—COMMUNICATIONS WITH PERSONS SINCE DECEASED.

In a suit by a trustee in bankruptcy to recover property alleged to have been conveyed through the bankrupt's wife to defraud creditors, a witness who is not a party is not incompetent to testify to conversations had with the wife, since deceased, under Sayles' Ann. Civ. St. art. 2302, relating to testimony in actions by or against executors, the suit not being against defendant as an executor.

4. BANKRUPTCY—PLEADING—CLAIMS OF CREDITORS.

A trustee in bankruptcy suing under Bankr. Act July 1, 1898, c. 541, § 70, subd. "e," 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], to recover property of the bankrupt alleged to have been conveyed in fraud of creditors, must allege the amount of the claims of creditors who were such at the time the fraudulent conveyances were made, and that the assets of the bankrupt estate in his hands were insufficient to pay them.

Error from District Court, Travis County; Geo. Calhoun, Judge.

Action by George E. Shelley, trustee in bankruptcy of the estate of Andrew J. Heissner, against S. F. Nolen and others. Judgment for defendants, and plaintiff brings error. Reversed.

The statement of the nature and result of the suit in plaintiff in error's brief appears to be substantially correct, and is as follows:

"This suit was originally filed by George E. Shelley, trustee of the estate of Andrew Jackson Heissner, bankrupt, on the 24th day of May, 1902, against the defendants S. F. Nolen, Adolph Trautwein, Jr., and H. C. Nolen. The plaintiff alleged in his amended original petition, filed April 16, 1904, that on the 30th day of September, 1899, Andrew Jackson Heissner, now deceased, filed in the

District Court of the United States for the Western District of Texas, at Austin, his petition in bankruptcy, and on the 6th day of October, 1899, was duly adjudged a bankrupt by the said court, and the plaintiff was thereafter duly appointed trustee of said bankrupt, and qualified as such trustee, and has ever since acted and is now acting as such trustee, and as such has brought this suit. Plaintiff further alleged that on or about the 15th day of February, 1898, said Andrew Jackson Heissner, being at that time insolvent, and a debtor of various creditors mentioned in his schedule in bankruptcy, had one G. D. Heissner and wife convey to his wife, Myra Heissner, 91.9 acres of land in Travis county, Texas, being one of the tracts in controversy in this suit; that the consideration for said land was the sum of \$320, the community property of said Andrew Jackson Heissner and his said wife, Myra Heissner, but that the title to said property was taken in the name of said Myra Heissner as her separate property; and that the said conveyance to the said Myra Heissner was made in fraud of the creditors of said Andrew Jackson Heissner, and for the purpose of placing said property beyond the reach of said creditors, by reason whereof the title to the said property never passed to the said Myra Heissner as her separate property, but the same became and was the community property of herself and her said husband, Andrew Jackson Heissner, and so remained up to the time of the death of the said Myra Heissner and Andrew Jackson Heissner. Plaintiff further alleged that on or about the 26th day of January, 1898, whilst the said Andrew Jackson Heissner was insolvent and indebted to the creditors mentioned in his schedule in bankruptcy, he had one E. W. Herndon convey to H. C. Nolen 517½ acres of land in Travis county, Texas, being the other tract of land in controversy in this suit; and that the consideration for said conveyance was the sum of \$1,000, the community property of said Andrew Jackson Heissner and his wife, Myra Heissner, which was paid to the said Herndon by the said Andrew Jackson Heissner with the agreement and understanding between the said Andrew Jackson Heissner and the said H. C. Nolen that said property was the community property of said Andrew Jackson Heissner and wife, but that the title should be taken in the name of said H. C. Nolen; and that thereafter, on the 14th day of April, 1898, the said H. C. Nolen, joined by his wife, conveyed the said aforesaid property to Myra Heissner as her separate property, but that there was in fact no consideration for such transfer save and except \$1,000 paid by the said Andrew Jackson Heissner to the said E. W. Herndon; and that the said two conveyances were made for the purpose of defrauding the creditors of said Andrew Jackson Heissner, and of placing the aforesaid property beyond the reach of said creditors;

*Second rehearing denied June 23, 1905.

and that said property was in truth and in fact, from the date of conveyance to the said H. C. Nolen up to and at the death of the said Myra Heissner and Andrew Jackson Heissner, the community property of the said Andrew Jackson Heissner and his said wife. Plaintiff further alleged that thereafter, on, to wit, the 22d day of June, 1899, the said Myra Heissner, being at that time on her deathbed, executed her last will and testament, whereby she bequeathed to S. F. Nolen, her brother, all of the property belonging to her, both real and personal, and on the same day the said Myra Heissner died; that at the time said will was made the said Myra Heissner stated to the said S. F. Nolen and the subscribing witness to said will, and to all persons who were present when said will was executed, that said bequest of property was for the purpose of securing said property to her husband, Andrew Jackson Heissner, from the claims of his creditors, and that said S. F. Nolen was to hold said property for the said Andrew Jackson Heissner until such time as said Andrew Jackson Heissner should demand a conveyance of the same to him, and the said S. F. Nolen accepted said bequest with said understanding and agreement; that in said will said S. F. Nolen was made independent executor; and that said will has been duly probated, and the said S. F. Nolen has taken possession of all the property here in controversy. Plaintiff further alleged that the aforesaid acts of placing the aforesaid property in the name of Myra Heissner and the making of the aforesaid will placing the title to said property in the name of S. F. Nolen were done with the fraudulent intent and design of placing said property beyond the reach of the creditors of Andrew Jackson Heissner, and for the purpose of preventing said creditors from applying the same to the payment of their debts, and that the said Myra Heissner and the said Andrew Jackson Heissner and the said S. F. Nolen were all parties to said fraudulent design and intent, and that all of the aforesaid acts were done in pursuance of the aforesaid design and intent and constitute a single object and conspiracy of defrauding the creditors of said Andrew Jackson Heissner. Plaintiff further alleged that in pursuance of said fraudulent design, purpose, and conspiracy the said Andrew Jackson Heissner subsequent to the death of his said wife, Myra Heissner, filed his petition in bankruptcy as aforesaid, for the purpose of securing a discharge from his said debts, and with the intention, after securing such discharge, of taking a reconveyance of said property from said S. F. Nolen to himself, and thereafter, and prior to the granting of such discharge, the said Andrew Jackson Heissner died. Plaintiff further alleged that subsequent to the death of the said Andrew Jackson Heissner and the death of his said wife, and in further pursuance of said fraudulent scheme and conspiracy, the

said S. F. Nolen colluding, conniving, confederating, and conspiring with Adolph Trautwein, Jr., and H. C. Nolan, and each and all of the said parties having notice and knowledge of the aforesaid scheme and conspiracy to defraud the creditors of Andrew Jackson Heissner, for the purpose of perpetuating the aforesaid fraud, and for the purpose of placing all the property herein described beyond the reach of the creditors of said Andrew Jackson Heissner, and for the fraudulent purpose of placing all of the property here in controversy beyond the reach of this plaintiff, as trustee in bankruptcy for said creditors, and for the purpose of fraudulently and falsely claiming and asserting that the said Adolph Trautwein, Jr., and H. C. Nolen were and are innocent purchasers of said property, did enter into a fraudulent conspiracy with one another, in pursuance of which the said S. F. Nolen has conveyed a part of the property here in controversy to H. C. Nolen fraudulently and without consideration, and has conveyed another part of said property fraudulently and without consideration to Adolph Trautwein, Jr.; and that the conveyances of the aforesaid property to said Adolph Trautwein, Jr., and the said H. C. Nolen were both made with the full knowledge on their part of all of the facts hereinbefore set forth, and specially with the knowledge that said property was the community property of said Andrew Jackson Heissner and his said wife, Myra Heissner, and with a full knowledge of the manner in which and the purpose for which the aforesaid will of Myra Heissner in favor of S. F. Nolen had been executed. Plaintiff further alleged that upon the adjudication of the bankrupt herein the title to the property here in controversy vested in plaintiff, as trustee of the said Andrew Jackson Heissner, and that by reason of the facts hereinbefore alleged none of the defendants, by reason of the conveyances to them, have acquired any title to said property, but that all of said property belongs to the estate of said bankrupt, and the creditors of said bankrupt had no notice of the fraudulent acts charged herein, and by reasonable diligence could not have discovered same until, to wit, about the thirty days prior to the filing of the original petition in this cause.

"Plaintiff further alleged that the reasonable value of the use and occupancy of said two tracts of land was at the time of the fraudulent conveyance of the same, and has been ever since, the sum of \$1 per acre per annum, and that by reason of the aforesaid fraudulent conveyance and the conspiracy to defraud the creditors of said bankrupt the plaintiff has been deprived of the possession of said two tracts of land ever since the adjudication of bankruptcy of said Andrew Jackson Heissner and of the use and occupancy of same; by reason whereof he has been damaged in the sum of, to wit, \$2,000. Plaintiff further alleged that one of said

tracts of land, containing 91.9 acres, and fraudulently conveyed to Adolph Trautwein, Jr., was at the time of said conveyance of the market value of \$10 per acre, and of the aggregate value of \$919, and that the other tract, containing 517½ acres of land, fraudulently conveyed by said S. F. Nolen to H. C. Nolen, was at the time of said conveyance of the market value of \$6 per acre, and of the aggregate value of \$3,105, and that by reason of the aforesaid fraudulent conveyances plaintiff has been damaged in the aforesaid sums of money; and, in the event that the plaintiff be held not entitled to recover said land from defendants Adolph Trautwein, Jr., and H. C. Nolen, then in that event he have judgment against the said S. F. Nolen for the value of the two several tracts of land conveyed by him to said Joseph Trautwein, Jr., and the said S. F. Nolen. In conclusion plaintiff prayed that in his capacity as trustee of the estate of Andrew Jackson Heissner, bankrupt, he have judgment for the recovery of the aforesaid real estate from all of the defendants, together with his damages for the use and occupation of the same, and the cancellation of the aforesaid fraudulent conveyances, or, if it be found that the said Adolph Trautwein, Jr., and the said H. C. Nolen did not participate in the fraud of the said S. F. Nolen in attempting to place the said two tracts of land beyond the reach of creditors of Andrew Jackson Heissner, then in that event he have judgment against the said S. F. Nolen for the value of said two tracts of land.

"The defendant S. F. Nolen answered as follows: (1) General demurrer. (2) Special demurrers. (3) Plea alleging misjoinder of parties defendant and misjoinder of causes of action. (4) General denial. (5) Plea setting up two, three, four, and five years' statutes of limitation. (6) Said defendant further answered that Andrew Jackson Heissner is dead, and that the said Myra Heissner is dead, and plaintiff claims by and through the said Andrew Jackson Heissner and through said Myra Heissner, and that these defendants claim through them also, and that, if the said Andrew Jackson Heissner committed the acts of fraud alleged by plaintiff, then the said Andrew Jackson Heissner, if alive, would be estopped, and the plaintiff, as his legal representative, is estopped, from taking advantage of same, and that as between him and his wife, Myra Heissner, they are bound by said acts. (7) Defendant further answered that the said Andrew Jackson Heissner was finally discharged as a bankrupt on the 20th day of April, 1900, and that this suit was not brought within two years from that date, and therefore plaintiff cannot recover herein. (8) Defendant further answered that he and those under and through whom he deraigns title to the lands in controversy committed no acts of fraud, and he specially denies all such, and says if said Myra Heissner, Andrew Jackson Heissner,

H. C. Nolen and A. Trautwein, Jr., committed any acts of fraud, he is not aware of it, and was no party to it; that he owned said lands by good and perfect title, without any knowledge of any fraud at the time of the disposal of same to the said H. C. Nolen and A. Trautwein, Jr.; that he was an innocent owner and holder of said land up to the date of his sale thereof to said H. C. Nolen and A. Trautwein, Jr., and that the plaintiff therefore is not entitled to recover any judgment herein against him.

"Defendant H. C. Nolen answered in this cause as follows: (1) General demurrer. (2) Special demurrers. (3) Special demurrer alleging misjoinder of parties defendant and misjoinder of causes of action. (4) Special demurrer interposing the three and four years' statute of limitation. (5) Defendant answered specially, denying that the 517½-acre tract was ever purchased in his name for the benefit of Andrew Jackson Heissner, and denying that the same was thereafter by him conveyed to Myra Heissner, wife of Andrew Jackson Heissner, for the purpose of defrauding the creditors of Andrew Jackson Heissner and placing said land beyond their reach, and alleging that said land was purchased from said E. W. Herndon by himself and paid for with his own money, and that the same was thereafter sold by him to Myra Heissner, and that the purchase money for same was paid to him by the said Myra Heissner, and was her separate property; that defendant denies that the said will of Myra Heissner was made for the purpose of perpetrating said fraud and of keeping said land beyond the reach of the creditors of Andrew Jackson Heissner, and denying the same was made in any secret trust or understanding in favor of Andrew Jackson Heissner; and defendant further alleged that the said 517½-acre tract was purchased by him on April 3, 1902, from S. F. Nolen in good faith, and that he paid to the said S. F. Nolen the sum of \$750, and assumed the payment of a certain note for \$500; and that this defendant purchased said land without notice or knowledge of any facts affecting the right of the said S. F. Nolen to convey same to him, and that he was not, and never has been, a party to any fraudulent conspiracy with Adolph Trautwein, Jr., S. F. Nolen, Myra Heissner, and A. J. Heissner to defraud the creditors of Andrew Jackson Heissner; and that the allegations in plaintiff's petition were falsely and fraudulently made for the purpose of conferring jurisdiction on this court to try in this suit the various and separate causes of action here involved. (6) Defendant further answered, pleading the three and four years' statute of limitation. (7) Defendant, by way of cross-action, asked judgment against S. F. Nolen upon his warranty for the value of the 517½-acre tract in case the same should be recovered by plaintiff, and have judgment against the said S. F. Nolen for whatever

sum of money plaintiff might recover against this defendant. (8) Defendant further answered by general denial.

"Defendant A. Trautwein, Jr., answered in this cause as follows: (1) General demurrer. (2) Special demurrers. (3) Special demurrers alleging misjoinder of parties defendant and misjoinder of causes of action. (4) Special demurrer interposing the three and four years' statute of limitation. (5) Defendant answered specially, admitting that on the 26th day of April, 1902, he purchased from S. F. Nolen the 91.9-acre tract described in plaintiff's petition, which was conveyed to him by said Nolen on that date, and that said Nolen conveyed this land to him in consideration of the sum of \$459.50 cash, which was at that time paid to said Nolen; that this defendant bought this land from the said Nolen, and paid for the same, relying on and believing to be true the recitals in his chain of title, showing said land to be the separate property of Myra Heissner, and that she had left same absolutely and unincumbered by any secret trust by her will to S. F. Nolen; that at the time he paid the purchase money he was wholly without knowledge or notice of any fact showing that the estate of A. J. Heissner, or the creditors of same, had any claim to said land, and that he bought and paid for said land in perfect good faith without any fraudulent purpose against the creditors of said A. J. Heissner, and without knowledge or notice of any fraudulent purpose on the part of S. F. Nolen, H. C. Nolen, Myra Heissner, and A. J. Heissner; that the allegations of plaintiff's petition, in so far as they state facts showing that this defendant participated in any conspiracy, are false, and made for the fraudulent purpose of conferring jurisdiction on this court to try in this suit the various causes of action set up herein. (6) Defendant pleaded specially the three and four years' statute of limitation. (7) Defendant pleaded over against S. F. Nolen upon his warranty for the value of said land, and for judgment against said S. F. Nolen for any sum of money which plaintiff might recover of this defendant.

"On the 19th day of May, 1904, this cause came on for trial, and, both parties having announced ready for trial, the jury, having been sworn, was duly impaneled, and the plaintiff thereupon offered all of his testimony in chief and rested. The defendants all thereupon filed in writing and presented to the court their demurrers to the evidence, and the court, after first overruling same, reconsidered his action, and entered a judgment, and sustained all of said demurrers to the evidence, and thereupon withdrew the case from the jury, and proceeded to enter a final judgment in behalf of the defendants."

James & Yeiser, for plaintiff in error. John Dowell, for defendant in error S. F. Nolen. Gregory & Batts, for defendants in error H. C. Nolen and Trautwein.

EIDSON, J. (after stating the facts). If the plaintiff in error was not authorized to maintain this suit under the United States bankruptcy law of 1898, then the judgment of the court below was correct, and should be affirmed, regardless of the other questions raised in the record.

The deeds of conveyance alleged by the plaintiff in error to be fraudulent are a deed from E. W. Herndon to H. C. Nolen, conveying the 517½-acre tract out of the Corbett Stevens survey described in plaintiff's petition, dated the 26th day of January, 1898, and filed for record in the clerk's office of Travis county, Tex., January 26, 1898; deed from H. C. Nolen and wife to Myra Heissner conveying the same tract of land, and containing a recital of the consideration of \$1,000, paid by Myra Heissner of her own individual separate money, dated the 14th day of April, 1898, and filed for record on the 21st day of June, 1898; and deed from George D. Heissner and wife to Myra Heissner, conveying 91.9 acres out of the R. S. M. A. de la Tulla survey in Travis county, Tex., the same tract of land described in plaintiff's petition, containing the recital of the consideration of \$320 paid by Myra Heissner out of her own individual and separate money, dated February 8, 1898, and recorded February 15, 1898.

The United States bankruptcy act was approved July 1, 1898, and contains the following provision with respect to the time when it would go into effect: "This act shall go into full force and effect upon its passage: provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof." Bankr. Law 1898, p. 23, c. 541, 80 Stat. 560 [U. S. Comp. St. 1901, p. 3448]. Andrew Jackson Heissner filed his petition in bankruptcy on the 30th of September, 1899, and was adjudicated a bankrupt on October 6, 1899, and was finally discharged April 20, 1900, and this suit was instituted on the 24th day of May, 1902.

The provision of the bankruptcy law relating to fraudulent conveyances, transfers, etc., by the bankrupt, reads as follows: "That all conveyances, transfers, assignments or encumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered, as aforesaid, shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts

by the law of his domicile, be and remain a part of the assets of the estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise, for the benefit of the creditors. And all conveyances, transfers or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory or district in which such property is situated, shall be deemed null and void under this act against the creditors of such debtor, if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt." Bankr. Law July 1, 1898, c. 541, § 67, subd. "e," 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]. The subdivision quoted only applies to conveyances, transfers, etc., made subsequent to the passage of the act, and within four months prior to the filing of the petition in bankruptcy, and excludes the idea that such conveyances made prior to the passage of the act, or prior to four months preceding the filing of the petition, were intended to be embraced within its provisions. As stated by Chief Justice Gaines in *Dittman v. Weiss*, 87 Tex. 620, 30 S. W. 863: "It is well settled, as a general rule, that one who claims property which has been conveyed in fraud of creditors by a title derived from the grantor subsequent to the conveyance cannot maintain an action to set it aside. In accordance with this rule it has been repeatedly held in this court, that the administrator of the estate of deceased persons cannot recover property fraudulently conveyed by his intestate." *Wilson v. Demander*, 71 Tex. 603, 9 S. W. 678, and cases cited. The fraudulent conveyance is valid as between the grantor and grantee. Though void as to creditors, they cannot avoid it except by legal proceedings. *Miller v. Koertge*, 70 Tex. 162, 7 S. W. 691, 8 Am. St. Rep. 587. The conveyances sought to be set aside by plaintiff in error, though fraudulent, place the title to the property in Myra Heissner, and it was no part of the bankrupt estate of her husband, A. J. Heissner; and, consequently, no title was acquired thereto by the trustee by virtue of the bankruptcy law or proceedings thereunder. The trustee of the bankrupt derives his authority to set aside fraudulent conveyances made by the bankrupt alone from the bankruptcy law, and he can maintain only such suits for that purpose as that law gives him specific authority to bring and maintain. In the absence of such authority he occupied the same relation to the bankrupt's estate as an administrator to his intestate's estate, or an assignee of an insolvent to the latter's estate. *Wilson v. Demander*, supra; *Dittman v. Weiss Bros.*, supra. We therefore conclude that the plaintiff in error had no legal

authority to maintain this action. This conclusion renders it unnecessary for us to consider or pass upon the other questions presented. There being no reversible error in the record, the judgment of the court below is affirmed.

Affirmed.

On Rehearing.

On a former day of this term of the court the judgment of the court below in this case was affirmed, and the case is now before us on motion for rehearing. On the original opinion the case was disposed of on the ground, as contended by defendants in error, that plaintiff in error was not entitled to maintain this action under the United States bankruptcy act of 1898, because the conveyances sought to be set aside for fraud were made prior to said act going into effect, and not within four months next preceding the filing of the petition by the bankrupt asking to be adjudged a bankrupt. We reached this conclusion upon the impression that subdivision "e," art. 67, c. 541, of said act of July 1, 1898, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] was the only provision in the act relating to the right of the trustee to maintain a suit for the property conveyed in this character of cases. In this impression, upon further examination of the act, we find we were mistaken. Subdivision "e," § 70, c. 541, Bankr. Act July 1, 1898, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], reads as follows: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." In our opinion, this provision of the act authorizes the trustee in bankruptcy to maintain actions based upon transactions of the character pleaded by plaintiff in error in his petition. While it is true that the conveyances made to the wife of the bankrupt were executed prior to the enactment of the bankruptcy act of 1898, it is alleged in the petition of plaintiff in error that the property embraced in such conveyances belonged to the community estate of the bankrupt, Andrew Jackson Heissner, and his wife, Myra Heissner, and that said conveyances were made without any consideration, and for the purpose of placing said property beyond the reach of the bankrupt's creditors; and that the true title to the property was concealed, and continued to be so concealed, in this manner up to the

death of the bankrupt's wife, Myra Heissner; that the said Myra Heissner on the 22d June, 1899, and while on her deathbed, devised the said property to S. F. Nolen, her brother, and one of the defendants in error, and that this was done for the purpose of securing said property to her husband, the said Andrew Jackson Heissner, free from the claims of his creditors; that the will named the said S. F. Nolen as executor thereof, and that it was the understanding and agreement by and between the said Myra Heissner, S. F. Nolen, and Andrew Jackson Heissner that he, the said Nolen, should hold said property for the said Andrew Jackson Heissner until such time as he should demand a conveyance of same to him; that the said Nolen accepted the bequest with said understanding, and impressed with said trust; and that after the death of the said Myra Heissner the said will was duly probated, and the said Nolen duly qualified as independent executor of said will. It is further alleged in said petition that the said Andrew Jackson Heissner, Myra Heissner, and S. F. Nolen were parties to and acted together in the fraudulent design to place said property beyond the reach of the creditors of the said Andrew Jackson Heissner, and that all the aforesaid acts were done in pursuance to the aforesaid design and intent, and that they constituted, in effect, a single object and conspiracy to defraud the creditors of the said bankrupt, Andrew Jackson Heissner. It was further alleged in said petition that in further pursuance of the said fraudulent design, purpose, and conspiracy the said Andrew Jackson Heissner, subsequent to the death of the said Myra Heissner, and on the 30th day of September, 1899, filed his petition in bankruptcy for the purpose of securing a discharge from his debts, and with the intention, after securing such discharge, of taking a reconveyance of said property to himself from said Nolen, and that thereafter, and prior to the granting of such discharge, the said Andrew Jackson Heissner died; and that after the death of the said Myra Heissner and Andrew Jackson Heissner, and in further pursuance of said fraudulent scheme and conspiracy, the said S. F. Nolen colluding, conspiring, and confederating with Adolph Trautwein, Jr., and H. C. Nolen, the other defendants in error herein, each and all of them having notice of the aforesaid fraudulent scheme and conspiracy to defraud the creditors of Andrew Jackson Heissner, and each and all of the said parties colluding, conniving, confederating, and conspiring with one another for the purpose of perpetuating the aforesaid fraud, and for the purpose of placing all of said property described in said petition beyond the reach of the creditors of the said Andrew Jackson Heissner, and for the fraudulent purpose of attempting to place all of said property beyond the reach of said creditors,

and beyond the reach of the plaintiff in error, as trustee in bankruptcy for said creditors, and for the purpose of fraudulently and falsely claiming and asserting that the said Adolph Trautwein, Jr., and H. C. Nolen were and are innocent purchasers of said property, have entered into a fraudulent conspiracy with one another, in pursuance of which the said S. F. Nolen has conveyed a part of the property herein described to H. C. Nolen fraudulently and without consideration, and has conveyed the other part of said property described in plaintiff in error's petition fraudulently and without consideration to Adolph Trautwein, Jr., and that the said H. C. Nolen and Adolph Trautwein, Jr., each had full knowledge of all the above facts set forth, and especially of the fact that said property was the community property of said bankrupt and wife, and not the property of the said S. F. Nolen, and that said S. F. Nolen merely held the same under said will for the purposes aforesaid and impressed with said verbal trust.

We think the above allegations show a conspiracy begun before the enactment of the bankruptcy act of 1898, but continuing not only after the act went into effect, but after Andrew Jackson Heissner was adjudged a bankrupt under said act, and after his death subsequently thereto, and practically to the date of the institution of this suit. The acts alleged constitute a continuous holding the property up to the death of the bankrupt in trust for him, and a concealment of same from his creditors, and after the death of the bankrupt a holding for the benefit of the defendants in error, who paid no consideration therefor, and a concealment of and placing the same beyond the reach of creditors of the bankrupt. These acts and the concealment resulting therefrom having continued long after the enactment of the bankruptcy law, and after the adjudication of Andrew Jackson Heissner as a bankrupt, the plaintiff in error, as trustee, is authorized under the law to maintain this action. The allegations of the petition show that at the time of the institution of this suit the defendants in error had the property described in plaintiff in error's petition in their possession, and that it belonged to the estate of the bankrupt, and that they had knowledge of this fact, and that, notwithstanding this knowledge, they were attempting to conceal it from the trustee of the bankrupt, and avoid its being subjected to the payment of the debts of the bankrupt. *In re Quackenbush* (D. C.) 102 Fed. 282; *Joseph v. Raff* (Sup.) 81 N. Y. Supp. 546; *Saxton v. Sebring* (Sup.) 89 N. Y. Supp. 372; *In re Schenck* (D. C.) 116 Fed. 554; *Cox v. Wall* (N. C.) 44 S. E. 635; *Hood v. Blair State Bank* (Neb.) 91 N. W. 701; *Hudson v. Bank*, 119 Fed. 346, 56 C. C. A. 250; *In re Countryman*, 9 Am. Bankr. Rep. 572, 119 Fed. 639; *In re*

House, 4 Am. Bankr. Rep. 603, 103 Fed. 616; In re Berner, 4 Am. Bankr. Rep. 383.

Plaintiff in error's first assignment of error complains of the action of the court below in refusing to permit the witnesses W. C. Roy, Fred Sevine, and George Heissner to testify to conversations had by each of them with Andrew Jackson Heissner, in which the said Andrew Jackson Heissner stated that the property in controversy in this suit was his, and that he had placed it in the name of his wife on account of his insolvency, and in order to prevent his creditors from subjecting it to the payment of their debts. We think this testimony was admissible under the pleadings, and in view of the evidence admitted tending to show the continuous conspiracy, as alleged. *Hudson v. Willis*, 65 Tex. 702. The testimony the exclusion of which is complained of in plaintiff in error's second assignment of error should have been admitted. The witness Sevine was not incompetent to testify to conversations had with Mrs. Myra Heissner, under article 2302, *Sayles' Ann. Civ. St.* He was not a party to the suit, and the suit was not against S. F. Nolen as executor. *Gilder v. City of Brenham*, 67 Tex. 349, 3 S. W. 309; *Curtis v. Wilson*, 2 Tex. Civ. App. 649, 21 S. W. 787; *Newton v. Newton*, 77 Tex. 511, 14 S. W. 157; *Mayfield v. Robinson* (Tex. Civ. App.) 55 S. W. 399.

We are of opinion that under the provision of the bankruptcy law authorizing this suit it is required that the petition should allege the amount of the claims of the creditors who were such at the time the fraudulent conveyances were made, and that the assets of the bankrupt estate in the hands of the trustee were insufficient to pay same, and these allegations should be supported by proof. In re House, 4 Am. Bankr. Rep. 603, 103 Fed. 616; *Mueller v. Bruss* (Wis.) 8 Am. Bankr. Rep. 447, 88 N. W. 229. We do not hold that the petition was subject to general demurrer on account of this omission, but, conceding that it was, the record shows that the court overruled defendants in error's general demurrer, and therefore, plaintiff in error had no opportunity to amend his petition. If the court had sustained the general demurrer to plaintiff in error's petition, he would have had an opportunity to amend it so as to have cured the omission mentioned; and doubtless he would have done so, as the record shows that proof could have been made of such allegations.

There are other questions raised in plaintiff in error's brief, and not discussed herein, but the matters to which they relate are not likely to arise upon another trial. The original opinion in this case is withdrawn, the motion for rehearing is granted, and the judgment of the court below is reversed, and the cause remanded.

Motion granted. Judgment below reversed, and cause remanded.

RED RIVER, T. & S. RY. CO. v. EASTIN & KNOX.*

(Court of Civil Appeals of Texas. May 27, 1905.)

1. CARRIERS—DELAY IN TRANSPORTING CATTLE—ACTION FOR DAMAGES—ADMISSIBILITY OF EVIDENCE.

In an action against railroads for damages to plaintiffs' cattle, resulting from delay in transportation, testimony of a witness who accompanied the cattle as to their value per head when shipped, and the amount that, in his opinion, they were damaged per head en route, was not objectionable as hearsay.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1214-1217.]

2. SAME—DAMAGES—EVIDENCE — REVERSIBLE ERROR.

It appearing that the evidence was directed to the issue of the difference between the market value of the cattle in the condition in which they arrived at their destination and that in which they would have arrived, had due care and diligence in transportation been exercised, the admission of testimony of the witness that they were in condition for beef, and worth \$20 apiece, when shipped, and were damaged \$6 each en route—being on arrival in condition to be put on feed—and that they were somewhat skinned and bruised, was not reversible error.

3. SAME—UNFIT CATTLE PENS — NOTICE OF CONDITION—REFUSAL TO ACCEPT CATTLE ON TENDER—LIABILITY—DAMAGES.

Rev. St. 1895, art. 4535, makes it the duty of a railroad to receive from connecting carriers freight, etc., tendered it for further transportation. Article 4496 provides that, on refusal of a railroad to take and transport property, it shall be liable to the party aggrieved for all damages thereby sustained. *Held*, that where no excuse for failure of defendant connecting road to receive cattle when tendered was shown, and up to the time it did thereafter accept them they were kept in muddy pens used by it for what the evidence showed was a reasonably necessary length of time, it was liable for all damages naturally and proximately resulting, whether it had notice of the condition of the pens or not; the law imputing to it notice of such proximate and natural results.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 950.]

4. APPEAL—OBJECTIONS NOT MADE BELOW.

Defendant's complaint of the overruling of its motion for a new trial on the ground that there was no evidence of certain facts necessary to be shown by plaintiff was unavailing on appeal, no such objection being made at the time the ruling was made.

5. CARRIERS—TRANSPORTATION OF LIVE STOCK—INSUFFICIENCY OF TENDER—WAIVER.

Where a carrier agreed to receive cattle for shipment, it waived any informality or supposed insufficiency in the tender of the cattle.

Appeal from District Court, Jack County: J. W. Patterson, Judge.

Action by Eastin & Knox against the Red River, Texas & Southern Railway Company and others. Judgment for plaintiffs, and the above-named defendant appeals. Affirmed.

N. H. Lassiter, Robt. Harrison, and Sil Stark, for appellant. Thos. D. Sporer, for appellees.

*Rehearing denied July 1, 1905, and writ of error denied by Supreme Court.

CONNER, C. J. Appellees instituted this suit against the Chicago, Rock Island & Gulf, the Chicago, Rock Island & Pacific, the Red River, Texas & Southern, and the St. Louis & San Francisco Railway Companies in the district court of Jack county to recover damages because of injuries to 157 cattle shipped from Jacksboro, Tex., to Tulsa, Ind. T., on November 22, 1902. The trial resulted in a judgment in favor of the two Rock Island companies and against the others named, which are designated in the evidence, and for the sake of brevity will hereafter be referred to, as the Frisco.

Briefly stated, it was alleged and proven that on November 22, 1902, appellees entered into a shipping contract with the Chicago, Rock Island & Gulf Railway Company at Jacksboro for transportation of said cattle to Ft. Worth, and thence via the other railway companies named to Tulsa. Upon arrival in Ft. Worth the Frisco was notified thereof, and tender made of the cattle for immediate continued transportation. The Frisco at first agreed to receive and ship the cattle as originally billed, but later refused on the ground that a bridge on its line had washed away. The cattle were therefore unloaded in pens used by the Rock Island and Frisco Companies, and remained therein until appellees, after considerable effort, secured a new contract with the Rock Island companies to ship the cattle over their lines by way of Oklahoma City. The pens were very muddy. The cattle remained therein from Sunday morning until Tuesday evening of the same week, when they finally left Ft. Worth over the Rock Island. The evidence tends to show that this detention in the pens could not reasonably have been avoided, and that the cattle were damaged by reason thereof as alleged. No evidence whatever justifying the Frisco in its refusal to receive the cattle was offered, and it further appears that the cattle were delivered to the Frisco at Oklahoma City, and by that company further transported to Tulsa, where they were finally delivered, and where it was found that the cattle were injured and depreciated in value in the amount of the verdict and judgment.

Error is first assigned to the court's ruling in admitting the testimony of J. B. Graves, who accompanied the cattle, as to the amount of damage. The bill of exception shows that he testified that the cattle were worth \$20 apiece when they left Jacksboro, and, in his opinion, were damaged \$6 en route to Tulsa. The testimony is objected to as hearsay, irrelevant, and only the opinion of the witness, and that the answer did not form any basis for assessing damages in the case, and was not the proper basis for damage. If competent, the evidence was certainly relevant. It related to one of the material issues in the case, and the objection that it was hearsay is untenable as against opinions of qualified persons of market value; knowl-

edge of market values being frequently based wholly upon knowledge of sales made between others, market reports, etc. It is not objected that the witness did not qualify himself. Among other things, he testified as follows: "These cattle were worth about \$20 per head. I am a cattleman, and have worked with cattle a long time. I think I know the value of cattle. I ought to. When these cattle left here they were in a condition for beef. By being left in the muddy pens at Ft. Worth and at Oklahoma City and on the side track, and being hauled around like they were, these cattle were just damaged enough that when they left here they were in a condition for beef, and when they got to Tulsa they were in a condition to be put on feed. That was their condition. They were skinned and bruised up some." He further testified that, because of their condition when they were put in the pens at Tulsa, they would not at first eat. And we think the court's ruling came fairly within the conclusion reached by us in the case of *Chicago, Rock Island & Texas Railway Company v. Halsell*, 80 S. W. 140, where testimony of a similar character was held to be but a short method of stating the difference in the market value of the cattle in controversy. See that case, and authorities on that point therein cited. We think it apparent from the agreed statement of facts and appellant's bill of exception No. 1, and the court's explanation thereof that the evidence was directed to the issue of the difference between the market value of the cattle in controversy at Tulsa in the condition they did arrive, and in which they would have arrived, had due care and diligence been exercised in the transportation; and, the witness having stated the facts, we conclude, as a whole, that no reversible error in the respect discussed has been shown. What we have said in the disposition of the first assignment we think also substantially applies to the objections made to the introduction of the evidence complained of in the second assignment, which will therefore also be overruled.

Error is assigned to the third paragraph of the court's charge, which is as follows:

"If you believe the cattle were carried by the defendant Chicago, Rock Island & Gulf Railway Company to Ft. Worth, and there tendered to the Red River, Texas & Southern Railroad Company, and if you believe that said Red River, Texas & Southern Railroad Company negligently failed to receive said cattle and transport them on over their line, and if you believe that by reason of such failure the cattle had to be kept in muddy pens at Ft. Worth, Texas, for a considerable time, and if by reason thereof the said cattle were damaged, then, if you so find and believe, you are charged that said Red River, Texas & Southern Railroad Company would be liable to plaintiff for such damages as were incurred by such failure to

receive and transport said cattle." Rev. St. 1895, art. 4535, made it the duty of the Frisco to receive from the Rock Island the cattle tendered to it for the purpose of further transportation. And article 4496, Rev. St. 1895, expressly declares that, in case of a refusal to so take and transport property, the refusing corporation shall pay to the party aggrieved all damages which shall be sustained thereby. As before stated, no excuse for failure to receive the cattle was shown by the Frisco. The evidence tended to show that the detention in the pens was reasonably necessary, and the charge in question required the jury to "believe that by reason of such failure the cattle had to be kept in the muddy pens," etc. In such event, we think the damage done the cattle by reason of their necessary detention in the pens was damage for which the Frisco was liable. In such case it cannot escape liability on the ground, as insisted, that it could assume that the cattle would be reasonably well cared for during the enforced detention in Ft. Worth. Under the state of facts submitted by the charge, the Frisco was liable for all damages that naturally and proximately resulted from its failure, whether it had notice of the condition of the pens or not, as in such case the law will impute notice to it of such proximate and natural results. Besides, if the pens were thus used by the Frisco, as there was evidence tending to show, knowledge and responsibility for the condition of the pens should also be imputed to it.

Complaint is made of the action of the court in overruling the motion for a new trial on numerous grounds. One is that there is no evidence of a sufficient tender of the cattle and tariff rate at Ft. Worth. This objection, however, it seems to us, is completely answered by the statement that no such objection was urged at the time, and that the Frisco at first agreed to receive the cattle; thereby waiving any informality or supposed insufficiency in the tender. Again it is insisted that the evidence tends to show that the cattle received some damage at Oklahoma City while on the Choctaw, Oklahoma & Gulf Railway Company. There is some evidence of damages as presented in this contention, but we think the evidence in this particular will not require a reversal. There is neither pleading nor proof that appellees were responsible therefor, or that the injuries, if any, mentioned, were the result of negligence on the part of any one; and the court, in its charge, expressly limited the jury in their finding of damages to such as resulted from negligence on the part of the Frisco. The jury, under the charge, were not authorized to find damages against the Frisco, except such as resulted from the detention of the cattle in the pens at Ft. Worth, and such as resulted from its negligence after having received the cattle at Oklahoma City; thus, as stated, excluding from the con-

sideration of the jury the damages, if any, occurring on other lines.

What we have said, we think, substantially disposes of all assignments, and all are accordingly overruled, and the judgment affirmed.

DUNN et al. v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS et al.

(Court of Civil Appeals of Texas. July 1, 1905.)

1. COURTS OF CIVIL APPEALS—JURISDICTION—ISSUANCE OF WRIT OF PROHIBITION.

Under Const. art. 5, § 6, providing that the Courts of Civil Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts, which shall extend to all civil cases of which the district courts or county courts have original or appellate jurisdiction under such restrictions and regulations as may be prescribed by law, and that they shall have such other jurisdiction, original and appellate, as may be prescribed by law and Sayles' Ann. Civ. St. 1897, art. 997, providing that the Courts of Civil Appeals shall have power to issue writs of mandamus and all other writs necessary to enforce their jurisdiction, a court of civil appeals has no power to issue a writ of prohibition when the writ is not sought in aid of the appellate jurisdiction of the court.

2. SAME—MANDAMUS TO JUDGE OF INFERIOR COURT.

Under Const. art. 5, § 6, and Sayles' Ann. Civ. St. 1897, art. 1000, providing that the Courts of Civil Appeals may issue a writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause agreeably to the principles and usages of law, those courts have no jurisdiction to issue a writ of mandamus to compel a judge of the district court to proceed to the trial of a cause which is pending before the court on a motion for new trial, in the absence of a showing that the judge had refused to hear or determine the motion or formally dispose of the case.

Original application by Bascom H. Dunn and others against the St. Louis Southwestern Railway Company of Texas and others for writs of prohibition and mandamus. Dismissed.

Jas. S. Davis, for applicants.

SPEER, J. This is an original application to this court for a writ of prohibition restraining the St. Louis Southwestern and a number of other railroad companies from claiming and asserting any right or rights under a certain restraining order issued by the Honorable Irby Dunklin, judge of the Forty-Eighth Judicial District, in a certain cause pending in his court wherein the said railway companies sought to restrain these applicants from buying and selling certain railroad tickets issued by the railroad companies; and for a writ of mandamus against the district judge to compel him "to proceed to trial upon the pleadings and answer of the defendants therein and upon the agreed and undisputed facts in said case, and to render such judgment therein as the law would warrant." The status of the case, as shown by the application to this court, is that the rail-

way companies mentioned instituted their suit seeking the restraining order as aforesaid, to which an answer consisting of demurrers and pleas was duly filed. The cause came on regularly to be heard, and the restraining order prayed for was regularly issued by the district court. In due time these applicants filed their motion for a new trial, which has never been disposed of, and the cause is still pending in the district court of Tarrant county. There is no pretense that the honorable district judge refuses to hear or determine the said motion or finally to dispose of the case.

The first question with which we are confronted is whether or not we have jurisdiction to entertain this application. Necessarily, the jurisdiction of any court is limited by the terms of the Constitution and statutes creating it, and the powers which it may lawfully exercise are those only which are expressly conferred upon it, or those which are reasonably incident to the powers expressly conferred. Section 6 of article 5 of the Constitution, creating the Courts of Civil Appeals, provides: "Said Courts of Civil Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts which shall extend to all civil cases of which the district courts or county courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. * * * Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law." In pursuance of the authority thus conferred, the Legislature, in articles 996, 997, 998, 999, and 1000, of Sayles' Ann. Civ. St. 1897, has defined the powers of this court. The only articles necessary to quote are article 997, which provides: "The said courts and the judges thereof shall have power to issue writs of mandamus and all other writs necessary to enforce the jurisdiction of said courts," and article 1000, which is: "The said courts or any judge thereof, in vacation, may issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause, agreeably to the principles and usages of law, returnable on or before the first day of the next term or during the session of the same, or before any judges of said court, as the nature of the case may require." Since the writs herein prayed for are not sought in aid of the jurisdiction of this court over this controversy, the article first quoted evidently confers no power upon us. So that any authority for entertaining this petition must be found in the last. The only authority conferred by this article is the power to compel a judge of the district court to proceed to trial and judgment in a cause where he improperly refuses. No such case is shown by the application, for, indeed, it appears that this controversy is still pending before the

district court upon applicants' motion for a new trial, upon which they are not shown ever to have requested a ruling, and, for aught that appears, the court is ready and willing to act upon it at any time.

Applicants insist that the district court has not determined the cause "agreeably to the principles and usages of law," and for that reason we are authorized by the terms of the article last quoted to issue the writ of mandamus therein provided for. While the expression, "agreeably to the principles and usages of law," has apparently been held to refer to the trial in the district court (*Schintz v. Morris*, 35 S. W. 516 and 825), the Supreme Court has shown clearly that the clause has reference only to the procedure in the appellate court (*Kleiber v. McManus*, 17 S. W. 249). With the question of whether or not the judgment actually rendered by the district court is erroneous, or even void, as applicants contend, we have nothing to do, since "mandamus will not lie to control the exercise of the discretion of inferior courts; and where such courts have acted judicially upon a matter properly presented to them, their decisions cannot be altered or controlled by mandamus from the superior court." *State v. Morris*, 86 Tex. 226, 24 S. W. 393, and authorities there cited.

As to our lack of jurisdiction to entertain the application, in so far as the main relief sought is concerned, we have no doubt. No other original jurisdiction than that immediately above discussed has ever been conferred upon this court by the Legislature, and in the absence of such legislation we clearly cannot exercise the jurisdiction. In some of the states appellate courts are by law invested with the general power of supervision and control over inferior courts. In these states it is generally held that the appellate court may, in the exercise of such control, issue the writ of prohibition, but in those states where no such general supervision is given or express power conferred, the rule is that such extraordinary writs will not issue except in aid of appellate jurisdiction. See *Seele v. State* (Tex. Civ. App.) 20 S. W. 946; *Fannin County v. Hightower* (Tex. Civ. App.) 29 S. W. 187; *Ex parte Hamilton*, 51 Ala. 62; *Ex parte Russell*, 29 Ala. 717; *Singer Mfg. Co. v. Spratt*, 20 Fla. 122; *Standard Oil Co. v. Linn* (Ky.) 32 S. W. 932; *State v. Judge*, etc., 26 La. Ann. 750; *State v. Falls*, 32 La. Ann. 553; *State v. Judge*, etc., 39 Ia. Ann. 97, 1 South. 281; *Harriman v. Commissioners*, 53 Me. 83; *State v. Rombauer*, 99 Mo. 216, 12 S. W. 661; *State v. City of Columbia*, 16 S. C. 412; *City v. Halsey*, 12 Helsk. 210; *Gresham v. Ewell*, 84 Va. 784, 6 S. E. 134.

Since we have no jurisdiction to issue the writ of prohibition prayed for, and since applicants' petition shows no ground for the issuance of mandamus against the district judge, the petition is dismissed.

WALL v. CLUB LAND & CATTLE CO. et al.
(Court of Civil Appeals of Texas, May 27, 1905.
On Rehearing, July 1, 1905.)

1. DEEDS — DESCRIPTION — CORNERS—LOCATION.

A description in a deed is not insufficient where one of the corners called for can be determined by a simple mathematical computation.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 65.]

2. ADVERSE POSSESSION—PAYMENT OF TAXES.

Under Rev. St. 1895, art. 3342, providing that an action to recover real estate against one having adverse possession and paying taxes must be instituted within five years, the payment of taxes and possession must concur.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 509, 510.]

3. VENDOR'S LIEN—PERSONS LIABLE.

In trespass to try title, plaintiff claiming under the sole heir of a former vendee could not recover without discharging the vendor's lien to secure the purchase money, which had never been paid.

On Rehearing.

4. ADVERSE POSSESSION—LIMITATIONS—PAYMENT OF TAXES—SUFFICIENCY.

Rev. St. 1895, art. 3342, declares that actions to recover real estate as against one having adverse possession and paying taxes and claiming under a duly registered deed shall be instituted within five years. *Held*, that where a deed under which a party claimed purported to convey an entire interest, and the claim under the statute of limitations was the same, nothing less than the payment of all the taxes for all of the years would satisfy the statute.

5. SAME—TIME FOR PAYMENT.

Sayles' Ann. Civ. St. 1897, art. 5164, declares that the collector of taxes of each county shall begin the collection of taxes on the 1st day of October, and he is required to post notices requiring taxpayers to meet him for the payment of their taxes. *Held*, that a taxpayer who had failed to pay his taxes after October 1st, the fifth year of his possession under the five-years statute of limitations having expired after October 1st, could not take advantage of the statute.

6. VENDOR'S LIEN—FORECLOSURE—TITLE ACQUIRED.

When a vendor forecloses his lien he loses his superior title, and is confined to such rights as the judgment gives him.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 831.]

7. DECEASE OF VENDEE — VENDOR'S LIEN — COLLECTION OF DEBTS.

Sayles' Ann. Civ. St. 1897, art. 2121, relative to estates of decedents, provides for a sale of real estate for the payment of debts, and declares that on the filing of an application a citation shall be issued to all persons interested, requiring them to appear and show cause, etc. *Held*, that a vendor's lien when established in the district court as against the estate of a decedent must be collected through the probate court, and a failure to pursue such remedy results in a loss of the debt.

Error from District Court, Archer County;
A. H. Carrigan, Judge.

Action by J. W. Wall against the Club Land & Cattle Company and others. Judgment in favor of defendants, and plaintiff brings error. Reversed, and on rehearing judgment rendered in favor of plaintiff in error.

Montgomery & Hughes, for plaintiff in error. Matlock, Miller & Dycus, for defendants in error.

SPEER, J. Plaintiff in error filed this suit of trespass to try title against defendants in error to recover 119 acres of land in Archer county. Defendants in error pleaded not guilty, the statutes of three, five, and ten years' limitations, and especially the existence of a vendor's lien against the land, which they sought to have plaintiff in error to discharge before a recovery should be awarded to him. The trial court ignored all questions save that of the issue of limitations of five years, which was submitted to the jury, and a verdict was returned, and a judgment entered in favor of defendants in error.

Three objections are urged by plaintiff in error to the submission of this issue to the jury:

First. It is contended that the deed under which the defendants in error claimed such limitation contained no such description of the land as could form the basis of limitations under the five-years statute. That part of the deed pertinent to this contention is as follows: "2nd tract, 100 acres being a part of the J. Ostane survey No. 83 and described as follows: Beginning at S. E. cor. of the 280 acre tract deeded by Harrold and East to J. S. Scott in the southwest corner of said survey; thence north 1340 varas to northeast corner of said 280 acre tract; thence east 42 varas; thence south 1340 varas; thence west on south line of said survey 420 varas to the beginning. 3rd tract [the one in controversy]. A part of said Ostane survey containing 119 acres, beginning at the S. E. corner of said 100 acre tract on the south line of said survey; thence north 1,340 varas to N. E. corner of said tract; thence 500 varas east; thence south 1,340 varas to the south line of said survey; thence west 420 varas to the beginning." The deed of Harrold & East to J. S. Scott for the 280-acre tract was not shown to be of record. We overrule this contention because the beginning corner of the 100-acre tract is placed at the southeast corner of the 280-acre tract, which corner is easily determined by a simple division of the number of square varas in the 280-acre tract by 1,340, the number of varas from the southeast to the northeast corner of said tract. This makes definite the location of the 119 acres in controversy.

The second contention is also overruled, because the deed purports to be more than a conveyance of the mere chance of title. It conveys the superior title held by the former grantor of those under whom plaintiff in error claims.

The third and last objection is sustained. It appears that the deed under which defendants in error claimed was filed for record on December 14, 1898, and this suit was filed April 11, 1904. The taxes were

paid by defendants in error for the years 1898, 1899, 1900, 1901, 1902, and on an undivided one-half of the land for 1903, as they accrued, before the suit was filed. This, we think, does not show such compliance with the statute as would support the plea of title by limitation. That statute provides: "Every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued and not afterward," etc. Rev. St. 1895, art. 3342. It is well settled that the payment of taxes and possession must concur. *Snowden v. Rush*, 76 Tex. 197, 13 S. W. 189. This we understand to mean, as applied to the facts of this case, that all taxes due on the land in controversy, if any, during the period of five years beginning on December 14, 1898, must have been paid by defendants in error prior to the institution of plaintiff in error's suit. It will be observed that, in order to complete the five years the possession, etc., must have continued to December 15, 1903. From and after October 1, 1903, the taxes for that year were due and payable. It follows from this that defendants in error had not paid the taxes due for the five years of their possession prior to the institution of plaintiff in error's suit. For this reason we reverse the judgment of the district court.

In view of defendants in error's cross-assignments, we will remand, rather than to render the judgment here. We are inclined to think the court erred in ignoring the issue of the vendor's lien sought to be established by defendants in error. The plaintiff in error has not favored us with a reply to these assignments, and no reason occurs to us why plaintiff in error, claiming, as he does, under the sole heir of a former vendee, to the extent at least of an undivided one-half interest, should be allowed to recover this part of the land without discharging the lien to secure the purchase money, which it is alleged has never been paid.

Reversed and remanded.

On Rehearing.

Both parties have filed motions for rehearing in this case, and in view of the questions raised we deem it proper to make this further statement: E. B. Harrold and E. H. East are the common source of title. They conveyed the land to Squires and Hurley, retaining a vendor's lien to secure the price. In 1896, East, being insolvent, made a deed of assignment of M. Harrold as assignee, who subsequently recovered a judgment against Mrs. Fredericka Hurley and W. A. Squires for the sum of \$679.54, which judgment declared the existence of a vendor's lien on said land, and directed a sale of the

interest of Squires, and that the remainder of the judgment for the purchase money be certified to the county court of Dallas county for payment. An order of sale was issued on this judgment, under which the interest of Squires was sold, and bought in by Mary A. King for \$21, on the first Tuesday in January, 1897, and a deed executed to her on January 5, 1897, for such interest. Mrs. Fredericka Hurley was the surviving wife and sole heir of T. F. Hurley, one of the makers of said note. T. F. Hurley died, and his will was probated in the county court of Dallas county on March 9, 1895, which will devised all his estate to said Fredericka Hurley, and made her sole executrix, but provided that she should manage and dispose of the estate under the authority and direction of the probate court. On December 24, 1896, Mrs. Hurley made a quitclaim deed to the land to Mary A. King. This deed was executed in her individual capacity, and not as executrix or devisee. On December 5, 1898, M. Harrold, as assignee of E. H. East, conveyed the land in controversy to E. B. Carver, and the deed was filed for record and recorded in Archer county on December 14, 1898. The Club Land & Cattle Company took possession of the land under a lease from Carver on the same day, and held possession of the same up to the time of filing this suit in April, 1904. On November 23, 1899, E. B. Carver conveyed to defendant in error F. E. Dycus an undivided half of said land, which deed was recorded in Archer county November 30, 1899, and on January 2, 1902, the other half interest in said land was conveyed by said Carver to said F. E. Dycus for the benefit of the grantee and his codefendants A. L. Matlock and George E. Miller. This latter deed was recorded on January 17, 1902.

From these facts it is apparent that, in order to complete the necessary five years' adverse possession, the period must begin, as stated in the original opinion, with the registration of the deed from the assignee, M. Harrold, to E. B. Carver, on December 14, 1898. This deed being to all the land in controversy, and the claim under the statute of limitations being also for all the land in controversy, we think anything less than a payment of all the taxes for all of the five years necessary to complete title would fall short of satisfying the requirements of the statute. This disposes of the first contention of defendants in error, to the effect that we should at least have affirmed the judgment of the district court in their favor for an undivided one-half interest in the land, in view of our finding that the taxes for the year 1903 on one-half of the land had been paid prior to the institution of this suit.

It is next insisted by defendants in error that they were not in default in the payment of taxes for the year 1903 until the time when, according to the law, the pay-

ment of taxes for that year could have been enforced by the tax collector. No authority is cited to support this contention save a dictum in the case of *Mariposa Land & Cattle Co. v. Silliman* (Tex. Civ. App.) 27 S. W. 773. In that case the period of prescription expired on June 28, 1890, and, say the court: "The taxes for 1890 were not due before January 1, 1891, and under the law could not be forcibly collected until after January 1, 1891. On June 28, 1890, no taxes were due for 1890, and could not have been paid, as collections could not begin prior to October 1, 1890." So that it is apparent that whether taxes are due on October 1st or not until January 1st following was an immaterial question in that case, since, in either event, they were not due at the date of the expiration of the period of prescription. On the other hand, in the case of *Snowden v. Rush*, 76 Tex. 197, 13 S. W. 189, cited in the original opinion, the Supreme Court treated the payment of taxes for the fifth year, where that year expired between October 1st and January 1st, as being necessary to a compliance with the statute. This, at least, is as strongly persuasive that taxes for any year are due on October 1st of that year, as is the case first cited that they are not due until January 1st following. But, in the absence of authority, we think it should be held, in view of our statute that "the collector of taxes of each county shall begin the collection of taxes annually on the first day of October, or so soon thereafter as he may be able to obtain the proper assessment roll, books or data upon which to proceed with the business," that it is contemplated by the law that taxes are due and payable on October 1st for that year. This view is strengthened by the further provisions of the same article, requiring the tax collector to post up notices at public places in the various precincts in his county requiring the taxpayers to meet him at such places for the payment of their taxes. *Sayles' Ann. Civ. St.* 1897, art. 5164. The fact that the statute does not authorize a seizure of property for the satisfaction of taxes prior to January 1st indicates a mere indulgence of the taxpayer, and not necessarily that the taxes are not sooner due and payable. Such a construction would be entirely too liberal in favor of one seeking to prescribe under a statute of limitations.

We therefore overrule defendants in error's motion for rehearing, and consider next the question of whether or not we erred in remanding the cause for another trial upon the issue of a vendor's lien in favor of defendants in error. Upon a fuller inquiry into the facts bearing upon this issue, we have concluded that such disposition of defendants in error's cross-assignment was erroneous. From the facts already stated it will be seen that at the date of the institution of the foreclosure suit by the assignee of East, Hurley, one of the makers of the note, was

dead, and there was an administration pending upon his estate in Dallas county, and that after the foreclosure and sale of the interest of Squires the judgment of the district court was directed to be certified to the probate court of Dallas county for payment. Whatever became of this claim, further than that defendants in error offered to show in the trial court that it had never been paid, we are not apprised. We take it to be settled in this state that when a vendor forecloses his lien on land he loses his superior title, and by this election is confined to such rights only as the judgment gives him. *Gardener v. Griffith*, 93 Tex. 358, 55 S. W. 314, and authorities there cited. No reason is apparent why the election by the assignee, Harrold, in this particular, would not be as binding as though it were exercised by the original vendor, East. It is also well settled that such a lien, when established in the district court as against the estate of a deceased person, must be collected through the probate court. *Sayles' Ann. Civ. St.* 1897, art. 2121; *Meyers v. Evans*, 68 Tex. 468, 5 S. W. 66; *Bradford v. Knowles*, 86 Tex. 505, 25 S. W. 1117; *Wilson v. Harris*, 91 Tex. 427, 44 S. W. 65; *Whitmire v. May* (Tex. Sup.) 72 S. W. 375; *Texas Loan Agency v. Dingee* (Tex. Civ. App.) 75 S. W. 866. The lands in controversy, at least to the extent of T. F. Hurley's interest, upon his death constituted a part of his estate, subject to the control of his executrix under the direction of the probate court, charged, of course, with defendants in error's lien, and by their failure to pursue the methods provided by law for the enforcement of such lien we think they have lost their debt. That the debt was for the purchase money of the land cannot alter the rule. *Whitmire v. May* and *Texas Loan Agency v. Dingee*, supra. The distinction between the cases of *Rogers v. Watson*, 81 Tex. 400, 17 S. W. 29, *Swearingen v. Williams* (Tex. Civ. App.) 67 S. W. 1061, and the line of cases cited above, is pointed out in the case of *Texas Loan Agency v. Dingee* supra.

The plaintiff in error's motion for rehearing is therefore granted, and our former order remanding the case for another trial is set aside, and judgment here rendered in favor of plaintiff in error for the land in controversy.

CITY OF AUSTIN et al. v. CAHILL.

(Court of Civil Appeals of Texas. March 5, 1905.)

1. MANDAMUS — PARTIES — PERSONS BENEFICIALLY INTERESTED—BONDHOLDERS.

Where a city issued bonds, and provided for a tax levy to pay the interest and accumulate a sinking fund thereon, and subsequently issued refunding bonds, and likewise provided for the interest and a sinking fund, and thereafter neglected to levy taxes to meet the interest, or accumulate a sinking fund for such of the original bonds as the owners thereof

refused to exchange for refunding bonds, but levied taxes to pay interest and accumulate a sinking fund for the refunding bonds, the holders of the refunding bonds were necessary parties to mandamus proceedings instituted by the holders of the original bonds to compel the application of the fund accumulated for the interest and sinking fund for the refunding bonds to the payment of the unpaid interest on the original bonds, regardless of whether the holders of the refunding bonds were legally entitled to the fund so accumulated as against the holders of the unrefunded bonds or not.

2. SAME—APPLICATION OF MUNICIPAL FUNDS—CONFUSION OF SEPARATE FUNDS.

Mandamus will not lie to compel a city to appropriate indiscriminately taxes collected and held as an interest and sinking fund for refunding bonds to the payment of interest on unrefunded bonds, where the taxes collected for interest and sinking fund are blended and not kept in separate accounts, so that it is impossible to determine from the record how much belongs to the interest and how much to the sinking fund.

3. MUNICIPAL CORPORATIONS—TAXES—LEVY FOR SPECIFIC PURPOSE—MISAPPROPRIATION.

Const. art. 11, § 8, authorizes cities to levy and collect taxes to pay interest and create a sinking fund for municipal indebtedness, but requires such taxes to be kept separate from those levied for current expenses. Rev. St. 1893, art. 416, authorizes city councils to provide special funds for special purposes, and make the same disburseable only for the purpose for which the fund is created. Article 408 substantially re-enacts the constitutional provision. Sp. Laws 27th Leg. p. 67, requires the city treasurer of Austin to keep the interest fund and sinking fund on bonds separate. Pages 12-17, of the charter provide that moneys collected on account of the sinking fund shall be exclusively applied to the redemption and retirement of bonds. *Held*, that moneys collected pursuant to tax levies to accumulate a sinking fund on bonds of the city cannot be legally appropriated to the payment of interest on other bonds.

4. APPEAL—ASSIGNMENTS OF ERROR—FILING IN LOWER COURT.

Where neither cross-assignments of error, nor a copy of appellee's brief containing them, are filed in the court below, as required by district and county court rule 101, such cross-assignments will not be considered on appeal.

Appeal from District Court, Travis County; L. W. Moore, Special Judge.

Mandamus proceedings by James G. Cahill against the city of Austin and others. From a judgment awarding the writ, defendants appeal. Reversed.

Allen & Hart, for appellants. Gardner Ruggles, for appellee.

RICE, Special Judge. It appears from the record in this case that in the year 1890 the city of Austin was without an adequate water and light supply, and had no available funds therefor, and, being desirous of constructing a system of waterworks and supplying the city with light, and having already outstanding bonds in the sum of \$125,000, whereby it was forbidden the issuance of additional bonds unless by consent of the taxpayers or special act of the Legislature, it being a city of more than 10,000 inhabitants, governed by a special charter granted

by the Legislature, its city council on the 1st day of April, 1890, passed an ordinance authorizing the holding of an election to obtain the consent of the taxpaying voters of said city to the extension of its bonded indebtedness to the amount of \$1,400,000. An election was held on the 5th day of May, 1890, resulting in favor of the issuance of said bonds by a two-thirds vote of the taxpayers. That in pursuance of said election, the city of Austin, between the 15th of October, 1890, and the 30th day of January, 1895, executed and issued 1,400 bonds, known as "Water and Light Bonds," each for the sum of \$1,000, of date August 1, 1890, payable to bearer on July 1, 1930 (redeemable, however, at the city's option at any time after June 30, 1910), bearing interest at the rate of 5 per cent. per annum, payable quarterly on the 1st days of January, April, July, and October of each year, as evidenced by the interest coupons thereto attached. The ordinance authorizing the issuance of said bonds provided that there should be levied and collected for the year 1890, and for each year thereafter while said bonds remained outstanding, a tax of \$1.11½ on the \$100 worth of taxable property in said city for the payment of interest on said bonds and the 2 per cent. sinking fund for their redemption; also that the net income or so much thereof as was necessary, arising from the receipts of said system of water and light plants which were erected with the proceeds of said bonds, should be applied and was pledged to the payment of said bonds, interest, and sinking fund, the rates of which were to be so regulated as to provide sufficient revenue therefrom to pay current expenses, interest, and sinking funds. That all of said bonds were thereafter sold by the city, and appellee became the owner by purchase of 15 of said bonds, together with their interest coupons, and that with the proceeds thereof a system of waterworks and an electric light plant were constructed and put into operation, but that they were destroyed in April, 1900, and were replaced in 1901 by another system, much of the old material being used in its construction, but no net receipts, if any, therefrom had ever been applied to the payment of appellee's interest on his said bonds. By an act of the Legislature of the state of Texas amending the charter of the city of Austin, approved September 20, 1901, authority was given said city to compromise and scale its existing debts or bonds by the issuance, in exchange for its outstanding bonds, of new or refunding bonds, bearing date July 1, 1901, payable July 31, 1931, to bear interest for the first 5 years at 3 per cent., for the next 10 years at 4 per cent., and after July 1, 1916, at the rate of 5 per cent. to maturity, interest payable semiannually on the 1st days of January and July of each year, and redeemable by the city, at its option, at the date of any interest payment. The said city council of said city, by proper

ordinance, on the 5th day of November, 1901, provided for the issuance of such refunding bonds, and for their exchange for such outstanding bonds as the owners thereof should be willing to take in lieu thereof. \$143,000 of said water and light bonds of the same issue as appellee's had been paid off and retired, leaving \$1,257,000 of said issue, of which \$985,000 were refunded at 3 per cent. by the consent of said bondholders, leaving \$322,000, including appellee's \$15,000, which were not refunded, still bearing interest at the rate of 5 per cent., but appellee and the holders of said \$322,000 did not consent to said refunding. There were other outstanding bonds of said city of Austin at said time which were likewise refunded by consent of the owners. No part of the interest on appellee's bonds has been paid since April 1, 1900, and no adequate provision for the sinking fund having been made therefor, and the city having refused payment thereof upon demand, appellee brought suit in the district court of Travis county against said city of Austin on October 22, 1901, on the coupons maturing July and October, 1900, and January, April, July, and October, 1901, and thereafter, on March 5, 1902, recovered judgment for \$1,196.67, with interest; and again on March 26, 1902, another suit was brought by him in said district court on the interest coupons maturing January 1, 1902, and judgment likewise recovered thereon. Said city appealed from both of said judgments, and they were affirmed by the Court of Civil Appeals, and writs of error denied by the Supreme Court in each case. The city of Austin refused to pay said judgments or any part thereof, except court costs, and execution was duly issued thereon and returned by the sheriff "No property found," it further appearing that said city had no property subject thereto. Appellee demanded that the officers of said city levy a tax for the payment of interest on his bonds, which was likewise refused. Thereafter, appellee brought this suit against the city of Austin, and its mayor and board of aldermen, constituting its city council, its secretary, tax collector, and treasurer, by petition filed in the district court of Travis county, Tex., on August 25, 1903, but trial was had on appellee's second amended original petition filed in said cause on the 5th day of May, 1904, wherein appellee pleaded all of the facts above recited, and sought to enforce by mandamus against said city the collection of said judgments theretofore obtained by appellee against said city for the interest upon certain water and light bonds, as well as to enforce the collection of certain other sums alleged to be due upon the bonds of said city since the recovery of said judgments, and asking that said city be required to appropriate to the payment of his said judgments, exclusive of all other bonds, all or so much as might be necessary of the amount then on hand in the treasury of said city in said interest and sinking fund,

amounting to \$72,738.96, arising from the collection of certain taxes levied by said city for the payment of interest and sinking fund, as well as for the appropriation of all amounts levied by said city on account of said taxes for the years 1900, 1901, 1902, and 1903, but which were then uncollected, and further asking that in the event that such amount then on hand and the amounts thereafter collected from said taxes should be found insufficient to pay appellee's debt, then to levy additional taxes for the years 1900, 1902, 1903, and 1904, and likewise to compel said city, during the time appellee's bonds should be outstanding, to annually levy sufficient taxes for the payment of the interest on his said bonds and the creation of a sinking fund of 2 per cent. for their redemption. Appellants answered by general demurrer, special exceptions, and general denial, which demurrer and special exceptions were overruled. The case was tried by the court without the intervention of a jury, and judgment was rendered in favor of appellee for the amounts prayed for, and granting a peremptory writ of mandamus requiring appellants to immediately pass an ordinance appropriating to the payment of appellee's claim, pro rata with the claim of the holders of \$13,500, April 1, 1895, 6 per cent bonds, and of the holders of the remainder of the \$322,000 5 per cent. bonds whose interest was unpaid, to the exclusion of all other bondholders of the city of Austin, the sum of \$53,523.19, that being the amount on hand in the city treasury of the city of Austin, on the date of the rendition of the judgment of interest and sinking fund, of the refunding bonds alone; further, that appellants levy an additional tax for the year 1903 upon all property of the city taxable by law, of one-sixth of 1 per cent. of the taxable values of all property in said city that was assessed for the year 1903, for the purpose of paying the interest and establishing a sinking fund upon appellee's bonds, pro rata with those above mentioned; and, further, that appellants duly pass for the year 1904, and each year thereafter so long as any of appellee's bonds or coupons remain outstanding and unpaid, an ordinance annually levying for each year a tax sufficient to pay off and fully discharge appellee's interest on said bonds, and to establish a sinking fund therefor, pro rata with all the bonds of the city now outstanding, but the prayer for the levy of additional taxes for the year 1900 and 1902 was refused.

By their fifth assignment of error appellants contend that the court erred in overruling defendants' special exceptions to plaintiff's second amended original petition contained in paragraphs 6 and 7 of defendants' first amended original answer to said petition, because it appears from said petition that plaintiff was seeking to establish a preference over certain other bondholders and creditors of the city, not made parties to this suit, to money alleged to be on hand belong-

ing generally to such parties and plaintiff, and further seeks to establish a preference as against others not made parties to this suit as to taxes to be hereafter levied by defendants; and seeks to have subjected to the payment of his debt and claim, to the exclusion of all other persons, interest funds, when it appears from said petition that the other persons not made parties to this suit are interested in said funds.

Appellants' sixth special demurrer is as follows: "Defendants further except to the allegations of said petition set forth as the basis for the mandamus prayed for, because it appears that the rights of other debtors and bondholders of said city will be materially affected by granting the writ as prayed for, that said other debtors and bondholders are not made parties, that said other debtors and bondholders are necessary parties to this suit, and the same cannot be proceeded with until all are made parties or notified of this suit."

Appellants' seventh special exception is as follows: "Defendants further except to the allegations relating to the writ of mandamus, because it appears in the petition that there is a defect in parties; that others not parties to this suit are interested in the subject-matter thereof, for the following reasons, to wit: (a) Because plaintiff seeks a preference over certain other bondholders, not parties to this suit, in an interest and sinking fund alleged to be on hand in the city treasury. (b) Because plaintiff seeks to subject said alleged sinking fund already set aside, as such, for the payment of the principal of all bonds, to the payment of plaintiff's interest coupons, and the holders of said other bonds are not parties to this suit. (c) Because plaintiff seeks to compel defendants to pay to him a pro rata share with other bondholders and coupon holders not parties to this suit of an interest fund, alleged to be on hand in the city treasury, in which said other bondholders and coupon holders not parties hereto are interested. (d) Because plaintiff seeks to compel defendants to pay him an interest fund alleged to be on hand, to the exclusion of other bondholders and coupon holders not parties to this suit, who likewise have a right to resort to said fund for payment of their coupons to mature thereafter. (e) Plaintiff seeks to subject to the payment of his coupons all the uncollected taxes on account of interest and sinking fund for the years 1900, 1901, 1902, and 1903, and the taxes collected for said years and on hand, as it appears from said petition that certain other bondholders of said city have an interest in said bonds and are not parties to this suit."

In this connection plaintiff alleged that at the date of the issuance of said 1,400 water and light bonds there were outstanding bonds against the city of Austin amounting to the sum of \$125,000, composed of \$72,500 worth of bonds issued prior to May 1, 1890, bearing interest at the rate of 10 per cent., \$12,500

worth issued July 1, 1881, bearing 6 per cent. interest, and \$40,000 worth issued July 1, 1884, bearing interest at the rate of 6 per cent.; that the \$72,500 worth of 10 per cent. bonds were on the 1st of April, 1895, exchanged for and converted into \$72,500 bonds of that date, bearing interest at 6 per cent. per annum; that the \$143,000 face value of said \$1,400,000 5 per cent. water and light bonds were retired and canceled on various dates prior to November 25, 1901, and that there were now outstanding, of said \$1,400,000 issue, \$322,000, including plaintiff's bonds that have not been refunded, and \$935,000 have been refunded to bear interest at the rate of 3 per cent.; that, of said \$72,500 issue, \$59,000 have been refunded and bear interest at the rate of 3 per cent. per annum, and \$13,500 bearing interest at 6 per cent. have not been refunded; that all of the \$40,000 issue have been refunded and bear interest at 3 per cent., and that all of said \$12,500 have been refunded and bear interest at 3 per cent.; that there were subsequently issued by the city of Austin, after the issuance of the series of bonds above named and mentioned, \$200,000, of date July 1, 1895, bearing interest at the rate of 6 per cent. per annum, \$10,000 of which were retired September 21, 1901, and the balance, \$190,000, bearing interest at the rate of 3 per cent., having been refunded; and another issue of \$45,000 high school bonds, bearing interest at the rate of 5 per cent., dated August 1, 1899, have all been refunded, and bear interest at the rate of 3 per cent. per annum.

It is further alleged that the interest on all of the refunding bonds has been paid as it matured up to the 20th day of June, 1904; that all of the \$200,000 issue of July 1, 1895, and the \$45,000 issue of August 1, 1899, are subordinated to the payment of interest and sinking fund to plaintiff's bonds and claims; that all of said bonds that have not been refunded were entitled to share, as to payment of interest and sinking fund, according to their original rate of interest, and all of said refunded bonds were entitled only to their new rate, and said \$190,000 and \$45,000 issues were subordinated to the payment of interest and sinking fund, because issued subsequent to the issuance of plaintiff's bonds, and that \$253,000 are not entitled to the payment of any interest and sinking fund until the payment of interest and sinking fund of plaintiff's bonds shall be fully made.

It was further alleged in plaintiff's petition that there remained uncollected, but collectible, of the taxes actually levied for the years 1901, 1902, and 1903, a total of \$80,982, all of which plaintiff is entitled to have collected and applied to the payment of his debt, to the exclusion of the holders of 3 per cent. bonds, because the holders of said 3 per cent. bonds have all been paid their interest up to and including January 1, 1904, to the exclusion of appellee; that plaintiff was also entitled to have for the year 1904, and each

year thereafter, a tax levy made by said city council of 1.16% on the \$100 worth assessed valuation of taxable property in said city of Austin for the payment of interest and sinking fund on his bonds, pro rata with those entitled to like payments during the life of his bonds, and up to July 1, 1930, and if said uncollected amounts were not sufficient to pay his debt, or if they were not collected, he was entitled to have applied and paid on his said debt any and all amounts, now in said treasury, collected from any tax levy made for the payment of interest and sinking funds on bonds. It further appeared from the pleading of plaintiff that there was then in said treasury the sum of \$72,738.46 levied and collected for interest and sinking fund on all bonds.

From the foregoing it will be seen that appellee's contention is that he is entitled to have the money on hand to the credit of the interest and sinking fund applied to the payment of his judgments, notwithstanding the record shows that the taxes which constituted this fund were levied and collected for the purpose of paying the interest and creating a sinking fund for the refunding bonds of the city; and likewise contending that he was entitled to have the uncollected taxes from 1900 to 1903, inclusive, when collected, applied to the payment and satisfaction of his judgments, to the exclusion of the other bondholders, the same having been levied for the payment of the interest and sinking fund on said refunding bonds. None of the refunding bondholders were made parties to this litigation. It appears to us that they were directly and vitally interested in the questions to be determined, as it affected the value of their securities. We think it plain that, where the record discloses that other parties are interested in the questions to be decided in a mandamus suit against public officers, no decree can be rendered, and no mandamus granted, unless said third persons are made parties to the suit for the adjudication of their rights. It is immaterial if the court correctly decided that appellee was entitled to the relief prayed for and obtained by him against the holders of said refunding bonds, because it is held in *Tabor v. Land Commissioner*, 29 Tex. 508: "If there were no other objections to the application for writ of mandamus in this case, the fact that there are other claimants to the land who are not parties to this proceeding would furnish ground for refusing it, and averments that their claims are void will not relieve the matter of the difficulty, for this court will not undertake to adjudicate other claims, whether valid or not, when the claimants are not parties to the suit." The case of *T. M. Ry. Co. v. Jarvis*, 80 Tex. 457, 15 S. W. 1089, was one where "appellants caused 62 alternate certificates of which it was the owner to be located on land in Webb county, but the surveyor refused to survey the land, and this action was brought against

him and persons claiming the land, with a prayer that a writ of mandamus issue to compel him to make the surveys." It appears from the record in this case that part of the land upon which these certificates were located had formerly been granted by the Spanish government to one Galan, but that a part of this land so granted to him had thereafter been expropriated by said government for the purpose of establishing a town (Palafox) which was afterwards located, but that subsequent to its location the town was destroyed and abandoned, and four porcions of the land originally within its jurisdiction was, by an act of the Legislature of the state, relinquished by the state—three porcions thereof to one Antonio Guerra, and one porcion thereof to Joaquin Galan—and was not therefore vacant public domain at the time of the location of said certificates, and was not subject to location. Neither Galan nor Guerra, nor any persons shown to have acquired their rights, are parties to the action. Judge Stayton, in passing upon the question of appellant's right to the writ of mandamus, says, among other things: "And, waiving all questions as to the effect of the recitals in that decree [then under discussion], the fact remains that there is land within the boundaries located, to the extent of four porcions, at least, three of which are held by Antonio Guerra, or some persons holding through him, by valid claim against the state, and there is no exception of these lands in the prayer that the surveyor be commanded to survey all the lands located. And in the face of the fact that these four porcions must be held to be within the limits of plaintiff's locations, in the absence of evidence other than that found in the record, the writ prayed for could not be granted, and especially so when neither Guerra, nor any person asserting his right, has had an opportunity to be heard, unless it be the law that in cases such as this a peremptory writ of mandamus may issue, still leaving to the surveyor the right to disregard it in part, or judge for himself how far he must obey it, what particular land he must survey and refrain from surveying, or otherwise, in obedience to the writ, do an act in violation of law and of the rights of persons who have not been heard. When such a writ issues, it must be obeyed in every particular, and this furnishes a reason why it will not be directed until the applicant shows that he is entitled to have the respondent do the very act which it is claimed to be his legal duty to do; and such a writ cannot issue when the relator shows that he has the right to have done only a part of that when he seeks, and does not show what part, less than the whole, he is entitled to have performed." In the present case, it clearly appearing from the record that other parties not before the court are interested in the funds sought to be appropriated to the payment of appellee's judgments, and that they will be materially

affected by the issuance of the writ, and it also appearing that appellee is seeking to require the appropriation of funds collected and held by the city as an interest and sinking fund, it appearing that no separate accounts were kept for interest and sinking funds, but that the same were blended, and that it would be impossible to determine from the record how much of said fund belonged to one and how much to the other, we conclude that this case falls clearly within the rule announced by Judge Stayton, and that the writ should not be granted, and that there was error in the judgment of the court overruling appellants' exceptions to said petition as above stated. Authorities: *T. M. Ry. Co. v. Jarvis*, 80 Tex. 457, 15 S. W. 1089; *Tabor v. Land Commissioner*, 29 Tex. 508; *Watkins v. Kirchain*, 10 Tex. 381; *Smith v. Power*, 2 Tex. 57; *Land Commissioner v. Smith*, 5 Tex. 471; *Chappell v. Rogan*, 94 Tex. 492, 62 S. W. 539; *Gibbs v. Ashford* (Tex. Civ. App.) 66 S. W. 858; *Ency. Pleading & Practice*, vol. 13, pp. 656-660.

Appellants' fifteenth assignment of error raises the right of the court to render judgment for the balance on hand in the city treasury belonging to the interest and sinking fund of the refunding bonds, and is as follows: "The court erred in rendering judgment directing the payment to plaintiff of money on hand in the city treasury and that thereafter collected, because it appears that a portion of such fund was held to the credit of the sinking fund account, and therefore not subject to the payment of plaintiff's claim at this time; and it does not appear from the pleadings or evidence of the plaintiff what portion of said fund belonged to the sinking fund, and how much to the interest fund, which fact it was necessary for the plaintiff to allege and prove in order to recover." The appellant alleged, and the court found, that there was levied for the years 1901, 1902, and 1903 one tax for the interest and sinking fund on bonds; that on June 22, 1904, the sum of \$73,738.96 was in the treasury of the city of Austin to the credit of the interest and sinking fund on the refunding bonds of the city of Austin alone, no distinction being made between interest and sinking fund, all of which arose from the collection of interest and sinking fund taxes; and that all of said fund, except \$53,523.19, has been drawn out by warrants against said fund to pay interest on said refunding bonds, for which balance the court rendered judgment, requiring said city to appropriate the same to the payment of appellee's judgments. Appellants contend that the 2 per cent. sinking fund provided for by the Constitution, the general laws of the state, and the charter of the city of Austin could not be appropriated or used for the payment of interest on bonds, or for any other claim whatever than the redemption of the bonds of the series on account of which such tax was levied and collected. Appellee alleged that no inter-

est had been paid upon his bonds since April 1, 1900, and no taxes had been levied for the payment of his interest and sinking fund, although taxes had been levied and collected and paid on interest of other outstanding bonds of the city to his exclusion. From the court's findings of fact it appears that, in the interest and sinking fund account on the refunding bonds of the city of Austin there was on June 20, 1904, the sum of \$72,738.48, all of which arose from the collection of interest and sinking fund taxes under the levies for the years 1900 to 1903, inclusive; and that \$19,245.77 of this amount was on June 20, 1904, appropriated to the payment of interest on the 3 per cent. bonds for the installment due July 1, 1904, leaving a balance of \$53,523.19, which the court held subject to the payment of appellee's judgment. The Constitution of the state (article 11, § 6) authorizes cities to levy, assess, and collect taxes necessary to pay interest and create a sinking fund to satisfy any indebtedness theretofore legally made and undertaken, but that all such taxes shall be levied, assessed, and collected separately from that levied, assessed, and collected for current expenses of the municipal government, and shall, when levied, specify in the act of levy the purpose therefor. Article 416 of the Revised Statutes of 1895 provides that city councils may provide by ordinance special funds for special purposes, and shall make the same disbursable only for the purpose for which the fund was created, and makes it malfeasance for an officer of a city to misappropriate such special fund, and declares him thereafter incapable of holding any office in said city. Article 498 of the Revised Statutes substantially re-enacts the constitutional provision above quoted. The last charter of the city of Austin, as well as the one in force for many years previous, provides that the city treasurer shall keep the interest fund and the sinking fund separately, and shall honor no draft on the interest fund except to pay interest on such bonds, and shall honor no draft on the sinking fund except to redeem such bonds, or to purchase interest-bearing bonds of the United States, the state of Texas, or the city of Austin. Sp. Laws 27th Leg. p. 67. This provision, or one similar thereto, was in force at the time of the delivery of plaintiff's bonds, and at the time of the levy, assessment, and collection of the various taxes now sought to be subjected to the payment of appellee's claim. The charter of the city of Austin, as shown by the amendment to the same (Sp. Laws 27th Leg. pp. 12-17, c. 4), provides that all moneys collected on account of sinking fund shall be annually applied exclusively to the redemption and retirement of the refunding bonds issued as set out by appellee in his petition. The Supreme Court, in construing the general law above mentioned in the case of *City of Sherman v. Williams*, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66, has held

that a special tax or special fund which had been collected for a particular purpose, in view of the limitations placed by the Constitution on municipal taxation, could not be applied for any other purpose; that if such fund, by act of municipal authority, could be diverted or used for some other purpose than the one for which it had been collected, then constitutional restraints would become unimportant, and the citizen could be subjected to taxation forbidden by the Constitution, and that which could not be done directly should not be done indirectly.

We therefore hold that the court below erred in rendering judgment directing the payment of the money on hand in the city treasury, as well as that thereafter to be collected belonging to the sinking fund, to appellee's judgment, because the same, having been levied, assessed, and collected for the payment of sinking fund on the bonds of said city, under the Constitution and laws of the state, could not be legally appropriated to the payment of any other claim whatever.

Appellee in his brief presents for the consideration of the court two cross-assignments of error, which appellants move to strike out. It appears from an inspection of the record that appellee's brief was not filed in the court below, nor were these cross-assignments of error copied in the transcript. Appellants' motion must prevail, and said cross-assignments will not be considered, because the same were not filed in the court below, nor was a copy of appellee's brief containing them filed in the court below, as required by rule 101 for the district and county courts. *Patterson v. Seeton*, 19 Tex. Civ. App. 432, 47 S. W. 732; *Morrow v. Terrell*, 21 Tex. Civ. App. 31, 50 S. W. 734.

In the view we have taken of this case, we deem it improper at this time to enter into a discussion of the questions raised by appellants' other assignments of error. But for the errors pointed out, the case is reversed and remanded.

CITY OF AUSTIN et al. v. CAHILL.

(Supreme Court of Texas. June 22, 1905.)

1. APPEAL—CERTIFIED QUESTIONS.

The Supreme Court may, in considering questions certified from the Court of Civil Appeals, determine every minor question upon which a correct decision of the general question certified may depend.

2. MUNICIPAL CORPORATIONS—BONDED DEBT—REFUNDING.

The charter of the city of Austin (Sp. Laws 27th Leg. 1st Called Sess., p. 12, c. 4, § 33, par. 2) authorizes the city to levy and collect an annual tax to raise such sum as may be necessary to pay interest and accumulate a sinking fund on all bonded debts of the city. Another provision (section 37, p. 13) authorizes the city to refund the whole or a part of its bonded indebtedness, and to levy such tax as is necessary to pay interest and accumulate a sinking fund on the refunding bonds. *Held*, that a levy under section 37 is to be devoted

exclusively to the payment of interest and the accumulation of a sinking fund on the refunding bonds, while such bonds as remain unrefunded may be provided for by an additional levy under section 33.

3. STATUTES—CONSTRUCTION.

A general provision of a statute must yield to a special one so far as is necessary to give effect to the particular subject of the special provision.

4. SAME.

In construing a statute, the Legislature must be presumed to have known, when it passed the statute, the constitutional limits of its legislative power.

5. SAME.

The courts may declare void a statute which is repugnant to the Constitution, but may not, in order to preserve the statute against constitutional objection, ascribe to it a meaning at variance with its plain import.

6. MUNICIPAL CORPORATIONS — REFUNDING DEBT.

The proceeds of a tax levy under Sp. Laws 27th Leg. 1st Called Sess., p. 13, c. 4, § 37, authorizing a city to refund its bonded indebtedness and levy a tax to pay interest and accumulate a sinking fund thereon, cannot be diverted by the city to meet the charges of unrefunded bonds.

7. STATUTES—CONSTRUCTION.

The legislative policy may be looked to as persuasive in a matter of doubtful statutory construction.

8. MUNICIPAL CORPORATIONS — EXCESSIVE TAX LEVY.

Where a tax levy is, in part, illegal, as in excess of the city's limit of taxation after making due allowance for authorized omitted levies having priority, it is so far in strictness returnable to the taxpayers, leaving them still subject to the imposition of the prior levies, but may, in avoidance of circuity, inconvenience, and expense, be applied as a credit on an omitted prior levy in diminution of the tax thereunder.

9. SAME—REFUNDING DEBT.

Whatever interest refunding bondholders have in a tax levied under Sp. Laws 27th Leg. 1st Called Sess., p. 13, c. 4, § 37, authorizing a city to levy taxes to pay interest and accumulate a sinking fund on refunding bonds, is a purely equitable interest, the legal title to the money so raised being in the city, which has the right to manage and invest the same, sue for its collection, and defend for the bondholders against any attempted depletion of the fund.

10. TRUST—CREATION.

In order to constitute a direct trust, no particular words are necessary, so long as the intent is clear, but there must be a conveyance or transfer to a person capable of holding it, an object or fund transferred, and a *cestui que trust* or purpose to which it is to be applied.

11. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS.

Where a city makes a valid contract for a bond issue, in which it stipulates to levy a certain tax for the payment of the bonds, subsequent legislation withdrawing or limiting the taxing power, without providing a substantial equivalent or otherwise affecting the validity or means of enforcement of the contract, violates the obligation of contracts, within the inhibition of Const. U. S. art. 1, § 10, and cannot affect the rights of the bondholders to an assessment, levy, and collection of taxes in accordance with the terms of the contract under which the bonds were issued, and in disregard of the invalid legislation.

12. MANDAMUS TO CITY—NECESSITY OF DEMAND.

Specific demand on and refusal of a city to levy taxes to meet bonds, in accordance with

the contract under which the bonds were issued, was not a necessary prerequisite to the issuance of a writ of mandamus compelling it to make the levy, where the city's duty in the premises was unconditional, and it was evident that it would refuse to comply with the demand if one were made.

13. SAME—JUDGMENT.

Where part of a claim for interest on bonds has been put in judgment, and the city is under a specific contractual obligation to levy a tax to pay such interest, a judgment for the balance of the claim, and a mandamus to compel the payment of the tax, may be obtained in the same suit.

14. SAME.

The writ of mandamus, being based on default of duty, cannot direct the levy of future taxes, the time for the levy of which has not yet arrived, but may direct the levy during a series of future years of taxes which should have been, but were not, levied in past years.

15. SAME—REFUSAL TO LEVY TAX.

The neglect of a city to perform its contractual obligation to levy taxes at the time directed by law, in order to meet the interest on bonds, does not enable the city to escape that duty, but it may be forced to perform the same by mandamus relating back to the time when the levy should have been made.

16. MUNICIPAL BONDS—RIGHTS OF PURCHASERS.

Purchasers of bonds take the same subject to the law in force at the time of their issuance, including the constitutional limitation upon the taxing power of the city.

17. MUNICIPAL CORPORATIONS—TAX LEVY.

Const. art. 11, § 5, prohibiting cities of over 10,000 inhabitants to levy taxes "for" any one year which shall exceed $2\frac{1}{2}$ per cent. of the taxable property of the city, does not prohibit the city to levy "in" one year a tax omitted to be levied in a past year, so far as such tax is, in connection with other valid taxes, within the $2\frac{1}{2}$ per cent. tax limit for such past year, although the levy for the year in which it is made may exceed the limit for that year.

18. NECESSARY PARTIES.

The fact that, in the course of litigation, points of law may be determined that will make a precedent harmful to the interests of certain persons in some future litigation, is not a sufficient reason for making such persons parties.

19. MUNICIPAL CORPORATIONS—REFUNDING BONDS—MANDAMUS—PARTIES.

A city issued bonds, which it was afterwards authorized, by Sp. Laws 27th Leg. 1st Called Sess., p. 12, c. 4, to refund, together with its whole bonded indebtedness. The refunding act (section 37, p. 13) also authorized it to levy a tax to pay interest on and accumulate a sinking fund for the refunding bonds. A refunding ordinance was passed, and the larger part of the original bonds was surrendered in exchange for refunding bonds, but certain holders of the original bonds refused to make the exchange. The city neglected for some years to pay the taxes on or accumulate a sinking fund for the outstanding original bonds, in accordance with the requirements of the law and ordinance under which they were issued, but did levy a tax under the refunding act to pay interest on and accumulate a sinking fund for the refunding bonds. *Held*, in mandamus proceedings by a holder of the original bonds to compel the city to apply to the payment of interest due him the money collected for the interest and sinking fund on the refunding bonds, to allow him payment out of the uncollected taxes levied for the refunding bonds, and to levy, assess, and collect, for omitted years of the past and in the future, taxes sufficient to pay the interest on and accumulate the prescribed sinking fund for his bonds, the holders of the refunding bonds were not necessary parties in their own persons, but

they were constructively present before the court through their trustee, the city.

Minor, J., dissenting in part.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Mandamus proceedings by James G. Cahill against the city of Austin and others. The Court of Civil Appeals reversed a judgment awarding the writ, and, pending a motion for rehearing, questions were certified to the Supreme Court. Questions answered.

Allen & Hart, for appellants. Gardner Ruggles, for appellee.

EWING, C. J. This was a mandamus proceeding, brought in the district court by James G. Cahill, to enforce payment by the city of Austin, through mandate against its proper officers, of alleged indebtedness, partly reduced to judgment, claimed to be due him for interest accrued on certain water and light bonds issued by the city. Judgment went in his favor, but it was reversed by the Court of Civil Appeals. 88 S. W. 536, 12 Tex. Ct. Rep. 285. The case, as it comes here on questions certified pending a motion for rehearing, is substantially as follows:

Austin, when the present Constitution of Texas took effect, was a city of more than 10,000 inhabitants, existing by special charter (Sp. Laws 13th Leg. p. 215, c. 65), which was amended by act approved April 17, 1883 (Sp. Laws 18th Leg. p. 36), and by a substitutional act passed in 1891 (Sp. Laws 22d Leg. p. 101, c. 22). Subsequently, besides intermediate amendments not necessary to notice, the charter was further amended by another substitutional act approved April 13, 1901 (Sp. Laws 27th Leg. p. 60), which was itself amended by two additional acts, one approved September 18, 1901, and the other September 21, 1901, the latter being the refunding act mentioned below. 1st Called Sess. 27th Leg. pp. 8, 12. In order to provide itself with an adequate supply of water and light, being thereunto duly authorized, the city issued, and between October 15, 1890, and January 30, 1895, sold and delivered, 1,400 bonds of \$1,000 each, aggregating \$1,400,000, dated August 1, 1890, payable to bearer on July 1, 1930, but redeemable at the city's option at any time after June 30, 1910. These bonds bore interest at the rate of 5 per cent. per annum, payable quarterly on the 1st days of January, April, July, and October of each year, as evidenced by the interest coupons thereto attached. The proceeds of the bonds were applied to providing the city with water and light by a system of obtaining power from damming the Colorado river. The ordinance authorizing the holding of an election looking to the issuance of said bonds was dated April 1, 1890, and was ratified by the necessary two-thirds vote of the taxpayers of the city at an election held May 5, 1890. It was pro-

vided by the ordinance under which the bonds were issued and sold that there should be levied and collected for the year 1890, and for each year thereafter while said bonds remained outstanding, a tax of \$1.11½ on the \$100 worth of taxable property in said city, for the payment of interest on said bonds, and to provide the 2 per cent. sinking fund for their redemption, and that the net income arising from receipts of said water and light system, or so much thereof as was necessary, should be applied, and such receipts were pledged, to the payment of said bonds, interest, and sinking fund, the rates of which system it was further provided should be so regulated as to produce sufficient revenue to pay current expenses, interest, and sinking fund. The appellee, Cahill, became the owner of 15 of said bonds, with interest coupons attached, upon which the interest appears to have been paid up to and including the installment falling due April 1, 1900, but no interest accrued thereon since that date has been paid. The system for water and light, put in operation as above stated, was destroyed in April, 1900, but this was replaced by a steam plant that was put in operation by June 1, 1901, the city being meantime without a system for water and light. The refunding act authorized the city to compromise and scale its bonded indebtedness, or any part thereof, by issuance in even exchange therefor, of refunding bonds bearing date July 1, 1901, payable July 31, 1931, with interest for the first 5 years at 3 per cent. per annum, for the next 10 years at 4 per cent. per annum, and after July 1, 1916, at the rate of 5 per cent. per annum to maturity, the interest to become payable semiannually on the 1st days of January and July in each year. These bonds were made redeemable by the city at its option on the date of any interest payment. The refunding act also provided for the levy of a tax of \$1.16½ on the \$100 valuation, or such part as might be necessary, to pay the interest and a 2 per cent. sinking fund on such refunding bonds. The city's council, by ordinance passed November 5, 1901, provided for the issuance of the refunding bonds, to be exchanged for the city's outstanding indebtedness to the extent that the owners might be willing to accept the same in substitution. The city had, when its water and light bonds were issued, an outstanding indebtedness of \$125,000, of which the sum of \$72,500 was indebtedness legally made and undertaken before the present Constitution of Texas became operative. This indebtedness bore interest at 6 per cent. per annum, except the part of \$72,500, which bore interest at 10 per cent. per annum until April 1, 1895, when it was reduced to 6 per cent. Subsequently the city incurred other indebtedness, consisting of \$200,000 in a new series of water and light bonds, bearing 6 per cent. per annum interest, issued July 1, 1895, and consisting of \$45,000 of high school

bonds, bearing interest at 5 per cent. per annum, issued August 1, 1899, but \$10,000 in amount of the first-named issue were retired September 21, 1901, leaving a balance unpaid of that issue of \$190,000. The owners of the original issue of water and light bonds to the amount of \$935,000 accepted refunding bonds in exchange, and the further amount of \$143,000 thereof had previously been retired and canceled, leaving in amount \$322,000 of the original water and light bonds, including appellee's, the owners of which have in no manner consented to the refundment. The owners of the other bonded indebtedness herein mentioned, including that existing when the water and light bonds were issued, have accepted refunding bonds, except the amount of \$13,500, being part of the indebtedness existing when the present Constitution of Texas took effect. Thus there are outstanding of the refunding bonds \$1,281,500 in amount, and of the original issue of water and light bonds \$322,000 in amount, and of the old indebtedness \$13,500 in amount, making a total of \$1,617,000. The total tax levied by the city on the \$100 value was, for the year 1900, \$1.41½, consisting of 70 cents for general purposes, 33½ cents for schools, and 8 cents for interest on bonds issued prior to May 1, 1890; and, for the year 1901, \$2.50, consisting of \$1 for general purposes, 33½ cents for schools, and \$1.16½ for interest and sinking fund on bonds; and, for the year 1902, \$1.73½, consisting of \$1 for general purposes, 33½ cents for schools, and 40 cents for interest and sinking fund on bonds; and, for the year 1903, \$2.33½, consisting of \$1 for general purposes, 33½ cents for schools, and \$1 for interest and sinking fund on bonds. The taxable values of the property subject to taxation by the city for these years are not shown in the state of facts certified here, as the only mention of them is by reference to the appellee's petition, which is not embraced in the certificate. The only bond tax levied since the year 1900 was to provide interest and a sinking fund for the refunding bonds, the interest on which bonds had been regularly paid. To the credit of this fund arising from the levy therefor is the sum of \$53,523.19, being the balance remaining after payment of the installment of interest due July 1, 1904, on the refunding bonds. There is also to the credit of this fund, arising in like manner, the sum of \$26,406.43½, uncollected taxes for the years 1901 to 1903, inclusive. No net receipts from the water and light system have been applied to the payment of unpaid interest or sinking fund on the unrefunded bond debt. Since June 1, 1901, there have been no net receipts except about \$25,000 in amount a year, all of which has been applied by the city in the extension, repair, and improvement of its present system. The appellee recovered judgments, bearing date March 5 and April 19, 1902, for the installments of interest on his bonds which fell

due on and between the dates of July 1, 1900, and October 1, 1901, being for the sum of \$1,196.06%, and he had judgment in the instant action for the interest which accrued on and between the date of January 1, 1902, and April 1, 1904, being for the sum of \$2,026.90. Upon the prior judgments there were nulla bona returns on executions duly issued. The city has no property out of which the judgments would be satisfied on execution, and it had refused to pay the appellee's demands, upon which said prior judgments were recovered, before suit brought therefor, notwithstanding demand of it for payment by appellee. There was no formal demand for the relief sought by the petition for mandamus before suit therefor was brought, but the petitioner's attorney had been told on several occasions by the city's mayor, its finance committee, and its attorney that the city would not pay him anything more or make any other or further arrangement with him than had already been made with holders of bonds that had been refunded into 3 per cent. bonds. The appellee claimed that the holders of the unrefunded bonds, of whom he was one, were entitled to the money in the treasury, and uncollected taxes mentioned herein, to the exclusion of the other bondholders. The appellee's suit was brought on August 25, 1903, and service thereon made by December 5, 1903, but trial was had on his second amended original petition, which was filed in the cause on May 5, 1904, and which set up for relief the facts substantially as herein stated. None of the holders of the refunding bonds were made parties, the only respondents being the city and its officers. The prayer of the appellee, in asking for the writ of mandamus, was that the writ should extend, in effect, to three separable and distinct items of relief: (1) To compel the municipal authorities to allow him payment out of the money in the treasury above mentioned; (2) to compel the municipal authorities to allow him payment out of the uncollected taxes mentioned above; and (3) to compel the municipal authorities, to the extent of deficiency of payment, to levy, assess, and collect, for the omitted years of the past and in the future, taxes sufficient to satisfy appellee's demands already accrued, and also sufficient to pay the interest and requisite sinking fund on appellee's bonds in the future. The trial court gave judgment in favor of appellee, allowing him payment out of the money in the treasury, amounting to \$53,523.19, pro rata with the remaining unrefunded water and light bonds, and allowing him payment out of the uncollected taxes, amounting to \$26,406.43¹/₁₀, pro rata with those equally entitled with him, and granting him a tax levy for the year 1903, as also for the year 1904 and subsequent years, to be shared pro rata with those equally entitled with him, but denying him any tax levy for the years 1900 and 1902, on the ground that the same

was prevented by the constitutional limit on the taxing power of 2¹/₄ per cent. The trial court overruled demurrers interposed by the respondents, in effect, that the refunding bondholders ought to have been made parties to the suit, but the Court of Civil Appeals reversed this ruling, holding that they were indispensable parties.

Both the opinion of the appellate court and the conclusions of the trial court are embraced in the certificate transmitted here, and from them we have made the foregoing statement of the case. The certificate declares that there are a number of cases in the appellate court dependent upon the decision of this case, and that by reason of that fact, as also the public interest involved, the following questions are submitted for our decision:

"First. In view of the averments of the plaintiff's petition, as set out in the opinion of this court, when considered in the light of the facts as found by the trial court, did this court err in holding that the other bondholders described in the pleadings and the facts were necessary parties to this proceeding, in order for the trial court to award the mandamus prayed for in plaintiff's petition?"

"Second. Did this court err in reversing the case on the ground that the trial court erred in not sustaining appellants' demurrers to plaintiff's petition, because the other bondholders therein described and mentioned, who were not parties to these suits, were not made parties and joined in the suit by the appellee? or, in other words, were such bondholders necessary parties in order for the plaintiff to recover the judgment rendered by the trial court in awarding the writ of mandamus, as prayed for by the plaintiff?"

The questions certified, it will be observed, resolve themselves practically into the inquiry, did the Court of Civil Appeals err in deciding that the refunding bondholders were indispensable parties to the proceeding? In logical order, we first give attention to it in its bearing on the items of relief relating to the money in the treasury and uncollected taxes. To take other than a superficial view of the subject, it is necessary to look into the substantive relation of the parties to the fund comprising the money and uncollected taxes, which may be properly done, as we are authorized to determine every minor question upon which may depend a correct decision of the general question certified as to parties. *Rosetti v. Lozano*, 96 Tex. 59, 70 S. W. 204.

Considering a contention much pressed in the argument, we observe that if the tax levy from which this fund arose, though ostensibly for the benefit of the refunding bondholders, was in legal effect for the equal benefit, aside from the rate of interest, of all the city's bondholders, without any foundation for an adverse claim to the contrary, there would be no difficulty in determining

that the refunding bondholders were not necessary, in the sense of indispensable, parties. In that event, the case would in so far fall within the ruling frequently made that it does not lie with the city to object that others of the same class of bondholders are not parties and may be deprived of equal participancy, when no effort has been made by the bondholders in whose interest the plea is urged to marshal the fund. *Voorhies v. City of Houston*, 70 Tex. 331, 7 S. W. 679; *City of Galena v. Amy*, 5 Wall. 709, 18 L. Ed. 560; *Meyer v. Porter*, 65 Cal. 67, 2 Pac. 884; *Ward v. Piper* (Kan.) 77 Pac. 699. The reason which justifies this ruling is doubtless found in the consideration that, while the fund is to be held exclusively for the beneficiary class, yet the persons in that class have no specific lien upon the fund, and no right to equality of payment beyond the rule that "equality is equity," so that within the class the fund is, like any other property of a debtor, subject to execution, the mandamus being in that sense a mode of execution (*Chanute v. Trader*, 182 U. S. 210, 10 Sup. Ct. 67, 83 L. Ed. 345), and the other creditors of the class being left to their remedy in equity of marshaling the fund under the rule of equality obtaining in that system. *Pomeroy's Eq. Jur.* vol. 1, §§ 405, 407.

Is it possible upon the facts, however, to adjudge that the tax levy was, in effect, for the benefit of all the city's bonded debt? The language of the legislative enactment and the city's ordinance, the one authorizing and the other making the levy, cannot be so construed as to warrant an affirmative answer. The charter provision (section 37, p. 13), in words free from any ambiguity, gave the city authority to refund the whole or a part of its bonded indebtedness, and to levy a tax of so much of the specified percentage as was necessary to pay interest and 2 per cent. sinking fund on the refunding bonds; and the ordinance, in making the levy, did so for the particular purpose so authorized. Another provision of the charter (section 83, par. 2) authorized the city to levy and collect an annual tax to raise such amount as might be "necessary to pay interest and two per cent. sinking fund annually on all bonded debts of the city." Sp. Laws 27th Leg. 1st Called Sess. p. 12, c. 4. It was evidently not the intention of the Legislature to make the tax authorized under the refundment exclusive of a tax to be levied for the city's bonds other than the refunding ones. The purpose in the legislative mind manifestly was to provide under said section 37 for a levy to pay the refunding bonds, but to leave power in the city under said section 83 to make another and additional levy to pay such bonds as might remain unrefunded. This is made more obvious by considering the two sections together, the one as applying to its particular subject, the refunding bonds, and the other to its general subject, all bonded debt, for in that way we preserve

the canon of construction that a general provision must yield to a special one so far as necessary to give effect to the particular subject of the latter. *Erwin v. Blanks*, 60 Tex. 583. Much strength is also imparted to this view by the consideration that the Legislature must be presumed to have known that it was not within its constitutional power to impair the contract with the holders of the unrefunded bonds by withdrawing the taxing power which was a part of the obligation of the contract. Const. U. S. art. 1, § 10.

It is to be borne in mind that we are now dealing with the meaning, not the validity, of the legislation in question. It may be quite true that a tax imposed by subsequent legislation, after making proper allowance for the tax to be levied as part of the obligation of the previous contract, would be void in so far as in excess of the limit of the city's taxing power (Const. Tex. art. 11, §§ 5, 6); but in this no warrant can be found, in construing the legislation in hand, to depart from its obvious intent. It is of paramount importance at all times that the three co-ordinate departments of government be maintained in independence, each of the others, without encroachment or transgression. The judiciary, above all, on account of the peculiar position it occupies in the construction and interpretation of law, should scrupulously keep within its sphere, following the ancient landmarks so far as adapted to modern conditions, and avoiding always the reproach of undertaking to legislate, directly or indirectly. Applying this salutary rule, it might be proper to treat the subsequent legislation as void and of no effect, under constitutional restraint, so far as it may, according to its true intent and meaning, impair the obligation of a prior contract; but it would not be proper to ascribe to it a meaning at variance with its plain import, so as to conform it either to constitutionality or wisdom.

Thus viewing the legislation being considered, it appears quite indubitable that the legislative intent was to make the proceeds of the tax levy for the refunding bonds a special fund in the hands of the city for the specific purpose of paying interest and the 2 per cent. sinking fund on these bonds to the exclusion of all others. The effect of legislation so providing has become elemental. "It is a very generally recognized rule that, in appropriating or disposing of tax funds, money raised for a specific purpose cannot be used for any other purpose." 27 Am. & Eng. Ency. of Law (2d Ed.) p. 807. The reason is quite obvious. Since the fund is raised for the benefit of a particular class, it is in a special sense impressed with a trust for that class, and hence to divert it would necessarily be to misapply it. The principle was given effect by this court in *City of Sherman v. Williams*, 84 Tex. 421, 423, 19 S. W. 606, 31 Am. St. Rep. 66, in which it was held

that taxes raised to pay the interest and provide a sinking reserve to satisfy designated indebtedness was a special fund, and could not be diverted or used for some other purpose. The legislative policy, which may be looked to as persuasive in a matter of doubtful construction, appears to be in accord, as manifested by articles 416 and 498, Rev. St. 1895, though these articles have direct application only to municipalities incorporated under the general law, and not to cities existing by special charters. There may be exceptions to the general rule we are discussing, but these exceptions are more apparent than real, and nothing is perceived in the facts to bring the instant case within any recognized exception. It may be true, for example, that it is sometimes competent in administrative matters, no statutory inhibition existing, to apply a tax professedly raised for one purpose to some other legitimate purpose. *Long v. Richmond County*, 78 N. C. 273, 280. But this can give no sort of warrant to divert a fund arising from a tax levied by special authority from the Legislature, when that fund is made part of a contractual obligation running beneficially to a particular class. It follows from what has been said that the refunding bondholders, as to the money and uncollected taxes, must be regarded, in determining the matter of parties, as occupying the position, not of co-beneficiaries of the same class, as in the cases before cited, of which *Voorhies v. City of Houston*, 70 Tex. 831, 7 S. W. 679, is a fair type, but of adverse claimants, which serves at once to distinguish their attitude, and therefore they cannot be dispensed with as parties on the authority of that line of cases.

At first blush it might appear, under the conclusion just announced, that the question of parties on this branch of the case had become unimportant, since the officers having custody of the special fund under consideration, if appellee was not one of the class for whose benefit it was created, would have no right to divert or use it for other than the particular purpose for which it was created, and it is well settled that the writ of mandamus will not go to compel officers to perform what they are under no duty to do, but under duty to desist from doing. *De Poyster v. Baker*, 89 Tex. 155, 34 S. W. 106. But we cannot admit that view as conclusive of the question. If, on the full facts set up in appellee's petition, it should appear, under principles to be discussed in another part of this opinion, that the tax levy for the refunding bonds, after making due allowance for other authorized levies having priority, was in part in excess of the city's limit of taxation, it would in so far be illegal, and, in logical strictness, the fund arising from such illegal levy would be returnable to the taxpaying inhabitants, leaving them still subject to the imposition of the prior levies; but, in avoidance of circuitry,

inconvenience and expense, no objection is perceived to the application of such illegal fund as a credit on an omitted prior levy, in diminution of the tax to be raised thereunder. The taxpayers being subject to the payment of the fund, it would be to require the doing of a vain and useless thing to compel the payment to them of the illegal fund with one hand and to take from them with the other the exact equivalent in a legal fund. Every illegal dollar may be justly treated as the representative of the legal, the legality of the one neutralizing the illegality of the other. The maxim applies, "*Lex nil frustra jubet*." The right in the city to so apply the fund, if it should be found to exist, would imply the correlative duty to do so, as concerns its compulsion by mandamus. Thus it may be that the holders of the unrefunded water and light bonds, proceeding in hostility to the trust under which the refunding bondholders claim, will be able to reach some or all of the money and uncollected taxes under consideration, and therefore the question of parties as to that fund must be determined.

Whatever interest the refunding bondholders may have in the money and uncollected taxes is purely equitable, with the city holding the legal title impressed with a trust for their benefit. *Commissioners v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 433; *Coler v. Commissioners (C. C.)* 89 Fed. 260; 27 Am. & Eng. Ency. of Law (2d Ed.) 868. The case of *Commissioners v. Walker*, *ubi supra*, is both pertinent and instructive. The state of Mississippi, in chartering the Planters' Bank, provided that the state should issue bonds, the proceeds of the sale of which should be used in the purchase of stock in the bank, and that the surplus of dividends beyond paying the interest on the bonds should "constitute a sinking fund under the management" of several specified bank officers for the redemption of the bonds. The court held, among other things, that a trust might be created by a legislative enactment, and that the legislative enactment there in question had created a trust in the designated officers of the sinking fund for the benefit of the holders of the bonds, and that the trust might have been conferred on the corporation as trustees instead of on its officers, and that these trustees had not only the power to sue and defend as to the fund, but the implied power to loan it by way of investment. Chief Justice Sharkey, in the course of the opinion, uses this language: "The general rule now is that all persons capable of confidence, and of holding real or personal property, may hold as trustees. Corporations may now hold as trustees, although they could not be seised to a use before the statute. *Willis on Trustees*, 32, 33-38, Law Lib. Two of these trustees are officers of a corporation, and as free from objection as the entire body corporate, and, if the corporation was capable of holding as trustees, surely two of its officers may." Was a trust created by

the act which originated the sinking fund? A trust is said to be "an obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence." Willis on Trustees, 2. To constitute a direct trust, there must be a conveyance or transfer to a person capable of holding it; there must also be an object or fund transferred, and a cestui que trust or purpose to which the trust fund is to be applied. No particular words are necessary to constitute a trust; but if it be the plain intention of the parties to create a trust, it will be regarded as such.

It has been settled in Texas, since a very early day, that third persons claiming an adverse interest in the subject-matter which might be affected by the judgment must be joined as respondents in a mandamus proceeding, without regard to the validity of their claim, which the court will not adjudicate in their absence. *Smith v. Power*, 2 Tex. 57; *Land Com'r v. Smith*, 5 Tex. 471; *Tabor v. Land Commissioner*, 29 Tex. 508; *Chappell v. Rogan*, 94 Tex. 492, 62 S. W. 539; *Tex. Mex. Ry. Co. v. Jarvis*, 80 Tex. 456, 467, 15 S. W. 1089. These cases, though correctly decided on their facts, constitute an exceptional class, and appear to us to go to the extreme in reason and the verge of authority. See *Jones v. Welsing*, 52 Iowa, 220, 222, 2 N. W. 1106; *Cooper v. Registrar of Arrears of Brooklyn*, 114 N. Y. 19, 20 N. E. 611, and cases cited. Independent of this rule as to adverse claimants, the only necessary respondents in a mandamus proceeding are those who are to perform the command of the writ. *Gaal v. Townsend*, 77 Tex. 465, 14 S. W. 365. These decisions in respect to adverse claimants do not involve the question, nor do any of them, as to whether the owners of equitable interests are necessary parties if the representative of the legal title is before the court, and therefore that particular question remains at large.

Mandamus is a common-law remedy, having no connection with equitable jurisdiction. 13 Ency. Pl. & Pr. 491, for cases cited. While it partakes of an ordinary civil action, it is in many respects sui generis in our practice, being returnable under a rule peculiar to itself (*Fitzhugh v. Custer*, 4 Tex. 391, 51 Am. Dec. 728), and being without the pale of our ordinary rules for defensive pleading (*May v. Finley*, 91 Tex. 354, 43 S. W. 257). It is true that, under our blended system of law and equity, the question of parties may often have to be determined as a mixed matter of law and equity. As a general proposition, however, the solution of this question will depend upon the rules obtaining at common law or in equity, according as the relief sought is legal or equitable. Illustrations of this are numerous in our decisions, among which we instance the ruling, frequently made, that, in the case of promissory notes and choses in action generally, no account is to be taken

of the holders of merely equitable interests as parties. *Texas Western Ry. Co. v. Gentry*, 69 Tex. 625, 631, 8 S. W. 98, and *Cleveland v. Heidenheimer*, 92 Tex. 106, 46 S. W. 80.

There is a line of decisions in the United States and Texas Supreme Courts which bear closely upon the precise facts of the instant case. In *Vetterlein v. Barnes*, 124 U. S. 169, 8 Sup. Ct. 441, 31 L. Ed. 400, an assignee in bankruptcy sued to cancel as fraudulent an assignment of policies of insurance to a trustee for the benefit of the assignor's wife and children, without making the wife or children parties. The court, after conceding the general rule that cestuis que trust ought to be made parties in order to enable them to defend for themselves, held that the rule was without application where the plaintiff's claim was made, not in recognition or in furtherance of the trust, but in opposition to it, and accordingly sustained the suit, without the wife or children being parties. *Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843, was the case of the trustee of a mortgage made for the benefit of creditors, in which the question as to the duty to make the creditors parties arose. The court, through Mr. Chief Justice Waite, thus held: "It cannot be doubted that under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust (*Shaw v. R. R. Co.*, 5 Gray, 162, 171; *Bisfield v. Taylor*, 1 Beat. 91 [1 Molloy, 193]; *Campbell v. R. R. Co.*, 1 Woods, 376, Fed. Cas. No. 2,366; *Ash-ton v. Bk.*, 3 Allen, 220), or to one by a stranger against him to defeat it in whole or in part (*Rogers v. Rogers*, 3 Paige, 379; *Wakeman v. Grover*, 4 Paige, 23, 34; *Winslow v. R. R. Co.*, 4 Minn. 317 [Gil. 230], 77 Am. Dec. 519; *Campbell v. Watson*, 8 Ohio, 500). In such cases, the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. The principle which underlies this rule has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analogous circumstances, and found to be well adapted to the protection of the

rights of those interested in such securities, without subjecting litigants to unnecessary inconvenience." In *Richter v. Jerome*, 123 U. S. 233, 8 Sup. Ct. 106, 31 L. Ed. 132, 137, the court thus disposed of the claim that the bondholders were necessary parties: "All the rights the bondholders have or ever had in the mortgage, legal or equitable, they got through the trust company, to which the conveyance was made for their security. As bondholders claiming under the mortgage, they can have no interest in the security, except that which the trustee holds and represents. If the trustee acts in good faith, whatever binds it in any legal proceedings it begins and carries on to enforce the trust, to which they are not actual parties, binds them. *Kerrison v. Stewart*, 93 U. S. 155, 160, 23 L. Ed. 843, 845; *Corcoran v. Chesapeake & O. Canal Co.*, 94 U. S. 741, 745, 24 L. Ed. 190, 191; *Shaw v. Little Rock & Ft. S. R. Co.*, 100 U. S. 605, 611, 25 L. Ed. 757, 758. Whatever forecloses the trustees, in the absence of fraud or bad faith, forecloses them. This is the undoubted rule."

In *Ebell v. Bursinger*, 70 Tex. 120, 8 S. W. 77, it appeared that Annie Bursinger executed to John Ebell a deed conveying to him certain lots in trust for the benefit of his daughter, Annie Ebell. Annie Bursinger, who was not a third party claiming in opposition to the trust, but who was the maker of the trust itself, brought suit against the trustee alone to set aside the deed, on the ground that it was procured by threats and intimidation. The question arose as to whether the cestui que trust, Annie Ebell, was a necessary party to the suit, and on that question the court, speaking through Mr. Justice Gaines, thus observed: "As to the first question, the general rule is well established that, in suits by or against the trustee for the recovery of the trust property, the beneficiary is a necessary party. *Boles v. Linthicum*, 48 Tex. 224; *Huffman v. Cartwright*, 44 Tex. 296; *Hall v. Harris*, 11 Tex. 300; *Holland v. Baker*, 8 Hare (Eng.) 72; *Woodward v. Wood*, 19 Ala. 213; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Richards v. Richards*, 9 Gray, 313; *Ward v. Hollins*, 14 Md. 158; 1 *Daniell's Chan. Prac.* (5th Ed.) p. 220, note 1; *Story's Eq. Plead.* § 207; 2 *Perry on Trusts*, § 873. To this rule there are well-recognized exceptions, but these embrace mainly that class of cases where, by reason of the number of the beneficiaries, it is inconvenient to make them parties, and where it may be presumed that it was the intention to invest the trustees with power to prosecute and defend suits in their own names. An apt illustration of the exception is found in the case of the trustees in a mortgage to secure a series of negotiable bonds upon the property of railroad companies. *Shaw v. Railroad*, 5 Gray, 162. Another illustration is afforded by the case of an assignee in a deed of an assignment made by an insolvent for the benefit of his credit-

ors. *Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843. The appointment of an assignee in such cases generally grows out of the necessity of having some agent to act for beneficiaries, who are usually too numerous to act together. In such a case the presumption is great that he is their representative, not only as to the general management of the assets, but also to prosecute and defend suits involving title to the assigned estate."

In the city of *Sherman v. Williams*, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66, it was developed that a lot of land had been taken by the city to meet a tax collector's default as to a special fund created in the interest of outstanding bondholders. A judgment creditor of the city levied execution upon the property and caused it to be advertised for sale, when the city brought suit to enjoin the sale on the ground that the property, being held by it for the special fund mentioned, was not subject to sale to satisfy the execution. The city, it is apparent, was acting in effect as trustee for the outstanding bondholders, but the right of the city to maintain the suit was not questioned by counsel for the court, and the final relief prayed for was granted. This case is cited as persuasive, since it tends to show that the general view has been to treat the city as the representative of the outstanding bondholders in all cases of attack upon a special fund in its hands held for their benefit.

In *Preston v. Carter*, 80 Tex. 388, 391, 16 S. W. 17, it was objected that a beneficiary of a general assignment made to a trustee for the benefit of creditors was not a party, but the objection was denied. The court, approvingly quoting from the *Kerrison Case*, *ubi supra*, held: "The general rule is well known that, 'in suits by or against the trustee for the recovery of the trust property, the beneficiary is a necessary party.' *Ebell v. Bursinger*, 70 Tex. 122, 8 S. W. 77. An illustration is given in the case cited of well-recognized exceptions to this rule. One of these exceptions will be found in the case of an assignee in a deed of assignment made by an insolvent for the benefit of his creditors. *Ebell v. Bursinger*, 70 Tex. 122, 8 S. W. 77."

We cannot distinguish in principle the instant from the cited cases. Not only in the case of the trustee of mortgage securities is persuasive analogy found, but also in the case of the administrator of a decedent's estate; for, in the latter event, the trusteeship of the administrator is created by legislative enactment, as in the instant case. It is familiar that the creditors represented by an administrator are not necessary parties to suits by or against him. The exception noted in the cited case of parties being numerous or unknown is doubtless here present. The city has the control and possession of the fund in question, and the writ of mandamus in a case like this, as we have seen, is but a mode of execution. If the refunding

bondholders are the exclusive beneficiaries of the money and uncollected taxes, they are so only by virtue of the legislative enactment on that subject as contained in the city's amended charter. This enactment, in that event, had the effect to grant the city the legal title to the fund for their benefit, coupled with the power in the city to create the fund by levy and collection, to periodically distribute some of it in the payment of interest, and to invest the sinking fund part by loan in the modes prescribed by law, giving preference in the payment to interest if the fund was short in the amount necessary to pay interest and create the requisite sinking fund. See Sp. Laws 1st Called Sess. 27th Leg. p. 12, c. 4. Whether or not the city became a trustee in technical strictness is unimportant; it was, at least, made such in the broad sense of the term, with all the substantial attributes of a trustee as concerns the question of parties being considered. Its attitude is that of a public agency, an intermediary between the taxpaying inhabitants and the tax receiving bondholders, and its function is in the nature of a public trust. It was given, either expressly or by implication, not only the right to manage and in part invest the fund, and not only the right to sue for its collection, but the right as well to defend against every adversary seeking its depletion. It is, in brief, the lawful conservator of a specific property for a particular trust purpose, and its duties in that respect are commensurate with its powers. It became entitled to make, and it is its duty to make, every defense for the beneficiaries against an opposing claim that they could make if before the court in their own proper persons. Being invested with such powers and subject to such obligations, those for whom it holds will necessarily be found by what is done against as well as by it; and in a suit by a stranger, brought in opposition to the trust, the beneficiaries are not necessary parties, being constructively before the court through their trustee. The refunding bondholders have no rights to the fund in question, and never had any, except as gotten through the city by virtue of the grant to it for their security, and they, therefore, can have no interest in the security beyond that which the city, as their trustee, holds and represents.

It is not perceived that the point of practice ruled in *Texas Mexican Ry. Co. v. Jarvis*, 80 Tex. 456, 15 S. W. 1089, can militate against the conclusion at which we have arrived. There is a line of authorities, freely cited and quoted from in Mr. Chief Justice Stayton's opinion in that case, to the effect that, in a mandamus proceeding, only the exact relief prayed for can be granted, no more or less; but the point actually ruled by the court was that the petitioner could not have less relief than the whole, if the facts did not show to what part of the whole he was entitled. The wisdom of the decision is evi-

dent, as the writ must necessarily be sufficiently certain and definite to be intelligently enforced; but to go beyond the point actually decided would be to blindly follow a rule where the reason has ceased to apply. The only foundation for the practice, obtaining in a few jurisdictions, of granting the relator the whole or none of the relief, is the technical one that the peremptory writ must conform with the alternative (13 Ency. Pl. & Pr. 684, 685, for cases cited), a reason wholly illusive in our system of procedure, under which the preliminary pleadings may properly consist of merely a petition and rule to show cause. The precise point, however, sought to be sustained by the *Jarvis Case* seems to be that the refunding bondholders are at least necessary parties as to the sinking fund portion of the money and uncollected taxes in question, with nothing in the facts to distinguish the interest from the sinking fund, although required by the charter to be kept and paid out under separate accounts. The point, if the refunding bondholders be regarded as before the court through the city as their trustee, is germane rather to the merits than to the matter of parties. Besides, the provision contained in section 33 of the amended charter, relative to keeping and paying out the interest and sinking fund parts separately, as quoted in the opinion of the Court of Civil Appeals (Sp. Laws 27th Leg. p. 67), was entirely omitted from the later amendment of that section of the charter, being the amendment under which the refunding bonds were issued. Not only so, but by this later amendment it was provided that if for any reason, at any time, the maximum tax possible as there authorized was insufficient for both interest and sinking fund, then the taxes for any year should be first applied to the interest of that year. Sp. Laws 1st Called Sess. 27th Leg. pp. 12-17. Independent of this provision of the charter just cited, it is deemed quite clear that, in the absence of some legislative inhibition, the interest payable out of the fund, held both for interest and the sinking reserve, cannot be withheld on the theory of preserving intact the requisite sinking fund. To do this would be to give the sinking fund a priority of right over the interest, unwarranted and arbitrary. Such being the state of the case, it is not apparent how the condition of the interest and sinking fund accounts can become important. Even if the holders of the unrefunded bonds were entitled to reach the money and uncollected taxes as co-beneficiaries with the refunding bondholders, they very plainly could not be affected by the condition of such accounts under the present provisions of the charter on the subject. If they are entitled to reach the fund on the theory of its being the product of a levy in excess of the city's power and void as to them, and for that reason open to their claim in avoidance *pro tanto* of further levy in their behalf, then the right

in them on that ground would be in opposition to the trust in favor of the refunding bondholders, and therefore no divisional lines between sinking fund and interest, fanciful or real, could apply as to them. Thus, if the holders of the unrefunded bonds have the right in any event to reach the money and uncollected taxes, it is yet apparent that, in neither of the conditions under which that right could be claimed to exist, would they be affected by the state of the account as to the sinking fund and interest.

There is no hardship to the refunding bondholders in dispensing with them as necessary parties in respect to the fund in question, since the right is open to them, as in other cases of trust representation, to impeach any judgment affecting their interests for fraud or bad faith, or to obtain in advance of judgment, if seasonably advised of the fraud, such equitable relief as may be appropriate. To hold them to be necessary parties would, on the other hand, be attended with serious embarrassment to suitors asserting adverse claims, such as the plaintiff in the instant case. It is impossible to ignore the fact that in all such cases the outstanding bondholders will probably be numerous and unknown, so that a requirement to make them parties in their own proper persons would be accompanied with serious inconvenience, if it did not operate a practical denial of relief. Cases may readily be supposed in which, on account of exemption of the property from taxation, or illegality of some sort in the procedure, a tax paying inhabitant might be entitled to injunctive or other relief. To hold that he would have to make outstanding bondholders parties, if invested with an equitable interest in the fund to arise from the tax, could have no less effect than to impede the due administration of justice. Without further extending this discussion, we conclude that the rule which dispenses with the refunding bondholders as necessary parties in their own proper persons in respect to the fund in question, treating them as constructively before the court through the city as their trustee, is the best in legal analogy, and the most wholesome in effect.

This brings us to the question of parties in its relation to the third item of relief in the prayer, the right to a tax levy for payment of the demands. At the threshold of that inquiry we are met with the contention in the brief for appellant that, for reasons specified, the appellee showed no cause of action for that relief. If this be true, the question of parties as to it becomes abstract, and need not be answered. *Sibley v. Hayes*, 96 Tex. 84, 86, 70 S. W. 538. We therefore feel authorized to examine into the points thus raised as preliminary to a decision of the ultimate matter of parties. Without pausing to inquire how far an attack on appellee's bonds would be concluded by the judgments in his favor for interest thereon (see Mayor

v. Lord, 9 Wall. 409, 19 L. Ed. 704, and *Brownsville v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780), we may safely assume, in the light of a former adjudication of this court on the subject, the entire validity of the contract under which the water and light bonds were issued and sold, including the tax levy provided for as a part of its obligation. *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960. The contract for the bonds being valid when made, inclusive of the stipulation for tax rate to be levied for their payment, any subsequent legislation, whether consisting of a legislative enactment or municipal ordinance passed under legislative authority, impairing the obligation of the contract, either as to its validity or means of enforcement, as by withdrawing or limiting the taxing power without providing a substantial equivalent, would in so far be utterly void as violative of the contract clause of the national Constitution. *Const. U. S. art. 1, § 10*; *Murray v. Charleston*, 96 U. S. 436, 24 L. Ed. 760; *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620. The result would be to require the courts to pursue the same course and remedies in enforcement of the contract as they would had such invalid legislation never existed. *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090; *U. S. ex rel. Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 408; *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560; *Selbert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161. In no other manner could the supreme law of the land be accorded pre-eminence. It follows that, in the absence of some special reason to the contrary, the holders of the outstanding unrefunded water and light bonds, to which class appellee belongs, are entitled to have assessed, levied, and collected (*City of Houston v. Voorhies*, 70 Tex. 356, 8 S. W. 109, and *East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. 739, 30 L. Ed. 798), in disregard of subsequent inconsistent legislation and the proceedings thereunder, such proportionate part of the contractual tax of \$1.11½ on the \$100 worth as \$322,000, the amount of the unrefunded water and light bonds, bears to the total issue of \$1,400,000, or bears to the remainder after deducting from the total issue such of the bonds as may have been retired out of the sinking fund provided for them. Presumably this contractual tax will be sufficient, under the city's taxable values, to pay the interest and provide for the requisite sinking fund, and hence no question is likely to arise as to whether, if insufficient, an implied duty would rest upon the city, within its taxing power, to levy an additional tax for the purpose. See *U. S. v. New Orleans*, 98 U. S. 351, 358, 26 L. Ed. 395; *City of Austin v. Nalle*, 85 Tex. 541-542, 22 S. W. 668, 960; and *U. S. v. Magn Co.*, 99 U. S. 582, 25 L. Ed. 331.

But if all this be conceded, appellants still

attack appellee's right to relief on several grounds. Claim is made that requisite formal demand and refusal do not appear. Specific demand and refusal are indispensable whenever necessary to show default in the duty to be commanded. In this necessity to show default is to be found the underlying reason of the requirement. Here the facts develop conclusively that it was the city's unconditional legal duty, certain and known, to make the levy under its contractual obligation, without demand, and that, in view of its conduct, there would have been refusal to comply if a demand had been made. Under these circumstances, there was no defect in the case for want of a more formal demand and refusal. The authorities on the subject have been extensively collated in a recent text (19 Am. & Eng. Ency. of Law [2d Ed.] pp. 759-761), but we deem it unnecessary to review them on a matter so obvious.

It is also contended that, as to so much of the demand as was not reduced to judgment, the mandamus should not go; but in view of parts of the claim having been put in judgment, and because the tax levy sought is a specific contractual obligation, it was proper practice in a state court to obtain judgment on the demand, and a writ of mandamus for its enforcement, in the same suit. *Dillon's Municipal Corps.* (4th Ed.) §§ 852-853; *City of Houston v. Emery*, 76 Tex. 282, 13 S. W. 264.

Insistence is made that appellee is not entitled to a tax levy because, as to the future, his action is premature, and, as to the past, it is too late to make a lawful levy. This claim demands careful scrutiny, since its effect, if sound, will be to destroy a solemn contractual obligation either "on the upper or nether millstone," as it would be an easy matter to fight off the execution of a mandate beyond the year. The writ of mandamus, being a command based on default of duty, cannot go to the future in advance of default (*Commissioners v. Allegany County*, 20 Md. 449, 460; *High on Extra Remedies*, §§ 12, 144); but there is no reason why it may not extend to the future in redress of a past default, and we hold that it may. Any other rule would often compel the courts to make an en masse levy in one year, although it might be essential to the very life of the municipality to parcel it through years of the future. As regards its being too late to levy for past years, we observe that the present requirement of the city's charter for the levy to be made by the council "at the first regular meeting in May of each year" (Sp. Laws 1st Called Sess. 1901, p. 12, c. 4) was not in the charter when the bonds were sold, the provision then being merely "to levy and collect annual taxes." Sp. Laws 1891, p. 105, c. 22. It is familiar that, as a general rule, the mandate will go for a levy only in the manner and at the time prescribed by law (*Desty's Taxation*, vol. 1, p. 533), but this gives no countenance

to the claim that by neglect to perform the contractual obligation of making a levy at the time directed by law, the duty can be entirely escaped. It would be a reproach to the law to so hold. The duty in such case is a continuing one that may be exercised under judicial mandate by relation back, else there would be the anomaly in our jurisprudence of reward accorded to default, of practically a new mode for the discharge of contracts. In *City of East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. 739, 80 L. Ed. 798, the requirement, as here, was of an annual levy to provide for payment of bonds, which had been neglected for several years, and it was objected that a tax could not be levied in one year sufficient in amount to make good the past defaults and pay the entire demand at once. The contention was disposed of in the opinion by Mr. Chief Justice Waite as follows: "It only remains to consider the objection that a tax cannot now be levied sufficient in amount to pay the entire judgment at once. The judgment is for interest in arrear and a small amount of principal. The law required a tax to be levied annually sufficient to pay all interest as it accrued, and the principal when due. This was neglected, and consequently there is now a large accumulation of debt which ought to have been paid in installments. Thus far the inhabitants have been allowed to escape taxation at the times it ought to have been laid, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation. Such being the case, we see no reason why it was not in the power of the court to order a single levy to meet the entire judgment, which was all for past-due obligations. Whether such a tax would be so oppressive as to make it proper not to have it all collected at one time was a question resting in the sound discretion of the court in ordering the collection. There is nothing here to show that there ought to have been a division."

But it is insisted that, under special constitutional restraint, levy for the past years cannot be made, and we are cited to section 5, art. 11, Const. Tex., in these words: "Cities having more than ten thousand inhabitants may levy, assess and collect such taxes as may be authorized by law, but no taxes for any purpose shall ever be levied for any one year, which shall exceed two and a half per cent. of the taxable property of such city." The specific contention is that the percentage of tax omitted to be levied in the past years for the unrefunded bonds, if added to the percentage now being validly levied as to such bonds, will exceed the 2½ per cent. limit imposed. The bondholders in question took their bonds subject to the law in force at the time, including this constitutional limitation upon the taxing power of the city, and the courts cannot send the writ

of mandamus beyond the taxing power as prescribed by law. *Huldekoper v. Macon*, 99 U. S. 582, 25 L. Ed. 331; *Commissioners v. King* (U. S. App.) 67 Fed. 202, 14 C. O. A. 421. The question, therefore, recurs to the meaning of the constitutional provision. It does not, be it observed, say when the taxes authorized shall be levied, assessed, or collected, nor does it limit the percentage of taxes to be levied in any one year, but only "for" any one year. It is certainly a natural construction of the language to hold that it fixes a limit, not to taxes levied in (that is, "within the bounds or limits of") any one year, but to taxes levied for (that is, "with reference to the needs, purposes, or uses of") any one year. See Cent. Dict. A different construction would be bad in policy; it would enable a city, by neglect of its own duty, to evade its contractual obligations. Courts should be loth to adopt a construction, especially of the organic law, that would encourage or open the way to wrong. In *Sutherland's Statutory Const.* §§ 321-322, it is pointed out that, even where the precise intent is not plain, "the effects and consequences enter with more or less force into consideration," and reference is made to the early case of *Wales v. Stetson*, 2 Mass. 146, 3 Am. Dec. 39, in which it is held that, construing the provisions of a law, "they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing rights of the public or of individuals be not infringed." There is a dearth of authority on the particular subject, the only case on the precise point to which we have been cited being that of *Bowen, County Treasurer, v. West* (decided by the Court of Appeals of Colorado) 50 Pac. 1085, in which a statutory provision similar in terms was construed in accord with the views we have announced. We conclude that, consistently with the constitutional provision in question, a tax provided for as part of a contractual obligation may be levied for each omitted year, so far as it is, in connection with other taxes valid as to it, within the $2\frac{1}{2}$ per cent. tax limit for that year, unless defeated by laches or limitation (*Teat v. McGaughey*, 85 Tex. 478, 22 S. W. 302; *Sayles' Ann. Civ. St. Tex.* 1897, art. 3358), although the levy for such year may be actually made in a future year, and may, when added to the valid taxes for such future year, go beyond the limit noticed. In other words, to such a levy in a future year, the constitutional limitation in question does not apply.

The other contentions made against appellee's right to a tax levy are not such as to require special notice.

Finding no good reason advanced for treating as abstract the question of parties in its relation to appellee's right to a tax levy, we proceed to consider that question. In view of what has already been said as to parties on the other branch of the case, it will not be necessary to here elaborate. No duty of

any nature is required of the refunding bondholders as to the tax levy. They are without interest in the controversy, the right to the tax levy, or in the subject-matter, the taxes to be raised from the levy, or in the event or object of the suit—the application of such taxes. The judgment sought would not affect any interest of theirs. The most to be said is that, in the course of the litigation, points of law may be determined that will make a precedent harmful of their interests in some other litigation; but this, of course, is insufficient as a reason for making them parties. It is perfectly plain, both on principle and under the authorities we have before cited, that the refunding bondholders were not necessary parties on this branch of the case.

In reaching the conclusions announced, under which provision will doubtless have to be made some time for payment of the unfunded bonds, we have been deeply sensible of the great burden of debt on the city for which, in view of its deplorable loss of the dam, it has no substantial equivalent; but we cannot permit such considerations to weigh against our plain duty under the law, especially as we are entirely persuaded that to meet the obligations without taint of repudiation will be better for the public interest, better for the administration of justice, better for the ultimate destiny of the city. In so saying, we but tread in the steps of able jurists who have gone before. Mr. Justice Stayton, in a somewhat similar case, used this language: "The record illustrates the embarrassments under which the city labors, and its heavy weight of debt; but this was voluntarily contracted, and, when called upon to enforce its payment, the courts have a simple duty to perform, from which seeming hardships cannot be permitted to divert them." *Voorhes v. Houston*, 70 Tex. 342, 7 S. W. 684. Judge Cooley, in the same line of thought, observed: "It sometimes happens that a municipality is found to have contracted indebtedness to an extent that is felt to be extremely burdensome, and then a local sentiment may spring up in favor of refusing to raise the necessary taxes for its payment. The purpose may be either to avoid the payment altogether, or to postpone it for a time, or, perhaps, to force a compromise with creditors and an abatement. Whatever may be the purpose, the refusal to levy taxes to meet municipal obligations according to terms is a public wrong." *Cooley's Taxation* (2d Ed.) p. 75. Mr. Justice Swayne, pronouncing judgment for the United States Supreme Court, pertinently declared: "The counsel for the plaintiffs in error has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as, personally, we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise

to the contract, the law, the legal rights of the creditor, and our duty to enforce them." *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 561.

We answer the questions certified, that the refunding bondholders were not necessary parties in *propris personis*, either as to the part of the case relating to the money and uncollected taxes, or as to the part concerning the tax levy, and that consequently the Court of Civil Appeals erred in the particulars of inquiry.

PADEFORD, J. I concur in the well-considered opinion of the Chief Justice filed herein.

Whenever a person has the possession, title, and management of property or funds for the benefit of others, to that extent which makes him the legal owner and possessor of such property or funds, with the duty imposed to protect the same by suit if necessary, such trustee or quasi trustee can institute and prosecute, or defend, suits affecting such property or funds, without the necessity of joining those interested in the management and appropriation of such property or funds, and more especially is this the case, where the trust or quasi trust relationship is created by statute. This rule applies to guardians, executors, and administrators of decedents' estates, statutory assignees, etc.

With equal if not with more force does this rule apply to defendants upon whom the statutes of this state impose the duty not only of raising by taxation, but of investing and preserving, the funds in controversy for all persons interested therein. It is made the duty of the city of Austin, if necessary to preserve this fund, to institute suit, and such suit can be instituted and prosecuted to final judgment by the city alone, as was done in the case of *City of Sherman v. Williams*, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66. It is equally the duty of the defendant, when a suit is instituted against it with reference to this fund, to see that it is legally appropriated. The law creating and imposing this trust or quasi trust relationship upon the defendants makes it a criminal offense, and a forfeiture of their offices, for a failure in the performance of this duty. Such being the relationship of the defendants to this fund, they could, and it was their duty by plea and proof, to present to the court all of the rights of all of the parties beneficially interested in this fund, without the necessity of joining such parties.

Again, where by reason of the number of the beneficiaries it is inconvenient to make them parties, it is the rule that such beneficiaries are not necessary parties. In accordance with both of the above principles or rules of procedure, the refunding bondholders were not necessary parties to this suit.

MINOR, J. I concur in the opinion of the majority of the court as to the questions de-

cided, but not in all the reasoning of the opinion.

In my opinion, there was no necessity to make the refunding bondholders actual parties to the suit; wherefore both of the questions certified should be answered in the affirmative.

As to the relief sought relating to the fund in the treasury and the levied but uncollected taxes, the refunding bondholders were constructively before the court, through virtual representation by the city as trustee of said funds for the benefit of those entitled to it.

As to the other relief sought—the levy and taxes to pay appellee's judgments—the authorities show clearly that there was no necessity to make said bondholders parties.

Upon the questions incidentally passed upon by the majority of the court, it is my opinion:

1. That, under the pleadings of appellee and the facts found, appellee had no right to a mandamus directing tax levies for the year 1904 and subsequent years, because said writ cannot be issued in advance of default.

2. That, under the pleadings of appellee and the facts found, appellee was entitled to the writ of mandamus to compel levies of taxes for the previous years in which there were no levies for his benefit. Upon none of the grounds presented in appellants' brief can this right be denied.

FEATHERSTONE v. FOLBRE, Judge.

(Supreme Court of Arkansas. May 27, 1905.)

COURTS — JURISDICTION — PROBATE COURT — MANDAMUS TO COMPEL GRANTING OF APPEAL.

Under Const. art. 7, § 14, providing that circuit courts shall have power to issue all necessary writs to carry into effect their general and specific powers; section 4, art. 7, providing that the Supreme Court shall have a general superintending control over all inferior courts, and in aid of its appellate and supervisory jurisdiction have power to issue writs of error and other remedial writs, and under the provision that appeals from the probate court must be taken to the circuit court and from thence to the Supreme Court—the Supreme Court has no jurisdiction to issue a writ of mandamus directing a probate judge to enter a nunc pro tunc order granting an appeal to the circuit court, it being a matter exclusively for the circuit court.

Mandamus by L. P. Featherstone, as administrator of Mary A. Cole, deceased, against T. C. Folbre, as judge of St. Francis probate court. Writ denied.

This is a petition to this court for a writ of mandamus directing T. C. Folbre, as judge of St. Francis probate court, to enter a nunc pro tunc order as of the April term, 1900, of said court, granting to petitioner an appeal from the judgment of the probate court rendered against him on January 29, 1900, for \$991.28; affidavit for appeal from the judgment having been filed by him, etc.

J. R. Beasley, for petitioner.

WOOD, J. (after stating the facts). The application is made direct to this court because it is said "the circuit court will not be in session until next March, and the necessity is urgent," etc. Section 14 of article 7 of the Constitution provides: "The circuit courts shall exercise a superintending control and appellate jurisdiction over county, probate, court of common pleas, and corporation courts and justices of the peace, and shall have power to issue, hear and determine all the necessary writs to carry into effect their general and specific powers, any of which writs may be issued upon order of the judge of the appropriate court in vacation." Section 4, article 7, provides: "The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity. And, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of errors and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and other remedial writs, and to hear and determine same." The aid of this court is asked to perfect an appeal from the probate to the circuit court. That is a matter, under our present Constitution, exclusively for the circuit court. The circuit court only has power to issue this writ in order to carry into effect its appellate jurisdiction over the probate court. The framers of the present Constitution, under section 14, art. 7, supra, lodged the power in the circuit courts to perfect their appellate jurisdiction over inferior courts, and to this end gave them authority to issue "all necessary writs." The writ, it will be observed, is not asked in aid of any appellate or supervisory jurisdiction of this court over the probate court, but is asked only in aid of the appellate jurisdiction of the circuit court. The language of our present Constitution differs from that of all prior Constitutions (except that of 1861) in that it gives the Supreme Court power to issue the various writs enumerated in section 4, art. 7, "in aid of appellate and supervisory jurisdiction." These words were doubtless used by the makers of the Constitution having in view the original laws that had been adopted prior thereto, and the decisions of this court construing them. "From the organization of the state, in 1836, until 1851, a period of fifteen years," says this court in *Price & Barton v. Page*, 25 Ark. 527, "this court held that it had original jurisdiction to grant writs of habeas corpus, mandamus, and quo warranto, and to hear and determine same. In 1851 this court changed its opinion, and held, as long as the Constitution of 1836 remained in force, that this court did not have original jurisdiction of any character, and that writs specifically named in the Constitution could only be used as a means of

superintending control, and in aid of the appellate jurisdiction of the court." The framers of the Constitution of 1874, doubtless having in view the construction that had been put upon the Constitution of 1868 and the prior Constitution by the decision in *Price & Barton v. Treasurer*, supra, and the earlier decisions, adopted the language in the present Constitution so as to make it certain that the Supreme Court had no original jurisdiction to issue the writ enumerated in section 4, art. 7, supra. Hence it used the language "in aid of its appellate and supervisory jurisdiction it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus, and other remedial writs," etc. The Constitutions of 1836, 1864, and 1868 omitted the words "in aid of its appellate and supervisory jurisdiction," which is significant. Under our judicial system appeals from all tribunals inferior to the circuit courts go to the circuit courts, and from the circuit courts to this court. This court has no original jurisdiction to control or supervise any proceedings of the probate court. That all belongs to the circuit courts as matters of original jurisdiction, and to this court by appellate and supervisory jurisdiction over the circuit courts. This court supervises and controls all inferior courts to the circuit courts only through the latter courts. In no other way can the harmony of our judicial system as at present constituted be preserved. Construing the two sections of the Constitution as above quoted, our conclusion is that the framers of the Constitution of 1874 did not intend to confer upon the Supreme Court concurrent jurisdiction with the circuit courts to issue writs of mandamus, etc., in aid of the appellate and supervisory jurisdiction of the circuit courts over those courts, but only in aid of its own appellate and supervisory jurisdiction; and its supervisory jurisdiction over the probate courts comes not originally, but by way of appeal and supervision through the circuit courts.

ST. LOUIS SOUTHWESTERN RY. CO. v. ROYALL et al.

(Supreme Court of Arkansas. May 27, 1903.)

PUBLIC ROADS—ESTABLISHMENT—ASSESSMENT OF DAMAGES—RAILROAD RIGHT OF WAY—ESTABLISHMENT OF CROSSING—COMPENSATION.

Under Kirby's Dig. § 3001, relative to the opening of public highways, and declaring that viewfers shall be appointed to assess the damages sustained by any person through whose premises the road is proposed to be established, and section 6881, declaring that, when any public road shall cross any railroad, the railroad company shall construct the crossing, and also keep it in repair, the railroad company is entitled to no compensation for constructing the crossing or keeping it in repair, but is entitled to damages for the establishment of the road across its right of way.

Appeal from Circuit Court, Clay County, Eastern District; Allen Hughes, Judge.

Petition by B. L. Royall and others for the appointment of viewers to lay out a public road, in which the St. Louis Southwestern Railway Company intervened. From a judgment denying to intervenor the relief sought, it appeals. Reversed.

The appellees in 1902 filed a petition in the county court of Clay county, asking the court to appoint viewers to lay out a public road. The viewers were appointed, and afterwards made a report recommending that the road be established. The line of the proposed road crossed the track of the St. Louis Southwestern Railway Company, and this company filed an intervening petition before the county court, in which it alleged that it would cost not less than \$500 to prepare its track and roadbed so as to make it a safe public crossing, and that it would require \$25 to keep such crossing in repair, and that the right to cross over its track was of the value of \$50, but that the viewers appointed to assess the damages sustained by any person through or across whose premises the road was located had failed and neglected to assess any damages to the intervening company for condemning a crossing over its track and right of way, wherefore it asked the court to set aside the report of the viewers, and to allow the company damages for crossing its right of way. The court ordered the company to be made a party to the proceeding, but held that it was not entitled to any compensation on account of the laying out of the public road across its track, and gave judgment against it. On the appeal to the circuit court the same ruling was made, and the company appealed.

S. H. West and J. C. Hawthorne, for appellant.

RIDDICK, J. (after stating the facts). This is an appeal by a railway company from a judgment of the circuit court holding that under the statute it was not entitled to any compensation on account of the laying out of a public highway across its track. The statute in reference to laying out and opening public highways requires that viewers shall be appointed, who "shall assess and determine the damages sustained by any person through whose premises the said road is proposed to be established mentioning the damages to each tract separately." Kirby's Dig. § 3001. It would seem that under this provision of the law it was the duty of the viewers to assess the damages sustained by the company by reason of the laying out and establishing the roadway across its track, unless the statute permits highways to be established across the right of way and roadbed of the company without compensation for damages. But we find nothing in the statute that gives such authority. The statute provides that, when any public road or highway shall cross any railroad, the railroad company shall construct the crossing, and also

keep it in repair. Kirby's Dig. § 6681. Now, this does not say that any public road may be established and opened across a railroad without compensation, but that, when public highways are established across a railroad, the railroad company must construct the crossing and keep it in repair. We think it may well be inferred from the language of this statute that no compensation was intended to be paid the company either for constructing the crossing or for keeping it in repair. When a highway is established across a railroad track in this state, it becomes its duty, under this statute, to construct the crossing and keep it in repair. This is a police regulation, and similar provisions are found in the statutes of other states. As nothing is said in the act about compensating the company for this burden which the law places upon it, we think that none can be implied. It seems plain to us that none was intended, for it is not usual to allow compensation for expense of obeying a police regulation. *Railroad v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. The burden of keeping up the public highways rests upon the citizens and property owners of the state, and it is not unreasonable to require that the railroad company should keep that portion of the highway where it crossed its track in repair. For this reason, we are of the opinion that the circuit court correctly held that the company was entitled to no compensation for constructing the crossing and keeping it in repair.

But the question of establishing the road across the right of way without compensation or without any assessment of the damages therefor is a different matter. Waiving the question of whether it is in the power of the Legislature to compel a railroad company to give a crossing over its right of way without compensation, we, as before stated, find nothing in the statute which authorizes the establishing a public road across a railroad track and right of way without an assessment of damages; and we think damages should be assessed by the viewers, just as the damages to other proprietors of land along the proposed road are assessed. Now, the report of the viewers in this case shows that they made no assessment of damages suffered by the railroad by reason of the public road crossing its track. The public does not seek to deprive the railroad of its right of way. It only seeks to condemn the mere right to cross, which would leave the company free still to use its right of way and track as it had used it before. A right affecting the use of its property by the company to so slight an extent as this country crossing would affect it would not call for any great amount of damages, but, whether large or small, the company has a right to be compensated to that extent. In the case of *Chi., B. & Q. R. Co. v. Chicago*, the facts were that the city of Chicago established a street across the tracks of a railroad in that

city. The jury that tried the case assessed the damages at only \$1, but the judgment was sustained both by the Supreme Court of Illinois and the Supreme Court of the United States. *C. B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. As the road in this case was not a street in a city or town, but a country road, if the viewers had passed on the question of damages sustained by the company by reason of the establishing of this public road across its roadbed and right of way, and had found only nominal damages, we might have sustained the finding, but they did not pass on the question at all; and the circuit court, in sustaining the demurrer to the petition of the company, held, in effect, that under the statute the company was not, as a matter of law, entitled to any damages. But as before stated, we are of the opinion that the company had the right to have the question of whether it was damaged, and the amount of such damage, if any, assessed by the viewers. We are therefore of the opinion that the court erred in sustaining the demurrer to the petition of the company.

Judgment reversed, with an order that the case be remanded to the county court, with directions that the viewers be required to ascertain and report the amount of damages suffered by the company by reason of the establishing the road, not including therein any damages for constructing the crossing or keeping same in repair.

WEST et al. v. BURGIE et al.

(Supreme Court of Arkansas. May 27, 1905.)

1. EXECUTOR'S SALE OF LAND — VALIDITY — PAYMENT OF PURCHASE PRICE BY GRANTEE — EVIDENCE.

In a suit to set aside an executor's deed on the ground that the name of the defendant as grantee was fraudulently inserted, evidence examined, and held to show that the defendant paid the purchase price.

2. SAME—DEED TO THIRD PARTY.

The validity of an executor's sale of land is not affected by the fact that the deed was made to the husband of the successful bidder at her request, even though the purchase price was paid by the wife.

Appeal from Chicot Chancery Court; Marcus L. Hawkins, Chancellor.

Action by R. B. West and others against Samuel Burgie and others. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

In December, 1871, one Curtis Garrett died, leaving a farm near Lake Village, in Chicot county, on which he resided at the time of his death, and other lands in the same county, and leaving his wife, Elizabeth, but no children. He also left a will, naming one Drusilla Acre as executrix. The wife dissented from the provision made for her by the will, and instituted proceedings in the probate court for assignment of her dower, and on the 12th day of September, 1873, the lands

involved herein were set apart to her as her dower in the real estate. Also one-half of the personal assets, amounting to about \$1,800, was received by the widow as dower. On the next day, September 13, 1873, upon the petition of the executrix, the probate court ordered a sale of the lands of the estate, including the reversionary interest in the dower lands, to pay claims probated against the estate. About April 15, 1873, the widow intermarried with the defendant Samuel Burgie. In accordance with said order, a sale of the lands was made on the 27th day of December, 1873, and the report thereof by the executrix was approved and confirmed by the court on January 17, 1874, and the report, the substance of which is stated in the order confirming the same, sets forth that the reversionary interest in the dower lands was sold "to Mrs. Elizabeth Burgie for the sum of \$600, she being the highest bidder therefor," and "that said purchasers had paid one-half of the amounts bid for said land, and executed their notes, respectively, for balance, payable in twelve months, with 10 per cent, and deed withheld until payments are made." No other order of the court appears to have been asked or made thereafter with reference to the sale of these lands, but a deed dated November 26, 1877, was executed by the executrix to the defendant Samuel Burgie, whereby she attempts to convey to him the reversionary interest in said lands, in which deed she recites the order of the probate court as authority for said sale, and, among other things, recites that she "did sell all of the lands of said estate on the 27th day of December, 1873, at which sale Elizabeth Burgie became the purchaser of that portion of said lands hereinafter described. And whereas, it is represented and appears to me, by the statements of said Elizabeth Burgie and of D. H. Reynolds, her attorney, then and now acting for both her and Samuel Burgie, that said bid was intended to be and should have been made in the name of Samuel Burgie, and said sale should have been confirmed in his name; and whereas, said Samuel Burgie then and there paid one half of the purchase money in cash and the remaining half has subsequently been paid, with interest, according to the terms of said sale; and whereas, report of said sale was duly made to the probate court of said county, and by it confirmed, and said Samuel Burgie now demands of me a deed to said lands." This deed was not acknowledged and filed for record until November 21, 1882—five years from its date, and nearly nine years from the date of the sale made by order of the probate court. Elizabeth Burgie died on the 4th day of February, 1895, and appellants, as her heirs at law, bring this action on the 22d day of July, 1901, to cancel the deed of Samuel Burgie, and incumbrances on the property made by him to the other defendants. The bill alleges "that the said defendant Samuel Burgie, with the fraudulent design and purpose of cheating and defrauding his said wife

and her heirs out of said property, and in utter disregard and violation of the confidence reposed in him by his said wife, as aforesaid, by false representations procured and obtained a deed from the said executrix of said estate of Curtis Garrett, deceased, pretending to convey said reversionary interest in said lands to him, the said Samuel Burgie, instead of said Elizabeth Burgie, the real purchaser and rightful owner thereof." The separate answer of Samuel Burgie denied separately and specifically all the allegations of the complaint, including the one charging fraud as above quoted. He further alleges that he had in money \$568 when he married, and that \$530 of this went into his wife's hands for debt and her own use; that he made a crop in 1873 on this land, and from money on hand and proceeds of crop he made first payment of \$300 in December, when the land was sold; that Gen. Reynolds represented both himself and his wife, and had represented her for years before his marriage; that the land was bid off by Reynolds in his wife's name, but that it had been the understanding distinctly made between him and his wife in advance of the sale that the same should be bought in his name; that both payments for the land were made through Reynolds, who had his (Burgie's) money in his hands; that the last payment was delayed for several years from neglect of Reynolds, and when made Reynolds was informed of the agreement between himself and wife, and Reynolds was directed by the said Elizabeth Burgie to have the deed made to him by the executrix of Garrett, and that he paid the purchase money; that he had exclusive management and control of the place after his marriage, and labored himself, and always made good crops thereon; that only a small portion of the place was cleared, and he cleared, farmed, and put houses on 125 acres; that a part of said land—being north half southwest fractional quarter, section 11, township 16 south, range 2 west—was under a mortgage to Real Estate Bank, and had been foreclosed and bought in by the state; that he acquired the title of the state thereto by purchase. By an amended answer Burgie alleges that he had expended on the land \$7,000 in permanent and lasting improvements and taxes, believing himself to be the owner thereof; that he had also paid the purchase money; and that plaintiffs were estopped from claiming the land after seeing him expend his labor and all his income for 25 years on said land. The other defendants answered, claiming certain interests in the land through Samuel Burgie. The court heard the cause upon the pleadings and exhibits and of witnesses, and dismissed the complaint for want of equity.

B. F. Merritt, for appellants. John G. B. Simms and E. A. Bolton, for appellees.

WOOD, J. (after stating the facts). The burden to show fraud in the deed was on appellants, and they have failed to make the

proof. On the contrary, Burgie has made good by his proof the denial in his answer of the charge of fraud. It appears that John G. B. Simms was the attorney for the executrix of the estate of Curtis Garrett. He, for her, procured from the probate court the order of sale of the lands in controversy. For her he conducted the sale, made report thereof, wrote the deed, and in fact, as attorney for the executrix, attended to the whole matter of this sale. Necessarily his relation to the transaction enabled him to testify, and to testify more intelligently, and, we are disposed to think, more correctly, about it than any one else. There are some conflicts between his testimony and that of Burgie. These have been stressed by learned counsel for appellants; also certain things which Burgie and Simms did, or failed to do, in regard to the report and confirmation of sale; all of which are urged as being inconsistent with the recitals in the deed, and as evidence of an effort to defraud Elizabeth Burgie. We may say, in this connection, if there was any fraud on the part of Burgie, Simms necessarily knew and participated in it, else the deed could not have been executed to Burgie. But we do not find any evidence of fraud on the part of either. The conflicts and inconsistencies are as to non-essentials, and, instead of tending to prove collusion and fraud, as counsel intimate, to our minds rather have the opposite effect. They indicate that natural divergence in language and recollection of witnesses who have not concocted their story, but each in his own way related the facts as he remembered them. The testimony and conduct of both Burgie and Simms we believe is entirely consonant with truth and good intention. The only testimony which appellants have introduced to show that Mrs. Burgie had no knowledge of the deed to Samuel Burgie, and that she claimed the land, was that of two witnesses to the effect that they heard Mrs. Burgie say some time in 1892 or 1895 "that the place was hers." These remarks are testified to having been made by Mrs. Burgie some 12 or 15 years after the execution of the deed. On the other hand, more than two witnesses heard her say long after the execution of the deed that the land belonged to Mr. Burgie. These are not essentially in conflict. If so, the preponderance is with the appellee. But Mrs. Burgie did have a dower interest in the land, and had long lived on it with her first and second husbands, and she might have spoken of the place as belonging to her without any thought of making the impression that she was the absolute owner, but only to express the idea that she had an interest in it, and claimed it as her home, and that she would not part with her interest. That she did not claim an absolute estate in the land is more convincingly shown by her conduct in joining in several conveyances after the deed in controversy had been executed, in which she only relinquished dower. This solemn act

in writing, of record, is a more cogent argument that she knew she had only a dower interest in the land than is any mere vague and loose declaration that the "place was hers" of the fact that she knew or believed that she was the owner of the fee. So again the preponderance is in favor of the appellee. Witness Jno. G. B. Simms testified that "the recitals of the deed as to the reasons why it was made to Samuel Burgie instead of to Elizabeth Burgie are absolutely correct," and we find nothing in the record to warrant a finding to the contrary.

2. The question, then, is, in view of the report and confirmation of the sale, was the deed valid? It is reasonably clear from the evidence that Burgie furnished the purchase money for the land, and, although it appears that the bid at the sale was made in the name of Mrs. Burgie, and the sale was reported as made to her, and so confirmed, yet there is abundant proof to justify the conclusion that Mrs. Burgie intended that Samuel Burgie should have the land, and that the deed, notwithstanding the report of sale and confirmation thereof to Mrs. Burgie, was made, nevertheless, in conformity to the wishes of Mrs. Burgie and the understanding between her and her husband, by the executrix to him. Even if it be conceded that Mrs. Burgie paid the purchase money, and the sale was made and confirmed to her, still no title passed until the deed was executed and delivered, and she had the perfect right to have the deed executed to whom she desired. The law concerned itself for the protection simply of the estate, and to this end would see that the purchase money was paid before the deed could be executed. This done, it was wholly immaterial to whom the deed was made, provided it was done at the request of the purchaser. The land, in equity, after the payment of the purchase money, even if made by Mrs. Burgie, was her property, and she could dispose of it as she saw proper. There is nothing in the law to interdict the executrix from making the deed as the purchaser directs, for the sale is in no manner affected thereby, and it is just a question at last in a court of equity of whether or not the purchaser desired the deed made in the name of another. 2 Woerner's Am. Law of Adm'n, §§ 480, *1067-68; 11 Am. & Eng. Ency. Law (2d Ed.) p. 1155; Ward v. Lowndes, 96 N. C. 367, 2 S. E. 591; McKee v. Simpson (C. C.) 36 Fed. 248. The deed was valid.

Decree affirmed.

LOUISIANA & NORTHWEST R. CO. v. STATE ex rel. ATTY. GEN.

(Supreme Court of Arkansas. May 27, 1905.)

1. FOREIGN RAILROAD CORPORATIONS—RIGHT TO LEASE AND OPERATE IN THE STATE—FRANCHISES AND CHARTER RIGHTS—PROCEEDINGS TO FORFEIT.

The terms of Acts 1901, p. 368, § 1 (Kirby's Dig. § 6749), providing for a forfeiture of

"the franchise and all charter rights" of any railroad in and to all railroad property, and the right to operate the same, acquired by it under a lease not made in conformity with the statute governing the making of such leases, are applicable to a foreign railroad corporation operating in the state under a lease; and hence a suit against such corporation can be maintained under section 2 of the act (Kirby's Dig. § 6750), providing for its enforcement by information in the nature of quo warranto, or other proper suit.

2. SAME.

The fact that the corporation's right in the state authorizes a contract—a lease—cannot alter its status, as a contract made under a franchise cannot reach beyond the rights acquired by the franchise itself, and afford immunity from public duties.

3. SAME—RETROSPECTIVE STATUTE.

The act is not retrospective, and does not apply to a lease made before its enactment; the right being a statutory and not a common-law right of forfeiture at the instance of the state.

4. CORPORATE CHARTER—ACTION TO VACATE—QUO WARRANTO—JURISDICTION OF APPELLATE COURT.

Under Kirby's Dig. § 7981, providing that in lieu of the writs of scire facias or quo warranto, or of an information in the nature of a quo warranto, actions by proceedings at law may be brought to vacate or repeal charters and prevent the usurpation of an office or franchise, and section 7982, providing that actions to repeal or vacate a charter shall be in the name of the state, and brought or prosecuted by the Attorney General, or under his direction, while the Supreme Court has jurisdiction to issue, hear, and determine the writ of quo warranto in aid of its appellate jurisdiction, the writ and information, as an original proceeding, are abolished.

5. SAME—RIGHT TO TRIAL BY JURY.

Acts 1901, p. 368, § 1 (Kirby's Dig. § 6749), provides for a forfeiture of "the franchise and all charter rights" of a railroad in and to all railroad property, and the right to operate it acquired under a lease, in case the lessee railroad fails to maintain the property in good repair, "so as to afford safe and reasonably prompt facilities of travel to the public." Section 2 (Kirby's Dig. § 6750) provides for the enforcement of the act by information in the nature of quo warranto, or other proper suit, in any court having jurisdiction. *Held*, that in a proceeding under the act, in a court of original jurisdiction, to forfeit the franchise and charter rights of a railroad company, defendant had a constitutional right to a jury trial on the question of fact as to whether it had maintained the property in good repair, etc.

Appeal from Circuit Court, Columbia County; Minor Wallace, Special Judge.

Proceeding by the state, on the relation of the Attorney General, against the Louisiana & Northwest Railroad Company and another. Judgment for complainant, and the above-named defendant appeals. Reversed.

This suit was brought under sections 6749-6751, Kirby's Dig., which in original form was as follows:

"Be it enacted by the General Assembly of the state of Arkansas:

"Section 1. The franchise and all charter rights whatsoever of any railroad company in and to all railroad, roadbed, bridge, depot, or other railroad property, as well as the possession of, and right to operate same, which may have been acquired by such railroad un-

der and by virtue of any lease, shall be forfeited and such railroad company ousted of its right thereunder to operate, possess or control the same, if such lease shall not have been made in conformity with the statute governing the making of such leases, or if such lessee shall fail to maintain said property in good repair so as to afford safe and reasonably prompt facilities of travel to the public, or shall fail to furnish reasonable shipping accommodations for freight to its patrons.

"Sec. 2. This act may be enforced at the instance of the state by her Attorney General, by information in the nature of quo warranto, or other proper suit in any court having jurisdiction.

"Sec. 3. That whenever any railroad company shall, by the judgment of any court, rendered in any suit instituted by the state, be ousted of the possession of or right to operate, any railroad, bridge, depot or other property leased to such company by any other railroad company, then such lessor shall immediately succeed to all the rights in and to said leased property, had and enjoyed by it at the time of the execution of such lease: provided such lessor shall have been in no way responsible for the acts upon which said judgment was based, except in the making of said lease.

"Sec. 4. That all laws in conflict herewith are hereby repealed and this act take effect from and after its passage."

Approved May 23, 1901 (Acts 1901, p. 368).

The complaint, filed October 22, 1901, was as follows: "The state of Arkansas, by her Attorney General, states and shows to the court that the defendant the Louisiana & Northwest Railroad Company is a railroad corporation organized under the laws of the state of Louisiana; that some time in April, 1897, the said Louisiana & Northwest Railroad Company pretendedly leased for 21 years from the defendant the St. Louis Southwestern Railway Company a certain line of the railroad, a branch of the said St. Louis Southwestern Railway Company, running from the town of McNeil to Magnolia, Columbia county, Arkansas, a distance of six and four-tenths ($6\frac{4}{10}$) miles, known as the Magnolia Branch, together with the right of way and all appurtenances thereunto belonging; that defendants are requested to attach a copy of said lease to their answer; that no notice of the making of said lease, or of the meeting of the directors at which it was made, was ever given as provided by law, nor was the making of said lease ever approved by a two-thirds majority of the stockholders or directors of said St. Louis Southwestern Railway Company; that said Louisiana & Northwest Railroad Company had not filed with the Secretary of the State of Arkansas its articles of incorporation as required by law. Plaintiff further alleges that said Louisiana & Northwest Railroad Company has for a long time past negligently,

knowingly, and willfully permitted the said line of railroad leased to it as aforesaid to decay, to be out of repair, to become unsafe and wholly unreliable in the carriage of passengers and freight between McNeil and Magnolia, Arkansas; that said Louisiana & Northwest Railroad Company has failed and refused to furnish cars or reasonable transportation for freight along said railroad leased as aforesaid, and has refused to take freight when tendered it at Magnolia for McNeil and other points on the main line of the railroad connected therewith. Wherefore he prays that a writ of quo warranto be issued, directed to and served on said Louisiana & Northwest Railroad Company and said St. Louis Southwestern Railway Company, commanding them to appear before this court and show cause, if they can, why the right and franchise of said Louisiana & Northwest Railroad Company to possess, use, and operate said line of railway under said lease, and all other property described in said lease, should not be declared forfeited and taken from it, and it be ousted of the possession and the right to the possession thereof."

Every material allegation of fact was put in issue by specific denial and positive allegation affirming the contrary of the facts alleged by the state. Issues of law were also raised, which are discussed in the opinion. The case was tried before the court, a jury trial being denied, and the following judgment entered: "And now, it appearing to the court that the defendant the Louisiana & Northwest Railroad Company, at and before the institution of this suit was, and still is, operating the railroad extending from Magnolia, Arkansas, to McNeil, Arkansas, a distance of six and four-tenths miles, and known as the Magnolia Branch, under a written contract of lease executed in April, 1897, with its codefendant; and it further appearing that said lease was not executed under authority of law, and not in accordance with the statute directing how such leases may be made, the court finds that said lease is invalid and of no effect; it further appearing that at the time of the institution of this suit, and for a long time prior to said time, the defendant the Louisiana & Northwest Railroad Company did not maintain said railroad in a condition so as to afford to the traveling public reasonably safe facilities of travel, and at and during said time did not furnish to its patrons reasonable shipping accommodations for freight, and that such failure was willful, unnecessary, without reasonable excuse, and was continuous; it further appearing that the St. Louis Southwestern Railway Company, one of the defendants herein, is not shown to have been responsible for the unsafe condition of said railroad, nor the failure to furnish proper shipping accommodations to the patrons of said road in any other way than the making of said lease—the court is of the opinion that the right

of the defendant the Louisiana & Northwest Railroad Company to any longer operate, possess, or control said railroad should be abrogated, and all of its charter rights claimed or owned by it so to do should be forfeited, and that said road should revert back to the St. Louis Southwestern Railway Company, and the possession thereof should be given to it, and that it be permitted and directed to proceed to operate said road in accordance with the law and its charter contract with the state of Arkansas. It is therefore considered, ordered, and adjudged by the court that the defendant the Louisiana & Northwest Railroad Company quit and surrender possession of the railroad extending from Magnolia, Arkansas, to McNeil, Arkansas, known as the Magnolia Branch, and described in a certain lease executed by said Louisiana & Northwest Railroad Company and its codefendant, St. Louis Southwestern Railway Company, and shall quit and surrender possession of all the depots, side tracks, and other appurtenances belonging thereto, as well as all other property covered by and described in said lease. And it is further considered, ordered, and adjudged by the court that all charter rights owned or claimed by said defendant railroad company to operate, possess, control, or in any manner interfere with said railroad, depots, and other property above described be, and is hereby, forfeited, and any effort on the part of said Louisiana & Northwest Railroad Company to attempt in any way to interfere with, operate, or possess any part or all of said railroad, the appurtenances thereunto belonging, or other property above described, shall be a contempt of the court. It is further ordered and directed that the said defendant the St. Louis Southwestern Railway Company take possession of said railroad, the appurtenances thereunto belonging and property described above, and at once proceed to operate the same in accordance with the laws governing railroad companies in this state, and that the defendant Louisiana & Northwest Railroad Company pay all costs in and about this cause expended." From this judgment the last-named railroad has prosecuted this appeal.

J. M. Moore and W. B. Smith, for appellant. Robt. L. Rogers, Atty. Gen., G. W. Hendricks, and A. S. Killgore, for appellee.

HILL, C. J. (after stating the facts). 1. It is insisted that the state has not the power to provide for the forfeiture of a lease made by a foreign corporation, and that the terms of the act providing for a forfeiture, under the conditions stated, of "the franchise and charter rights," cannot be held applicable to a foreign corporation operating in this state under lease. A foreign railroad corporation can only lease and operate in this state by virtue of express statutes permitting it to do, so, and the right to enter the state is conferred for the welfare of the state; and,

when that right is not exercised for the welfare of the state, it is within the power of the sovereignty which conferred it to withdraw it. The terms employed may not be technically accurate, but they are substantially so. This court held in *Russell v. Ry.*, 71 Ark. 451, 75 S. W. 725, that a foreign railroad corporation complying with the laws of this state becomes a domestic corporation, and capable of exercising eminent domain, which can only be exercised by domestic corporations. Hence it is not inappropriate to describe the rights acquired on the corporation becoming domesticated by conforming to the laws of this state as the "franchise and charter rights." The fact that its right in this state authorizes a contract—a lease—cannot alter its status. The lease is acquired and held only in virtue of the franchise to operate its road in that way, and is subject to the law requiring it to perform its duty to the public. A contract made under a franchise cannot reach beyond the rights acquired by the franchise itself, and afford immunity from public duties. Both franchise and lease have written in them the law requiring the performance of the duty to the public, or suffer a forfeiture of rights for dereliction in this respect. The action of the state is not against property rights acquired through the lease, and it seeks no confiscation of property, but merely a surrender of the right to further enjoy its privileges because it has failed in its duties to the public. The suit can be maintained.

2. The act is not retrospective. *Duke v. State*, 56 Ark. 485, 20 S. W. 600; *Ry. v. Sullivan*, 70 Ark. 262, 68 S. W. 495; *Ry. v. Speer*, 71 Ark. 126, 71 S. W. 267. The act provides, among other grounds of forfeiture, "If such lease shall not have been made in conformity with the statute governing the making of such leases." Clearly it is competent for the state to provide that a foreign railroad corporation shall not enjoy a lease in this state until it acquires it in conformity to the statute, and a failure to conform to the statute on the subject shall be subject of forfeiture. 2 Spelling, Inj. & Ex. Legal Rem. § 1807. In this case the lease was made long prior to the enactment of this statute rendering such failure a ground of forfeiture of charter rights. The court found that the lease in question had not been made with the approval of two-thirds of the stockholders, nor had such lease been ratified at a meeting of the stockholders—two-thirds present or represented—specially called for that purpose, as provided in section 6742, Kirby's Dig. That the lease was approved by formal action of the stockholders is not questioned. That it was approved by acquiescence and receiving the benefits of it is apparent. It was by conduct so clearly ratified that neither party could recede from it on the ground of informality in its origin. It only lacked a literal compliance with this statute. Such literal compliance was not a ground of forfeiture of

the lease when it was made, and cannot be retrospectively made such when rights are builded upon it which were enforceable between the parties, and then valid. This is a statutory, not a common-law, right of forfeiture at the instance of the state. Therefore the court erred in forfeiting the lease upon this ground.

3. The next ground of forfeiture which the court sustained was a failure to furnish the patrons of the road reasonable shipping accommodations for freight. The evidence was insufficient to work a forfeiture on this ground. There was not much evidence on this issue, most of it being directed to the passenger facilities; and what there was on the subject did not show sufficient failure in public duty to forfeit the franchise on this ground, and doubtless it would not have been forfeited upon it alone.

4. On the alleged failure to "maintain said property in good repair, so as to afford safe and reasonably prompt facilities of travel to the public," there is substantial evidence justifying the court in finding that the appellant had failed in its duty to the public in this regard. Although error was committed in adjudging the forfeiture on the other grounds, the judgment must be affirmed, unless this question of fact was one upon which the appellant had a constitutional right to trial by jury. The question in the first trial was submitted to a jury, which disagreed; and on the second trial the court held that the appellant was not entitled to a jury trial, and heard the case before the court. The appellant demanded a trial by jury, and has preserved proper exceptions to the action of the court in denying it. There was much ancient learning on the subject of writs of quo warranto and informations in the nature of quo warranto. A reference to the subject may be found in the recent case of *Moody v. Lowrimer* (Ark.) 86 S. W. 400, and the cases there cited. Those questions are academic now. While this court is clothed with jurisdiction to issue, hear, and determine the writ in aid of its appellate jurisdiction, the writ and information, as an original proceeding, are abolished by the Code. "Actions by proceedings at law may be brought to vacate or repeal charters and prevent the usurpation of an office or franchise." And actions to repeal or vacate a charter shall be in the name of the state, and brought and prosecuted by the Attorney General, or under his sanction and direction. Kirby's Dig. §§ 7981, 7982. In considering these Code changes, the court said, through Chief Justice Cockrill: "But the constitutional right to trial by jury is confined to cases which by the common law were so triable [citing authorities]; and it was decided in *State v. Johnson*, 26 Ark. 281, that the right did not extend at common law to a civil proceeding in the nature of quo warranto against a public officer. The statute does not enlarge the right, nor attempt to extend it to cases of this or like nature [a usur-

pation of office case], as was held in *Williams v. Citizens*, 40 Ark. 290. * * * No claim for fees or emoluments was made by the plaintiff." *Wheat v. Smith*, 50 Ark. 263, 7 S. W. 161. *State v. Johnson*, 26 Ark. 281, is one of the leading American authorities to sustain the view that trial by jury was not a right at common law on quo warranto proceedings to oust an alleged usurper from office. There is much conflict of authority on that question. It seems that the weight of authority is against that view, but the same rule is adhered to in *Wheat v. State*, since the adoption of the Code, when no fees or emoluments are claimed, and merely the title to the office is in question. Whether *Johnson v. State* is authority for the nature of the writ as an original proceeding under the present Constitution is not a question in this case. In the case of *Taylor and Marshall v. Beckhan*, 178 U. S. 548, 20 Sup. Ct. 1009, 44 L. Ed. 1187, the Supreme Court of the United States held that a public office was not property, and this view will unquestionably lend great weight to the line of authorities like *State v. Johnson* and *Wheat v. Smith*, denying trial by jury in usurpation of office proceedings. Chief Justice Cockrill evidently had that distinction in mind in *Wheat v. Smith*, when he called attention to the fact that fees and emoluments were not involved in that suit. When a franchise or charter is in issue, and the manifold contractual rights growing out of them, property, in its highest sense, is involved. In quo warranto proceedings at common law, brought to vacate charters, trial by jury seems universally to have been accorded to determine the facts. In *People v. Albany & Sus. R. Co.*, 57 N. Y. 161—an action by the Attorney General, in the nature of quo warranto, to try the title of directors controlling a corporation—the court said: "This issue, being strictly a legal issue in its character, is one in the trial of which, in the language of the Constitution, the trial by jury has been heretofore used. Such a trial was therefore the constitutional right of the parties." The Supreme Court of Florida said: "Our examination into the matter has conducted us to the conclusion that at the time of the Revolution the trial of pure questions of fact in such proceedings was by jury." The court then proceeds to cite and quote from the common-law authorities showing that issues of fact were uniformly triable by jury. The court proceeded: "In *Rex v. Bennett* all the judges of England were equally divided, the division being over the question whether a new trial could be granted after a verdict in favor of the defendant in such proceeding. The view that the suit was criminal then widely prevailed, but this point was finally settled in favor of the view above announced—that the action, though criminal in form, was regarded as a civil suit for the purpose of trying the right to the franchise." *Buckman v. State*, 34 Fla. 43, 15 South. 697, 24 L. R. A. 806. In *Attorney General v. Sui-*

Ivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455, the Massachusetts court said: "Without considering whether a suit or information to declare forfeited the charter of a private corporation would not be held to be a controversy concerning property, within the meaning of this article, we are of the opinion that a public office, such as that of president of the common council of the city of Lowell, is not property, within the meaning of this article." The common-law authorities showing that issues of fact in quo warranto were triable by jury are collected in this case. The Indiana court said that the decided weight of authority was that issues of fact in quo warranto proceeding were triable by jury at the time the common law was inherited by the colonies, and cites the authorities on both sides of the question. *Reynolds v. State*, 61 Ind. 393. In *Com. v. Delaware & Hudson Canal Co. et al.*, 43 Pa. 295—a proceeding by quo warranto to control the improper exercise of corporate powers, and oust the corporation from the excessive exercise of them—the court said: "It is a matter of no importance to the parties whether this authority is exercised in the common law or in equity form, provided the right of trial by jury is not interfered with, as it cannot be in this case." See, further, *People v. Doesburg*, 16 Mich. 133; *State v. Burnett*, 2 Ala. 140; *State v. Allen*, 5 Kan. 213. While some of the cases referred to, and many reviewed in those cases, are dealing with the question of public office, and their conclusions are different from the rulings of this court on the subject, yet it is thought that a consideration of them shows beyond question that, so far as franchises and corporate interests and property rights are concerned, it was thoroughly settled at common law that issues of fact were triable by jury. That being true, then that right is preserved to litigants by the Constitution. Therefore the court is of opinion that in quo warranto proceedings in courts of original jurisdiction, brought under the Code and statutory provisions, to annul, vacate, and cancel a charter or franchise or any other property right (not including title to public office), the right of trial by jury of issues of fact is a constitutional right.

The case is reversed, and the cause remanded, with directions to try the issues of fact by jury.

MAGNOLIA COMPRESS CO. v. SMITH.

(Supreme Court of Arkansas. May 27, 1905.)

SEVERABLE CONTRACTS—CONSTRUCTION.

Where a contract provided that plaintiff should furnish certain described lumber to defendant at a certain price, and that plaintiff should also have the bill for any other lumber defendant might need, the contract was severable; and a breach by defendant of the provision that plaintiff should have the bill for any other lumber it might need did not entitle plain-

tiff to disregard the contract, and sue on a quantum meruit for the lumber furnished under the contract.

Appeal from Circuit Court, Columbia County; Charles W. Smith, Judge.

Action by D. R. Smith against the Magnolia Compress Company. From a judgment for plaintiff, defendant appeals. Reversed.

This was a suit brought by the appellee, D. R. Smith, against the appellant, Magnolia Compress Company, for the recovery of the value of a lot of lumber furnished the appellant by the appellee. The complaint alleged that appellee furnished the appellant 40,000 feet of rough lumber, worth \$9 per thousand feet, to wit, \$360; that he also furnished defendant 44,000 feet dressed lumber, worth \$10 per thousand feet, to wit, \$440; that there has been paid on said amounts the sum of \$630, and there is due plaintiff \$170, now past due. Wherefore he asks judgment for said sum, costs, and other relief. The appellant answered, denying these allegations, and averring that the lumber furnished by appellee to appellant was on the following contract, to wit:

"This agreement made and entered into this the third day of April, 1899, by and between D. R. Smith and John Wilkerson, parties of the first part, and the Magnolia Compress Company, parties of the second part, all of the county of Columbia, and State of Arkansas, witnesseth:

"That the parties of the first part do hereby agree and bind themselves to furnish to the parties of the second part, the following bill, kind and quality of lumber, to wit: Two hundred and eight (208) pieces of lumber, 6x8, sixteen feet in length. Eight hundred and sixteen (816) pieces 2x10, sixteen feet in length, the same to be well sawed and strictly all heart, but rough and undressed. Two thousand one hundred and fifty (2150) pieces of lumber, 2x8, 12, 14 and 16 feet in length, to be well sawed and sized, and strictly all heart. The same to be delivered on the grounds of the said Magnolia Compress Company, in the town of Magnolia, Arkansas, at and for the sum of Seven and half Dollars (\$7.50) per thousand feet. The same to be delivered on or by the aforesaid date, then they, the parties of the first part agree to pay the said parties of the second part \$10.00 per day for each day after the 1st day of July, 1899, until said lumber aforesaid is delivered.

"And the said parties agree and bind themselves in consideration of the aforesaid agreement of the said parties of the first part aforesaid, being well and fully performed, to pay to the said parties of the first part, the sum of seven and half dollars (\$7.50) per thousand feet for said lumber described aforesaid. The price herein named is for delivered lumber on the grounds of the

Magnolia Compress Company; it is also agreed that the parties of the first part shall have the bill of any other lumber that the Compress Company may need in the building, at the same price, \$7.50 per thousand for rough lumber.

"In testimony whereof we hereunto set our hands and seals, this first day of April, 1899. D. R. Smith. John Wilkerson."

The appellant alleged that it had paid appellee for all the lumber furnished according to the terms of the contract \$7.50 per thousand feet. Appellant then set up a breach of the contract on appellee's part, alleging "that the plaintiff failed to deliver said lumber on or by the 1st day of July, 1899, and never delivered same in full until about the 1st of August, 1899; that, by the terms of said contract, said defendant is entitled to recover from the said plaintiff the sum of \$10 for each and every day that the plaintiff failed to deliver the said lumber in full after the 1st day of July, 1899; that by reason of said failure said defendant was damaged in the sum of \$250." And appellant asked judgment against the appellee in that sum. The verdict was for appellee for \$75, and judgment entered for that amount.

Magale & McKay, for appellant.

WOOD, J. (after stating the facts). The first question presented on this appeal is, conceding that appellant violated the second clause of the contract in evidence, by purchasing a car load of lumber from a third party, which was used by appellant in erecting its building, did this give appellee the right to ignore the terms of the contract as to the price of lumber which he had furnished, and to sue appellant therefor upon quantum meruit? The second clause reads: "It is also agreed that the parties of the first part shall have the bill of any other lumber that the Compress Company may need in the building, at the same price \$7.50 per thousand for rough lumber." This clause of the contract is wholly independent of the first clause. There is nothing to indicate that it was a part of the inducement for the first clause. There are no reciprocal obligations in it. The compress company, under it, is bound to give appellee the bill of any other lumber it may need in its building at the same price (\$7.50 per thousand); but there is nothing in the clause that can be

construed as binding appellee to furnish the lumber at the same price, or to furnish it at all. If appellant had called upon appellee to furnish more lumber than that called for in the first clause of the contract, at \$7.50 per thousand, could appellee have been forced to furnish it? We think not. Could appellant have refused to pay for lumber furnished by appellee under the first clause, because of a failure upon the part of appellee to have furnished any amount appellant might have needed and demanded under the second clause? Certainly not. It is very clear from the language used in both clauses, that the parties did not intend that the enforcement of the first clause of the contract should be conditioned upon the performance of the second. We are of the opinion that the contract is clearly severable, and that the failure of appellant to perform the second clause would not justify appellee in treating the contract as discharged and rescinded, and suing upon the quantum meruit. The utmost that could be claimed would be that the breach by appellant would be a partial failure of performance on its part, that would give appellee the right to compensation in damages; the amount being the price designated for which the lumber was to be paid by appellant in case any had been furnished. The court erred in treating this as an entire contract, and in not granting appellant's second request for instruction (which reporter will set out in note).¹ *Lawson on Con.* § 450; *Jacob Weintz v. Hafner*, 78 Ill. 27; 2 *Parsons, Con.* 672, note; *Gatlin & Gibson v. Wilcox*, 26 Ark. 309; *Bertrand v. Byrd*, 5 Ark. 657. See *E. A. H. F. Co. v. Tanner*, 67 Ark. 156, 53 S. W. 896.

For this error the judgment is reversed, and the cause is remanded for new trial.

¹The following is the request for an instruction by defendant referred to in the opinion: "(2) The jury are instructed that if they find from the evidence that the compress company agreed with the plaintiff to give him a bill for any other lumber that it might need in the erection of its compress, and which lumber is not specified in the contract, and that the compress company failed to furnish the plaintiff with a bill for any or all of the lumber used in the erection of said compress, and not specified in the contract, and purchased same from other parties, that this will not constitute such a breach of the contract in this case as will entitle the plaintiff to recover the cash market value of the lumber at the time it was delivered."

MORRIS v. GREEN.

(Supreme Court of Arkansas. May 27, 1905.)

1. CONTRACT—FORFEITURE—RELIEF.

Where an agreement secured is simply one for the payment of money, a forfeiture incurred by its nonperformance will be relieved against on payment of the debt, interest, and costs.

2. VENDOR AND PURCHASER — CONTRACT OF SALE—VALIDITY.

A contract for the purchase of land providing for the payment of the price in installments, evidenced by notes, and also providing that on the payment of the notes, interest, and taxes, the vendor would execute a deed therefor to the vendee, and that, in case of default on the first payment, all the notes were to become due, and payments made on the purchase price were to be considered as rent, is valid.

3. SAME—FORFEITURE FOR NONPERFORMANCE—ESTOPPEL TO CLAIM.

Where the vendor, under the contract, permitted the vendee, who was an illiterate person, and who testified that he had no knowledge of the rent provision, to continuously and substantially improve the land after a forfeiture had been incurred by the strict letter of the contract, accepted the vendee's money, knowing that the vendee believed that each payment was reducing the debt on his land, and for over a year after the default retained the vendee's notes, which were negotiable, and on their face not due, and failed to notify the vendee that the contract was forfeited, he was estopped, in a court of equity, from insisting on the letter of the contract.

Appeal from Lonoke Chancery Court; John Fletcher, Special Chancellor.

Action by W. N. Morris against Eli Green for rent. From a judgment of a justice of the peace in favor of plaintiff, defendant appealed to the circuit court, and by consent the cause was transferred to equity, and consolidated with a suit by Green against Morris for specific performance of a contract for the purchase of the land in question. From a decree in favor of Green, Morris appeals. Affirmed.

Oliphint & Miles, for appellant. P. O. Dooley and Pugh & Wiley, for appellee.

HILL, C. J. Morris sold Eli Green a 40-acre tract of land for \$480. This agreement was verbal, made about March 1, 1897, and no written evidence of the contract was to be made until a payment on purchase price was made. Green went into possession at once, and commenced improving the land. On the 28th of October, 1897, Green paid Morris \$45 on the purchase price, which payment was satisfactory to Morris, who then drew a written contract between them. This contract provided for the payment of the \$480 in four equal, annual installments, evidenced by four notes executed by Green, due November 1, 1897, November 1, 1898, November 1, 1899, and November 1, 1900. The contract provided that on the payment of each of said notes, with accrued interest, and the taxes upon the land, Morris would execute a deed therefor to Green; and, in case of default upon the first payment, all the notes were to become due, and payments

made on the purchase price were to be considered as rent. The contract, on the face of it, was a valid one. *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440; *Quartermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096; *Block v. Smith*, 61 Ark. 268, 32 S. W. 1070. Green was an ignorant negro, whose learning was limited to ability to sign his name. Morris was a business man. This contract was read over to Green and signed by him. The first note fell due two days after its date, and Morris admits that he knew Green could not pay it, and agreed to wait till the second became due before requiring payment of the balance of it; the \$45 then being the only payment required. Green testified that under the original verbal contract, and the written contract as he understood it, he was to have four years to pay for the land, and, further, that he did not know of the rental provision in case of default. Conceding that his evidence is not sufficient to overcome the written contract (*Goerke v. Rogers*, 86 S. W. 837), pass to the subsequent conduct of the parties. In the fall of 1898 Green was owing, under the written contract, on the land, \$195, and owing a store account to Morris of \$169.05. To secure the latter, Morris had a crop mortgage. From the proceeds of his crop Green paid Morris in October \$151.60. He says it was agreed that \$100 should be paid on the land debt. Morris denies this, and asserts it was all paid on the store account. Morris says that Green then forfeited his contract, but fails to show any notice of such assertion of this claim to Green, beyond saying that he told his bookkeeper to tell Green. Green says he was not so notified, and the bookkeeper was not called. Green made several payments after this alleged forfeiture. According to Morris' books, his total payments were \$184.92, which would be \$33.32 after the October payment, and which would discharge the store account due of that date, and leave \$17.45 to apply on the land. The chancellor found—and there is evidence to sustain it—that Green made further payments, which are not entered on Morris' books. Morris entered upon his books a charge against Green for rent, but the date of the entry fails to appear on the books. Morris did not return the notes till 1901. In November 1899, Morris received an offer from a responsible party, acting as Green's attorney, to pay all Green owed, and asking a statement of his account. Green also made an arrangement with a bank in November, 1899, to secure the money to pay Morris; the bank only requiring that Morris furnish a statement of the amount. Green positively and circumstantially testified to repeated demands for a statement from Morris, and was always refused or postponed, and always assured, until October, 1899, that he had four years in which to pay out this land. In October, 1899, Morris claimed that the contract was forfeited; and it was short-

ly after that that Green made the arrangements to borrow the money to pay the balance, but could not secure a statement of it. From the time he went into possession till the alleged forfeiture, Green had put about \$350 worth of permanent improvements on the land. In February, 1901, Morris attached Green's crop for rent. This case originated in justice court, and went to the circuit court on appeal; and in the circuit court Green filed an answer and cross-complaint, averring that he had purchased the land, improved it, and paid \$240 on the purchase price, and had repeatedly offered to pay the balance, and that he was imposed upon in the written contract, etc., and asked a transfer to equity, and prayed specific performance of the original contract upon payment by him of balance due. This case was transferred to the chancery court, and Morris filed an amended complaint, and alleged a misdescription of the land in the contract, and prayed a reformation of it, and that the purchase contract be forfeited, and he have judgment for rent. Green also brought suit in chancery for specific performance, which was consolidated with this transferred case. The chancellor found in favor of Green, ascertained the amount due on the purchase price, after all payments were credited, and decreed specific performance by directing Morris to make a deed upon the payment of said amount. This decree is right.

Morris testified that his intention in putting the forfeiture provision into the title bond was to secure the payment of the money, and not to enable him to get the land back. "It is well settled that, where the agreement secured is simply one for payment of money, a forfeiture either of land or chattels, etc., incurred by its nonperformance, will be relieved against on payment of debt, interest, and costs." Pomeroy, Eq. Jur. (2d Ed.) § 450. Moreover, the facts estop Morris from claiming a forfeiture of the purchase contract. This court approved this thoroughly sound principle of equity jurisprudence: "If there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by relieving him against it, if necessary." *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562. In the first place, the default in the payment of the first note (due two days after its execution) was admittedly waived when the note was executed, and the performance of the contract in regard to it was not expected or required. Permitting this ignorant negro to continuously and substantially improve the land; to accept his money knowing that he believed, and with good reason, that each payment was reducing the debt on his land; to retain his notes for the purchase price (negotiable and on their face not due) for over

a year after the alleged forfeiture; to fail to notify him that the purchase contract was forfeited, and that all payments prior and subsequent thereto were rent payments—estops Morris, in a court of conscience, from insisting upon the letter of his contract. These facts, and more, are found in Green's evidence, which comes here accredited by the chancellor, and is strongly corroborated. In truth, the most of the essential facts are admitted by Morris.

The decree is affirmed.

BOYNTON et al. v. ASHABRANNER.*

(Supreme Court of Arkansas. May 27, 1905.)

1. EVIDENCE—BEST AND SECONDARY.

Kirby's Dig. § 3064, providing that a commissioner's transcript from the State Land Office shall be evidence of the facts therein stated, makes such certified copies of the records of equal dignity with the originals.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1302-1314.]

2. PUBLIC LANDS—DEED BY STATE.

A subsequent deed by the state reciting that the land agent granted a patent certificate to the grantee on a prior date, and that, the purchase money having been fully paid, the conveyance was made by the Auditor, was ineffective to avoid a state deed to another on a prior date, in the absence of proof rebutting the presumption that the prior grantee had surrendered a certificate prior to that of the subsequent grantee, or made a valid assignment of such certificate.

3. CONSENT DECREE—VALIDITY.

Where it appeared that a consent decree was entered between two terms of court, it was a nullity.

4. SAME.

A consent decree void because entered between two terms of court was not cured by a subsequent order, entered in term time, importing only to correct an error in the description of one of the parties.

5. ADVERSE POSSESSION.

A claim of ownership, payment of taxes, and the exercise of fitful, disconnected acts of possession, and the cutting of timber and firewood, were insufficient to establish adverse possession.

6. SAME—PAYMENT OF TAXES.

On an issue of title to property by adverse possession, a general statement of payment of taxes for 12 years is insufficient to overcome evidence of a tax receipt produced for one of such years by the opposite party.

7. SAME.

Where certain tax receipts described the land, by mistake, as the west half of the southeast quarter of a certain section, instead of the east half of such section, they were insufficient to support a title by adverse possession, under Kirby's Dig. § 3057, providing that unimproved and uninclosed land shall be deemed to be in possession of the person who pays the taxes thereon, if he have color of title thereto, etc.

Appeal from Mississippi Chancery Court, Chickasawba District; Edward D. Robertson, Chancellor.

Action by C. D. Boynton and others against Thomas Ashabranner. From a judgment for defendant, plaintiffs appeal. Reversed.

Driver & Harrison, for appellants. W. J. Lamb and J. T. Caston, for appellee.

HILL, C. J. The land in controversy is the east half of the southeast quarter of section 28 in township 15 north, and range 8 east, being situated in Mississippi county. The appellants deraign title as follows: The swamp-land grant to the state of Arkansas. The state deeded it to D. C. Cross December 4, 1866. The Citizens' Bank of Louisiana obtained a judgment in the federal court against D. C. Cross, and this land was sold under execution, and purchased by the said bank, to whom it was conveyed by the marshal. The said bank conveyed to W. L. Culbertson. Culbertson and wife conveyed to C. O. Boynton. The widow and heirs at law of D. C. Cross conveyed to C. O. Boynton. The appellants are heirs at law of C. O. Boynton. The appellants also claim under a tax deed and a decree confirming the tax title. The tax title and decree are both attacked, but the view the court takes of the case renders a discussion of those issues unnecessary. The appellee claims to be the owner under a deed from the state executed December 7, 1889; the state's title being based on forfeitures for taxes in the years 1869 and 1870. The forfeitures for these years are shown to be void, and this title is not insisted upon by appellee, other than as giving color of title. The appellee attacks the state deed to Cross, and the title of the Citizens' Bank and of Culbertson, derived therefrom, and sets up title in himself by adverse possession, and by seven years' payment of taxes under color of title in virtue of the act of 1890. These issues will be presented and decided in the order mentioned:

1. The evidence of the conveyance by the state to Cross is a transcript of the record of the Commissioner of State Lands, showing that the state deeded this land to D. C. Cross on December 4, 1866; and it is certified by the Commissioner that the transcript is a true and correct copy of the record of that office, in so far as it relates to this land. This certificate falls within section 3064 of Kirby's Digest, making such transcripts from the record evidence of the facts therein stated. It is objected that the original patent was not produced or accounted for, and that this evidence is secondary. The court said, through Chief Justice Cockrill, referring to this statute: "The statute makes a certified copy of such records of equal dignity as evidence as the originals." Dawson v. Parham, 55 Ark. 286, 18 S. W. 48. The state issued a subsequent deed to this land to Jephtha Fowlkes on the 3d of April, 1867. This deed recites that the land agent granted a patent certificate to said Fowlkes on the 7th of June, 1855, and, it appearing that the purchase money was fully paid, the conveyance was made by the Auditor. The appellee does not deraign title under this deed, but introduces it, seeking to avoid the Cross deed of prior date. It is well settled that a state deed may be attacked in equity for fraud or mistake or other equitable grounds

showing that the state had only a naked legal title, and not the real title, when it conveyed. Coleman v. Hill, 44 Ark. 452; Chowning v. Stanfield, 49 Ark. 87, 4 S. W. 276. The Court of Appeals of this federal circuit, in Boynton v. Haggart, 120 Fed. 819, 57 C. C. A. 301, took a different view of the effect of the issuance of the state's deed; holding it was impervious to collateral attack. But following the decisions of this court on this subject, the result is the same, because the appellee has not proved that Fowlkes' purchase was prior to Cross', nor negatived a valid transfer of the original certificate to Cross. The following excerpt from Dawson v. Parham, 55 Ark. 286, 18 S. W. 48, reading "Brinkley" into "Cross," and "appellant" into "Fowlkes," fits this case exactly: "The patent to Brinkley was issued in pursuance of the authority granted by the swamp-land acts. It is recited that the land agent had previously issued his patent certificate to Brinkley, by virtue of the act of January 20, 1855, as the original purchaser of said land. These recitals show the authority upon which the government assumed to act in issuing the patent. There is a presumption, therefore, that they are true. We must take it, then, that Brinkley was the original purchaser, until the contrary is proved. The reason for that presumption is made more apparent by a consideration of the act of January 20, 1855, under which the certificate was issued. One of the objects of the act was to afford the swamp-land agents the opportunity to adjust conflicting entries. Hempstead v. Underhill, 20 Ark. 337. To that end, provision was made to the effect that a certificate previously issued by the swamp-land commissioners should be presented for examination to the officers then known as the 'swamp-land agents' of the proper district. If the holder was ascertained to be the original purchaser, he received from the agent what the act terms a 'patent certificate.' The deed affords evidence, as we have seen, of the fact that Brinkley was the holder of such a certificate issued in pursuance of this act; and, as the officer who issued that certificate is presumed to have acted in conformity to law in issuing it (Rice v. Harrell, 24 Ark. 402), we must presume that Brinkley surrendered a valid certificate of purchase upon the issue of the patent certificate. In order for the appellants to show a prior right, and a consequent superior equity, it was incumbent upon them to establish that their certificate of purchase was issued prior to that which Brinkley surrendered. Holland v. Moon, 39 Ark. 120." In that case the court further said that it was not necessary to rely upon these presumptions, but in this case the presumption necessarily arises from evidence of the prior deed from the state that, upon its issuance, Cross surrendered a certificate prior to that of Fowlkes, or a valid assignment of the same certificate, and

shifts the burden upon those attacking it to overcome these presumptions in its favor. It is of no consequence that the state deed is not present, because it is presumed to contain all recitals required by law.

2. The title of the Citizens' Bank, through whom appellants deraign title, is attacked. It was shown that a consent decree was spread upon the records of the Mississippi chancery court in a case entitled "Jeptha Fowlkes and Sarah W. Fowlkes, Executrix of the Last Will and Testament of Jeptha Fowlkes, Deceased, and others, against the Citizens' Bank of New Orleans, in Louisiana." It recites the appearance of the respective parties, and consent to the decree, and findings from the evidence by the court, the purport of which was to divest the title of the bank acquired under its judgment against Cross, and purchase at execution sale thereunder, and invest it in the plaintiffs, the Fowlkses. The said decree "appears upon the record of proceedings of the chancery court to have been rendered after the adjournment of the May term and the beginning of the fall term thereof, and the record fails to show that an adjourned term of the court was held, at which the same might have been rendered. It appears upon the record between the adjourning order of the May term and the opening order of the fall term of said chancery court." This decree was an absolute nullity—without even as much basis as the decree in *Biffie v. Jackson*, 71 Ark. 226, 72 S. W. 568. In that case a decree was entered in vacation in a space reserved for it, and it was certified by the judge that the case was taken under advisement during the term, and agreed by all parties for the decree to be entered then for a term-time order. The court held it a nullity. The appellee seeks to take it out of the rule of *Biffie v. Jackson* by showing that at the ensuing fall term the following entry appears: "Now, on this day comes the complainants, by their solicitor, and in open court, and in the presence of and by the consent of the counsel for said defendants, amends the final decree heretofore rendered in this cause, so as to make the said decree against the Citizens' Bank of Louisiana, in place of the Citizens' Bank of New Orleans, in Louisiana, which final decree is of record on page 451 in chancery record." This entry can do no more than it purported to do, which was to correct a misdescription in the corporate name of the defendant in the suit. With it corrected, the void decree is equally void against it in its correct description as in its incorrect description. Counsel argue that the entry is just as binding as if it read: "It is ordered, considered, and decreed that the decree heretofore entered on page 451 be, and is hereby, made and adopted as the decree of this court." But the entry is far from pretending to such effect. Doubtless

counsel in that case thought that the entry in vacation was valid, and procured the correction of a slight error in description, and nothing more can be imparted into the decree than the actual order itself imparts into it.

3. It is insisted that, even if this decree was valid, Culbertson and Boynton were innocent purchasers, and the decree passing title, not being recorded in the recorder's office within one year, was not effective against them. Kirby's Dig. § 4478. As the court holds the title of appellant is valid, it is unnecessary to consider this question. An interesting discussion of it may be found, by the Court of Appeals, in *Boynton v. Haggart*, 120 Fed. 823, 57 O. C. A. 301.

4. Appellee's evidence of actual possession is insufficient to create title under seven years' statute of adverse possession. The payment of taxes, the claim of ownership, and the exercise of fitful and disconnected acts of possession are insufficient to create title by adverse possession. The cutting of timber and firewood from this place did not evidence the continuity of possession and hostile and notorious holding which is necessary to give title. *Ringo v. Woodruff*, 43 Ark. 486; *Scott v. Milla*, 49 Ark. 263, 4 S. W. 908; *Brown v. Bocquin*, 57 Ark. 97, 20 S. W. 813; *Driver v. Martin*, 68 Ark. 551, 60 S. W. 651.

5. Appellee testifies that he paid the taxes every year from the time he got his colorable title, in 1889, till 1902, and said he would attack all the tax receipts he could find. He attaches tax receipts for every year claimed, except for the taxes of 1898. That year he fails to produce, and appellants produce a tax receipt for that year. Appellee argues that the payment could be proved by other testimony than the tax receipt, but a general statement of payment for 12 years is insufficient to overcome the evidence of the tax receipt produced by the other party. Part of the receipts produced were for the west half of southeast quarter of section 26, instead of the east half of the southeast quarter; and appellee says this was a mistake, as he did not own the west half, and it should have been the east half. This is insufficient to give title under the act of 1899 (section 5057, Kirby's Dig.), as construed in *Towson v. Denson*, 88 S. W. 661.

The judgment is reversed, and the cause remanded, with directions to enter a decree in favor of the appellants.

BOYNTON et al. v. ASHABRANNER.

(Supreme Court of Arkansas. May 27, 1905.)

ADVERSE POSSESSION—EXTENT.

Where the owner of certain land in controversy did not have possession of any part thereof when defendant took possession and held a part thereof adversely for a period sufficient to

give title by adverse possession, defendant's possession extended to the limit of his grant.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 547-574.]

Appeal from Mississippi Chancery Court, Chickasawba District; Edward D. Robertson, Chancellor.

Action by C. D. Boynton and others against Thomas Ashabranner. From a judgment for defendant, plaintiffs appeal. Affirmed.

Driver & Harrison, for appellants. W. T. Lamb and J. T. Caston, for appellee.

WOOD, J. This is a suit by appellants against appellee to recover and quiet title to the southwest quarter of section 25, township 15 north, range 8 east, in Mississippi county, Ark. The issues in this case are the same as in No. 5,810 (decided this day) 88 S. W. 566, opinion by Chief Justice Hill; and the facts are the same, except on the question of limitation. Therefore the opinion in that case is controlling in this on all issues except adverse possession. On the question of adverse possession the court found in this case "that defendant was in the open, notorious, actual, adverse, and continuous possession of the aforesaid land for more than two years prior to the filing of this suit." This finding is not clearly against the weight of the evidence. On the contrary, it has the preponderance in its favor. There was evidence tending to prove that 40 acres of the land were deadened in 1897. A portion of it had been cleared for three years, and 10 acres had been fenced for 10 years. Ten acres were cleared in 1899, and two crops were made on it before the suit was brought. This suit was begun February 12, 1902; the owner not having possession of any part when the appellee took possession and held adversely a part. Possession under the law was extended to the limit of his grant. *Crill v. Hudson*, 71 Ark. 390, 74 S. W. 299; *Sparks v. Farris*, 71 Ark. 117, 71 S. W. 255, 945.

The decree is affirmed.

BAILEY v. FRITZ BROS.

(Supreme Court of Arkansas. May 27, 1905.)
PARTNERSHIP — EVIDENCE — STATEMENTS OF PARTNER.

On an issue of partnership, a statement of one alleged partner, made in the absence of the other, after the bringing of suit, that he knew plaintiff should recover of the absent partner, but hoped he would not, because, if the latter had to pay plaintiff, he would force the speaker to pay him, was incompetent, as against the absent partner, and prejudicial to him.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 70.]

Appeal from Circuit Court, Ashley County; Zachariah T. Wood, Judge.

Action by Fritz Bros. against H. F. Bailey and another. From a judgment for plaintiffs, defendant Bailey appeals. Reversed.

Robt. E. Craig, for appellant. Geo. W. Norman, for appellees.

BATTLE, J. Fritz Bros. brought this action against R. J. McBride and H. F. Bailey on a promissory note which is as follows:

"\$237.25. Montrose, Ark. Nov. 22nd, 1900. February 1st after date I promise to pay to the order of Fritz Bros. two hundred and thirty-seven and ²⁵/₁₀₀ dollars, at Ashley Co. Bank, Arkansas, value received. [Signed] R. J. McBride."

They alleged in their complaint that the defendants, being partners doing business under the firm name and style of R. J. McBride, executed to them the note sued on for goods previously purchased of plaintiffs.

Bailey answered, and denied that he and McBride were partners, and, as such, executed the note sued on, and that he was indebted to plaintiffs in any sum whatever.

L. P. Thomas testified that McBride and Bailey in June, 1900, at Montrose, Ark., told him that they were partners doing business in the name of R. J. McBride, and that he, as agent of plaintiffs, then and there sold to them, as such partners, 5,000 Marguerite cigars, and that they thereafter executed the note sued on for the amount due to plaintiffs on account thereof, and that the note belonged to him.

McBride and Bailey testified that they did not tell Thomas that they were partners, and that McBride purchased the cigars for himself, and that Bailey was not indebted to plaintiffs or for the cigars.

After the close of the evidence for the defendants, L. P. Thomas testified, over the objections of the defendants, as follows: "At Parkdale, in this county, after this suit was brought, R. J. McBride said to me he did not blame me a bit for trying to make my money out of Bailey; that he knew I ought to recover of Bailey in this suit, but he hoped I would not, because, if Bailey had to pay me, Bailey would force McBride to pay him. Bailey was not present at this conversation."

McBride, testifying, denied that he made such a statement.

The undisputed evidence in the case showed that the note belonged to L. P. Thomas.

Plaintiffs recovered a judgment against Bailey for \$237.25, and 6 per cent. interest thereon from February 1, 1901. The style of the action, preceding the judgment, is as follows: "Fritz Bros. for Use of L. P. Thomas v. R. J. McBride and H. F. Bailey." The record does not show that the complaint was amended. Bailey appealed.

The undisputed evidence shows that L. P. Thomas was the owner of the note, and that Fritz Bros. were not entitled to recover thereon.

The testimony of Thomas as to the conversation with McBride at Parkdale was inadmissible. It was not admitted or admissible for the purpose of impeaching McBride, as no foundation was laid for that purpose. It was not admissible against Bailey, because the statement made by Mc-

Bride was made in his absence. It was prejudicial to Bailey, because it tended to show, if it was worth anything, that he was liable for the debt sued for, and was in duty bound to pay it. It is true that McBride denied the conversation, but it was still before the jury, depending for its force and effect upon the relative credibility of two witnesses, when it should not have been before them at all. Bailey was held liable for the debt. How far this incompetent testimony contributed to that result, we cannot tell.

Reverse and remand for a new trial.

LOVEWELL v. BOWEN.

RHODES v. DRIVER.

(Supreme Court of Arkansas. May 27, 1905.)

1. ELECTIONS—BALLOTS—CUSTODY.

Under Kirby's Dig. § 2838, requiring ballots cast at an election to be preserved by the election commissioners for a certain period, unless they are required as evidence, in which event they must be produced in court from an unbroken package, in which they shall be retained while being preserved, the court becomes the proper custodian of ballots after they have once been produced in court, and the subsequent production of the ballots from the election commissioners is not a production from the proper custodian, such as to authorize presumptions of official regularity on account of the source of their production.

2. SAME—CONTEST.

In an election contest, the ballots of a certain township were produced from the chairman of the election commissioners, although they had previously passed under the control of the court, which had thus, by Kirby's Dig. § 2838, become their proper custodian. This chairman was a strong partisan of one of the contestants, and had, according to the evidence, used improper means to influence the result of the election. No evidence was offered of the identity, in untampered form, of the ballots produced with those cast, and on a previous hearing no irregularity had been noted in the ballots from the township in question, whereas the ballots produced were fatally defective, in that they did not have the initials of one of the judges thereon, as required by statute. *Held*, that the ballots could not be deemed the identical original ballots, in untampered form, so as to authorize the returns from the township in question to be thrown out.

3. SAME—EVIDENCE.

Kirby's Dig. § 2861, requiring evidence in election contests to be taken by deposition, is exclusive of other methods, and precludes the hearing of oral testimony of judges of election to sustain the returns.

[*Ed. Note.*—For cases in point, see vol. 18, Cent. Dig. Elections, § 288.]

4. SAME—ELECTION DISTRICTS:

Where for many years lines recognized by the election judges had been universally acted upon in elections as the true township lines, votes cast in accordance with and reliance on such lines would not be excluded because they were not the true lines, and the votes were actually cast in the wrong township.

Appeal from Circuit Court, Mississippi County; Felix G. Taylor, Judge.

Election contests by J. W. Rhodes against O. S. Driver, and by John A. Lovewell against Sam Bowen. From judgments for contestees, contestants appeal. Reversed.

James M. Greer, S. S. Semmes, Geo. W. Thomasson, John M. Rose, and Chas. G. Coleman, for appellants, cited, *Inter alia*, *Tullos v. Lane*, 45 La. Ann. 333, 12 South. 508; *Peard v. State*, 34 Neb. 372, 51 N. W. 828; *Esler v. McCoy*, 5 Ohio Dec. 573; *Davis v. Moore*, 70 Ark. 240, 67 S. W. 311.

Driver & Harrison and Berry & Shafer, for appellees.

HILL, C. J. These consolidated cases involve contests over the offices of sheriff and clerk of Mississippi county. This is the second appeal. The first appeal is reported as *Rhodes v. Driver*, 69 Ark. 501, 64 S. W. 272. The case was reversed on the former appeal for not discrediting and disregarding the returns from Fletcher township, and remanded, with directions to allow the parties litigant to take additional evidence, if desired. Much additional evidence was taken, and the court adjudged that Bowen and Driver were elected sheriff and clerk, respectively, and their opponents appealed.

In summarizing the result of the votes, and the various contentions over the votes in different townships, the appellees make this statement: "With Pecan included and Troy excluded, Driver's vote would be 780, less 83, the vote given him by the returns in Troy; making a total of 697 in the whole county. The foregoing computation gives Lovewell a majority of 2 votes, and Driver a majority of 48, in the whole county." The appellant attacks many of the votes included in this summary, but for the purpose of this opinion this will be taken as a basis from which to discuss the effect of the rulings of the court on some of the questions presented.

1. Should Pecan township be included in the returns? The appellees thus state the situation in regard to the facts and ruling on this township: "Upon the second trial of this cause in the circuit court, while examining the pollbooks and ballots of Pecan township, it was discovered by the contestees [appellees] that none of the ballots cast in this precinct bore the initials of one of the judges, as required by the statute. It was thereupon moved by counsel for contestees that the returns from Pecan township be struck out and disregarded. This motion was afterwards sustained by the court. The returns from Pecan township gave Lovewell 61, Rhodes 65, Bowen 11, and Driver 9." In the former trial these ballots were introduced in evidence, were examined by the circuit judge and passed to the respective attorneys, and their agreement with the pollbooks tested. They were produced at this trial by the chairman of the board of election commissioners, and it was found that, instead of having the initials of one of the judges upon them, they had a mark like this: #. Section 2838, Kirby's Dig., provides that the election commissioners shall preserve for a period of six months the ballots cast at an election, and after that period destroy them, unless they

are notified of a civil suit or criminal prosecution where they will be required as evidence, in which event they must be produced in court from an unbroken package, in which they shall be contained while being preserved. The control of the election commissioners over the ballots ceases when they produce them in court. Then they become evidence in the cause, and pass under the dominion and control of the court. Hence it follows that the production of these ballots from the election commissioners after they had been turned into court was not from the proper custodian of them, and no presumptions of official regularity can be indulged on account of the source whence produced. This election officer was admittedly a strong partisan of the appellees in the election, and there is evidence tending to prove that he used whisky and other improper means to influence voters, and that he attempted to bribe the county judge while the contest was pending before him. No sworn evidence from him is found that these ballots were in the condition shown on this trial when he received them. The appellees seemingly rested entirely upon their production by the election commissioner being sufficient to prove their genuineness and integrity. That proof failed to apply, and, no testimony of their genuineness and integrity and unchanged condition being offered, this question rests entirely upon the ballots themselves, as produced by this election officer. In view of the evidence adduced against him, no presumptions can be indulged in their favor. The fact that they passed through the hands and under the inspection of the circuit judge and the attorneys for both sides without discovering this fatal defect is a circumstance against them, and this is especially so in this case, because the attention of court and counsel was then focused on defective markings of ballots by the judges, as that was one of the vital questions presented in regard to Fletcher township at the time these ballots were first being examined. The court is of opinion that the circuit court did not have legally sufficient evidence that these were the identical original ballots, in untampered form, to exclude Pecan township, and therefore in the calculation it should be included.

2. As to Troy township. The integrity of the returns from this township was successfully impeached. It is unnecessary to review the evidence on that subject, because the appellees evidently recognized that fact, and on the trial produced the oral testimony of the judges of election to sustain the returns. The appellant objected to the introduction of oral testimony. If the oral testimony was properly admitted, then there is legally sufficient evidence to sustain the finding of the trial court in including it in the count for appellees; otherwise there is not. In *Davis v. Moore*, 70 Ark. 240, 67 S. W. 311, this court held that the section 2881, Kirby's Dig., providing for the evidence in election contests

to be taken by depositions, was exclusive of all other methods of taking testimony in these cases, and the terms of the statute on the subject were mandatory. It is insisted that this decision should not be followed. The case was decided after mature consideration, and two of the judges dissented. If the question was presented as an original proposition, taking the individual views of the judges now constituting the court, it might receive a different construction. It establishes a rule of practice, and was decided prior to this trial, and it cannot be said that the rule established is a bad one, or that it works unjustly; and the court declines to overrule that decision. That necessarily excludes the returns from Troy township.

3. Oral testimony was also admitted on the question of township lines, and by it 28 votes in Monroe township and 7 votes in Fletcher township were proved to have been cast by parties living without the townships. The court erred in excluding these votes in Monroe township for another reason. While the township lines were proved by the oral testimony, yet it was shown that for many years the lines recognized by the election judges in this instance had been universally acted upon as the true lines of the township. Under such circumstances, the voters should not be disfranchised on account of universal ignorance of the true technical lines. If authorities are needed on this proposition, those cited in appellants' brief will be found to sustain it. These conclusions, using the basis of appellee's calculation above given, elect appellant Lovewell by 37 votes over Bowen, and leave Driver a majority of 13 votes over Rhodes.

4. On the former appeal the court said: "The contestees have shown that several hundred electors of Mississippi county had their poll tax paid by others, and that they were not qualified electors. But they have only shown that about 116 of these voted, and these are all that we could consider in the court. The proof shows that of these Rhodes received 107, while Driver received 9, and that Lovewell received 106, while Bowen received 8. In the summary of appellees above quoted, 107 votes are excluded from Rhodes, and 106 from Lovewell, on this account. Appellees contend that this is justified by the former evidence and this statement from the opinion. The opinion did not intend to establish this as a fact beyond proof to the contrary in the new trial, but merely stated the situation as then developed, and leave was given for new evidence to be adduced on all points. On the second trial of this cause many electors included in said 106 and 107 lists excluded by the testimony then before this court took the witness stand and testified that they authorized the payment of their poll tax by the parties who paid them, or afterwards ratified the payment, in good faith, and repaid the amount. Many were proved to be tenants whose taxes were paid

by their landlords, and, with their consent, charged to their accounts, and paid out of their crops when gathered. When payment by others is valid, and when invalid, is discussed and the line clearly marked in *Whittaker v. Watson*, 68 Ark. 553, 60 S. W. 652. Counsel differ as to the exact number properly proved under this rule, but an exact estimate is not necessary, for there can be no doubt that more than sufficient were fully proved to have been paid in good faith through others to wipe out the apparent majority of 13 for Driver, and give Rhodes a majority over him, and to increase the majority already shown of Lovewell over Bowen. Appellants also proved many illegal votes which were cast on "gift receipts," as they are called in the record, to have been cast for Bowen and Driver. A discussion and calculation of them is unnecessary, as these conclusions call for a reversal of the case.

Other questions are presented and argued, but it is not thought that it is necessary to discuss them, because no new questions of law are involved.

The case is reversed and remanded, with directions to grant appellees a new trial.

AMERICAN CENT. INS. CO. v. NOE.

(Supreme Court of Arkansas. May 27, 1905.)

1. INSURANCE — VALUED POLICIES — TOTAL LOSS—ACTIONS.

Under Kirby's Dig. § 4375, declaring that a fire insurance policy, in case of total loss of the property insured, shall be considered a liquidated demand for the full amount of the policy, the value of a house wholly destroyed by fire is not open to evidence in an action on the policy covering the same.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1275.]

2. SAME—ACTION ON POLICY—VALUE OF PROPERTY—SUBMISSION OF ISSUE.

In an action on an insurance policy, where the evidence of the value of the property destroyed is uncontradicted, and is given without objection, and without the witness being subjected to cross-examination, the question of value need not be submitted to the jury, although the evidence thereof is general in character, and the witness does not show himself qualified to testify thereto.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 336.]

3. SAME—LIMITATION OF ACTION—PROVISIONS OF POLICY.

Under the express provisions of Kirby's Dig. § 4381, if plaintiff in an action on an insurance policy suffers nonsuit he may commence a new action within one year after such nonsuit, notwithstanding stipulations in the policy of insurance to the contrary.

4. SAME — TOTAL LOSS — CONSTRUCTION OF POLICY.

Where a building covered by an insurance policy was wholly destroyed by fire, with the exception of a glass door, which was crushed after its removal, the loss was a total one within the meaning of the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1266.]

Appeal from Circuit Court, Fulton County; John B. McCaleb, Judge.

Action by T. D. Noe, as special administrator of Ula Mitchell (formerly Ula Robinson), against the American Central Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sam H. Davidson, Shepard Barclay, and Thos. T. Fauntelroy, for appellant. Chas. E. Elmore and J. B. Baker, for appellee.

HILL, C. J. The insurance company issued a policy of fire insurance to Mrs. Ula Robinson (afterwards Mrs. Mitchell) upon her dwelling house and household and kitchen furniture. The policy was for \$1,000 on the house and \$400 on the furniture, in consideration of a single premium of \$17.50. During its life the house and part of the furniture were destroyed by fire. Proofs of loss were sent to the company within the stipulated time required by the policy. The proofs were made upon the forms furnished by the company, and were in substantial compliance with the terms of the policy, and seem to be full and complete. The company objected to them as incomplete and unsatisfactory, and declined to accept them for these reasons: They did not give copy of written portions of the policy, or all the descriptions in the policy; a conflict was stated to exist in the valuation of the house; and failed to show depreciation in the building. Then a demand is made to produce for examination books of accounts, bills, vouchers, invoices, etc., relating to half dozen articles of household goods, etc., including the Family Bible and the Criminal Code of Arkansas. Objection was further made to the insufficiency of the statements as to the origin of the fire, the proofs merely stating it was unknown, and the company intimated that she had knowledge of circumstances which required explanation. In reply to this Mrs. Robinson requested a return of the proofs, which were sent her. The matter rested for about a year, when a demand was made by Mrs. Robinson for arbitration and appraisal, and fuller and more explicit proofs were sent. Nothing was done by the company, and this suit was brought. Various defenses, including all the matters above referred to (except no charge was made that Mrs. Robinson caused or connived at the fire), were interposed. Other defenses, which are settled against the company by the statutes of this state, were also interposed. On the trial Mrs. Mitchell and her father were the only witnesses. They proved the destruction of the house by fire, its value to be from \$1,300 to \$1,500, and Mr. Robinson, the father, testified, "The loss on the personal property was \$298." He showed that he had assisted his daughter in making the proofs of loss and placing the value on the personal property. This sum was the aggregate of the values placed on the various items in the proofs of loss. No

objection was made to this evidence, and no cross-examination of the witness to show his familiarity or unfamiliarity with the property or its market value; no cross-examination to develop upon what basis he made the estimate was had. At the conclusion of this testimony, and upon it and the correspondence between the parties, the court directed the jury to find a verdict for \$1,298 and interest.

1. The first point urged for a reversal is that the question of value should have been sent to the jury for determination. This argument is chiefly based on a lack of qualification of the witnesses to testify as to the value of the house and the fact that it was put between \$1,300 and \$1,500. The question of value of the house was not open to evidence. Section 4375, Kirby's Dig., makes the amount of the policy on the house a liquidated demand. This was evidently overlooked, by the insurance company in its demands and in its present insistence. The value of the personal property was proved by Mr. Robinson in the general statement above quoted, which was not objected to. The company could have required him to have first proved his knowledge of the property and its market value, and could have cross-examined him to show the incorrectness of his valuation, to impeach the truth or accuracy of his estimates, and may have shown by such cross-examination a doubt of the absolute valuation placed on the property. In such event it would have been error to have directed a verdict, for the determination of the value would then have been a question exclusively within the province of the jury. But a jury cannot be permitted to arbitrarily disregard the sworn testimony of a witness which is uncontradicted, and bears upon its face no fact impeaching either its verity or accuracy. In this case there was absolutely nothing to impair the force of this testimony, and therefore there was no error in instructing a verdict.

2. Error is assigned in permitting recovery on the policy in an action begun more than one year after the fire, contrary to a clause in the policy. The complaint alleges and the answer admits that suit was filed within a year, and a nonsuit taken in that suit, and this suit filed within a year thereafter. This brought the action within section 4381, Kirby's Dig.

3. A question is raised as to the total loss of the building. The uncontroverted evidence is that all of it was lost except a glass front door, which was crushed after removal. This was a total loss within the meaning of the policy. 4 Joyce, Insurance, § 3029.

4. Other questions are incidentally raised, but they are not regarded as sufficiently substantial to call for discussion.

The judgment is affirmed.

TILLAR v. HENRY.

(Supreme Court of Arkansas. May 27, 1905.)

1. CONSTRUCTIVE TRUSTS—PAROL EVIDENCE.

Though a constructive trust may be proved by parol, the evidence is insufficient unless "it is full, clear, and convincing."

2. SAME—SUFFICIENCY.

Evidence held insufficient to establish a constructive trust of land purchased at a foreclosure sale.

Appeal from Drew Chancery Court; Marcus L. Hawkins, Chancellor.

Action by T. R. Henry against T. F. Tillar, in which Mrs. Sue M. Henry filed a cross-complaint. From an adverse decree, defendant Tillar appeals. Reversed.

S. M. Taylor and W. S. McCain, for appellant. Bridges & Wooldridge and Wells, Williamson & Cotham, for appellee.

HILL, C. J. T. R. Henry and J. T. Duncan were partners in business under the firm name of Duncan & Henry. Henry died, leaving Mrs. Sue M. Henry, his widow, and Claude Henry, their son. Duncan is a brother of Mrs. Henry, and after her husband's death looked after her affairs. T. F. Tillar was a neighbor and friend of the Henrys—a business man and a planter. The firm of Duncan & Henry owed considerable money, but Henry owned considerable property, both real and personal, but the estate had no cash to meet present demands. The real estate consisted of three places—the Henry place, or home place, consisting of over 500 acres, of which nearly 300 was in cultivation; the Guinn place, of about 700 acres, of which about 100 acres was in cultivation; and the Roane place, 160 acres, of which 40 was in cultivation. Mrs. Henry was administratrix of her husband's estate. The Guinn and Roane places were under mortgages. The mortgages were foreclosed, and the properties sold at commissioner's sale January 28, 1893, and bought by Tillar, for about \$1,450 for the two places. Deeds were duly executed to him. On April 1, 1893, the Henry or home place was sold at administratrix's sale, subject to the widow's dower. Duncan requested Tillar to buy this property for Mrs. Henry's benefit. He went to the county seat to attend the sale, and found the representatives of the creditors there, expecting to buy the place to protect their debts. They regarded the estate as solvent, and expected to work their debts out through regular course of administration. Tillar entered into negotiations with them, and effected an agreement by which he purchased all the claims at par; the creditors giving him one and two years' time on the payment. When this agreement was reached, the property was then sold, and Tillar purchased, and at once announced he was purchasing for Mrs. Henry. There is no dispute as to his purchase of the place for her benefit; he to retain possession and use of it until the

place repaid his expenditures, and then to turn it over to her and her son. About the last of 1901 or early in 1902 Tillar brought suit against Duncan on a judgment against Duncan & Henry which he had purchased. The suit was brought just before the judgment would be barred by limitations. Duncan filed a cross-complaint against Tillar, alleging that Tillar bought the three places pursuant to an agreement with him to the effect that he would purchase these places in his own name, and hold them in trust to pay the debts of Duncan & Henry—the remainder over to Mrs. Henry and her son—and that the rents and profits and sales had been sufficient to pay off all the indebtedness, including the judgment sued on. Mrs. Henry, on the same day this cross-complaint was verified, filed in behalf of herself and son a suit in equity to the same effect. The cases were consolidated in chancery and tried together, with the result that Tillar was held a trustee for all three places, and an account stated accordingly. To reverse that decree he has appealed, but does not appeal from the decree as to the Henry place, nor the accounting in regard thereto; averring that he always held that subject only to reimbursement, which is accorded him in the decree. Therefore the only question presented is as to whether he should be held as trustee for the Guinn and Roane places.

The substance of the evidence is as follows: Duncan says that on the 27th of January, 1898, the day before the chancery sales of these places, at the village of Tillar, he made an agreement with Tillar by which Tillar was to buy in the places, pay the probated claims, and hold the real estate as security until he got his money back; that there was no agreement as to interest, but he expected Tillar to get 10 per cent. Duncan says that prior to this he had a promise from a gentleman in Monticello, of means, to let him have \$4,000 to pay off the claims, but Mrs. Henry preferred dealing with Tillar, and when he made this arrangement with Tillar he dropped the other matter. Tillar did not attend the sale, but Duncan says he carried a note from him to Judge W. T. Wells, who was attending to Mrs. Henry's administration matters, and also foreclosing these mortgages, to buy in the land in his (Tillar's) name for Mrs. Sue Henry, but not to pay over \$1,500. The lands were bid in at a price slightly under \$1,500 by Judge Wells, and the purchase money paid by Tillar, and the deeds made to him. Judge Wells testifies that he does not remember whether Tillar was present, or not, at the sale; has an impression that Duncan was there, and Tillar was not. He is not certain that he bid in the lands for Tillar; thinks it likely he did so; and his recollection is that he received a note or message from Tillar, but, if a note, he cannot produce it, for it is either lost or de-

stroyed. His impression was that in buying the Henry lands there was some understanding between Tillar and Mrs. Henry that Tillar was buying to assist her. Tillar positively denies any agreement with Duncan about the purchase of these places in January, and says when he bought at these sales he had no thought of afterwards buying at the probate sale the Henry place; that he bought the Henry place pursuant to request of Duncan, and told Mrs. Henry of the arrangement immediately afterwards, and was always ready to fulfill it. His version of the purchase at the January sales is that he wrote a letter to Judge Wells by mail, prior to the sales, to buy the lands for him, but not to pay exceeding \$1,500 for both places. He denies positively any agreement with Duncan or Mrs. Henry about them. He details his agreement with the creditors, and the purchase on April 1st of the home place; but, as there is no dispute over that matter, it is not necessary to further refer to it, other than to say that his statement in this regard comports with the other witnesses. Mrs. Henry's testimony throws but little, if any, light on the question. Her whole testimony leaves doubt whether she regarded Tillar as trustee for all the lands, or the home place only. As her information was derived from Duncan, stronger corroboration of his testimony would be expected than is found in this evidence. She asked him for a statement of her account in 1898, and he furnished an itemized account of the Henry place, brought to April 1, 1898. Appellee claims two items in it acknowledged credits arising from the Guinn and Roane places. These grew out of rents collected from two negroes to whom Henry had sold small tracts in his lifetime. One had a clearing right on the line between the home place and the other, and, of the other, it is doubtful which tract it came from. Tillar testified that he thought these tracts were on the Henry place, and they had been so treated, and he continued to do so, and, if they were not, he simply made a mistake against himself in charging himself with rents of them. He received rents from other tenants on both places for five years, and received a large sum from the sales of a cypress brake, and received money and notes from other sales. If he intended to recognize a trust against these two places, it is inconceivable that he should do so by charging himself with the rent from these two negroes, and omit to charge all other receipts from the places. The statement, including these errors, if errors they be, is strongly corroborative of Tillar's evidence. In the nine years of the alleged trust, it was the only account called for, and only one conversation between him and Mrs. Henry was shown during that time, except his promise at the beginning of his trust to do the best he could for her; and that left doubt, as indicated above, whether she regarded him as trustee for

more than the home place. There are some corroborating evidence and circumstances for each side, but in the main the case rests upon the testimony of Duncan and Tillar. Each intelligent, interested, and with equal knowledge of the facts, yet their testimony is in irreconcilable conflict. One establishes the trust, and the other defeats it. The appellees rely in the first instance on an express trust, resting on the letter Duncan says Tillar wrote Judge Wells, telling him to buy the places in his (Tillar's) name for Mrs. Sue Henry. This letter and its contents depend entirely upon the testimony of Duncan. Judge Wells does not even remember whether he received any letter at all, and, of course, cannot and does not testify to its contents. Tillar positively denies writing such letter, and denies sending any letter by Duncan at all, and says that he wrote an entirely different letter from the one quoted by Duncan, and sent it by mail to Judge Wells, some days prior to the sale. To say nothing of the unreliability of the memory of the contents of a letter 12 years ago, the appellees wholly fail on the burden of proof on this issue. The trust chiefly relied upon by appellees is a constructive trust.

Counsel for appellant lays down this application of the principles of constructive trusts to this case: "Now, if Tillar, on the day before the chancery sales, agreed with Duncan to go and buy the place for Mrs. Henry, this of itself would not make Tillar's purchase fraudulent, because fraud consists in acts and results, and not in mere words. But if Tillar made with Duncan such an agreement, oral or otherwise, and thereby Duncan and Mrs. Henry were induced to relax their efforts to raise money and pay off the decrees, or if this agreement was made known to other bidders, who would have paid more for the property, and they were, by reason of this agreement, induced to refrain from 'bidding against the widow,' then it would have been a fraud for Tillar afterwards to claim the land for himself." Counsel for appellees insist that this application of the law concedes the case to them. Thus the counsel met on common ground in applying the doctrine of constructive trusts to the case at bar. Accepting this application as sound, it is left to determine the sufficiency of the evidence. Constructive trusts may be proved by parol, but parol evidence is received with great caution, and the courts uniformly require the evidence to establish such trusts to be clear and satisfactory. Sometimes it is expressed that the "evidence offered for this purpose must be of so positive a character as to leave no doubt of the fact," and sometimes it is expressed as requiring the evidence to be "full, clear, and convincing," and sometimes expressed as requiring it to be "clearly established." *Crittenden v. Woodruff*, 11 Ark. 82; *Trappall's Adm'x v. Brown*, 19 Ark. 39; *Johnson v. Richardson*, 44 Ark. 365; *Richardson v.*

Taylor, 45 Ark. 472; *Robinson v. Robinson*, 45 Ark. 481; *Crow v. Watkins*, 48 Ark. 169, 2 S. W. 659; *Camden v. Bennett*, 64 Ark. 155, 41 S. W. 854; 1 Perry on Trusts, § 137. The statement of the rule makes it manifest that the evidence in this case does not measure up to the standard required to establish a constructive trust by parol. Titles to real estate cannot be overturned by a bare preponderance of oral testimony seeking to establish a trust in opposition to written instruments. The conservatism of the courts has prevented the tenure of realty being based on such shifting sands. The statute of frauds has limited trusts capable of being proved by parol, and the courts uniformly tell those who seek to establish those trusts permitted to be established in this way, "Your evidence must be full, clear, and convincing." The appellees failed to establish the trust as to the Guinn and Roane places according to the requirements of equity jurisprudence.

The decree is affirmed as to the Henry place, but is reversed as to the Roane and Guinn places, and the cause is remanded, with directions to enter a decree in accordance herewith.

PRICE et al. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. May 27, 1905.)

1. CARRIERS—INJURY TO DRUNKEN PASSENGER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company for the death of a drunken passenger, who, it was alleged, was placed in charge of defendant's conductor, and was by him negligently permitted to go onto the platform and fall from the train, evidence held to justify submission to the jury of the issues of defendant's negligence and the contributory negligence of deceased.

2. SAME—ACCEPTANCE OF INTOXICATED PERSON AS PASSENGER.

A railroad company is not required to accept as a passenger, without an attendant, one who, from intoxication, is mentally or physically incapable of taking care of himself.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 971.]

3. SAME—AUTHORITY OF CARRIER'S AGENT.

The conductor of a passenger train who accepts an unattended passenger so drunk as to be unable to look after himself is acting within the scope of his authority.

4. SAME—CARE REQUIRED OF CARRIER.

Where the conductor of a passenger train accepts an unattended passenger who is so drunk as to be unable to look after himself, the railroad company, while not an insurer of such passenger's safety, is bound to exercise reasonable care to protect him from danger.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1095.]

5. SAME—CONTRIBUTORY NEGLIGENCE.

Where a railroad company accepts an unattended passenger who is so drunk as to be unable to take care of himself, and has knowledge of such condition when it accepts him as a passenger, the question of contributory negligence cannot arise when he is injured.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1350.]

6. SAME—RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* does not apply where the accident might as plausibly have resulted from negligence on the part of the passenger as on the part of the carrier; nor is it applicable to the death of a passenger from circumstances that are personal and peculiar to him, and not by reason of any management of or accident to the train itself.

7. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CONFLICTING EVIDENCE—QUESTIONS FOR JURY.

Where the evidence is conflicting the questions of negligence and contributory negligence are for the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 298, 299.]

Appeal from Circuit Court, Miller County; Joel D. Conway, Judge.

Action by C. S. Price and others against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. F. Price was killed on the night of December 16, 1898, by falling from a passenger train of the St. Louis, Iron Mountain & Southern Railway. The "cause of fall unknown to jury" was the verdict of the jury of inquest. The widow and children of Price, appellants, sued the appellee, alleging, *inter alia*, that the proprietor of the Silver Moon Hotel, at Texarkana, where Price was stopping, being aware that he expected to go to Newport, Ark., to visit his wife, who was then sojourning there, took Price, who was in an insensible condition from intoxication, to appellant's depot at Texarkana, and delivered him to the conductor of the Cannon Ball train; stating to the conductor that he desired Price to be put off at Newport, and paying his fare to that point. The complaint then continues as follows: "The said conductor received the deceased in such insensible and irresponsible condition, well knowing the same, and, having divested him of all his valuables, including about twenty-seven dollars in money, said conductor took charge of his money, valise, and other valuables, for which he gave a receipt to said proprietor of the hotel, and said conductor caused the deceased to be laid down on the seats near the door of the smoking car of said train, and there left him, and that the defendant received said deceased, and undertook to transport, carry, and safely deliver him at Newport, Arkansas, well knowing the insensible and irresponsible condition of said deceased. That after having deposited the deceased in said smoking car, the conductor, brakeman, and other employes of defendant on said train paid no further attention to the deceased, and negligently and carelessly failed to exercise any diligence or care whatever with respect to said deceased, by reason of which he came to his death. That just before said train reached the station at said Cabot, it being then nighttime, the deceased awoke from his drunken stupor, in a dazed and bewil-

dered condition, and, not knowing or realizing his situation or whereabouts, while in said drunken and irresponsible condition, arose, and without being warned, cautioned, or restrained as he should have been, staggered through the door of the car, which was but a few feet distant, and out upon the platform of said car—the train being then moving at great rate of speed—and was thrown from said car to the ground, thereby receiving mortal injuries, from which he died, and which could and should have been prevented by the exercise of proper care by the defendant, and that his dead body was discovered lying upon or near the defendant's railway track, horribly mutilated, on the morning of the 17th of December, 1898. That upon the arrival of said Cannon Ball train at Newport, the said conductor left the valise belonging to said deceased at the depot at Newport; stating that deceased was lost somewhere between Little Rock and Newport." That deceased at the time of his death was earning a total income of \$4,000 per annum. The plaintiffs were obliged to expend \$500 for the burial expenses of deceased, and, by reason of the wrongs and injuries complained of, had sustained damages in the sum of \$10,000, for which they prayed judgment. The defendant, for its answer, denied every material allegation in the complaint, save that it was a corporation and common carrier, and that the deceased was intoxicated, and alleged contributory negligence of the deceased, and that whatever injuries he received were due to his intoxication and want of care. There was a trial at the November term, 1900.

The proprietor of the hotel, who put deceased, Price, on the train, testified, so far as his evidence is material here, as follows: "I took him in, and he had a valise, with a quart bottle of whisky in it. I put him in care of the conductor, and paid his fare, and gave the remainder of his money to the conductor, to take care of until he got home. I told the conductor he was unable to take care of himself. He didn't seem to know anything. There were two seats in the back end of the car where we took him, and, if I remember right, we put him in the end seat and laid him down. I took out his money, and got the conductor to take his fare out. The conductor told me he would take care of him. I said: 'You have to watch him closely. Take care of him.' I opened his valise, and showed him a bottle of whisky and said: 'He will need a drink or two before reaching Newport, to keep him from getting too nervous on you.' I don't think he knew what was going on in regard to the money. Anybody could see he was just like a child. The conductor said, 'Yes,' he would see that he would be taken care of all right. I told him two or three times. The reason I took him down was that I was uneasy, and

afraid the man was going to die in my house. He told me he wanted to go to Newport; that his wife and boy were there. I never saw him after I put him on the train. This was after 3 o'clock, on the north-bound Cannon Ball train. He must have weighed over 200 pounds, was a square-shouldered, fleshy, strong man, and looked like he carried his age well. I would judge him to be between fifty and sixty, and seemed to be stout and healthy in every way. At that time I did not know the conductor. The deceased walked with me to the depot. Nobody helped me until I came to the train. He fell down a couple of times. I needed help. He fell down from weakness. He was a little stupid and weak. I can't say that I put him on the train before I saw the conductor. I can't say whether the conductor was standing on the platform at the time or not. The conductor and brakeman were standing there, but I am not sure they were on the platform. Somebody pointed out to me the conductor, but I can't swear whether before or after I put deceased on the train. If I am not mistaken, they were on the platform at the time I got on, and helped to put him up there. I think the brakeman helped me, and both were together when I got him on the car. The conversation with the conductor was after I put him on the car. I had not gotten off. I was standing in the car when he took the money. I had the conversation spoken of with the conductor, inside the car. The man seemed perfectly quiet; not disposed to get up nor run around; perfectly content to lie there. That man that helped me on the train, I think, had on a brakeman's cap. I knew the conductor by his receiving the money."

The dead body of Price was found about four miles south of Cabot, on the right of way of the St. Louis, Iron Mountain & Southern Railway Company. The coroner found the body lying in a diagonal position from the railroad track, the feet toward the track, and the head five or six feet from the track. The tie inspector, who informed the coroner of the death, found the body with head and shoulders in the ditch, and he had drawn the body out of the water. The body was soaked from the shoulder to the waist with water. His left arm and leg were broken, and he was badly bruised about the left side of head and face. It was shown that the conductor told the agent at Newport "that he had lost a man between there and Little Rock."

On behalf of appellee the conductor testified, so far as material here, as follows: "I did not see Mr. Ward bringing Dr. Price to the train in December, 1898. I went out as conductor of that train, No. 56. The first I knew of Ward's bringing Price down there was, Mr. Ward was brought to me by Mr. Hall, who stated that he had a man whose

fare he was going to pay to Newport. He said: 'I have got a man. I want to pay his fare to Newport.' I said: 'All right. Why don't you go and buy a ticket?' He said: 'I would rather pay you the money. I will show him to you.' I got on the steps, Ward going ahead. He said: 'This is the man. I want to pay his fare to Newport.' I told him the fare was \$6.85. The fare was paid, and he said: 'He has been with me for three or four days, drunk. He is getting in good shape now, and I want you to take charge of his money, and don't let him buy any more whisky. I have given him what whisky I want him to have.' He made no request of me, and I made no agreement with him, in regard to looking after the old man. Nothing was said about that; not a word about looking after him; nothing except what I have stated. He gave me the money. I took it and counted it. Mr. Hall was a witness. He told me to give it to him when we got to Newport. He said if he had the money he would probably get off and get another drunk. At this time he was sitting up in the south end of the smoking room. In the course of his trip north he was lying down once or twice. During the trip I would see him frequently—every time I worked the train. I would see everybody on there. Every station we stopped at, I went through the entire train, and I saw him on every occasion. He sat in the smoking room quite awhile, and I saw him several times inside, sitting in a chair. He passed through the swinging door of the partition and stepped into the car. I know that twice I saw him in that car. He looked to me like a man that had been on a drunk. He certainly did not seem to be entirely incapable of taking care of himself. I did not see anything in his condition or conduct, or anything he did, to suggest to me that he needed any special looking after. I saw him twice walk into the car and look around. One time he had come just inside, and had a conversation with me. This is not unusual for a drunk man. I paid no attention to that. The conversation was between Malvern and Arkadelphia. It was a few words. He said: 'You have my money. Get me a bottle of whisky.' I first missed him just after leaving Holland, which is twenty-one miles north of Little Rock, and two and three-fourths miles from Cabot. I told the porter to go through the train and search for him. We could not find him. When I found he was off the train, I stopped at the first telegraph station and wired back that we had lost him. The telegram was as follows: '12-16-98. To C. M. H.: I am short a passenger. Think he fell off train between McAlmont and Austin. He was very drunk. Think his name is J. F. Price, Newport. Please have trains look out for him. Brandon.'" The testimony of other witnesses for appellee tended to corroborate the evidence of the conductor.

O. D. Scott, Chas. S. Todd, and B. D. Tarlton, for appellants. B. S. Johnson and J. E. Williams, for appellee.

WOOD, J. (after stating the facts). There was evidence to support the verdict. It was a mixed question of law and fact as to whether appellee was liable in damages for the death of Price. There was such substantial conflict in the evidence as to make it entirely proper for the court to submit the questions of negligence and contributory negligence to the jury upon proper declarations of law to be applied by the jury to the facts. *Fisher v. Ry. Co.* (W. Va.) 19 S. E. 578, 23 L. R. A. 758.

The court granted many separate requests for instructions on behalf of appellants, as well as appellee. It would uselessly extend this opinion for us to discuss each instruction given at the instance of appellee to which appellants object. It shall suffice to announce the law applicable to such cases, and then to determine whether the instructions, as a whole, conform to the principles announced.

A railway company is not required to accept as a passenger one without an attendant, who, from intoxication, is mentally or physically incapable of taking care of himself. But it cannot refuse to receive as a passenger one who is capable of taking care of himself, and whose presence is not dangerous or hurtful or annoying to fellow passengers. If the conductor of a passenger train accepts one as a passenger, unattended, who, from drunkenness, is unable to look after himself, he (the conductor), in so doing, is acting within the scope of his authority. It is one of the duties of the conductor to pass upon the eligibility, so to speak, of those presenting themselves for transportation. If a conductor accepts a person as a passenger whom he knows to be unattended, and knows to be insensible from intoxication, and thereby unable to protect himself from danger and injury, the company owes him the duty to exercise such care as may be reasonably necessary for his safety. While the company is not an insurer of the person of one who has been received as a passenger in such condition, being cognizant thereof, it is bound to exercise all the care that a reasonably prudent man would to protect one in such insensible and helpless condition from the dangers incident to his surroundings and mode of travel. The railroad company must bestow upon one in such condition any special care and attention, beyond that given to the ordinary passenger, which reasonable prudence and foresight demand for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or any conduct or disposition that might have been reasonably anticipated from one in his mental and physical condition, which would tend to increase the danger to be apprehended and avoided.

If its servants, knowing the facts, fail to give such care and attention, and injury results, as the natural and probable consequence of such failure, the company will be guilty of negligence, and liable in damages for such injury.

The question of contributory negligence could not arise where the undisputed evidence showed the passenger to be mentally or physically incapable of self-protection, and where the railway company had knowledge of such condition when it accepted him as a passenger.

Where the evidence is conflicting, and men of fair judgment and reasonable information might reach different conclusions in considering it, then the question of negligence and contributory negligence must be determined by the jury as matters of fact.

The doctrine of *res ipsa loquitur* does not apply in cases where the accident or injury, unexplained by attendant circumstances, might as plausibly have resulted from negligence on the part of the passenger as the carrier. Nor is it applicable to the death of a passenger that comes by reason of circumstances and conditions that are personal and peculiar to him, and not by reason of any management of or accident to or condition in the train itself, over which the carrier has exclusive control. "The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury." Authority for the various propositions of law announced above will be found in 4 Elliott on R. R. § 1844; Penn. R. Co. v. Ralston, 119 Pa. 577, 13 Atl. 324; Barnowski's Adm'r v. Nelson, 15 L. R. A. 33, note; Hutch. on Car. § 800, 801; Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160; 6 Cyc. 628-630; Thompson, Car. & Pass. 209 et seq., 214; Washington v. M., K. & T. R. R., 90 Tex. 314, 38 S. W. 764; Wood on R. R. p. 1559, et seq. 1569; 4 Elliott, R. R. §§ 1577, 302, 1330; Thompson on Car. Pass. p. 270, 271, 369; 3 Wood, R. R. § 1207; Robert Croom v. Ry., 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, note, 38 Am. St. Rep. 557; Ry. v. Evans, 71 Tex. 381, 9 S. W. 325, 1 L. R. A. 476; Millman v. N. Y. & H. R. Ry., 66 N. Y. 642; 6 Cyc. p. 598, 9, note; Meyer v. St. L., I. M. & S. Ry. Co., 54 Fed. 116, 4 C. O. A. 221; Cin. Ind., St. L. & Chicago R. Co. v. Cassius B. Cooper, Adm'r, etc. (Ind. Sup.) 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. Rep. 334; Kingston v. Ry., 40 L. R. A. 131, notes; Fisher v. Ry. (W. Va.) 19 S. E. 578, 23 L. R. A. 758; St. A.

& Terre Haute Ry. v. Carr, 47 Ill. App. 353; Atchison, T. & S. F. Ry. Co. v. Parry (Kan.) 73 Pac. 105; Putnam v. Ry., 55 N. Y. 103, 14 Am. Rep. 190; Ry. v. Martin, 61 Ark. 549, 33 S. W. 1070; Ry. v. Sweet, 60 Ark. 550, 31 S. W. 571; Ry. v. Rexroad, 59 Ark. 180, 26 S. W. 1037; Ry. v. Duffey, 35 Ark. 602.

Instruction No. 8 given at the request of appellants is not an accurate and complete statement of the doctrine of *res ipsa loquitur*, as applicable to the facts in this record. But the error presents no ground for reversal, because the instruction was favorable to appellants, and was asked by them, and the verdict was for appellee.

The other instructions, upon the whole, conform to the law as herein announced, and fairly presented the issues.

Affirm.

LEWIS et al. v. TISDALE et al.

(Supreme Court of Arkansas. June 10, 1905.)

1. DEEDS—OPERATION IN FUTURE.

A deed reserving a life estate to the grantor, and to become operative at her death, is valid.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 5, 16; vol. 49, Cent. Dig. Wills, §§ 208, 209.]

2. SAME—DELIVERY—EVIDENCE.

Where a deed was executed by a husband and wife to the latter's daughter, corroborated evidence that in the husband's absence the wife had it produced, and gave it to her granddaughter to keep for the grantee, is sufficient to sustain delivery, though the husband stated that his wife gave him the deed to do as he pleased with, and that he placed it in his trunk.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 625-629.]

Appeal from Chancery Court, Randolph County; Geo. T. Humphries, Chancellor.

Suit by Charles Tisdale and others against Emily Lewis and another to set aside a certain deed. From a decree for complainants, defendants appeal. Reversed.

The deed referred to in the opinion is as follows:

"Know all men by these presents that we, Mary A. Brady and John R. Brady, for and in consideration of the sum of Fifteen Hundred Dollars, and for the further consideration of the love and affection which the said Mary A. Brady bears for Emily Lewis, her daughter, issue of her marriage with Sherly Tisdale, the receipt of the said Fifteen Hundred Dollars being hereby acknowledged, have this day granted, bargained, sold and conveyed and by these presents do hereby grant, bargain, sell and convey unto the said Emily Lewis and unto her heirs forever the following described real estate in the county of Randolph and State of Arkansas, to-wit: North-west fractional quarter (north of Spring river) in section eight (8), north of the base line, in range two (2), west of the fifth principal meridian.

"To have and to hold unto her, the said Emily Lewis and her heirs and assigns in fee simple forever. And I, the said Mary A. Brady, do hereby covenant to and with the said Emily Lewis that I am lawfully seized in fee of the aforegranted premises, that I have a good right to sell and convey the same and that I will for myself and heirs, executors and administrators shall forever warrant and defend the title to the same unto her the said Emily Lewis, her heirs and assigns, against the lawful claims and demands of all persons whomsoever.

"And it is hereby expressly understood that the said Mary A. Brady shall have and retain the use and enjoyment, the rents and profits of the aforegranted premises for and during her natural life; and that this grant, bargain and sale shall not be operative and shall not take effect until her death; at which time said Emily Lewis shall take possession of said lands and hold the same under and by virtue of these terms and conditions of this conveyance, but not until then.

"Given under our hands this the 4th day of September, 1902. [Signed] Mary A. Brady. John R. Brady."

Jno. B. McCaleb and Witt & Schoonover, for appellants. Chas. Tisdale, Margaretta Wells, and Hatcher Miller, for appellees.

HILL, C. J. Mrs. Mary A. Brady was the owner of a tract of land which is the subject-matter of this litigation; and on the 4th day of September, 1902, she and her husband executed and acknowledged, in the town of Pocahontas, a deed thereto to Mrs. Emily Lewis. Mrs. Lewis was a daughter of Mrs. Brady by a former marriage. The deed reserved a life estate to Mrs. Brady, and was to become operative at her death. It will be set out by the reporter in the statement of facts. The description is defective, but it is agreed that it was intended to cover the farm known as the "River Farm," and no point is made against it on account of the misdescription. The deed was valid. *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. 563; *Cribbs v. Walker* (Ark.) 85 S. W. 244.

The only question in the case is a question of fact—whether or not the deed was delivered. This suit was brought by Mrs. Brady's heirs at law to set it aside. Mr. Brady testified his wife gave it to him to do as he pleased with it, and that he placed it in a trunk, and it was not delivered, but wrongfully taken by Mrs. Lewis after Mrs. Brady's death, and then placed of record. He is corroborated in this version of the transaction by several witnesses testifying to statements and conduct of Mrs. Lewis consistent with this theory, and inconsistent with her version of the transaction. Mrs. Lewis and her daughter Mrs. Wells testify that a few days before the death of Mrs.

Brady, while Mr. Brady had gone to Imboden for a physician and medicine, Mrs. Brady had the deed produced, and gave it to her daughter to read, and, after it was read, delivered it to her granddaughter to keep for her (the granddaughter's) mother; that Mrs. Wells put the deed in a trunk containing some of her own clothes and some of her grandmother's; that after Mrs. Brady's death, in going through her things, Mr. Brady got this deed, and a contention at once arose between Brady and Mrs. Lewis over it; that Brady put it in another trunk, and later Mrs. Lewis, in his presence and that of other members of the family, took it therefrom. These witnesses are corroborated by a disinterested witness, who testified to communications with Mrs. Brady showing it was her intention for Mrs. Lewis to have this property. The execution of the deed itself and its terms are also corroborative of this testimony, and the direct testimony of its delivery is not inconsistent with Brady's testimony of what his wife told him, as she might have decided afterwards, and during his absence, as stated by the witnesses, to perfect the transfer. On the whole case, the court is of the opinion that the preponderance of the testimony sustains the delivery of the deed.

The decree is reversed, with directions to dismiss the complaint and grant the prayer of the cross-complaint, reforming the description in the deed and quieting Mrs. Lewis' title.

ST. LOUIS, I. M. & S. RY. CO. v. GRANT.* (Supreme Court of Arkansas. June 10, 1905.)

1. AGENCY—TORT OF AGENT—SCOPE OF AUTHORITY—EVIDENCE—SUFFICIENCY.

In order to hold a principal liable for a tort of his agent, the agent must have been at the time engaged in the principal's business, and the tort must have been committed while he was carrying out such business.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 599, 600.]

2. SAME—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for an assault committed on plaintiff by defendant's detective while plaintiff was taking down the numbers of cars belonging to defendant, evidence held sufficient to show that the detective was acting under directions of defendant to stop the taking down of numbers.

3. SAME—SUFFICIENCY OF EVIDENCE—COURSE OF EMPLOYMENT.

In an action for an assault on plaintiff by defendant's agent, evidence held sufficient to warrant a finding that the agent was acting in the course of his employment for the benefit of his principal, and within the line of his duty.

4. ASSAULT—EXCESSIVE DAMAGES.

Where, in an action for an assault and battery, the jury found no exemplary damages, but returned a verdict for \$7,000, and it appeared that the assault was a vicious one, that plaintiff was lame and bruised for two weeks, incurred medical and drug bills, suffered pain and the practical loss of one eye, had a slight personal disfigurement, and was a constant sufferer from headaches; that he was a stenog-

rapher, and that the loss of his vision seriously impaired the pursuit of his occupation—the verdict was not excessive.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 55.]

Battle and McCulloch, JJ., dissenting.

Appeal from Circuit Court, Pulaski County; Edw. W. Winfield, Judge.

Action by one Grant against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The appellee, Grant, brought suit in Pulaski circuit court against the appellant railway company for personal injuries received from an assault and battery of one O. W. Burke, a "special agent" or detective of the appellant railway company. He sued for both compensatory and exemplary damages. The jury found against the plaintiff as to exemplary damages, and found in his favor as to compensatory damages, which were assessed at the sum of \$7,000, and judgment was entered therefor. The defendant railway company, properly preserving its exceptions, brought the case here. Grant was a young man employed in the freight department of the Choctaw, Oklahoma & Gulf Railroad Company (hereafter referred to as the "Choctaw Road"), and he was directed by his employer to go to the switches where freight cars were standing, and take the numbers of the various cars and gather data therefrom for the use of his employer. He was instructed not to go on the appellant's tracks or right of way in performing this work. While he was standing in a public street of the city of Little Rock in the performance of this work of taking numbers of Iron Mountain freight cars on a switch in said street, he was set upon by said Burke. Burke attacked him without warning, and beat him viciously. The result of this beating was the permanent loss of 90 per cent. of the vision in one eye, the permanent drooping of one eyelid, and suffering from the date of the injury to the time he testified in the trial, in addition to expenses, loss of time, etc. The appellant offered no evidence on the trial, and the substance of the appellee's testimony was: Bossinger, the local freight agent of the Iron Mountain Railway at Little Rock, learned of Grant's taking the car numbers, and notified A. R. Bragg, the division freight agent, by letter and verbally, of these facts, and he told the commercial agent of the Choctaw Railroad and the local freight agent of said road that if they did not stop this boy from taking these numbers that he (the boy) would get hurt. Bragg was the head of the freight department of the road at Little Rock and in the division of which Little Rock was the headquarters. When he received this information from Bossinger, he wrote to the general superintendent at St. Louis in regard to it, and had some correspondence with him about it and probably other officers. He wrote the following

*For dissenting opinion, see 83 S. W. 1123.

letters to Mr. Morrison, the general freight agent of the Choctaw Road:

"Personal. Little Rock, Ark. Sept. 30, 1902. Mr. H. W. Morrison, G. F. A. C. O. & G. R. Little Rock, Ark.—Dear Sir: For several months it has been called to my attention, at different times, that a man in the employ of your company, either in your office or the office of your commercial agent here, makes a practice of going over our team and private tracks daily taking numbers and initials, etc. In two or three instances merchants have complained to me that your representative has been to them calling their attention to such cars received via the Iron Mt. wanting to know why such cars were not shipped via the Choctaw. The name of the party who is taking the numbers is Grant. He was found taking numbers of our cars on the Penzel Grocery Company's track on last Saturday. All I desire to say is that I consider this a contemptible piece of business, and a method that no fair competitor would take to gain information, and we propose to treat this man as a trespasser. [Signed] Yours truly A. R. Bragg. ARB."

"Personal. Little Rock, Ark. Oct. 6, 1902. Mr. H. W. Morrison, G. F. A., C. O. & G. Ry., City.—Dear Sir: Replying to your personal letter of Oct. 5th in answer to my letter of Sept. 30th.: I desire to say that is entirely with you whether you answer communications from this office or not. In the second place, I deny positively that anyone connected with this company in Little Rock ever resorted to the practice to which your company have resorted to get information, and the statement made in the second paragraph of your letter is without foundation. I desire further to add that, hereafter, if the party in your employ is found in our yards taking car numbers and getting other information, as charged in my communication of September 30th, he will be treated as a trespasser. [Signed] Yours truly, A. R. Bragg, D. F. A."

Daniel Webster was a young man employed as "utility man" in Bossinger's office, and he was acquainted with Grant, and Bossinger was not. Burke came to Bossinger's office, according to Bossinger's testimony, asked if they were having any trouble with the Choctaw representative, and was told they had, and Burke said he wanted to have some one identify the party, and Bossinger—so Webster says, and Bossinger practically admits—delegated Webster to go with Burke to identify the party. Webster went with him three different times before they found him; the first time about a month before the other trips; and finally found him as heretofore stated, and Webster pointed him out to Burke, with the result that Burke immediately assaulted him. A short time before the assault Webster stated to W. H. Davis, a witness, that they were looking for Grant (referring to himself and the detective), and the witness asked what the detective was do-

ing looking for Grant, and Webster told him that Grant was checking up their cars, and the witness asked what they were going to do if they caught him, and he said they were going to beat him. Burke was not present, but in sight, when this conversation was had. When Burke attacked him, he told him he had been warned before not to do this work, and during the attack on Grant Burke secured his memorandum book, with the car numbers, and just after the attack remarked, in hearing of a bystander, "We will just take this up, and show it to them." Webster testified that once after the assault he saw Burke come into Bossinger's office, get some money, and walk out. Bossinger says he was not in his office after the assault. Bragg says that Burke came to his office before the assault on Grant, which was November 25, 1902, and he had a conversation once or twice with him before the assault. Burke asked him, so he says, if he knew who was taking the car numbers, and he said he knew it was being done, but did not know who was doing it. He denied all further knowledge of the affair than as stated. He said that he was (at the time under inquiry) a general agent in Arkansas of the company for freight business, and had control of the local agents in matters relating to freight traffic. Wm. Ballard was chief of the special agents and detectives, and O. W. Burke was under his direction and control. He assigned Burke to his territory, which was the Arkansas division, and his duties; and he was instructed to look after merchandise while he was in Little Rock, as many cars had been robbed in the yards there and at Fort Smith. Ballard testified it was Burke's duty to act without special instruction in cases of robbery or trouble with freight cars. His instructions to his men were to investigate at once when they found out that cars were broken into or other depredations committed. He denied sending Burke on this mission, and said he did not remember of having a request for a detective to be specially sent to the yards in question. The payroll of the company for November showed that Burke was working for the company for \$85 per month, and he also received \$66.30 for expenses during that month.

B. S. Johnson, for appellant. Cantrell & Loughborough, for appellee.

HILL, C. J. (after stating the facts). The appellant does not insist upon any errors in the instructions. The court gave all the instructions the appellant requested, and they were in harmony with those given at the request of the appellee, and fairly presented the law of the whole case to the jury.

The appellant objected to a great deal of the testimony adduced, and insists that much of it is incompetent and prejudicial. A corporation acts only through agents, and the appellee had no direct evidence to sustain his cause, and necessarily relied upon various

acts of different agents of the corporation, seeking to establish therefrom sufficient probative strength to bind the corporation. The court fails to find the evidence constituting any link in this chain incompetent; but little of it alone would have weight; and the serious question is, taking all the various bits of evidence—the entire chain proved—whether it is sufficiently strong to sustain the verdict hanging upon it. In the treatise just published on the Law of Agency by Clark & Skyles, these principles are laid down: "In determining a principal's liability for his agent's torts, two important elements are to be considered: * * * First, it must be committed in the course of the agent's employment; and, second, it must be committed for the principal's benefit; although there are cases holding the principal liable for the agent's wrongs committed for his own benefit." Section 491. Again, the authors say: "It is well established that a principal is liable for all torts, negligences, or other malfeasances committed by his agent in the course of his employment and for the principal's benefit, although such torts or negligences are not authorized or ratified by the principal, or even though he had forbidden or disapproved of them, and the agent disobeyed or deviated from his instructions in committing them. * * * This rule is not based on the ground that the agent had authority, express or implied, to commit the tort, as is the case with contractual obligations binding on the principal; but it is based on the ground that in such cases the agent represents the principal, and all acts done by the agent in the course of his employment are the acts of the principal; and it is also on the ground of public policy that, where one or two innocent persons must suffer from the agent's wrongful act, it is just and reasonable that the principal, who has put it in the agent's power to commit such wrong, should bear the loss, rather than the innocent third person." Section 493. After discussing the difficulty of ascertaining what is meant by "course of employment" within the meaning of the rule and the varying application of it, the authors say: "It is certain, however, that the agent must be engaged in the principal's business, and the tort must be committed while he is carrying out such business. If, from a consideration of all the facts and circumstances of the case, it is determined that the agent was acting for his principal, and in pursuance of his real or apparent agency, at the time the tort was committed, then it may be said that he was acting in the course of his employment, and the principal will be liable for such tort, whether authorized or not." Section 494. The authors say further: "In accordance with the principles heretofore considered, a principal may be held liable for an assault committed by his agent in the course of his employment, and for purpose of advancing the principal's interests." Section 502.

The questions involved have been before this court in several cases, and the principles condensed in the foregoing excerpts have found application in *Ry. v. Hackett*, 58 Ark. 381, 24 S. W. 881; *Ward v. Young*, 42 Ark. 542; *Pine Bluff W. & L. Co. v. Schneider*, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366. In the latter case the court said: "A servant may do an act expressly forbidden by his employer, and yet, if it be within the scope of his authority, the employer may be liable for a resulting injury. This rule is constantly enforced in cases against railroads, electric light and gas companies, and it applies to private persons who employ servants to transact their business." Applying these principles to the facts, that Burke was acting for his principal, and in furtherance of its affairs, and not in the indulgence of any private pique or quarrel, is manifest from all the evidence, especially the statement of Webster when he was seeking Grant to show him to Burke, the statement of Burke when he struck him, that he had been warned not to do that work, and the action of Burke in forcibly taking Grant's memorandum book containing the car numbers, and saying, "We will just take this up, and show it to them." Who the "them" referred to is a matter of conjecture, but in view of his persistent seeking to find this offending young man, and applying in regard thereto to the general agent of the state and then the local agent at Little Rock in charge of the freight affairs of the company, it is apparent that it was to some superior servant interested in these car numbers that he would show the book. That this assault was to stop by force and intimidation a method of securing information of the company's business by a competitor which the company considered injurious to its interests and unfair competition is a fair and legitimate conclusion for the jury to draw from the facts, and would tend to prove that the act was intended for the principal's benefit. The most difficult proposition is whether it was in the course of employment. Bragg, the general agent, was in correspondence with the superintendent, and probably other general officers—his memory is not positive as to the others—about this conduct of the Choctaw Railway in sending Grant out to gather this information. He denounced the conduct of Mr. Morrison in warm terms, and said and repeated that "we propose to treat this man as a trespasser." Shortly after that this railroad detective reports to Bragg for information of this man. Bragg said he could not give him his name (although he had written to Mr. Morrison giving Grant's name), but he knew of this practice. Then Burke goes to Bossinger, the next in authority in the freight affairs, and asks about the trouble with the Choctaw representative, and desires to be shown the man taking the car numbers. Bossinger turns him over to Webster, his "utility man," and after unsuccessful efforts he

finds Grant in the act of doing this work, and points him out to Burke, who at once assaulted him, stating, as he did so, that he had been warned before of taking these car numbers. Burke's duties were to detect and prevent crimes against the company's property. His chief says that it was his duty to investigate robberies of cars, and other trouble with freight cars, and sometimes other depredations. Whether Burke and those under whom he acted considered Grant's action within the depredations and infringement on the company's property rights, the special duty of guarding which rested on the detective force, is unimportant, for the evidence clearly tends to prove that he was acting under directions to stop this practice, which the general agent regarded as unfair competition, and the man engaged in it a trespasser. Whether he exceeded his instructions in the means and force used in stopping this practice is immaterial. The evidence is sufficient to justify the jury in finding that he was acting in the course of his employment, for the benefit of his principal, and within the line of his duty.

The verdict is alleged to be excessive. The jury found in favor of the company on this count for exemplary damages, and thereby showed a determination not to punish the company, but to compensate the young man for his injury. The assault was a vicious one. Grant was lame and bruised for two weeks, incurred medical and drug bills, suffered pain from the attack, and the practical loss of one eye, has a slight personal disfigurement and up to the time of the trial was a constant sufferer from headaches produced by the attack. He was a stenographer, working as such when sent out on the duty of taking these car numbers, and it is shown that his loss of vision seriously impaired the successful pursuit of his chosen occupation. The verdict cannot be said to be excessive.

The judgment is affirmed.

BATTLE and McCULLOCH, JJ., dissent.

ENGLISH v. ANDERSON.

(Supreme Court of Arkansas. June 10, 1905.)

TRIAL—ARGUMENT OF COUNSEL—UNWARRANTED STATEMENTS.

In an action for damaging an orchard, polluting a cistern, and committing other similar injuries, defendant's counsel, in opening, stated that he expected to prove that plaintiff had damaged his orchard himself, and had poisoned his well, in order to collect the insurance on his wife's life. The court mildly stated that the remarks were not proper, and instructed the jury not to consider the same. In closing, the attorney stated that he had not proved the assertions of his opening, because the court would not permit him to do so, but that he could have done so if permitted. The court again stated in the same tone as before that the argument was not proper, whereupon defendant's attorney stated that he apologized, but that plaintiff was one of the meanest men who ever came into court, and had destroyed his own trees

and poisoned his own cistern. There was absolutely no testimony or offer of testimony to support any of the charges in either the opening or the closing argument, and the verdict which was rendered for defendant was against a preponderance of the evidence. *Held*, that the argument constituted reversible error, which was not obviated by the admonitions of the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 302, 308, 316.]

Appeal from Circuit Court, Sharp County, Western District; John W. Meeks, Judge.

Action by C. W. English against Hardy Anderson. From a judgment for defendant, plaintiff appeals. Reversed.

John B. McCaleb, Sam H. Davidson, and D. L. King, for appellant.

HILL, C. J. The appellant, English, sued appellee, Anderson, alleging that Anderson, as his tenant, failed to cultivate his farm in a husbandlike manner, in violation of the contract of rental; that he injured his orchard by allowing cattle to break into and eat the branches and break down the trees, and that he suffered the trees to be cut, broken down, etc.; and that he burned the rails from his fences, and polluted his cistern—and other specific acts of injury, for which he prayed damages, specifying the amount of each item. Anderson denied all allegations of injury, and the issues were tried before a jury, who found in favor of Anderson. It cannot be said that the verdict is without evidence to support it, yet a great preponderance of the evidence is against the verdict, which does not seem responsive to the evidence on the issues before the jury. This, of course, is not ground for reversal, but it does lend weight to the errors assigned in regard to the argument of counsel for the prevailing party.

The record shows the following: George G. Dent, Esq., one of the attorneys for appellee, in opening his case, stated to the jury that he expected to prove "that plaintiff had damaged his orchard himself"; "that plaintiff had poisoned his own well"; "that he (plaintiff) had his wife's life insured, and that he poisoned the well for the purpose of poisoning her and collecting the insurance"; and that "plaintiff had killed and poisoned another party." The appellant, by attorney, objected to this language at the time, and asked the court to withdraw it from the jury; and thereupon the court, in a mild manner and tone of voice, stated to the attorney that the remarks were not proper, and said to the jury, in the same tone, not to consider said remarks. The evidence was then produced to the jury, the court delivered the instructions of law, and the case was argued by the attorneys for both parties. In his argument to the jury, appellee's attorney, Dent, stated that "he had not proved the statements he asserted in opening that he expected to prove to the jury, for the reason that the court would not permit him to do so, but that he could have done so if permitted, and

that said statements were true." The appellant at the time, by his attorneys, objected and excepted to these statements; the court at the time of appellant's objections stating to said attorney for appellee, in a mild tone of voice, that such argument was not proper; whereupon said attorney said that he "apologized for said statement," but, "that plaintiff was one of the meanest men who ever came into a court of justice"; that he had destroyed his own trees and had poisoned his own cistern; and that the evidence warranted him in saying so. And Hon. W. A. Turner, one of the attorneys for appellee, in arguing said case before the jury, asserted that "he was warranted in saying, from the evidence, that the plaintiff had destroyed his own orchard, that he believed this, and was warranted in believing it, from the evidence in the case." The record fails to disclose any offer of testimony to support any of the charges. Evidence that English injured his own cistern, of course, would have been competent, but not the charges of murder. There is absolutely nothing in the record to warrant any of these remarks. Anderson's testimony is confined to denials and explanation of the evidence against him, and some of his witnesses are corroborative of him, and some are corroborative of English's evidence. These assertions, therefore, were wholly unwarranted, and were attempts of counsel to make witnesses of themselves of matters without the record. The court fell short of the duty imposed on him to enforce the argument in legitimate channels, and permitted repetitions of it, in offensive and denunciatory terms, after his mild admonitions to counsel to desist. Even if the court had acted emphatically, it is doubtful if the sinister effect of these remarks could have been eradicated. This subject has recently been gone into fully in the cases of *Kansas City Southern Ry. v. Murphy* (Ark.) 85 S. W. 428, and *Day v. Ferguson* (Ark.) 85 S. W. 771. Applying the principles therein stated, the court is of the opinion that an undue advantage has been secured by this argument, not warranted by the law or facts of the case.

Reversed and remanded.

ST. LOUIS & S. F. RY. CO. v. CARLISLE.

(Supreme Court of Arkansas. June 10, 1905.)

1. RAILROADS—KILLING STOCK ON TRACK—INSTRUCTIONS—SPEED OF TRAIN.

Where, in an action against a railroad for negligently killing plaintiff's mule, the court instructed that defendant was not required to run its train at a low rate of speed, as to one who owned stock and allowed it to range in the vicinity of the track, an instruction that it was not negligence to run the train at 50 or 55 miles an hour was properly refused.

2. SAME—ISSUES.

An instruction that, if the rate of speed of the train was the sole cause of the injury, defendant was not liable, was also properly refused; the issue being one of care in the operation of the train, whether slow or fast.

3. SAME—NEGLIGENCE.

Plaintiff's mule was killed by defendant's train while on the right of way and track, going from the train some distance before it was struck. The view along the track was clear for at least a quarter of a mile from the point the mule entered the right of way, and, at the speed the train was running, it was evidently far enough from the mule so that, if action towards slowing down had been earlier begun, the injury could have been avoided. *Held*, that defendant was liable.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1489-1493.]

Appeal from Circuit Court, Washington County; John N. Tillman, Judge.

Action by J. D. Carlisle against the St. Louis & San Francisco Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. F. Parker and B. R. Davidson, for appellant. Walker & Walker, for appellee.

HILL, C. J. This is an action against the appellant railroad company for negligently killing appellee's mule. There were a verdict and a judgment in favor of appellee. The court gave one general instruction, and it was in entire accord with the statute governing these cases. At the instance of appellant the court gave ten instructions, and refused three. Those given presented fairly every phase of the appellant's case which it was entitled to have considered, and some more favorably for it than the law authorized. The first one refused was a peremptory instruction which ought not to have been given. The next instruction refused stated that it was not negligence to run the train at 50 or 55 miles an hour. The court had just instructed, at instance of appellant, that the company was not required to run its train at a low rate of speed, as to one who owned stock and allowed it to range in the vicinity of the track. The last instruction requested which was refused stated that, if the rate of speed the train was operated was the sole cause of the injury, to find for the defendant. This was not the issue in the case, but the issue was one of care in the operation of the train—whether slow or fast—and that question was properly and fairly presented in instructions framed by the appellant.

On the evidence, the jury, if it believed plaintiff's witnesses, were amply justified in finding the verdict. The mule killed was on the right of way and track going from the train some distance before it was struck, and the vision along the track was clear at least a quarter of a mile from the point the mule must enter the right of way. At the rate of speed the train was running, it was evidently a sufficient distance away from the mule to have prevented the injury if action towards slackening the speed was earlier begun. In fact, it is doubtful if it was slackened at all.

Judgment affirmed.

COROTHERS v. STATE.

(Supreme Court of Arkansas. June 10, 1905.)

1. CRIMINAL LAW—APPEAL—INSTRUCTIONS—REVIEW.

Where there was no exception to an instruction in a criminal case, nor any assignment of error based thereon, in the motion for a new trial, the instruction is not reviewable.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2868, 2883.]

2. SEXUAL ABUSE OF INFANT FEMALE—CONSENT.

Sexual intercourse with a female under 16 years of age, with or without her consent, constitutes a crime, within Kirby's Dig. § 2008, punishing the offense of carnally knowing a female under the age of 16 years.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 12.]

3. CRIMINAL LAW—CROSS-EXAMINATION OF DEFENDANT.

Under Kirby's Dig. § 3088, making a defendant on trial for crime a competent witness, a defendant testifying is subject to a similar cross-examination as any other witness, and it is not error to cross-examine him with reference to his attempt to silence testimony against him.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 979-984.]

4. SAME—DISCRETION OF COURT—REVIEW.

The court, in controlling the cross-examination of a defendant on trial for crime, is vested with discretionary power, and it is only for an abuse thereof prejudicial to defendant that a reversal can be had.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3084; vol. 50, Cent. Dig. Witnesses, §§ 923-930.]

Appeal from Circuit Court, Conway County; Wm. L. Moore, Judge.

One Corothers was convicted of carnal abuse of a female under the age of 16 years, and he appeals. Affirmed.

Cravens & Covington and Atkinson & Patterson, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

HILL, C. J. Corothers was indicted under section 2008, Kirby's Dig., for carnal abuse of Lou Eldridge, a female under the age of 16 years, was convicted, and has appealed.

1. The indictment was returned May 6, 1904, and alleged the offense to have been committed on May 10, 1904. It was essentially similar to the one in *Conrand v. State*, 65 Ark. 559, 47 S. W. 628. The court in that case held that an indictment charging the offense in the past tense was not vitiated by the insertion, evidently by clerical error, of a date in the future. The trial judge, in his charge, told the jury that the indictment charged the crime was committed in 1904, "and the proof shows that it was in 1903, which makes no difference." The instruction is criticised for assuming that the crime was proved. While the instruction is not happily worded, yet its meaning, in view of the facts and the connection in which it was used, is clear. However, there is no exception to this instruction, and no assignment of error based upon it, in the motion for a

new trial, and hence it is not properly for review here.

2. The appellant complains of the following action of the court: "The defendant thereupon asked the court to instruct the jury that, if the act of sexual intercourse was committed forcibly and against the will of the prosecuting witness, then the crime was rape, and not carnal abuse, which was by the court refused." The prosecutrix testified that the first act of intercourse was without her consent and against her will. She also testified to four other subsequent acts of intercourse, where the lack of consent is not shown. Discarding the first act, still the evidence sustains the verdict. But the fact that the intercourse was procured in a manner to constitute rape will not be a defense to an indictment under this statute. The charge of rape does not include this crime, as pointed out in *Warner v. State*, 54 Ark. 660, 17 S. W. 6, but the fact of sexual intercourse with a female under 16 years of age, with or without her consent, whether obtained by force or from lust, constitutes the crime denounced by this statute.

3. The appellant testified in his own behalf, and denied the crime charged, and explained the occasion of the trip when the first act was charged to have been committed. He testified in regard to all the material questions before the jury. The state was permitted to cross-examine him to inquire whether one Riggs, a friend of his, had offered the father of the prosecutrix \$1,000 to get the girl out of the county in order to prevent her testifying against him. He denied all knowledge of any such action. There was evidence on behalf of the state tending to prove that an effort had been made by another party to get the girl away. The first case in which this court passed on the act of 1885 (Kirby's Dig. § 3088) permitting the defendant to testify in criminal cases was *McCoy v. State*, 46 Ark. 141, and the following rule announced: "A defendant in a criminal case takes the stand like any other witness. He is subject to the same liabilities on cross-examination as any other witnesses." This rule has been followed and applied in many cases since. It was entirely competent to attempt to prove by this witness (defendant) that he was attempting to silence testimony against him. Some of the questions asked assumed facts not proved, and he denied all knowledge of the matter inquired of, and no prejudicial error is seen in this regard. The circuit court is necessarily vested with a large discretion in controlling the examination of witnesses, and it is only for an abuse of such discretion prejudicial to the appellant that reversals can be obtained. *Straw Scott v. State* (Ark.) 86 S. W. 1004.

4. On the whole case the court is unable to find any prejudice to the appellant. The prosecutrix was severely attacked, and her moral character questioned, and the proba-

bility of her evidence assailed. The jury has, however, believed her and discredited the appellant, and their decision upon all such matters is final.

The judgment is affirmed.

WROUGHT IRON RANGE CO. v. YOUNG.
(Supreme Court of Arkansas. June 10, 1905.)

1. MASTER AND SERVANT—EMPLOYMENT—CONTRACTS—WAGES—INDEBTEDNESS—SET-OFF.

Where plaintiff was employed as defendant's agent under a separate but similar contract for each of several years, to be paid by commissions on ranges sold by employees under his charge, defendant was entitled to set off the amount due by plaintiff to it on account for one of the years against sums due from defendant to plaintiff on the account for that and prior years.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 111; vol. 43, Cent. Dig. Set-Off and Counterclaim, §§ 44, 53.]

2. SAME—OVERDRAFTS—INSTRUCTIONS.

Where plaintiff's contract of employment provided that he should not permit any man under his supervision to overdraw his monthly allowance, and that in the event of such overdraft the same should be charged to plaintiff's account, and in an action on the contract the court charged that if sums were appropriated by the salesmen under plaintiff, without his permission, knowledge, or consent, before such sums reached his hands, such retention did not constitute an overdraft, within the meaning of the contract, the refusal of an instruction stating the converse of such proposition was error.

Appeal from Circuit Court, Ouachita County; Charles W. Smith, Judge.

Action by S. K. Young against the Wrought Iron Range Company. From a judgment for plaintiff, defendant appeals. Reversed.

During the years 1897, 1898, and 1899 S. K. Young was employed by the Wrought Iron Range Company to take supervision of salesmen engaged in selling Home Comfort ranges manufactured by the defendant. The company agreed to allow him for his services about \$2 on each range sold by men under his supervision. But when a range was sold on credit the commission was not due until the notes given for the same were collected. On his part, Young agreed:

"(1) To discharge the duties required of him strictly and faithfully; to devote all his time to the business of said company, in such territory and in such manner as may be prescribed by it; to keep careful oversight of the expenses of the men under his supervision, keeping their and his own expense account to the lowest possible limit, and to accept said commission, as provided, in full satisfaction for his services.

"(2) To personally inspect all notes and sales made by men under his supervision, and to ascertain if any promises or verbal agreements have been made by such men and left unfilled; to report each month to his general superintendent the work inspected and its condition; to settle the books of all men under his supervision on or about the first of

each calendar month, and transmit them immediately, together with his monthly report, and all cash on hand in excess of \$500.00 to said Company at Denver; any failure upon his part to discharge these duties shall be sufficient grounds for the termination of this contract.

"(3) Not to draw for his personal use more than One Hundred Dollars per month until the final settlement at the expiration of this contract.

"(4) Ten per cent. of all losses upon notes received for sales made by men under his supervision during the term of this contract, shall be deducted from amount due him; and any balance due on notes for ranges taken up and returned to the Company shall be accepted as losses.

"(5) Under no circumstances will he permit any man under his supervision to overdraw the monthly allowance due him for his work; in the event of such overdraft, same to be charged to the account of the party of the second part."

A separate contract was signed for each year of service, but these contracts, with the exception of the dates, were the same.

Afterwards S. K. Young brought an action at law against the defendant company, in which he alleged that the company was owing him \$774.57 for commissions due January 1, 1899, for sales made by men under his supervision for the years 1897 and 1898, and the further sum of \$600 for commissions for sales made on credit during year 1898, and not realized on until year 1899, and which were due January 1, 1900, and also the further sum of \$600 for services as superintendent during year 1898, outside of the contract referred to, wherefore he asked judgment against the company for the amounts named, with interest. The defendant, in its answer, denied that it was due the plaintiff any sum upon the contracts sued on, and denied that plaintiff performed any services not included in the contracts made by him, and denied that it was indebted to plaintiff anything either on the account or for extra services. Defendant further alleged, by way of counterclaim and set-off, that during the year 1897 the plaintiff overdraw his personal account \$80.78, and further that during the years 1897, 1898, and 1899 he permitted salesmen under his supervision to draw in excess of the commissions due them the sums amounting to \$3,748.03, for which overdrafts, it alleged, the plaintiff was liable under the terms of his contract. On the trial there were a verdict and judgment in favor of the plaintiff for the sum of \$1,974.57, from which judgment the defendant appealed.

J. M. Moore and W. B. Smith, for appellant. Campbell & Stevensen and Smead & Powell, for appellee.

RIDDICK, J. (after stating the facts). The plaintiff was employed by the defendant for

the years 1897, 1898, and 1899, to have supervision of salesmen selling ranges manufactured by defendant. He sued for commissions due him for the years 1897 and 1898, but it appeared that during the year 1899 plaintiff had overdrawn his account, and that if the account for 1899 be considered, and plaintiff charged with the amounts advanced to him by defendant during that year, it will materially reduce the amount due from defendant to plaintiff. While the services performed by plaintiff for defendant were continuous during the years named, they were performed under a separate contract; but it is clear we think that the amounts due by plaintiff to defendant on the account of 1899 can be used as a set-off against the sums due from defendant to him on the accounts for the years 1897 and 1899. When the accounts for all these years are considered, it seems quite clear that the judgment in this case is excessive, for, if every item claimed by plaintiff is allowed, when the accounts for 1899 are considered, the judgment is still much too large.

Again, the contract under which plaintiff performed the services for defendant stipulated that he should not permit any man under his supervision to overdraw the monthly allowance due him for his work, and that in the event of such overdraft the same should be charged to the account of the plaintiff. Now, the evidence showed that the men under the supervision of plaintiff retained from time to time various sums collected by them in excess of the amounts due them for their work, and it became a material question in the case as to whether these sums should, under the contract, be charged to plaintiff, and the loss borne by him, if the sums were never refunded by such salesmen. On this point we think the court correctly stated the law in his first instruction, in which he said that if those sums were appropriated by the salesmen to their own use, without the permission, knowledge, or consent of the plaintiff, before such sums reached his hands, such retention did not constitute an overdraft, within the meaning of the contract. But he refused to give the fifth instruction asked by defendant, in which the converse of that proposition was stated, to the effect that, if plaintiff did permit salesmen to retain out of the moneys paid them on account of sales more than their monthly allowance, then, under the terms of the contract, he was chargeable with such amounts as overdrafts. The refusal to give this instruction we think, was error prejudicial to the defendant, because, under the facts of this case, it was a question for the jury to determine whether the plaintiff consented to the retention of such amounts by the salesmen under his supervision. If he did consent to the retention by salesmen of sums in excess of their monthly allowance, he was, in effect, permitting them to overdraw their accounts, and he became liable for such sums under his contract.

For the reasons stated, the judgment will be reversed, and the cause remanded for a new trial, with leave for either party to amend his pleadings so as to include accounts of 1899. It is so ordered.

SHORTER UNIVERSITY v. FRANKLIN BROS. CO.

(Supreme Court of Arkansas. June 10, 1905.)

1. APPEAL—ABSTRACT—FAILURE TO SET OUT INSTRUCTIONS—PRESUMPTION.

Where none of the instructions are set out in the abstract, as required by Sup. Ct. Rule 9, the court will assume that they were correct.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3749, 3750.]

2. SAME—REFERENCE TO TESTIMONY—SUFFICIENCY OF PRESENTATION.

An abstract of the transcript as follows: "By reference to the testimony of [a witness] (see Tr. p. 59), etc., it is conclusively shown," etc., insufficiently presents the testimony to the Supreme Court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2595, 2596.]

3. SAME—AMENDMENT OF RECORD IN LOWER COURT—PRESUMPTIONS.

It is in the province of the circuit court to amend its record, and, in the absence of evidence showing error, it will be presumed correct.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3804—3806.]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Franklin Bros. Company against Shorter University. Judgment for plaintiff, and defendant appeals. Affirmed.

John Barrow, for appellant. Maloney & Maloney, for appellee.

HILL, C. J. This is a cause originating in justice of the peace court, and after trial on appeal in circuit court is brought here. The contest seems to have been whether a grocery bill of \$54.95 was properly charged to Shorter University, or to one W. C. Cox, the manager of the boarding department of the university. The appellant has wholly failed to set forth "the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to the court for decision," as required by rule 9. None of the instructions are set out, and therefore the court must assume that the jury was correctly instructed. Koch v. Kimberling, 55 Ark. 547, 18 S. W. 1040; Carpenter v. Hammer (Ark.) 87 S. W. 646.

The appellant contends that there is no proof to show that Shorter University agreed or undertook to pay this bill, and then says: "By reference to the testimony of T. H. Jackson (see Tr. p. 59) and the testimony of J. W. Walker (see Tr. p. 67), etc., it is conclusively shown," etc. This is what Mr. Justice Mansfield described in this language:

"And content themselves with a mere reference to it [the testimony] by way of insisting upon its insufficiency." The court added: "The rules of practice do not make it our duty to explore the transcript for the evidence thus omitted." *Buble v. Helm*, 57 Ark. 304, 21 S. W. 470. To properly understand the case, each of the five judges of this court would have to take turn about in exploring the transcript to discover the facts of the case. The rule was promulgated 20 years ago to obviate that slow and tedious method of trial in this court. For a recent discussion of the proper office of the abstract and transcript reference is made to *Neal v. Brandon* (Ark.) 85 S. W. 776. The judgment seems to have been first rendered against T. H. Jackson as superintendent of Shorter University, and afterwards, on motion, which was resisted, amended so as to be rendered against the corporation. It was in the province of the circuit court to amend its record, and, in the absence of evidence showing error, it will be presumed to be correct. The appellee has set forth the substance of some of the evidence, and from it and the appellant's argument of its force, it appears that the circuit court arrived at the right conclusion in the case.

The judgment is affirmed.

BUNCH et al. v. WILLIAMS.

(Supreme Court of Arkansas. June 17, 1905.)

LEASE—CONSTRUCTION—RECOVERY OF POSSESSION BY LESSOR.

Plaintiff contracted to let defendants have the use for five years of so much of a tract of timber land as they might clear up. It was provided that the clearing necessary should be the removal of all timber except trees exceeding 2½ feet in diameter, and that plaintiff should have the option, after one year, to take back the lands which had been cleared, on paying defendants a certain sum per acre per annum for each acre they had cleared. Defendants partially cleared a portion of the land, leaving some trees standing which were less than 2½ feet in diameter. *Held*, that plaintiff was not entitled to retake the land under the option without first tendering the amount to which defendants were entitled for labor performed.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by E. W. Williams against Bunch & McKenzie. From a judgment for plaintiff, defendants appeal. Reversed.

E. W. Williams, on the 5th day of December, 1898, rented to Bunch & McKenzie a part of the Leland plantation in Jefferson county for one year for the sum of \$4,000. Along with this improved land Williams let them have 240 acres that had been deadened, but not cleared, which is called "New Ground" in the contract. This contract was reduced to writing, and so much of it as refers to this "New Ground" is as follows: "It is expressly understood and agreed between the parties that the New Ground hereinbefore

described, that they, the said Bunch & McKenzie, are to have the use and occupation thereof, or the use and occupation of so much thereof, as they may clear up and put in a good state of cultivation for the term of five years, free of rent. The clearing necessary to make this term of the contract operative shall be as follows: The said Bunch & McKenzie are to cut down and remove all the timber from the land with the exception of all gum and sycamore trees, exceeding two and one-half feet in diameter, which trees are to be deadened and left standing; the said Bunch & McKenzie are to further build a house 16x32 feet with a partition in the middle, for every twenty acres of land cleared land at such points as may be designated by the said E. W. Williams. It is not understood by the terms of this contract that the said Bunch & McKenzie are to clear and put into a good state of cultivation, all of the New Ground hereinbefore specified, but it is especially understood and agreed that whatever amount of uncleared land they shall put into cultivation as aforesaid, they shall have the use thereof free of rent for a term of five years. It is, however, agreed and understood between the parties that the said E. W. Williams shall have the option after the expiration of one year, to take back the lands that have been cleared and placed in cultivation by the said Bunch & McKenzie, but in doing so he shall pay to the said Bunch & McKenzie the sum of Three and 50-100 Dollars per acre per annum for each acre that they may have so cleared as aforesaid, until the expiration of the five years." Bunch & McKenzie during 1897 cleared and put in cultivation about 40 acres of the new ground, and erected two cabins upon it, but left several hundred trees standing on the land which were not 2½ feet in diameter. In December, 1900, Williams notified Bunch & McKenzie that he would exercise the option reserved in the contract and take back the new ground on January 1, 1901, and asked them to have the ground measured to determine what was due them under the contract. Bunch & McKenzie replied that they would hold possession of the new ground until "the same is paid for according to our contract." Williams served notice on defendants to quit as provided by the statute in proceedings for unlawful detainer, and afterwards brought this action to recover possession. But he made no tender or offer to pay defendants for the clearing before bringing the action. On the trial it was shown, as before stated, that Bunch & McKenzie had cleared and put in cultivation about 40 acres of land, and had built two houses thereon of the dimensions as required by the contract, and that they had expended in such work something over \$500. It was also shown that at the end of the first year there were several hundred trees under 2½ feet in diameter still standing on the land, to remove which at once would cost several hundred dollars. Bunch & McKenzie testified that it was their intention

to burn or remove these trees from time to time, and to turn the land over at the expiration of five years cleared as called for by the contract. The circuit court held that under the contract the plaintiff was entitled to re-enter and take possession of the land without regard to whether a tender had been made or not, and gave judgment in favor of the plaintiff. Defendants appealed.

N. T. White and Ben. J. Althelmer, for appellee.

RIDDICK, J. (after stating the facts). This is an action by plaintiff to recover possession of certain land which he had leased to defendants. The decision of the case turns on the construction of the following clause in the contract: "It is however, agreed and understood between the parties that the said E. W. Williams shall have the option, after the expiration of one year to take back the lands that have been cleared and placed in cultivation by the said Bunch & McKenzie, but in doing so he shall pay to the said Bunch & McKenzie the sum of \$3.50 per acre, per annum, for each acre they may have so cleared as aforesaid until the expiration of the five years." The provisions of this contract are not altogether clear, but after consideration of the same we are of the opinion that the payment of the defendants for the clearing was a condition precedent to the right of the plaintiff to take back the land under this contract before the expiration of the five years. It is true that the evidence here shows that this land had not, at the time this suit was brought, been fully cleared as required by the contract, for there were at that time trees still standing on the land under 2½ feet in diameter. But defendants, having put the land in cultivation during the first year, were not required by the contract to have it fully cleared during that year. Defendants had during the first year expended over \$500 in improving this land, and it would be a harsh construction of the contract to hold that, as the land was not then fully cleared, plaintiffs could take it back and pay nothing for the work and labor expended by defendants. The time during which these trees were all to be taken from the land was not limited to the first year, and, if defendants had been permitted to retain the use of the land for the full term of five years to pay for the clearing, it would not have injured plaintiff, if the trees had been taken from the land before the expiration of the term of the lease. But counsel for plaintiff admit that defendants were entitled to some compensation for the work and labor expended on the clearing, but contend that this compensation was not to be paid before plaintiff re-entered the land, but afterwards. I feel some doubt about that point myself, but after consideration thereof the court has concluded that the contract required that a payment or tender of the amount due defendants for the clearing, what-

ever it was, should have been made before commencing the action to recover the land.

It follows, therefore, that in our opinion the suit, being brought before any payment or tender was made, was premature. The judgment will therefore be reversed, and the case remanded for further proceedings.

McNUTT v. McNUTT et al.

(Supreme Court of Arkansas. June 10, 1905.)

1. DEEDS—VACATION—CONSTRUCTIVE TRUST—FRAUD—DEGREE OF PROOF.

A mere preponderance of parol proof is insufficient to establish a trust *ex maleficio* on real property and to set aside an absolute deed, but the fraud relied on for that purpose must be clearly established.

2. SAME—EVIDENCE.

Complainant and his sister conveyed certain land to defendant, their mother, in consideration of \$5 and other good and valuable considerations, which defendant claimed she had purchased and paid for, with the exception of \$200 paid by her husband, and had the land conveyed to plaintiffs. Plaintiffs testified that defendant obtained the conveyance by representing that she wanted to sell the property to P., and agreeing to divide the purchase price between the plaintiffs, which defendant denied; claiming that the conveyance was executed in justice to her, in order that she might have a home. Complainant did not bring the suit until more than three years after the deed was given, during which time he was impecunious, and had solicited his mother to build a small house on the property and rent it to him. *Held*, that such facts were insufficient to justify a decree setting aside the deed and establishing a trust *ex maleficio*.

Appeal from Miller Chancery Court; James D. Shaver, Chancellor.

Action by A. B. McNutt and another against Margaret A. McNutt. From a decree in favor of plaintiffs, defendant appeals. Reversed.

Scott & Head, for appellant. William F. Kirby, for appellees.

RIDDICK, J. This is an action by a son and a daughter against their mother to cancel a deed executed by them, conveying to her two lots in the city of Texarkana, and the improvements thereon, on the ground that the conveyance was procured through fraud. The facts are that one A. B. McNutt purchased the two lots mentioned, paying \$200 cash, and agreeing to pay a balance of \$600 in installments of \$25 each. His wife, Mrs. Margaret A. McNutt, the defendant in this action, claims that she paid all of the purchase money, except the \$200 paid by her husband in cash. By the consent of herself and her husband, their vendor executed a deed conveying the lots to their two children, who are the plaintiffs in this case. After these children became of age and were married, they executed a deed conveying these lots to the defendant, their mother. The deed recites that it was executed "for and in consideration of the sum of five dollars and other good and val-

uable considerations paid by Margaret A. McNutt." But the plaintiffs, and also the wife of one of the plaintiffs, testify that the defendant procured the execution of the deed by telling her son and daughter that she desired to sell the property to Mrs. Preston, who, she said, was willing to pay \$1,500, for it, but that Mrs. Preston would not purchase from the plaintiffs, but insisted upon having a conveyance from defendant. The defendant then proposed that plaintiffs convey the property to her; promising that she would convey it to Mrs. Preston, and divide the purchase price between the plaintiffs. They say that they made the conveyance, but that the defendant refused to carry out her part of the contract, and still retains the property, in fraud of their rights. The defendant answered the complaint, and denied that she had procured the property as alleged in the complaint. But she states that, she having paid a large part of the purchase money, the plaintiffs, her children, when they became of age, as a matter of justice, executed the deed conveying the lots to her for love and affection, in order that she might have a home, and that she is the owner thereof, both in law and equity.

The chancellor found the issues in favor of the plaintiffs, and the question presented by the appeal from his judgment is mainly a question of fact. But this is an effort to have a court of equity impose a trust ex maleficio upon real property, and to change the beneficial title to such property by parol evidence from the defendant to plaintiffs. In order to justify a court in granting such relief, the fraud alleged should be clearly established. A mere preponderance of the evidence is not sufficient to obtain such relief. *McGuigan v. Gaines*, 71 Ark. 614, 77 S. W. 52; *Ammonette v. Black*, 73 Ark. 310, 83 S. W. 910; *Tillar v. Henry* (Ark.) 88 S. W. 673. Now, the plaintiffs do testify positively that their mother obtained the property in the manner alleged, but there are undisputed facts in the case which cast a suspicion upon the justness of their claim. This deed that they say was procured by fraud was executed on the 11th of June, 1900. As Mrs. Preston lived in Texarkana, near where they lived, they must have discovered the fraud of their mother only a short time afterwards, but it was nearly three years afterwards before they brought this action to set the deed aside. There is nothing to show that the daughter ever asked her mother to perform her part of the contract or pay her for the lots. The son, A. B. McNutt, testified that he did ask his mother two or three times to sell the lots and pay him his part of the proceeds, but she denies that he did so. The testimony and his own letters read in evidence show that he was poor, and had to borrow money from his parents. In several of these letters he asks them for financial assistance, but in none of them does he men-

tion the fact that his mother owed him anything for this land. On the contrary, in several of these letters he refers to the lots as her property, and offers to rent one of them from her if she will put up a small house on it. These letters written by plaintiff A. B. McNutt commence only a month or two after the deed was executed by plaintiffs to their mother, and continue at intervals for a year or two. If his mother had perpetrated such a gross fraud upon him in reference to this deed, it is remarkably strange that, though he several times refers to this property in his letter as his mother's property, he never refers to or hints at the fraud which he now testifies that she committed in reference thereto. These letters, it seems to us, completely overthrow the testimony of this plaintiff in reference to the acts of his mother, for it is inconceivable that she should have committed such a fraud, and that he should never have mentioned it in letters which refer to the property. The parties who testify to this fraud are all interested parties, and one of them the wife of one of the plaintiffs, of doubtful competency as a witness. But it is unnecessary to discuss that point, for it seems to us that, considering all the evidence, it does not make out a case clear enough to justify the court in granting the relief asked, and in changing the title to this land.

On the whole case, we are of the opinion that the chancellor erred in his decree in favor of plaintiffs. The judgment will therefore be reversed, and the cause remanded, with an order to dismiss the complaint for want of equity at the costs of the plaintiffs. It is so ordered.

BROOKS, NEELY & CO. v. YELL COUNTY. (Supreme Court of Arkansas. June 17, 1905.) **CONDEMNATION — RECEIPT OF DAMAGES — ESTOPPEL.**

Where a landowner, after condemnation of a highway over the land, received the damages assessed, he was estopped from claiming the land appropriated, and could not, without the consent of the county, restore his rights by a return of the money.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 442-444.]

Appeal from Circuit Court, Yell County; William L. Moose, Judge.

Condemnation proceedings by Yell county against Brooks, Neely & Co., on the laying out of a highway, and from the judgment of condemnation, the landowners appeal. Affirmed.

J. M. Parker, for appellants.

BATTLE, J. Yell county was entitled to the condemnation of a portion of the lands of Brooks, Neely & Co. for a certain public highway over the same. The land was condemned for that purpose, and the damages

caused thereby were assessed, and a county warrant was issued to them therefor, and was received and collected by them. They cannot now contest the right of the county to the land so condemned. The warrant was issued in payment of such damages, and they were not entitled to hold it to satisfy damages that might thereafter be assessed in another proceeding to condemn other lands of theirs for the same highway. Having received and collected it, they accepted it for the purpose for which it was issued, and are estopped from claiming the land appropriated for the highway, and cannot, without the consent of the county, restore their rights by the return of the money received on the warrant.

Judgment affirmed.

THALHEIMER et al. v. LOCKHART.

(Supreme Court of Arkansas. June 10, 1905.)

1. REFORMATION OF INSTRUMENTS — SUBSEQUENT PURCHASER WITH NOTICE.

A vendor sold 40 acres off the west end of the south half of a quarter section, but by mistake the deed described the land as the southwest quarter of the quarter section, which contained 23 acres. The vendor sold the rest of the quarter to a subsequent purchaser, who had notice that the vendor had sold 40 acres to a prior purchaser, who was in the actual and open possession of 8 acres of the land conveyed to the subsequent purchaser. *Held*, that the first purchaser's possession was equivalent to actual notice of his rights, and he was entitled, as against the subsequent purchaser, to a reformation of his deed.

2. SAME—ALLEGATION AND PROOF—DECREE—VARIANCE—EFFECT.

In a suit by a purchaser for the reformation of his deed, the complaint and proof showed that he was entitled to 40 acres off the west end of the south half of a quarter section, while the decree awarded to him the southwest quarter of the quarter section, containing 23 acres, and 17 acres off the west side of the southeast quarter of the quarter section. A subsequent purchaser contested the right to reformation, but raised no question as to the variance between the proof and the decree. *Held*, that the court on appeal would not disturb the decree because of the variance.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Suit by Aaron S. Lockhart against Fannie Thalheimer and others. From a decree for plaintiff, certain of the defendants appeal. Affirmed.

This is a suit by appellee, Lockhart, against appellants Fannie Thalheimer and her husband, Ben S. Thalheimer, and John F. Smith, for the reformation of a deed executed by appellant Smith to appellee.

It is alleged in the complaint that Smith was the owner of the northwest quarter of section 6, in township 2 north, range 14 west, and on December 19, 1900, agreed to sell and convey to appellee 40 acres off the west end of the south half of that quarter section for the sum of \$100; that appellee paid the price, and Smith undertook to convey the

land, and, by mistake in the preparation of the deed, the land was described as the southwest quarter of said quarter section, which, according to the government survey, was fractional, and contained only 23 acres; that Smith subsequently sold and conveyed the remainder of the quarter section to appellant Fannie Thalheimer, who bought with the full notice of the previous sale of 40 acres to appellee. Thalheimer and wife answered the complaint, denying that Smith sold appellee any more land than that described in the deed, and that Fannie Thalheimer bought without notice of the sale to appellee. The chancellor gave a decree in accordance with the prayer of the complaint for the reformation of the deed so as to describe the 40 acres of land claimed by appellee, and the Thalheimers appealed.

Mehaffy & Armistead, for appellants. W. S. McCain, for appellee.

MCCULLOCH, J. (after stating the facts.) Appellee and Smith both testify to the same effect, that, under the purchase, appellee should have 40 acres of land, and that the deed should have described it. As against Smith, appellee's right to a reformation of the deed is clearly established, the only question in dispute being whether Mrs. Thalheimer under her subsequent purchase took without notice.

Smith testifies that, when he agreed with Thalheimer (who made the trade as agent of his wife) for the sale, he informed the latter of his previous sale of 40 acres to appellee, and that he proposed to sell the remainder. At the time of appellee's purchase there was open and in cultivation on the place about 15 acres, all but about 2 acres being on the 23-acre tract (fractional southwest quarter of northwest quarter). The remaining two acres of open land was in the same inclosure, but on the southeast quarter of said northwest quarter. Appellee at the time of his purchase occupied the land as Smith's tenant, and immediately after his purchase he moved the east line of his fence so as to enlarge his inclosure and include about eight acres of the southeast quarter of the northwest quarter. He cleared several acres of this addition to his inclosure, and was occupying the whole when Mrs. Thalheimer purchased. She purchased without any actual notice of appellee's occupancy, and appellee did not place his deed of record until after the sale to Mrs. Thalheimer. But she was informed by Smith that he had previously sold 40 acres to appellee, and, when she purchased, appellee was in actual, open, and visible possession of 8 acres of the land which Smith conveyed to her. Such possession was equivalent to actual notice of the title, rights, or equities of the occupant. *Hamilton v. Fowlkes*, 16 Ark. 340; *Jowers v. Phelps*, 33 Ark. 465; *Sisk v. Almon*, 34 Ark. 391; *Bird v. Jones*, 37 Ark. 195; *Rockafellow v. Oliver*, 41 Ark. 169; *Atkinson*

v. Ward, 47 Ark. 533, 2 S. W. 77; Watson v. Murray, 54 Ark. 499, 16 S. W. 293; Kendall v. Davis, 55 Ark. 318, 18 S. W. 185; Strauss v. White, 66 Ark. 167, 51 S. W. 64. Mrs. Thalheimer purchased, therefore, with notice of appellee's equities, and the reformation can be enforced against her.

Appellee claims in his complaint 40 acres off the west end of the south half of the northwest quarter, and the court so decreed by reforming the deed so as to embrace 17 acres off the west side of the southeast quarter of the northwest quarter, in addition to the fractional southwest quarter of the northwest quarter; but the testimony of appellee and Smith both shows that according to agreement he was to have 40 acres in the southwest corner of the quarter section, and the decree should have been for a reformation according to that agreement. However, appellants contested the right of appellee to any reformation at all, and raise no question as to this variance, so we will not disturb the decree on that account.

Decree affirmed.

ROBINSON et al. v. NORDMAN et al.

(Supreme Court of Arkansas. June 10, 1905.)

1. ADVERSE POSSESSION — POSSESSION OF PREDECESSORS—TACKING.

A grantee whose adverse possession, added to the continuous adverse possession of his predecessors in title, exceeded seven years, had title by adverse possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 213-217.]

2. SAME—POSSESSION UNDER COLOR OF TITLE.

A grantee took possession of land by virtue of his deed, and held adversely for about six years, when the land was overflowed, compelling the occupant to leave it. During the six years the grantee cleared a part of the land and made other improvements on it. Because of his acts of exclusive ownership, the land became generally known as his land. During the year of the overflow it remained idle. Subsequently he planted trees on the land. No one questioned his possession for about nine years. *Held*, that he acquired title by adverse possession.

Appeal from Woodruff Chancery Court; Edward D. Robertson, Chancellor.

Suit by Frederick Nordman and another against S. C. Robinson and others. From a decree for plaintiffs, defendants appeal. Reversed.

Blackwood & Williams, for appellants. Thos. C. Trimble, Joe T. Robinson, and Thos. C. Trimble, Jr., for appellees.

BATTLE, J. Frederick Nordman and Joseph M. Schmunch brought a suit in equity against S. C. Robinson and others, asking that their title to the north half of the northwest quarter, and northwest quarter of the northeast quarter, and the southwest quarter of the northwest quarter, of section 34, in township 4 north, and in range 3 west,

be quieted. Robinson answered, and asked for the same relief. An action by Robinson and others, brought against Nordman to recover damages for cutting timber on these lands, was consolidated with the suit instituted by Nordman and Schmunch. The chancery court rendered a decree quieting the title of Nordman and Schmunch to the land as against the defendants to their suit, and the defendants appealed.

Robinson's title to the lands in controversy depends solely upon the statute of limitations. The state of Arkansas executed to Rachel Mayberry a donation deed for the northwest quarter of said section 34. She held adverse possession under this deed for many years, and conveyed to one McBride, and he held under his deed for several years, and conveyed to another, and each grantee conveyed to another until it was conveyed to Robinson. Each held adverse possession until he conveyed, and the aggregate possession of all exceeded seven years. So Robinson acquired title by adverse possession to this part of the land in controversy.

On the 22d day of December, 1892, J. T. South by deed pretended to convey to Robinson the north half of section 34. Robinson took possession of the land under this deed on the 28th of December, 1892, and held adversely until sometime in 1898 or 1899, when an overflow came and flooded the land. One witness testified that it drove every one out of the vicinity of the land, except himself. During the six years prior to the flood, Robinson rented the land, from year to year, to tenants, and they raised and gathered crops thereon, and Robinson cleared a part of the land and made other improvements on it. Such were his acts of exclusive ownership that the land became generally known as the "Robinson land." He endeavored to rent it to a tenant for the year 1899, but on account of the overflow was unable to do so. For that year it remained idle. The visible and well-known effects of an extensive, notorious, and disastrous flood, doubtless, clearly indicated that he had not abandoned it, but that he had been forced to discontinue cultivation of it temporarily. There still remained on it a farm of 60 acres, susceptible of cultivation, and it was unreasonable to presume that he had abandoned it after a continuous cultivation for six years. In 1901 he planted 300 Texas pecan trees on it. No one interfered with or questioned his possession until June, 1901. For seven years under color of title, we find, he remained in the open and adverse possession of the north half of section 34, in township 4 north, and in range 3 west, and thereby acquired title thereto. *Downing v. Mayes*, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896; *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137; *Hamilton v. Boggess*, 63 Mo. 233.

Reverse, and remand for decree and proceedings consistent with this opinion.

ISELL v. JONES et al.

(Supreme Court of Arkansas. June 10, 1905.)

1. HOMESTEAD — EXEMPTION FROM LIENS—CONVEYANCE—ATTACK BY CREDITORS.

Under Const. art. 9, § 3, declaring that the homestead is not subject to the lien of any judgment or decree of any court, or sale under execution, except in certain cases, an ordinary judgment creditor cannot complain of the conveyance by the judgment debtor of his homestead as fraudulent, nor reach the property so conveyed in the hands of the grantee.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 118-123.]

2. SAME — LOSS OF RIGHT — CLAIM AGAINST EXECUTION.

Under the express provisions of Kirby's Dig. § 3902, a debtor's right of homestead is not forfeited by his omission to select and claim it as exempt before sale on execution, nor by his failure to file a description or schedule of the same in the recorder's or clerk's office, but he may select and claim it after or before a sale on execution.

Appeal from Circuit Court, White County; Hance N. Hutton, Judge.

Suit by Ben Isbell against George W. Jones and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Ben Isbell, in pro. per. J. N. Cypert, for appellees.

BATTLE, J. George W. Jones owned a certain tract of land in White county, in this state. He conveyed it to his wife, L. M. Jones. J. A. Godsey recovered a judgment against him at the January, 1896, term of the White circuit court for \$385.65, and \$25 for damages. On the 31st day of January, 1896, Godsey caused an execution to be issued on the judgment, directed to the sheriff of White county, and caused him to levy on the land to satisfy the same. On the 11th day of March, 1896, after having advertised the land for sale, the sheriff undertook to sell the same to Ben Isbell, he being the highest bidder therefor, and on the 5th of July, 1897, pretended to convey it to Isbell, no one having redeemed it. On the 17th day of October, 1899, George W. Jones and wife, L. M. Jones, conveyed the land to E. E. Jones, who conveyed it to J. B. Blessing, and he took possession thereof. Some time in May, 1901, Isbell brought a suit against George W. Jones and his wife, L. M. Jones, E. E. Jones, and J. B. Blessing, in the White chancery court, which was afterwards transferred to the White circuit court, to recover the land, and to set aside the deeds executed by Jones to his wife, and by Jones and wife to E. E. Jones, and to Blessing by E. E. Jones. Judgment was rendered by the court in favor of the defendants, and plaintiff appealed.

The land was occupied as a homestead by George W. Jones and wife from the time he acquired it, which was before the rendition of the judgment in favor of Godsey, and at all times thereafter until they conveyed it,

on the 17th day of October, 1899, to E. E. Jones. George W. Jones was a married man and a resident of this state, and the tract of land in controversy, occupied by him as a homestead, was outside of any town or city, and did not contain exceeding 80 acres. Under the Constitution of this state, it was not "subject to the lien of any judgment or decree of any court, or to sale under execution, or other process thereon, except such as may be rendered for the purchase money, or for specific liens, laborer's or mechanic's liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them, and other trustees of an express trust, for moneys due from them in their fiduciary capacity." Article 9, § 3. Judgments for damages caused by torts are not excepted. There was no restraint upon his selling or conveying it. Creditors cannot, therefore, lawfully complain of it being fraudulently conveyed. "They could not reach it if not conveyed, and the motive for the conveyance does not concern them." His grantee can hold the land, notwithstanding the judgment against him. *Stanley v. Snyder*, 43 Ark. 429; *Carmack v. Lovett*, 44 Ark. 180; *Bogan v. Cleveland*, 52 Ark. 101, 12 S. W. 159, 20 Am. St. Rep. 158; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; *Davis v. Day*, 56 Ark. 156, 19 S. W. 502; *Pipkin v. Williams*, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241; *White Sewing Machine Co. v. Wooster*, 66 Ark. 382, 50 S. W. 1000, 74 Am. St. Rep. 100; *Gray v. Patterson*, 65 Ark. 373, 46 S. W. 730, 1119, 67 Am. St. Rep. 987. Under the statutes of this state, it was not necessary for him (George W. Jones) to file a schedule to protect the homestead against a judgment or execution. Kirby's Dig. § 3902.

Judgment affirmed.

ST. LOUIS & S. F. R. CO. v. THOMPSON, YONT & CO.

(Supreme Court of Arkansas. June 17, 1905.)

RAILROADS—NEGLIGENCE—INJURIES TO ANIMALS ON TRACK—ARBITRARY DISREGARD OF TESTIMONY BY JURY—SUBMISSION TO JURY.

In an action against a railroad for killing plaintiff's cow, evidence examined, and held not to present a case of arbitrary disregard of evidence by the jury, but one of a conflict in the testimony, rendering proper the submission of an issue of fact.

Appeal from Circuit Court, Madison County; John N. Tillman, Judge.

Action by Thompson, Yont & Co. against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. F. Parker and B. R. Davidson, for appellant. E. B. Wall, for appellee.

HILL, C. J. This was an action for killing a cow by appellant railroad company.

The appellant admitted the killing of the cow by the train, and assumed the burden of proof that it was not negligently killed. The testimony of the engineer and fireman sustained the allegation that it was unavoidable, and the case is brought here on the sole ground that the jury arbitrarily discarded their testimony in finding for the appellee. The engineer's testimony was weakened on cross-examination, and contradictions with a previous statement shown. The fireman's testimony, while fully sustaining the allegation that it was an unavoidable accident, did not in all respects accord with the engineer's version of the matter. The appellee introduced evidence tending to prove the cow could have been seen much further than the testimony of the engineer and fireman showed it could have been. It is true this testimony was directed to the vision along the track in the daytime, but, assuming the engine was equipped with a proper headlight, it was contradictory to the testimony of the engineer and fireman as to the distance of unobstructed vision at night. The court is of opinion that this is not a case where the refusal to believe the engineer and fireman is arbitrary and without cause, but it presented a conflict in the testimony rendering the submission of the issue of fact proper, and the finding of the jury final.

The judgment is affirmed.

CAUTHRON LUMBER CO. v. HALL.

(Supreme Court of Arkansas. June 10, 1905.)

1. ACTION ON ACCOUNT—EVIDENCE—PRODUCTION OF BOOKS OF ACCOUNT—NECESSITY FOR—WAIVER.

Where, in an action on account, the complaint contained an itemized statement thereof, and defendant did not move to make more specific, nor demur to the complaint when the issues were being made up, nor notify plaintiff before trial to produce his books of account, plaintiff was properly permitted to proceed, over defendant's objection, with his testimony relative to the items of his account as set forth in the complaint, although he admitted having a book account thereof.

2. STATUTE OF FRAUDS—DEFENSES—ORIGINAL UNDERTAKING.

A complaint alleging that defendant is indebted to plaintiff in a certain sum for goods sold and delivered to defendant's employes, at its request and on contract between plaintiff and defendant, shows a suit on an original undertaking, and the statute of frauds is not a defense.

Appeal from Circuit Court, Scott County; Styles T. Rowe, Judge.

Action by J. P. Hall against the Cauthron Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This suit was instituted in the circuit court of Scott county by appellee against appellant on account, the complaint alleging: "That defendant, Cauthron Lumber Company, is indebted to him in the sum of \$923.14 for goods and merchandise sold and delivered to defendant's hands and employes

at defendant's request, and upon contract made by and between plaintiff and defendant, particulars of which are set out in an account herewith filed, together with credits to which defendants are entitled, and leaving due and unpaid the sum above mentioned." Prays for judgment. The account appended to the complaint is as follows:

Cauthron Lumber Company to J. P. Hall, Dr.

Per C. E. Barkes.....	\$ 62 20
" Bob Wilkes	9 25
" Geo. Thompson	12 50
" H. L. Thompson	36 45
" J. W. Smith	23 21
" Sam Kunkle	179 46
" W. H. Mills	21 83
" R. M. Mills	114 65
" Z. B. Hogue	69 09
Balance on Lundy timber	21 25
Hauling John Thompson timber.....	63 00
Work on road	8 00
Hauling A. L. Smith timber.....	81 14
" R. G. Moore "	15 51
" Will Cooley "	5 00
" Jim Cooley "	30 60
To profit on one car of feed.....	100 00
To profit on two cars hay.....	60 00
To merchandise	14 70

\$923 14

Affidavit of J. P. Hall to account that it "is true and correct, that nothing has been paid thereon, and that the sum of \$923.14 is now justly due thereon." Appellant filed answer and cross-complaint, denying that it is indebted to plaintiff in the sum of \$923.14, or in any other sum; denies that plaintiff sold goods and merchandise to defendant's hands and employes at defendant's request and upon contract made by and between plaintiff and defendant, and alleged that plaintiff was indebted to it in the sum of \$81 for 9 tons of hay ordered by defendant, and by defendant turned over to plaintiff upon his promise to pay the purchase price of same, which he has not done; admitted an indebtedness of \$14.70 for merchandise, \$3 for road work, and \$20.09 for balance on timber bought from Lundy, making a total of \$37.79, which, deducted from \$81, leaves a balance of \$43.21 due from plaintiff to defendant, or which amount it prayed judgment. Plaintiff filed reply, denying indebtedness to defendant in the sum of \$81 for hay or in any other sum. During the trial, while the plaintiff was testifying relative to the items of his account as set forth in his complaint, defendant's counsel asked if he had a book account of these, and, on his replying that he had, the defendant objected to his proceeding without producing his book. The court permitted the witness to proceed, and this is urged as cause for reversal. It appears that the complaint, containing an itemized statement of the account, was filed in the clerk's office with the complaint on July 11, 1903, and suit was commenced July 23, 1903. The regular term of the circuit court convened on the 3d day of August, 1903. The appellant filed his answer and set-off on the 4th day of August. The appellee filed a reply to the set-off on the 6th day of August.

The issues were made, and no further pleadings were had in the case. The trial was had on the 7th day of August.

A. G. Leming and Daniel Hon, for appellant. J. P. Hall, for appellee.

WOOD, J. (after stating the facts). The court did not err in overruling appellant's motion to have appellee produce his books. It was not a matter that appellant had the right to insist upon at that stage of the proceedings. It was too late to call upon appellee to enter upon a more specific itemization of account at the time. The appellant had not moved to make more specific, and had not demurred to the complaint when the issues were being made up. Nor had it given appellee notice before the trial was entered upon to produce his books of account. It should have taken some or all of these steps if it expected to insist, as matter of right, upon the production of appellee's books. The books were not essential to the maintenance of appellee's cause of action, and if appellant desired them for any purpose it should have called for them before. It was at least within the sound discretion of the court, under the circumstances, to refuse appellant's request made at that juncture of the trial. Appellant might very properly have called for and had some of the items in the account made more specific had it demanded it earlier, and might have had appellee produce his books if it had advised him before that they were material or essential in its defense.

Second. The statute of frauds is urged as a defense here. But the allegations of the complaint show a suit upon an original undertaking on the part of appellant to pay appellee for goods and merchandise furnished appellant's hands and employees at the request of appellant, and upon contract made by and between appellant and appellee.

There is evidence sufficient here to sustain the verdict, both as to the contract, and the amount recovered under it.

Affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. COOMBS
et al.

(Supreme Court of Arkansas. June 17, 1905.)

1. APPEAL—FINDINGS—REVIEW.

In an action for the destruction of a building by fire, a finding on conflicting evidence that defendant's engine passed the building on the day of the fire is conclusive on appeal.

2. RAILROADS—FIRES—EMISSION OF SPARKS—PRESUMPTIONS.

Where an engine passed near inflammable material immediately before the discovery of the fire, the jury, in the absence of proof explaining its origin, may infer that it originated from sparks from the engine.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1713.]

3. SAME—PRIMA FACIE CASE—NEGLIGENCE.

Where it is shown that fire originated from an engine of defendant, a prima facie case is

made for plaintiff, casting on defendant the burden of exonerating itself from negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1710.]

4. SAME—PRESUMPTION OF NEGLIGENCE.

In an action for the destruction of a building by fire, where it appeared that the fire was communicated from an engine, and the evidence tended to show that an engine equipped with proper appliances and operated with due care would not emit sparks of sufficient size to ignite inflammable material, the jury were warranted in finding either that the engine was not so properly equipped, or that it was not operated with due care, and that defendant had not rebutted the presumption of negligence raised against it.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1711.]

5. EVIDENCE — WEIGHT AND SUFFICIENCY — CREDIBILITY OF WITNESSES.

In an action for destruction of a building by fire, the jury need not accept as conclusive the statement of witnesses that the engine was in good order and carefully operated, though they were not contradicted, but may consider all the evidence bearing on the condition of the engine and the mode of operating it, and the circumstances under which the fire occurred.

6. RAILROADS—FIRES — SPARK ARRESTERS — DUTY TO PROVIDE.

A railroad company discharges its duty if it exercises reasonable care in providing its engines with the most approved appliances and contrivances in general use by railroads throughout the country for the prevention of the escape of sparks, and they are in good condition.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1665-1672.]

Battle, J., dissenting.

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Action by E. F. Coombs and another against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Appellee Coombs was the owner of a cotton compress plant, consisting of building and machinery, in the city of Batesville, near the track of appellant's railroad, which was destroyed by fire on May 5, 1902, between 3 and 4 o'clock in the afternoon. It was not then in operation as a compress, and had a lot of hay stored in the building—some of it scattered loose over the floor—and there were cracks about two inches wide in the walls. The property was insured in the sum of \$1,200 against loss by fire under a policy issued by appellee Sun Insurance Company, and that company paid Coombs the sum of \$1,193.41 in satisfaction of a claim under the policy for loss on the property. This suit was brought by Coombs and said insurance company against appellant to recover the value of said property, which is alleged to be the sum of \$4,000. It is alleged that the fire was caused by sparks which were by appellant's servants negligently permitted to escape from its locomotive while passing near the building. Appellant, in its answer, denied that it had been guilty of negligence, and denied all the other allegations of the complaint. The jury returned a verdict in

favor of plaintiffs for \$1,000, and defendant appealed.

B. S. Johnson, for appellant. Neill & Neill and Arthur Neill, for appellees.

MCCULLOCH, J. (after stating the facts). Appellant challenged the sufficiency of the evidence to support a verdict for plaintiffs by a request to the court for a peremptory instruction in its favor. The plaintiffs introduced several witnesses who testified that a short while before the building was discovered to be on fire (the precise time, according to these witnesses, varies from 10 to 20 minutes) they saw the engine pass near the building. This is denied by the engineer and brakeman, who testified that they did not go down the track as far as the compress building that day, but the preponderance of the evidence seems to be against them; and the jury, in returning a verdict in favor of the plaintiffs, necessarily found that the engine did pass the building, and, there being a substantial conflict in the testimony, we are concluded on this point by the verdict.

The building is shown to have been about 34 feet from the track on which the engine is said to have passed, and no other means appears by which the fire could have been communicated. The fire occurred on Monday, and no person had been seen in the building since the preceding Saturday, when the man in charge securely fastened it. In order for the railroad company to be held liable for the damage, the fire must have been communicated by sparks from the engine, and the escape of sparks must have resulted from negligence on the part of the company or its servants either in the construction or operation of the engine. This court has held that from proof that an engine passed near inflammable material immediately before the discovery of fire, there being no evidence to explain its origin, the jury may infer that the fire originated from sparks from the engine. *Railway Co. v. Dodd*, 59 Ark. 317, 27 S. W. 227. In that case the court said: "The cotton was liable to take fire from these trains and communicate it to the depot. One of them passed ten or fifteen minutes before it was destroyed. The cotton caught fire, and the depot was consumed by it. These were facts from which the jury might have inferred that the fire originated in sparks from the engine of the train which had just passed, there being no evidence to explain its origin upon any other theory. All these facts tended to show that the property of appellees was destroyed through the negligence of appellant, and are sufficient to sustain the verdict of the jury in this court." This enunciation is in line with many adjudged cases on the subject. *Burke v. L. & N. Ry. Co.*, 7 Helsk. 451, 19 Am. Rep. 618; *Karsen v. M. & St. P. Ry. Co.*, 29 Minn. 12, 11 N. W. 122; *Woodson v.*

M. & St. P. Ry. Co., 21 Minn. 60; *Hagan v. Railroad Co.*, 86 Mich. 815, 49 N. W. 509; *Johnson v. Railway Co.*, 77 Iowa, 667, 42 N. W. 512; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Fremont v. London & Northwestern R. Co.*, L. R. 6 Q. P. 14; 3 *Elliott on Railroads*, § 1243. When it is proved that the fire originated from an engine of the defendant railroad company, a prima facie case is made for the plaintiff, and it then devolves upon the railway company to exonerate itself from the charge of negligence. *Railroad Co. v. Payne*, 33 Ark. 818, 34 Am. Rep. 55; *Tilley v. St. L. & S. F. Ry. Co.*, 49 Ark. 535, 6 S. W. 8; 3 *Elliott on Railroads*, § 1244.

The jury having found upon legally sufficient evidence that the fire was communicated by sparks escaping from the engine, the next inquiry presented is whether appellant overcame the presumption of negligence arising therefrom. The engineer and yard watchman and the regular fireman, who was off duty the day of the fire, testified that they examined the engine immediately after the fire, and found the spark arrester in good condition. Three days later the engine was examined at Newport by an expert from the shops of appellant at Baring Cross, who testified that the spark arrester was of the most approved pattern in use, and was then in good condition. Mr. Luttrell, the superintendent of locomotives of appellant company, testified that the kind of spark arrester on the engine in question was the most approved in practical use, and that, "if it was in good condition at the time—the parts all tight in their places, screwed up as they belong, and no holes or apertures that were not made in them"—sparks or cinders of sufficient size to ignite anything could not, in his opinion, escape. He said: "I do not think it possible for sparks from an engine equipped like this to set fire to hay from a spark falling 35 or 40 feet." The engineer testified also to the effect that an engine equipped with that kind of spark arrester would not, unless there was some defect or break in it, throw sparks large enough to set fire to anything. There was no testimony on the part of appellant as to the manner in which the engine was being operated when it passed the building, as the witnesses introduced denied that they passed down by the compress at all.

So the case stands thus: From the fact that the engine passed near the building a few minutes before the fire, and its origin cannot be accounted for upon any other theory, a conclusion is warranted that it was communicated from the engine; and it is shown by said agents of appellant that a spark arrester of approved pattern, in good condition, such as is in common use, will not emit sparks of sufficient size to ignite inflammables. Against this, the witnesses introduced by appellant testified, without contradiction by direct testimony, that the

engine was provided with a spark arrester of the most approved kind in use. Therefore, when it was established that fire had been communicated from the engine, and there was testimony tending to show that an engine equipped with proper appliances and operated with due care would not emit sparks of sufficient size to ignite inflammable material, the jury were warranted in finding either that the engine was not so properly equipped, or that it was not operated with due care, and that appellant had not rebutted the presumption of negligence raised against it. Upon this state of the proof, it cannot be said that the verdict of the jury was without evidence sufficient to support it. The Supreme Court of Iowa, in the case of *Johnson v. Railway Co.*, *supra*—similar to this—said: "Counsel for defendant maintain that there is an utter failure of proof that the defendant's engines said to have set out the fire were negligently handled or were not in good repair and condition. In reply to this position, it need only be said that one of defendant's witnesses—a locomotive engineer who was in charge of one of the engines from which it was claimed the fire escaped—testified that an engine in good repair could not throw fire a distance from the track to the place the fire caught in the grass. As has been said, the fires could have originated from no other source. The jury were authorized to infer from this evidence that the engines were not in good repair." In *Hagan v. Railroad Co.*, *supra*—a case also similar to this, where the origin of the fire was unexplained, except by the proximity of the engine, and the railroad operatives had testified that the engine was properly equipped and skillfully operated, and that such an engine when so operated could not throw sparks—the court held that there was sufficient evidence to go to the jury, saying: "Testimony cannot be said to be undisputed when inconsistent with some other fact or circumstance, either established, or regarding which testimony has been admitted. The court very properly declined to take the case from the jury, or to pass upon the conclusiveness of the testimony offered by the defendant." The Supreme Court of Minnesota, in the case of *Karsen v. M. & St. P. R. Co.*, *supra*, which was quite similar to this on the facts, said: "A verdict cannot be said to be unsupported by the evidence when, taking the entire evidence together, it will fairly and reasonably warrant the conclusion arrived at. Neither is a jury necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skillfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the facts and circumstances in evidence bearing upon the condition or mode of operating the engine, and upon the accuracy of witnesses." See, also, *Solum v. Great Northern Ry. Co.*,

63 Minn. 233, 85 N. W. 443; *Burud v. Great Northern Ry. Co.*, 62 Minn. 243, 64 N. W. 562.

Error is assigned by counsel in the giving of several instructions by the court, but we find no error in them. It is especially urged that the court erred in giving the seventh instruction asked by plaintiffs, wherein the jury were told that they were not bound to accept as conclusive the statement of witnesses that the engine was in good order and carefully operated, although there might be no direct evidence to contradict them, but that they should consider all the circumstances and evidence bearing upon the condition of the engine and mode of operating it, and the circumstances under which the fire took place. We think this instruction correctly stated the law, and follows the language used in some of the decisions we have cited herein.

Complaint is also especially urged against the oral instruction of the court on the ground that it holds the railroad company to the absolute duty of providing the most approved appliance for the preventing the escape of fire, instead of holding it merely to the duty of exercising ordinary and reasonable care and diligence in providing the best known appliances in practical use. We do not think that the instruction is open to that objection. The instructions, taken as a whole, correctly state the law to the jury—that the company had discharged its duty if it "had exercised reasonable care in providing its engine with the most approved appliances and contrivances in general use by railroads throughout the country for the prevention of the escape of sparks, and that said appliance and contrivances were in good condition."

The judgment is affirmed.

BATTLE, J., dissents.

GRAYSON-McLEOD LUMBER CO. v. CARTER.

(Supreme Court of Arkansas. June 17, 1905.)

1. MASTER AND SERVANT — SAFE PLACE TO WORK—APPLICATION OF RULE.

A servant engaged in dismantling a trestle or bridge, who is continuously changing his place of work, and sometimes making it more insecure, assumes the hazard of his employment, and is without the protection of the rule requiring the master to furnish a safe place to work.

2. SAME—TRIAL—INSTRUCTIONS—CURE OF ERRORS.

In an action for injuries to a servant engaged in dismantling a trestle, a charge that the rule requiring a master to furnish a safe place to work does not apply where the servant is engaged to do work obviously hazardous in irreconcilable conflict with, and does not cure the error in, other instructions stating that the master is required to furnish a safe place to work, and to warn the servant of extrahazards; that plaintiff was not required to inspect the trestle to see that it was safe, but had a right to rely upon the performance of that duty by defendant; and that plaintiff could not be char-

ged with having assumed the risk unless he knew the facts and appreciated the dangers.

3. SAME—DUTY TO INSTRUCT SERVANT.

In the absence of evidence that the master knew or should have known that a servant engaged, with full knowledge of the facts, in dismantling a trestle, did not appreciate the danger to which he was exposed, there was no duty on the master to instruct the servant of that danger, and no liability on the part of the master for injuries to the servant caused by his failure to appreciate the danger.

Appeal from Circuit Court, Clark County; Joel D. Conway, Judge.

Action by Henry Carter against the Grayson-McLeod Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. H. Crawford, for appellant. J. E. Callaway and C. V. Murry, for appellee.

BATTLE, J. Henry Carter sued the Grayson-McLeod Lumber Company for damages arising from personal injuries. He alleged in his complaint substantially as follows: That defendant owns and operates a line of railway in connection with its sawmill at Guerdon; that plaintiff is a common laborer, and was in 1892 in defendant's employ, engaged in removing a railway trestle; that he was ordered to go upon a trestle by defendant's superintendent, who assured him that it was safe; that, in obedience to said order, being unaware of the danger, he went upon the trestle, and while there at work it fell, and he was thrown to the ground, his hip broken, body and head seriously injured, from which he suffered great physical pain and mental distress, continuing for ——— months, and was permanently injured, and made a cripple for life.

He charges defendant with negligence (1) in requiring him to go upon said trestle while it was being torn down, knowing that it was liable to fall, and that it was dangerous to be on it at the time, place, and under the circumstances; (2) in being unmindful of his safety, in having the stringers of said trestle pulled down while he was upon it; and (3) in failing to use such care in the removal of the trestle as would subject the laborers thereon to the least possible danger.

That before said injury he was a stout, active, healthy man, but since he is permanently disabled and incapable of earning a living. He prayed judgment for \$5,000 damages.

Defendant, in its answer, specifically denied each and every act of negligence as charged in the complaint, and alleged that plaintiff was engaged in an extrahazardous line of duty—that of dismantling the bridges on its logging road; that whatever danger attended that work was as apparent to plaintiff as to defendant; and that, if there was any special danger, the defendant was not aware of it prior to the collapse and fall of the bridge. It alleged that plaintiff's injury grew out of the risks assumed by him, and which were

incident to the dangerous character of the work in which he was engaged.

That plaintiff was guilty of contributory negligence in exposing himself upon an apparently dangerous bridge.

The evidence adduced in the trial of this action tended to prove the following facts: At the time plaintiff was injured as alleged in his complaint he had been working upon defendant's logging road for some time. He was working with a crew, taking up the track of the road, wrecking or dismantling a trestle or bridge; taking from it the rails, bolts, and spikes, and such ties and stringers as were good and might be serviceable elsewhere. The bridge was 640 feet in length, 23 feet high, and contained 40 bents, each being 16 feet long. In obedience to the directions of defendant's superintendent, plaintiff and others were upon the bridge, pulling spikes that had been overlooked. While he was so employed oxen were hitched to the "far end of the trestle" (from where he was at work), pulling off some stringers. The whole bridge fell, and plaintiff was injured.

Among other instructions, the court gave the following to the jury over the objections of the defendant:

"(1) The law requires the master to provide a safe place for the servant to do the work required of him, and, if it is a work of extrahazard, to warn him of the danger, and to direct the performance of the work in such a way and with such care as will not subject the servant to a risk that a reasonably prudent man would not knowingly assume. So, if you believe from the evidence that the defendant failed in any particular to discharge this duty to the plaintiff, you must find for the plaintiff, unless the proof shows that after being aware of the danger, or by the exercise of ordinary care he might have known of it, the plaintiff failed to use reasonable care for his own safety.

"(2) The plaintiff was not required to inspect the trestle to see if it was safe to go upon it. He was only required to use ordinary care. The law made it the duty of the defendant to see that it was safe, and the plaintiff had a right to rely upon the care, superior knowledge, and judgment of his employer, and to act upon the assumption that the defendant would not expose him to unnecessary risk, and that it had and would take all proper precaution to guard him against danger.

"(3) Although you may believe from the evidence that the plaintiff knew, or by the exercise of ordinary care might have known, the condition of the trestle in every particular, and the effort that was being made to pull it down, this alone will not preclude a recovery. Before the plaintiff can be charged with having assumed the risk, it must be proven that he not only knew these facts, but that he fully appreciated the danger. So, if you believe from the evidence that a person

of plaintiff's experience and intelligence, under all of the circumstances, might reasonably have supposed that he could safely perform the work he was ordered to perform, by the use of proper caution, he is not guilty of contributory negligence, unless the proof shows that he failed to use proper care for his own safety after being aware of the danger, and you should find for the plaintiff."

Other instructions were given. The jury returned a verdict against the defendant for \$1,500. It appealed.

The instructions copied above are inapplicable to this case. In this case the appellee was engaged in tearing down a bridge, and in continually changing his place of work, and sometimes in making it more insecure. There was no duty to furnish him a safe place in which to work, since his employment made it his duty to tear down and to change and destroy his places for work, and to make them safe or unsafe as his work rendered them, and was such as to place it out of the power of his employer to perform such duty. He assumed the hazards of this employment. *Gulf, C. & S. F. Ry. Co. v. Jackson*, 65 Fed. 48, 12 C. C. A. 507; *Finlayson v. Utica Mining & Milling Co.*, 67 Fed. 507, 510, 14 C. C. A. 492.

It is true that the court, at the instance of appellant, instructed the jury as follows: "The doctrine that the master or employer must furnish its servant or employé with a safe place in which to work does not apply to a case where the servant or employé is engaged, with knowledge of the dangers, to do work obviously and inherently hazardous, such as wrecking or repairing structures. In such cases the servant or employé takes upon himself the extrahazardous risk of the employment, and if he is injured he cannot recover, unless the master or employer is guilty of some act of negligence, or, with knowledge of some special danger unknown to the servant, sends him into the dangerous position."

But this did not explain the instructions given over the objections of the appellant, but is in irreconcilable conflict with them.

In the third instruction given over the objection of the defendant, the court told the jury: "Although you may believe from the evidence that the plaintiff knew, or by the exercise of ordinary care might have known, the condition of the trestle in every particular, and the effort that was being made to pull it down, this alone will not preclude a recovery. Before the plaintiff can be charged with having assumed the risk, it must be proved that he not only knew these facts, but that he fully appreciated the danger." This is not correct. The burden was not upon the defendant to prove that the plaintiff fully appreciated the danger. There was no evidence that it knew or ought to have known that he did not appreciate the danger to which he was exposed, and there was no duty to instruct; and, of course, there was

no liability for his failure to appreciate a danger, all the facts having been known to him, when there was no duty to instruct. See *Southwestern Telephone Co. v. Woughter*, 56 Ark. 210, 211, 19 S. W. 575; *Railway Company v. Torrey*, 58 Ark. 223, 24 S. W. 244; *Ford v. Bodcaw Lumber Co.*, 73 Ark. —, 83 S. W. 346.

The instructions given over the objections of the appellant were calculated to mislead the jury, and were prejudicial.

Reverse and remand for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. KIMBERLAIN.

(Supreme Court of Arkansas. June 17, 1905.)

1. ACTIONS—INJURIES TO STOCK—SOUNDING ALARM—QUESTIONS FOR JURY.

In an action against a railroad for killing a cow, whether the engineer had time to sound the stock alarm after discovering the cow *held*, under the evidence, a question for the jury, notwithstanding the engineer's statement that he did not have sufficient time.

2. SAME—DUTIES OF ENGINEER—LOOKOUT.

A higher degree of care is required of railroads in running a train at a high rate of speed through a town than when going through the open country, and the engineer while passing through a town, should be on the alert, and prepared for instant action in case stock stray upon the track.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1397, 1405.]

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Action by J. O. Kimberlain against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. S. Johnson, for appellant.

RIDDICK, J. This is an appeal from a judgment against the defendant for damages for killing a cow belonging to plaintiff. The cow was struck and killed by a passenger train on the 19th day of April, 1902. The train was passing at the rate of 40 miles an hour through the town of Tuckerman early in the morning of that day, and the cow came from behind an icehouse about 20 or 30 feet from the track. The engineer testified that he did not and could not see the cow until it came from behind the icehouse, going towards the track, and that it was then too late to do anything to avoid striking it. He did not sound any stock alarm, and there was evidence tending to show that no bell was rung for the crossing. It seems clear from the engineer's testimony that it was too late after he saw the cow to do anything towards checking the speed of the train, and he says that he did not have time to even give the stock alarm. But he stated that he did not know whether the cow was walking or running, nor does he state how far the train was below the crossing at the time he first saw the cow. As the

cow was 20 or 30 feet from the track at the time she came from behind the icehouse, with a ditch between her and the track, it would seem that unless she was running very fast he could have sounded the stock alarm, as that can be done in an instant. He states that he did not have time to do this, but that statement was in the nature of an opinion. As he did not go into particulars, and show how near the train was to the cow, or whether the cow was walking or running, we think the facts are not definitely enough shown for us to say, as a matter of law, that the jury had no right to disbelieve his statement that he did not have time enough to sound a stock alarm. A higher degree of care is required in running a train at such a high rate of speed when passing through a town than when going through an open country. The engineer, while passing through this town, should have been on the alert, prepared for instant action, and whether, by so doing, he might have sounded the stock alarm, was, we think, properly left to the jury under the facts proved.

Judgment affirmed.

WILLIAMS et al. v. BENNETT et al.

(Supreme Court of Arkansas. June 10, 1905.)

1. ATTACHMENT—SALE OF PROPERTY — IRREGULARITIES—COLLATERAL ATTACK.

Where land was sold under an attachment the title of the purchaser was not subject to collateral attack for irregularities which might have been cured by amendment.

2. SAME — TERMS OF COURT—ALTERATION—STATUTES.

Act March 13, 1867 (Laws 1866-67, p. 317), changing the time for the holding of court in Arkansas county, and providing that it should not take effect until after July 1, 1867, did not affect an order for the publication of a warning order in attachment made at the May, 1867, term of such court.

3. SAME—FOREIGN JUDGMENTS — COLLATERAL ATTACK.

Where a suit was brought on a foreign judgment, and land of the judgment debtor attached, an objection that the judgment sued on was not properly authenticated was reviewable only on appeal, and was not ground for the vacation of a sale of property under such attachment.

4. SAME—APPEAL — OBJECTIONS NOT RAISED AT TRIAL.

In a suit to recover real estate sold under an attachment alleged to have been invalid, an objection that the bond for the sale was improper because the plaintiff was dead at the time of the sale, could not be made for the first time on appeal.

5. SAME—LACHES.

Where plaintiffs made no effort for 35 years to set aside an attachment sale of land belonging to their ancestor, and all facts urged against the validity of the sale were open to their ancestor for eight years before his death and to plaintiffs for two years prior to the beginning of the suit, and defendants, relying on their title under such attachment proceedings, had expended a large sum in clearing the land of tax liens, etc., plaintiffs were barred by laches from urging objections to such title, which, if urged in time, could have been cured by amendment.

Appeal from Arkansas Chancery Court; John M. Elliott, Chancellor.

Action by J. P. Williams, as administrator of the estate of Ferdinand M. Goodrich, deceased, and others, against Joseph F. Bennett and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

H. A. & J. R. Parker, for appellants. P. C. Dooley, for appellees.

HILL, C. J. This suit was brought in the chancery court of Arkansas county by the administrator and heirs at law of Ferdinand M. Goodrich, who died in 1878, to set aside a deed executed by the sheriff of Arkansas county to Amazon Dixon, and deeds from Amazon Dixon's heirs, under whom the appellees claim, as clouds on their title, and that they be permitted to redeem from tax liens and have their title quieted. Goodrich, to whom both parties look as the source of their respective titles, was the owner of the land in controversy, lived in Louisiana, and a judgment was obtained against him in a court of that state. In 1867 his judgment creditor, John J. Michie, filed suit against him in Arkansas county circuit court, and obtained an attachment, which was levied on this land. The first proceeding seemed to have been based upon the attachment provisions then contained in Gould's Digest, but the attachment law was amended in 1867, which was evidently not known when these proceedings were instituted. At the next term of court, evidently discovering the proceedings were irregular, the plaintiff caused the first attachment to be set aside, and the court ordered constructive service to be made, and the lands were levied upon under alias attachment, warning order was published, and proof of publication filed. Judgment was entered November 8, 1867, and the lands ordered sold. On November 25, 1867, Amazon A. Dixon as principal, and others as sureties, executed a bond to Goodrich (and his codefendant, who was only a nominal party) in form of the statute requiring such bond of the judgment creditor before sale of the attached land. This bond recited the death of John J. Michie and that Amazon A. Dixon was his "sole heiress." This bond was filed November 9, 1868, and a ven. ex. issued April 3, 1869, under which the land was sold, and bought by Amazon A. Dixon. The sheriff's deed was executed May 11, 1870. The record fails to show confirmation of the sale, but this deed has a certified copy of what purports to be its presentation in open court, and an order that its acknowledgment in court be indorsed on the deed and certified by the clerk to the end that the deed may be entitled to record. Various attacks are made on the validity of these proceedings. The first is that there is no affidavit for attachment or warning order. The record does not negative in any way its existence, and

the evidence to sustain this allegation is the absence from the papers which otherwise seem complete of the affidavit. This will be considered in another connection.

It is claimed that the deed is based on an attachment which was set aside, and is therefore void. As indicated, the first proceeding was not in conformity to a new statute; the second was in substantial compliance therewith, and, if irregular, the irregularities did not extend to more than errors rendering the judgment reversible, not void on collateral attack. In fact, a slight amendment to the sheriff's return would have obviated many of the questions now presented.

It is contended that the term of court at which the proceedings were begun anew was held at the wrong time. It is true that the act of March 13, 1867 (Laws 1866-67, p. 317), changed the time, but that act provided that the change should not take effect until after the 1st of July, 1867, and hence the May term, 1867, when the order was made, was not affected thereby. The next point is the lack of confirmation appearing of record, and the lack of proper authentication appearing upon the Louisiana judgment. The former matter will be referred to again, and as to the latter it was a matter of the sufficiency of the evidence before the court, reviewable on appeal only. Attack is made on the titles of the appellees. They are charged with not being bona fide purchasers. But that issue is immaterial, for the plaintiff in these actions to quiet title must have a "reasonably clear title" to invoke the jurisdiction of equity. *Lawrence v. Zimbleman*, 37 Ark. 643. They are not trespassers, and have a title which has been successfully maintained in another litigation against other parties claiming under Amazon A. Dixon, which will be referred to again. Whether they were bona fide purchasers, or speculating on the strength of the title they bought, makes no difference here, for they are indisputably the owners of the Amazon Dixon title, and the question is whether that title is good, or whether the appellants have successfully assailed it.

Another reason is presented here why the Dixon title is not good, and that is that it appears from the bond given for the sale that Michie, the plaintiff, was dead, and authorities are cited on both sides to the effect of his death after judgment and before sale, and also as to the bond being made by some one other than the judgment plaintiff. In this case it was made by his sole heir. That question was not raised in the pleadings below, and should not be raised here for the first time. It appears that in 1882 this land was sold under probate order by the executor of Amazon Dixon and guardian of her children, and purchased by Gibson, and Gibson conveyed to Newgass and Newgass to Beer. Suit was brought by this appellant Bennett, as gran-

tee of the Dixon heirs, or some of them, against Newgass and Beer, in the United States Circuit Court, and he prevailed, and in 1899 a decree was entered in his favor for the land subject to a lien for taxes paid by Newgass and Beer amounting to about \$3,500, which was satisfied some two years before this suit was brought by the appellants.

It appears that the appellants live in Kentucky, and had no information of their right, supposed or real, to this land, until a short time before the suit was brought. They learned of their supposed rights from a letter written by one Brown in Louisiana, and later through attorneys in Arkansas county who were engaged to bring this suit. The transactions culminating in the deed of May 11, 1870, to Mrs. Dixon were had from 1867 to 1870, and this suit was filed February 28, 1902. The land has always been wild and unoccupied, and the record is silent as to its value at any time. This court recently held that as to wild and unoccupied lands the mere payment of taxes under a void tax title for 13 years would not ripen the void tax title, and the landowners who failed for that period to pay taxes or assert their rights would not be barred by laches from so doing where there was no evidence of enhanced value, no evidence of the change of status of any one towards the land, and no loss of evidence by lapse of time, or other equitable ground to invoke estoppel by laches. *Jackson v. Boyd* (Ark.) 87 S. W. 126. There is no evidence here of the increase in the value, and the same argument is made here as in *Jackson v. Boyd* that it is to be inferred from the general increase in land values over the state; but, as therein decided, that is insufficient. Loss of evidence by lapse of time is one of the most frequent causes to defeat an asserted right by laches. This case aptly illustrates the necessity of that salutary rule of equity jurisprudence. Almost every defect relied upon is susceptible of correction by parol.

Much stress is laid upon the absence of the affidavit for warning order and attachment. The files in the case disclose all other important papers except this, and after 35 years it is impossible to prove that it was duly made and filed and has been lost. Yet if this suit had been brought in reasonable time, can any one doubt that this would have been proved? The other papers show a painstaking effort to comply with the statute, and surely this primal requirement would not have been omitted. After the papers have been subject to public inspection and handling for 35 years, no presumptions can be indulged that they are "all present or accounted for."

The record fails to show confirmation of the sale or approval of the deed, yet the deed contains what purports to be a copy of an order directing its acknowledgement to be noted thereon to the end that it be re-

corded. This is certified under the signature of the clerk and the seal of the court. Either this is a false official certificate, or else the record was omitted. Thirty-odd years ago it would have been easy to correct the record by nunc pro tunc, or punish the officer for making a false and forged certificate of an order. If the question of the abatement of the suit by the death of the plaintiff, precluding valid subsequent process, could be considered and become material, then parol evidence of the date of death, the condition of his estate, and the devolution of his property, would be important. If the sheriff's return is so fatally defective as appellant contends, it could easily have been amended at that time. The matter in which it is defective—the failure to show that Goodrich was not to be found in the county—was a failure to show something evidently a fact. Conceding, without deciding, that every defect relied upon is fatal to the title, yet every one was susceptible 35 years ago of having been met by parol evidence and the defect cured. There is not a single matter open to appellant on the face of the record of that class which cannot be supplied by parol or else susceptible to proper amendment. A stronger case for the application of the rule cannot be found. But it is shown that the appellants were ignorant of their rights until a short time before the suit was brought, and it is insisted that this excuses them. They utterly fail to show in their pleadings or evidence the causes of the long delay in ascertaining their rights. All matters now set up have been open to the world for 35 years and to their ancestor for 8 years and more before his death. When the opposing party misleads, or the facts are successfully concealed, or other reasons rendering ignorance permissible, it is an excuse for laches; but there must be a showing of some good reasons.

This question was before the Supreme Court of the United States in the case of *Wetzel v. Minn. Ry. Transfer Co.*, 169 U. S. 237, 18 Sup. Ct. 307, 42 L. Ed. 730. Remsen was a soldier in the Mexican War, and as such became entitled to a land warrant. The warrant was issued to his widow and children, and was sold by the widow and one adult child, acting for all, but they failed to procure proper consent of the orphans' court rendering the sale void on account of such failure. The parties lived in Philadelphia, and the purchaser located the land warrant on lands near St. Paul, Minn., which in time became very valuable. Incidentally the heirs learned of the defect from a lawyer who was examining into titles, and 30 years after the youngest became of age brought suit for the land. The court held that the exercise of diligence was incumbent on them; that they knew, or were culpably ignorant if not, that their father was a Mexican War veteran, and that such fact

would lead to information that he would be entitled to a land warrant. In this case these heirs certainly knew, or else were culpably ignorant, that their father had owned this large tract of about 8,000 acres of land. The court said in the case mentioned that knowledge of the transfer came to them not through any exertion of themselves, but from an accidental meeting with this lawyer. In this case the knowledge came to these parties through a third person, and not through their exertion. In that case the ground for applying laches was the great increase in the value of the property; in this the equally well established ground of loss of evidence. The court concluded: "While the fact that the complainants were ignorant of the defect in the title, and were without means to prosecute an investigation into the facts, may properly be considered by the court, it does not mitigate the hardships to the defendants of unsettling their titles. If the complainant can put forward their excuses for delay after 30 years, there is no reason why they may not allege the same as an excuse after a lapse of sixty. The truth is, there must be some limit of time within which these excuses shall be available, or titles might forever be insecure. The interests of public order and tranquility demand that parties shall acquaint themselves with their rights within a reasonable time; and, although this time may be extended by their actual ignorance or want of means, it is by no means illimitable." This reasoning, from this great tribunal, is so sound, and so in harmony with many decisions of this court, that it is decisive of this case.

In addition to the loss of evidence, the status of parties towards this property has changed. The appellees purchased, for a small sum, it is true, the interests of the Dixon heirs; but they conducted to successful conclusion a lawsuit to establish their rights, and then had to pay \$8,500 tax liens, and this was done over two years before this suit was brought. They put in time and money to win the land, and the appellants waited till after they won the suit and expended this sum, and now seek to recover the lands of them. All of these matters were publicly done in the courts of the country, and these parties waited too long to ascertain and assert what are at best very doubtful rights.

The decree is affirmed.

WELLS v. PARKER.

(Supreme Court of Arkansas. June 17, 1905.)

1. APPEAL — ASSIGNMENTS OF ERROR—EXCEPTIONS IN GROSS.

An assignment of error that "the court erred in giving instructions Nos. 2, 3, 4, 5, 8, and 9, asked for by the plaintiff," based on an exception stating that "defendant at the time excepted to the giving of instructions numbered

2, 3, 4, 5, 8, 9," will not be considered if any of the instructions are good.

2. MALICIOUS PROSECUTION — TERMINATION OF PROSECUTION — DISCHARGE BY GRAND JURY.

A discharge by a grand jury is *prima facie* a termination of a prosecution such as will support an action for malicious prosecution.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 71, 75.]

3. SAME — PROBABLE CAUSE — COMMITTAL OF MAGISTRATE.

The binding over of accused by the committing magistrate to await the grand jury is *prima facie*, but not conclusive, evidence of probable cause in a subsequent action by accused for malicious prosecution.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 54.]

4. SAME—QUESTIONS FOR JURY.

In a suit for malicious prosecution, whether defendant acted under advice of counsel and made a full disclosure of the facts to counsel is a question of fact for the jury.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 165.]

Appeal from Circuit Court, Pulaski County.

Action by F. M. Parker against J. M. Wells. From a judgment for plaintiff, defendant appeals. Affirmed.

Hallum & Clay, for appellant. W. O. Adamson and J. H. Carmichael, for appellee.

HILL, C. J. This is a suit for malicious prosecution, and terminated in the circuit court in a judgment for the plaintiff for \$500, and the defendant has prosecuted this appeal.

1. The motion for new trial presents four grounds. The first three are that the verdict is contrary to the law, to the evidence, and to the law and evidence. The fourth is: "The court erred in giving instructions Nos. 2, 3, 4, 5, 8, and 9 asked for by the plaintiff." The exception upon which this assignment is based reads as follows: "The defendant at the time excepted to the giving of instructions numbered 2, 3, 4, 5, 8, and 9, and asked that his exceptions be noted of record, which was accordingly done." Mr. Justice Eakin, speaking for this court in *Atkins v. Swope*, 38 Ark. 539, where the exception was in the exact language of the foregoing exception, said: "The objection made to giving these instructions was general, embracing all of them in gross. It was not specific as to either or any of them, and directed the attention of the court to no particular error. We have several times held that objections of such sweeping nature will not be considered here if any of the instructions be good. It is not to be encouraged, even if all be bad. It is mani-

festly due the court that the attorney should 'lay his finger' upon the errors complained of, and not compel the judge to seek them amongst all the matter included in a dragnet objection." This rule has been a settled rule of practice in this court (and it is practically the same in every appellate court) for many years, and has been often followed. The authorities on this subject have been recently reviewed and approved in the case of *Young v. Stevenson* (Ark.) 86 S. W. 1000. Some of these instructions excepted to are elemental statements of law, and this kind of exception precludes the court from going beyond a finding that any one of them is sound.

2. This leaves only the question of the sufficiency of the evidence to sustain the verdict. The plaintiff was bound over by a justice of the peace to answer before the grand jury for a felony, and the grand jury dismissed the case. The appellant contends that the dismissal of the case by the grand jury is not a sufficient termination of the prosecution to authorize the maintenance of the action for malicious prosecution. The authorities are practically uniform in holding that a discharge by a grand jury is *prima facie* a termination of the prosecution, and is sufficient to support the action on this requirement. *Miller v. Ry.* (C. C.) 41 Fed. 898; *Newell on Malicious Prosecution*, pp. 358-363; 19 Am. & Eng. Ency. of Law (2d Ed.) p. 682.

The binding over to await the grand jury by a committing magistrate is deemed evidence of probable cause, but the authorities do not go beyond holding it only *prima facie* evidence of probable cause, not conclusive evidence, as a conviction in a court of competent jurisdiction is, even though it be reversed. *Hale v. Boylen*, 22 W. Va. 234; *Holliday v. Holliday*, 123 Cal. 28, 55 Pac. 708; *Miller v. Ry.* (C. C.) 41 Fed. 898; *Ross v. Hixon*, 46 Kan. 550, 26 Pac. 955, 12 L. R. A. 760, 28 Am. St. Rep. 123; 19 Am. & Eng. Ency. of Law (2d Ed.) 684.

This committal by a magistrate was evidence in favor of the appellant, but not conclusive; there was evidence that he acted under advice of counsel (but there is some conflict on that), and also evidence that he did not make a full disclosure to his counsel of all facts known to him. These were issues of fact properly determinable by a jury, and in the absence of any uncontroverted evidence of a fact, conclusive of itself, in favor of appellant, the verdict cannot be disturbed.

The judgment is affirmed.

STATE v. CRONIN.

(Supreme Court of Missouri, Division No. 2.
June 20, 1905.)

1. LOTTERIES—"POLICY"—INDICTMENT.

In a prosecution for violating Rev. St. 1899, § 2219, prohibiting any person from establishing a "policy" as a business or avocation, an indictment charging that defendant unlawfully and feloniously made and established a policy as a business and avocation was not objectionable for failure to define in what manner a "policy" was made or established, or what was meant by a "policy."

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lotteries, §§ 29-32, 34.]

2. SAME—EVIDENCE.

In a prosecution for aiding and assisting in establishing a "policy" in violation of Rev. St. 1899, § 2219, evidence held sufficient to sustain a conviction.

3. SAME—INSTRUCTIONS.

Where, in a prosecution for aiding and assisting in establishing a "policy," an instruction pointed out the facts constituting the felony, it was not objectionable for failure to require that the acts must have been "feloniously" committed.

4. SAME—VERDICT—JUDGMENT.

Where, in a prosecution for aiding and assisting in establishing a policy as a business and avocation, the jury rendered a special verdict finding defendant guilty of aiding and assisting in establishing a policy, and the judgment followed the verdict, both were fatally defective for failure to find that defendant aided or assisted in establishing a policy as a "business or avocation."

5. SAME—MOTION IN ARREST.

Where a verdict finding defendant guilty of aiding and assisting in establishing a policy was fatally defective for failure to find that he established such policy "as a business or avocation," defendant was entitled to urge such objection on appeal, though not raised by motion in arrest of judgment.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Frank Cronin was convicted of aiding and assisting in establishing a policy, and he appeals. Reversed.

Morton Jourdan, for appellant. Herbert S. Hadley, Atty. Gen., and N. T. Gentry, for respondent.

GANTT, J. At the February term, 1903, the grand jury of the city of St. Louis preferred indictment against the defendant, the second count of which is in the following words: "And the grand jurors aforesaid, upon their oath aforesaid, do further present and say that Frank Cronin and Louis Miller, late of the city aforesaid, on the fifteenth day of February, one thousand nine hundred and three, and at the city of St. Louis aforesaid, and state aforesaid, unlawfully and feloniously did aid and assist in making and establishing a 'policy' as a business and avocation in the state of Missouri, against the peace and dignity of the state." A severance was granted to the defendant Cronin, and at the February term, 1904, he was put upon his trial, convicted, and found guilty of aiding and assisting in making and establishing

a "policy," and his punishment assessed at six months in the city jail. After an unsuccessful motion for new trial, he took his appeal to this court.

The indictment is predicated upon section 2219 of the Revised Statutes of Missouri of 1899, which provides: "If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery as a business or avocation in this state, * * * upon conviction [he] shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months." The state's evidence tended to show that all three of the witnesses Winterer, Linnebar, and Tarrant, with others, were policy vendors, and each one went by a number; Winterer was 23, Linnebar was 22, and Tarrant was 28. It was their custom for some months to sell and dispose of tickets, each one of which was numbered, and the number of the ticket was placed on the vendor's book. At certain hours of each day the book was closed, and the vendor turned the same into the headquarters, which was an establishment on South Tenth street, in St. Louis, called "The Henry Book." Some of the witnesses visited this place twice a day, at noon and at 5 p. m. Others visited there at noon, at 5 p. m., and at 9 p. m. As stated by the witness Tarrant, they went there to turn in their books and money. All the money received by these policy vendors for tickets sold by them was turned into this place, except a commission of 25 per cent. which was allowed them. All who visited this place went by way of the alley entrance, and, although there was a front door, there was no evidence that any one could or ever did come in at the front door. This alley entrance opened into a room which had shelves and benches all around, each vendor had his seat, and his number was on the wall near his seat. There was a partition across this room, and a door and a small window in the partition. This door was opened occasionally, at which time a person would come out from behind and make out the drawing. None of the vendors ever passed behind the sacred portals of this partition, but the defendant Frank Cronin, and his codefendant, Louis Miller, were often seen behind there, especially at the hours of 12, 5, and 9, when the business was conducted through the window. One witness, who was a frequenter of this place, said that he never saw any one behind this partition except the defendant and Miller. By looking through the window in this partition, the witness could see some chairs behind the partition, and also a table that had some money on it. Each vendor made it convenient to arrive at this interesting place 5 or 10 minutes before the hours above mentioned. After entering the room at the stated times, each vendor would sit on

his bench, take out his book and deposit in a pigeonhole, and it was then laid on the table. In about 10 minutes they would get to drawing, and each vendor would take his book and see if he had made a "hit." The drawings were given out two or three at a time, and were wrapped up in a piece of tissue paper about 12 inches long. Each paper was numbered, and by examining the numbers on his book the vendor could see if he had made a "hit." The persons possessing the lucky number (or hit) would make out a "hit" slip and throw it in at the window, and the money would be paid to him in an envelope which was passed out to him through the window from behind the partition. A three number play was called a "gig," and two numbers were called a "saddle." While the money was usually handed out by Miller, yet on one occasion when the witness Winterer had made a hit and some money was paid to him in the above manner, on counting it, he found that the full amount had not been paid, so defendant Cronin handed him the balance due. At that time defendant was sitting back of the partition by the side of the table. At another time defendant Cronin came out from behind the inner office and gave out the drawings, while the vendors were sitting down; or, as expressed by witness, he "just walked around and distributed them." At another time, this witness testified that the slips were given out by defendant and a man named Dutch Fred. Witness Linnebar said that the drawing was sometimes handed to him by defendant, sometimes by other parties; and that he had seen defendant standing up behind the partition waiting for the drawings to be handed back to him. One witness testified that he saw defendant at this place sometimes once a day, sometimes twice a day, and sometimes three times a day; and that the defendant was opening envelopes of the vendors and seeing that the money was right. This witness further testified that he saw defendant as often as three times a day sitting in a chair behind the partition, examining the sheets (or books) and handling the money. The supplies and advertising matter used by the vendors were given to them in this room by a negro who was frequently seen there, and who went by the name of "Sunny Mack." The evidence shows that this defendant and his associates conducted this sort of business at this place for five months. Finally the police made a raid, and vendors, policies, books, hits, gigs, and saddles were taken before the grand jury, and this and other indictments were the result. Several grounds are assigned in this court for the reversal of the judgment of conviction, and they will be considered in the order of the brief of counsel for the defendant.

1. The indictment is assailed as insufficient, in that it fails to define in what manner a "policy" was made or established, and fails to define what is meant by a "policy."

This objection was made and answered in *State v. Wilkerson*, 170 Mo., loc. cit. 191, 192, 70 S. W. 480, in which Burgess, P. J., speaking for this court, said. "Now, what is it at which the statute is leveled? Clearly, the unlawful and felonious making and establishing a policy as a business and avocation, and these facts are set forth in the indictment. The statute specifically defines the offense in such a way that it cannot be misunderstood, nor can there be any question as to the kind of policy intended, for, when the statute says 'make and establish a policy,' it is well understood to be 'a form of gambling in which bets are made on numbers to be drawn by lottery.'" (*Century Dictionary*.) The indictment in that case was in all essentials like the one before us, and, adhering to the views there expressed, we hold the indictment is sufficient. The statute itself sufficiently individuates the offense, and in such case it is the well-established law of this state that an indictment following the form of the statute is sufficient.

2. It is next urged that the evidence is insufficient to support the conviction. The evidence tended to prove a continuous presence of the defendant at this "policy" establishment; that the defendant and his co-indictee, Miller, were not only there, but they were admitted at all times behind the partition and in the innermost office, and the defendant was seen handling the money and opening the envelopes brought in by the various "policy" vendors. Not only this, but he himself handed out the drawings, and made the corrections in case of error. He took a chair at the money table, and examined the books in the room behind the partition into which the vendors turned their books and money through a small window in the partition. It appeared also that the defendant was thus engaged as often as three times a day for a period of five months in a room which had a front door, but which all parties preferred to keep closed and use the alley entrance. This evidence was practically uncontradicted. There was ample evidence on which to base the verdict, and we discover nothing which smacks of recklessness, prejudice, or bias on the part of the jury; and this conclusion disposes of the next ground of error, to wit, that the court erred in refusing to direct an acquittal. There is no evidence which would have justified the court in submitting to the jury that the defendant was performing merely a clerical duty, or that he was simply engaged in the sale of tickets.

3. Instruction No. 1 given by the court is criticised for the failure to use the word "feloniously" therein. This court in a number of cases has held that this word is entirely unnecessary when the instruction points out, as this instruction does, the facts which constitute the felony. In *State v. Scott*, 109 Mo. 232, 19 S. W. 89, it was said: "So, in the instruction complained of here,

the word 'feloniously' scarcely had a definable meaning, as used, and could have been altogether omitted without affecting, in the least, the correctness and sufficiency of the instruction." See, also, *State v. Toble*, 141 Mo. 547, 42 S. W. 1076. The instruction required the jury to find the facts charged in the indictment, and the indictment follows the law, and, when these facts are found, the conviction of a felony follows as a legal conclusion.

4. Finally, the verdict is assailed as insufficient. In consideration of this assignment it should be noted that the defendant expressly waived his motion in arrest of judgment, and nowhere assails in his motion for new trial the form of the verdict. Counsel for the defendant relies upon *State v. DeWitt* (Mo. Sup.) 84 S. W. 956. In that case it was said: "Whatever the practice may be in other states, it is the settled law of Missouri that if a verdict which is a part of a record is not responsive to the issue, or is so uncertain and indefinite that it will not support the judgment, this effect may be reached by a motion in arrest of judgment." *Webber v. The State*, 10 Mo. 8; *Davidson v. Peck*, 4 Mo. 438; *Griffin v. Samuel*, 6 Mo. 50. In *State v. De Witt* supra, the verdict which was held insufficient was duly assailed by a motion in arrest of judgment specifically calling attention of the trial court to the insufficiency of the verdict. In *Finney v. State*, 9 Mo. 632, which was an action on an administrator's bond executed by O'Neil and McGowan, the jury by their verdict found that neither McGowan nor O'Neil, after the death of McGowan, did pay over the money, but omitted saying anything in relation to the nonpayment, after the death of O'Neil, by his representatives. The defective finding was assigned as error in this court. Judge Scott, speaking for the court, said: "In accordance with the previous decisions of this court, the defective finding of the jury could only be taken advantage of by motion in arrest. Where a material issue is entirely overlooked by the jury, and the finding is not a general one, the want of such finding is a material issue, and may be taken advantage of on a writ of error, though no motion in arrest be made in the inferior court. *Jones v. Snedecor*, 8 Mo. 390; *Pratt v. Rogers*, 5 Mo. 53. But when the finding is a general one, it will raise a presumption that all the issues have been duly considered by the jury (*Stout v. Calver*, 6 Mo. 256, 35 Am. Dec. 438); and, where the finding is merely defective or imperfect, the judgment will not be reversed, unless a motion has been made in the inferior court to arrest the judgment, and overruled. In the present case there was but one breach before the jury, and their verdict upon that breach did not embrace all the matters which they should have found to authorize their conclusion in favor of the plaintiff, but inasmuch as the contention of the circuit court was not directed to the defect, where it

would have been readily corrected, no advantage can be taken of it here." This statement of the law by Judge Scott, we think, announces the correct rule, and it follows that in each case the sufficiency of the verdict must be determined by the consideration whether the issue to which the jury fails to respond is a material one and the finding is not a general one. If it be a material and essential element of the crime in a criminal case, the defect may be taken advantage of on a writ of error or appeal, though no motion in arrest be made in the inferior court because the verdict is a part of the record proper. That the aiding or assisting in the establishment of a "policy" must be "as" a "business and avocation" under the statute is perfectly apparent. The indictment so charged, and the court so instructed the jury; but the jury in this case, instead of making a general finding of guilty, which would have been entirely sufficient, made a special finding, to wit, "that the defendant was guilty of aiding and assisting in making and establishing a 'policy,'" and did not find that he did this "as a business and avocation"; and the judgment is as defective as the verdict, and neither responds to this essential element of the crime charged in the indictment. The authorities collated in *State v. De Witt* established beyond question that this defect in the verdict is a most material one, and, this being true, it may be taken advantage of on writ of error or appeal in this court, though no motion in arrest be made in the inferior court. We think there is no escape from this conclusion. It was absolutely essential to a conviction of the defendant that he should not only have aided and assisted in the establishing of a "policy," but that he must have done it "as a business and avocation," and yet the jury have not so found. They could have found all that they did, and yet refused to find the essential fact that the defendant was doing this "as a business and avocation." The finding is a special one, and we are compelled to hold the verdict is insufficient. We again repeat that, in every case of a verdict rendered, the judge or prosecuting officer, or both, should look after its form and substance, so as to prevent an insufficient finding from passing into the record of the court. In this case, doubtless, had a general form of the verdict been furnished the jury, they would have returned a general verdict of "guilty," or "guilty as charged in the indictment," and it would have been entirely sufficient; but as it is, the verdict is a special one, omitting an essential requirement of the statute, and the judgment of the court is as defective as the verdict.

The result is, the judgment must be reversed, and the cause remanded for a new trial.

FOX, J. concurs. BURGESS, P. J., not having heard the argument, takes no part in the decision.

STATE v. MILLER.

(Supreme Court of Missouri, Division No. 2.
June 20, 1905.)

1. CRIMINAL LAW—MOTION FOR NEW TRIAL—DENIAL—REVIEW—BILL OF EXCEPTIONS.

Where no bill of exceptions was filed to an order denying a new trial in a criminal case during the term at which the motion was overruled, and there was no extension of time given to file the same, the overruling of such motion cannot be reviewed.

2. SAME—AFFIDAVIT FOR APPEAL—FAILURE TO FILE—MOTION TO DISMISS.

A motion to dismiss an appeal in a criminal case or strike the same from the docket because no affidavit for an appeal was filed, not made until after the case had been submitted on the merits, was too late.

3. LOTTERIES—"POLICY"—VERDICT.

In a prosecution under Rev. St. 1899, § 2219, prohibiting any person from establishing a "policy as a business and avocation," a verdict finding "the defendant guilty of aiding and assisting in making and establishing a policy," and assessing his punishment, was fatally defective for failure to find that he established a policy "as a business and avocation."

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Louis Miller was convicted of establishing a "policy as a business," and he appeals. Reversed.

Morton Jourdan, for appellant. H. S. Hadley, Atty. Gen., and Frank Blake, for respondent.

FOX, J. This cause comes here upon appeal by defendant from a judgment of conviction, in the circuit court of the city of St. Louis, upon an indictment charging defendant with a violation of the provisions of section 2219, Rev. St. 1899.

The record in this cause discloses that on March 28, 1904, being a part of the February term of the circuit court of the city of St. Louis, defendant was put upon his trial before a jury duly impaneled for the offense charged in the indictment, and they returned a verdict of guilty, in the following form:

"State of Missouri vs. Louis Miller. On Indictment for Establishing a Policy. We, the jury in the above-entitled cause, find the defendant guilty of aiding and assisting in making and establishing a policy, and assess the punishment at 6 months in the city jail. John J. Sheehaw, Foreman." On March 30, 1904, during said term of court, defendant filed his motion for new trial; on April 1, 1904, said motion for new trial was overruled. On April 2, 1904, defendant filed his motion in arrest of judgment, and this motion was continued to the April term, 1904, of said court.

There is an entire absence of any disclosure in this record that the action of the court in overruling the motion for new trial was preserved by bill of exceptions during the term of court at which the motion was overruled, nor was there any leave given to file it later. It is clear that timely objections

and exceptions to the action of the court in overruling the motion for new trial, in order to be subject to review by this court, must be made at the time of such action, and duly preserved by bill of exceptions filed during the term at which such action was taken, or at such time to which leave to file had been granted. No bill of exceptions was filed during the term at which defendant's motion for new trial was overruled, nor was there any extension of time for filing the same; hence it is apparent there is nothing before this court in this cause for review except the record proper. *State v. Broderick*, 70 Mo. 622.

Our attention is directed by the Attorney General to the fact that it does not affirmatively appear in the record that an affidavit for an appeal was filed in this cause. It does appear, however, that an order granting an appeal was made, and, in pursuance of such order, the clerk of the circuit court of the city of St. Louis transmitted to this court a transcript of the proceedings in that court, and the record is now before us. There was no motion by respondent to dismiss the appeal or to strike the case from the docket, and the cause was submitted without any suggestion as to the jurisdiction of this court by virtue of the order granting the appeal; hence we are inclined to the opinion that the better practice is that defects of the character here complained of should be taken advantage of by motion to dismiss the appeal or to strike the case from the docket. This would enable the defendant to make such showing upon such defect as may be within his power, but we think it would be unfair, after submitting the cause, presumptively upon its merits, for this court to dismiss the appeal or strike the case from the docket. This cause having been submitted by counsel, it is too late to urge the striking of the cause from the docket or dismissing of the appeal; suggestions in that direction should be made in advance of submitting the cause to this court. Will say, however, in justice to the Attorney General in failing to call our attention by motion to the defect in this record now insisted upon, that doubtless such failure occurred by reason of the absence of the record from the clerk's office.

The verdict in this cause forms a part of the record proper, hence may be reviewed without motions for new trial or in arrest of judgment. We have reproduced the verdict rendered in the form as returned by the jury, and it is sufficient to say that a verdict in substantially the same form was fully discussed by Gantt, J., in *State v. Cronin* (at the present sitting of this court) 88 S. W. 604. It was held insufficient, and not responsive to the issues presented to the jury. Adopting the views of this court as expressed in that case, as well as the conclusions reached, results in the conclusion that the verdict in this cause is insufficient, and will not support the judgment.

With this expression of our views upon the

record before us, the judgment in this cause is reversed, and the cause remanded. All concur.

AYERS v. WABASH R. CO.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. RAILROADS — PRIVATE CROSSINGS — DUTY TO GIVE SIGNALS.

There being no statute requiring a railroad to give a signal on approaching a private crossing, its failure to sound the bell or whistle on approaching such a crossing is not negligence per se, but whether it is negligence or not depends upon the circumstances of the case.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 994, 1005.]

2. SAME—INJURIES TO TRESPASSERS — CONTRIBUTORY NEGLIGENCE.

An intoxicated man, who seats himself on the end of a cross-tie on the main track of a railroad, and there sinks into a drunken stupor, is negligent.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1304.]

3. SAME—DUTY OF ENGINEER — LOOKOUT—USE OF TRACK BY PEDESTRIANS.

A locomotive engineer is bound to be on the lookout for persons using the track at a place where it is, to the railroad's knowledge, habitually used for a footpath, but is not chargeable with notice that a man is liable to be lying on the track at such a place, and the mere fact that the engine strikes a man so lying on the track is not of itself sufficient to justify the inference that the engineer saw him, or failed to use ordinary care to discover him in time to prevent injuring him.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1285.]

4. EVIDENCE — CONCLUSIONS OF WITNESS—VISUAL POWERS.

Testimony that on a clear day one could see a "small object" at a certain place on a railroad track from a standpoint of a quarter or half mile is incompetent unless it is the result of an actual experiment.

Appeal from Circuit Court, Carroll County; Jno. P. Butler, Judge.

Action by Montle B. Ayers against the Wabash Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John T. Barker and Conkling & Rea, for appellant. Geo. S. Grover, for respondent.

VALLIANT, J. Plaintiff was struck by a locomotive on defendant's railroad, and suffered personal injuries. He brings this suit for damages. The negligence ascribed to the defendant in the petition is failure to sound the bell or whistle on approaching the point where plaintiff was, and failure of the engineer to use the appliances at hand to stop the train in time to avoid striking the plaintiff after seeing him in a position of peril, or after the engineer, by ordinary care, might have seen him. The petition states that defendant's track was, and had been for many years, a well-recognized public path for pedestrians, with the knowledge and consent of defendant, and that plaintiff was

on the track when he was struck, but it omits to say what he was doing, or in what position he was. The answer was a general denial and contributory negligence.

The evidence for the plaintiff tended to prove as follows: Defendant's railroad runs north and south through the town of La Plata. There is a well-beaten footpath in the track, and for many years the people in that vicinity, men, women, and children, habitually used the path in going to and from the town. About a mile south of La Plata there is a private crossing over the railroad, called "Gates' Crossing." From that point, looking south, the track for a half mile or more is level and straight, with nothing to obstruct the view. In the afternoon of a clear day, January 8, 1902, the plaintiff had been to town, became intoxicated, and started home, walking in the footpath in the track, going south. When he got as far as Gates' Crossing he sat down on the west end of a cross-tie, and then and there all consciousness ceased, and his memory of events ended. A regular north-bound passenger train, running about 40 miles an hour, came along, and struck him, inflicting serious injuries. As the engine approached Gates' Crossing, there was no signal given by bell or whistle. The train ran a quarter of a mile past the crossing before it stopped, then backed, and took the plaintiff on. Gates' Crossing was constructed by cross-ties laid lengthwise the track and plank on the ties. The plaintiff was sitting on the west end of a cross-tie a few feet north of the crossing. Sincock, the only witness for the plaintiff near this crossing at the time of the accident, testified that he was approaching the track from the east, and when he got within about 85 yards of the crossing he saw the train coming from the south, and waited for it to pass. He did not see the plaintiff until after the accident. There was evidence tending to show that this train, running at the rate of 30, 35, or 40 miles an hour, as some of the witnesses thought it was, could have been stopped within 300 or 400 feet. The plaintiff called as a witness the engineer who was operating the locomotive at the time of the accident, and interrogated him on two subjects; that is, asked him how the engine was equipped, and what kind of a day it was. Then the witness was turned over to attorney for defendant for cross-examination, and was examined in regard to the accident, in which examination he stated: That when at his post on a level, straight track he could see from a half to three-quarters of a mile ahead. That this track was level and straight for about a quarter of a mile south of Gates' Crossing. That on this occasion he was at his post on the east side of the cab, looking north. He was running a little over 40 miles an hour. At that speed the train could not be stopped shorter than within 600 or 700 feet. That he did not see the plaintiff until he was within 150 feet of

him. The plaintiff was then lying on the west side of the west rail, his body showing about 5 or 6 inches above the rail. As soon as he saw him, he used every effort and means at hand to stop, but it was too late. It was then impossible to stop in time to prevent striking him. The position of the plaintiff on the track was such that the witness could not have discerned him sooner than he did. At the close of the plaintiff's evidence the court, at the request of defendant, gave an instruction to the jury to find for the defendant. The jury rendered a verdict accordingly, and the judgment for defendant followed. The plaintiff has appealed.

The only question for decision is, was the plaintiff entitled to have his case submitted to the jury under instructions authorizing a verdict in his favor under any view of the evidence? The plaintiff insists that the testimony of the engineer to the effect that he was at his post and looking, yet did not see him until it was too late, and that as soon as he discovered him he did everything possible to avert the injury, is not the plaintiff's evidence, and did not justify the court in giving the peremptory instruction. The proposition is that the engineer was the plaintiff's witness only in reference to the subjects on which he was examined by plaintiff, and as to the rest he was defendant's witness. The question of latitude allowed in cross-examination of an adversary's witness has led to the adoption of one rule in some jurisdictions and a different one in others. A distinguished text-writer on this subject calls one the "orthodox rule," and the other the "federal rule" (3 Wigmore on Evidence, § 1885 et seq.), and quotes for the orthodox rule *Fulton Bank v. Stafford*, 2 Wend. 483-485: "When a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue. He may establish his defense by him without calling any other witness. If he is a competent witness to the jury for any purpose, he is so for all purposes." For the federal rule the same text-writer quotes from Judge Story in *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 461, 10 L. Ed. 535: "(The answers in controversy were inadmissible) upon the broader principle (now well established, although sometimes lost sight of in our loose practice at trials) that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the case." What is there called the "orthodox rule" has always been the rule in this state. *Page v. Kankey*, 6 Mo. 433; *Railroad v. Silver*, 56 Mo. 265; *State v. Jones*, 64 Mo. 391; *State v. Soper*, 148 Mo. 88 S.W.—39

234, 49 S. W. 1007. The learned author above named, after an exhaustive discussion of the subject, says, in section 1895: "The rule under consideration is concerned solely with the order of presenting evidential material. The assumption is that the fact may be proved on direct examination at a later stage, and the only question is whether it may be elicited during the earlier stage." That is really the only essential difference in effect between the two rules. Under what is called the "federal rule," the defendant may cross-examine the plaintiff's witness on the subject of his examination in chief, and afterwards, when defendant comes to introducing his evidence, he may recall the witness, and examine him on other subjects, making him as to those matters his own witness. Under our rule the defendant need not wait until the time for introducing his evidence has come, but may examine the witness before he leaves the stand on other subjects; yet as to these other matters he is the defendant's witness. The testimony is the defendant's, and not the plaintiff's. *Hume v. Hopkins*, 140 Mo. 65, 41 S. W. 784; *State ex rel. v. Branch*, 151 Mo. 622, loc. cit. 641, 52 S. W. 390; *Anderson v. Railroad*, 161 Mo. 411, 61 S. W. 874. In such case, if the plaintiff had by other evidence made out a prima facie case, the court could not take it from the jury on account of testimony brought out by defendant in the examination of the plaintiff's witness touching matters that had not been referred to in the direct examination. Such testimony would be the same, in effect, as if the witness had, as in conformity with the federal rule, come down from the stand, and been recalled by the defendant after the plaintiff had closed his case. The only difference, as the text-writer above quoted says, is in the order in which the testimony is introduced. Involved in this subject is the question of the right of plaintiff to cross-examine the same witness on the new subject on which the defendant has examined him, and the right of the plaintiff, after having closed his case in chief, to bring out testimony not strictly in rebuttal by examining defendant's witnesses on subjects upon which defendant had not examined them. Those questions, however, are not in this case, but they are scientifically discussed by the text-writer above quoted, citing and reviewing numerous decisions on the subject.

It is not clear, however, from the record in the case at bar, that the plaintiff did not make this engineer his witness on the disputed point. He asked him if his engine was equipped with modern appliances, and if it was not a bright day. The only significance of the modern appliances was the facility for stopping the engine, and the only point to be attained in proving that the day was clear was to show that the engineer must have seen the man on the track, if he was at his post and doing his duty. We have thus dis-

cussed the subject of the examination of an adversary's witness not because it is a vital question in this case, but because the counsel on both sides have discussed it in their briefs; for, even if all that the plaintiff claims on that point be conceded, and if we disregard entirely the evidence the engineer gave on cross-examination, the plaintiff made out no case for the jury.

There is no statute requiring the defendant to give a signal by bell or whistle on approaching a private crossing. Its duty to do so depends on the circumstances of the case. There was therefore no negligence per se in failing to sound the bell or whistle. The plaintiff was guilty of negligence in placing himself in the position of danger. And, taking the plaintiff's own account of his condition, it leaves little room to infer that the sound of the bell or whistle would have had any effect on him. This reduces the case to a question of whether the engineer, after seeing the plaintiff in the position of danger, or after he could have seen him if he had been looking, could, by the exercise of ordinary care, with the means at hand, have avoided the accident. The evidence showed that although this occurred on defendant's right of way, and where there was no public crossing, yet it was where the defendant knew that the public was in the habit of using the railroad track for a footpath, and therefore it was the duty of the engineer to be on the lookout for persons so using the track. If this man had been walking or standing on the track, he could have been seen by the engineer in time, at least, for a danger signal to have been given; but, lying as he was on the west side of the track, he was not as conspicuous as a person walking or standing would have been. The engineer was not chargeable with notice that a man was liable to be found lying on the track, and therefore the fact that the engine struck the plaintiff in that position is not in itself sufficient to justify the inference either that the engineer saw him or that he failed to use ordinary care to discover him in time. The plaintiff's testimony, aside from that of the engineer, does not undertake to expressly show his attitude. He sat down on the west end of the cross-tie, and there the stupefaction of intoxication overcame him, and there the plaintiff's evidence leaves the result to inference. The natural inference is that he fell into a recumbent position.

Some of plaintiff's witnesses said that from a standpoint a quarter or half mile south on a clear day one could see a "small object" at Gates' Crossing. The term "small object" in that connection is indefinite, and means nothing. Besides, unless the witness is giving the result of an actual experiment or experience, the evidence is incompetent. Given a straight, level track, and a clear day, the jury were as competent as the witnesses to say how far a given object could be seen. The only witness of plaintiff (not counting

the engineer) who was near enough to the accident to have seen the plaintiff on the track if he had been visible to ordinary observation said he did not see him until after the accident, although he saw the train coming, and waited for it to pass.

There is no room for the application of the humanitarian doctrine in this case. The learned trial judge had the right view of the subject.

The judgment is affirmed.

BRACE, C. J., concurs. MARSHALL and LAMM, JJ., concur in the result, but are of the opinion that the engineer put on the stand by plaintiff was plaintiff's witness throughout, and all his testimony in chief, as well as on cross-examination, was to be taken as part of plaintiff's case.

VANDEVENTER v. GOSS.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. APPEAL — JUDGMENT ON REFEREE'S REPORT—AFFIRMANCE.

A judgment on the report of a referee will be affirmed on appeal where appellant's transcript and abstract of the record does not contain documentary evidence introduced before the referee.

2. SAME — ABSTRACT—SUFFICIENCY — DISMISSAL.

Supreme Court Rule 12 (78 S. W. vi) provides that where a complete transcript is brought to the court the appellant shall file a copy of his abstract of the record. Rule 13 requires that the abstract shall set forth so much of the record as is needed to a full understanding of the questions raised. Appellant, in a suit in equity, filed a record styled "Abstract of Record, Statement, and Brief," containing the pleadings, order of reference, report of referee, judgment, and motions for new trial and in arrest, together with a recital of the rulings thereon and the asking of the appeal. In the brief he claimed that the findings were against the evidence, but without setting forth the substance of the evidence, merely referring the court to the pages of the transcript where the testimony might be found. Held, that the abstract was insufficient, requiring the dismissal of the appeal.

Appeal from Circuit Court, Monroe County; D. H. Eby, Judge.

Action by John W. Vandeventer against John P. Goss. From a judgment for plaintiff, defendant appeals. Dismissed.

J. H. Whitecotton, T. P. Bashaw, and W. W. Barnes, for appellant. R. N. Bodine and W. T. Ragland, for respondent.

MARSHALL, J. This is a proceeding in equity for the appointment of a receiver and an accounting between the parties in their relation of copartners. The petition alleges that the partnership was formed in 1870 for the purpose of farming, merchandising, and milling, and that it continued to exist until March 14, 1898, when it was dissolved by mutual consent, and that during its continuance the defendant received \$25,000 more

than he was entitled to out of the partnership funds and assets. The answer admits the formation of the partnership, but denies the other allegations of the petition, and asserts that the plaintiff received \$30,000 more than he was entitled to out of the funds and assets of the partnership. The case was referred, on the 26th of December, 1896, to a referee. The referee heard the case, and made a report on the 29th of July, 1901, during the vacation of the court. Thereafter, on the 29th of August, 1901, the defendant filed exceptions to the report of the referee, specifying 31 grounds of exception. The court overruled the exceptions, and approved the finding of the referee, and entered judgment for the plaintiff for \$5,073.94. After proper steps, the defendant appealed.

1. The appeal in this case must be dismissed on account of a total failure by the defendant to comply with rules 12 and 14 of this court. 73 S. W. vi. The defendant filed what purports to be a complete transcript, but he has wholly failed to file any abstract of the record, much less such an abstract as is required by rule 13. The purported complete transcript covers 618 typewritten pages, but even this does not contain all of the evidence that was adduced before the referee and that the trial court had before it. It does not contain the contents of the books and documentary evidence that were introduced in evidence before the referee, and therefore this court is not placed in a position to intelligently determine the various exceptions and errors saved and relied on, and, even if the court could or would look into and examine the complete transcript, it would still be compelled to affirm the judgment of the trial court for this reason alone. *McCullough v. De Witt*, 163 Mo. 308, 63 S. W. 694.

In addition to this, however, the plaintiff has not made any attempt whatever to comply with rules 12 and 13 of this court, which require an abstract of the record to be prepared by the appellant where the case is brought up on a complete transcript, and which require that the abstract shall set forth as much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. The appellant has filed what is styled on the cover as "Appellant's Abstract of the Record, Statement, and Brief," but, outside of such statement on the cover, there is nothing contained therein which bears any resemblance whatever to an abstract of the record. The pleadings, the order appointing the referee, the report of the referee, the exceptions to the report of the referee, the judgment of the court, and the motions for new trial and in arrest, together with a recital of the rulings of the court thereon, and the asking of the appeal, are all that are set out. In the brief, appellant claims that the referee erred in allowing some 34 different items against him, and asserts that there was either

no evidence whatever to support the finding, or that the finding was against the weight of the evidence, and, as this is a proceeding in equity, he asks this court to review the evidence and reverse the finding of the referee and the judgment of the trial court. Even in his brief, appellant does not set forth the evidence bearing upon the items of account complained of, but refers the court to some of the pages of the complete record where testimony bearing upon the exceptions may be found, and in other instances claims that there is no testimony in the record to sustain the finding, and in still other instances contends that an examination of all the entries in all of the books of account that were in evidence before the referee will show that the referee erred in the respects set out. The appellant does not even undertake to state the substance of all of the evidence, or the names of the witnesses who testified in the case. In short, appellant proceeds upon the theory that this court will read the complete transcript when no abstract of the record has been furnished it.

The appellant has not brought himself within either the letter or the spirit of the rules of this court. In *Brand v. Cannon*, 118 Mo., loc. cit. 597, 24 S. W. 435, this court, per Gantt, J., said, in speaking of a record that was in like condition: "It is shown that there were 1,065 pages of typewritten matter of the evidence alone. Among other grounds for reversal, appellants urge that the verdict was contrary to the evidence; that the court committed error in giving and refusing instructions; and error in permitting medical experts to answer the hypothetical questions propounded by respondents, because said questions assumed matters not in the evidence. It is apparent that it is important to respondents that the substance, at least, of all the evidence, shall be before us to enable us to rule upon the propriety of some of these questions. By the issue thus raised we have been driven to an examination of this abstract to determine its sufficiency. The first seven pages contain a seemingly fair and clear statement of the pleadings. Then follow about 400 pages of extracts from the evidence. No attempt is made to state the substance, nor is it stated in a narrative form, nor are there any explanatory headings or words to indicate the object of the evidence, but it consists wholly of literal excerpts of the questions and answers as they appeared in the bill of exceptions. Many omissions occur, but it is not explained whether the omitted matter is material or immaterial. * * * Respondents have with great care filed a comparative list, showing how much of the evidence is omitted. To the suggestion of respondents, appellants reply that if they desire the omitted record they could file it in an additional abstract. But it is apparent at once that this is not the spirit of our statute or of our rules. When a party obtains a judgment of a court

of competent jurisdiction in his behalf, the presumptions are all in favor of its validity and the correctness of the means by which it was obtained, and the burden is on one who alleges error to show it. The law of this state has cast upon the appellant, not the respondent, the onus of preparing a printed abstract of the entire record of the cause, which he shall serve upon his opponent and file in this court. Rev. St. 1889, § 2253. If a party, relying upon the provisions that his opponent, if not satisfied, shall file a further abstract, can cast any burden on his adversary by filing a wholly insufficient and garbled abstract, it can readily be seen that the burden will be on the respondent to maintain his judgment, and not on the appellant to reverse it. Moreover, after the respondents have successfully prosecuted their suit to a judgment, there is no principle of justice that would require them to incur the labor and expense of furnishing this court with the information necessary to a proper determination of this appeal. * * * Our laws are liberal in providing for reviews of the judgments of lower courts by this court, and it ought not to be considered onerous if we require of one who seeks to set aside a judgment of a circuit or other court that he should conform to the mode of procedure prescribed for that purpose. When a failure has been occasioned by accident or honest oversight, we have always been ready to condone it; but where it is palpable, the course followed generally has been to affirm the judgment or dismiss the appeal." And accordingly the appeal was dismissed.

In *Halstead v. Stone*, 147 Mo., loc. cit. 652, 49 S. W. 851, it was said: "We have every disposition to be lenient in construing questions of compliance with these rules and with this statutory provision, but, under the most liberal construction possible, the appellant in this case cannot be held to have complied with them. There is, in fact, no semblance of an abstract in the case, and, except for the word appearing on the cover and at the beginning of the printed matter inside, no one would have imagined that it purported to be an abstract. The testimony of the witnesses is not set forth in narrative form or otherwise. * * * It is not only the right of the respondent to insist upon a substantial and reasonably fair compliance with the rules, but it is a duty which the appellant owes to the court to bring himself within their requirements. * * * These rules are not mere arbitrary requirements. They are founded upon experience, and, when fairly observed, facilitate the transaction of the business of the court and expedite the determination of litigation." Accordingly, the appeal was dismissed.

These principles were again affirmed in *Western Storage Warehouse Co. v. Glasner*, 150 Mo. 427, 52 S. W. 237; *Murrell v. McGulgan*, 148 Mo. 334, 49 S. W. 984; *Clements v. Turner*, 162 Mo. 466, 63 S. W. 84; *Smith*

v. Baer, 166 Mo., loc. cit. 404, 66 S. W. 170; and *Whitehead v. Railroad*, 176 Mo. 479, 75 S. W. 919. In the last case cited it was said: "There is no effort to abstract the evidence at all, and that of only 3 witnesses is mentioned whereas 11 other witnesses testified. The pertinency of this observation will be seen when we note that plaintiff says the circuit court directed a verdict for the defendant and the jury returned a verdict. Now, it is evident that if we are to review the action of the circuit court on a demurrer to the evidence, we are entitled to an abstract of the testimony of all, not merely three, witnesses. Moreover, it often happens that a fragment of testimony standing alone appears to be incompetent or erroneously excluded, but, when viewed in the light of all the testimony and the rulings of the court, it is entirely proper, or at least harmless. We have been very conservative in the enforcement of these rules, but a number of cases will show that when the appellant disregards the rules to such an extent that his so-called 'abstract' will necessitate the preparation of one by this court, or the burden and cost of so doing will be entailed on the respondent, we have enforced them by dismissing the appeal."

The appellant herein, by failing to file any abstract whatever, and by simply referring the court to the complete, or rather incomplete, transcript, would thereby shift onto the court the necessity of making an abstract of the complete record before it could intelligently pass upon the exceptions relied on by the appellant. This is a burden that this court has always refused to bear. Counsel who have grown up with a case are necessarily familiar with the facts adduced upon the trial thereof, and can more easily and readily abstract the record and bring out the salient facts in the case than the judge of the appellate court can do. For the matter is to such judge wholly new matter. This is one of the reasons underlying the rules of this court. Another reason, equally cogent, is that counsel are employed by litigants to do such work, and that the people of the state have not imposed that duty upon the judges of this court, and do not expect them to spend so much of their time in the performance of such labor.

From the foregoing, it appears that the appellant has not presented his case in such shape that this court can intelligently pass upon the questions presented by him for adjudication. For these reasons, the appeal in this case is dismissed. All concur.

RUPPENTHAL v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 1.
June 13, 1905.)

MUNICIPAL CORPORATIONS — STREETS—IMPROVEMENT—INJURIES.

Where a street 80 feet wide had only been improved and opened to public use as to the

central 50 feet thereof, and the city had never invited the public to use the 15-foot strips on each side reserved for sidewalks, the city was not liable for injuries to a pedestrian caused by a defect in a sidewalk along the street, which was constructed without the consent or authority of the city, the condition of which was such as to indicate to a person exercising ordinary care that the sidewalk portion of the street had not been improved.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, §§ 1600, 1602.]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by Adolphus F. Ruppenthal against the city of St. Louis. From a judgment for plaintiff, defendant appeals. Reversed.

Chas. W. Bates, Wm. F. Woerner, and Benj. H. Charles, for appellant. A. E. Taylor, for respondent.

MARSHALL, J. This is an action for \$5,000 damages for personal injuries, alleged to have been received by the plaintiff on the 29th of July, 1900, on the south side of Arsenal street, about 160 feet west of Portis avenue, caused by the plaintiff stepping into an alleged hole or trench running across the sidewalk, which hole is alleged to be 18 inches deep, 18 inches wide, and 8 feet long, in consequence of which the plaintiff's left foot and ankle were injured and sprained. The answer is a general denial, coupled with a plea of contributory negligence. There was a verdict for the plaintiff for \$2,500, and the defendant appealed.

The case made is this: Arsenal street runs east and west, is 80 feet in width, and is immediately south of Tower Grove Park. It was a macadamized country road at the time of the separation of the city and county of St. Louis. The macadamized portion aforesaid occupies 50 feet of the 80-foot width of the street. Outside of the macadamized portion, the street has never been graded; the city has never exercised jurisdiction over it, or invited travel thereon. Weeds to the height of two or three feet grow between the macadamized portion and the outside limits of the street. The macadamized roadway is much higher than the unimproved portion of the street. Along the sides of the street that have not been improved there is a natural water drain. Beginning at Portis avenue, and extending 160 feet westwardly there is a granitoid sidewalk 6 feet wide, which was built, supposedly, by the abutting property owners. The city did not construct it, or order it constructed, and there is no evidence in the record that it was constructed by the authority or permission of the city. On the corner of Portis avenue and Arsenal street there is a vacant lot 109 feet 7½ inches. Immediately west thereof there is a two-story brick house, located on a 25-foot lot. West of said house there is a 25-foot lot, which is used for truck gardening. Between that point and Kings highway, a distance of 1,200 feet, there are four houses

at considerable intervals. All the remaining portions of the land abutting Arsenal street on the south is used for agricultural purposes. Between the end of the granitoid sidewalk and Kings highway, the southern portion of Arsenal street is in a state of nature, and has never been graded or improved in any manner. The evidence shows that pedestrians have used it for a passway, and by such use there has been created a worn pathway about one foot wide, which is described as not being in as good condition as the ordinary country road. On the north side of Arsenal street, opposite the terminus of Portis avenue, there is an electric arc light. There is also another electric light at the first or second house beyond the western end of the granitoid sidewalk. About one foot or one foot and a half west of the western terminus of the granitoid sidewalk some one quite a while before the date of the accident put a pipe extending northwardly and southwardly from the natural drain aforesaid, towards the south, so as to drain the lot lying to the south of the street. There is absolutely no evidence as to who put the pipe in said place, nor is there any evidence connecting the city therewith. The pipe is not as long as the width of the granitoid sidewalk. The pipe is covered over with earth, but the width of the dirt sidewalk, commencing at the western end of the granitoid sidewalk, is only 3 feet, whereas the granitoid sidewalk is 6 feet, thus leaving on each side of the dirt pathway, at the end of the granitoid sidewalk, a space of 18 inches where there is no sidewalk or pathway. The water had washed holes at each end of the pipe in the said 18 inches of space aforesaid. The survey of the place showed the hole on the north side to be 10 inches deep and 12 inches in width and in length. The plaintiff lived on Magnolia avenue, west of Tower Grove Park—Magnolia avenue being the north boundary of Tower Grove Park—and had lived there seven or eight years. His daughter lived at 4146 Wyoming street, which was south and east of the place of the accident. The plaintiff had been in the habit of visiting her about once a week, and in doing so he said he usually went through the park, and had never used this portion of the street before, and did not know of the hole at the end of the granitoid sidewalk. On the 29th of July, 1900, the plaintiff and his wife had visited their daughter, and started home about 10 o'clock p. m. They traveled north on Portis avenue to Arsenal street, and then turned west on the south side of Arsenal street, walking along the granitoid sidewalk. When they reached the end of the granitoid walk, the plaintiff stepped off the end thereof into the hole aforesaid, at the northern end of the drain across the dirt walk above described, and was injured.

The plaintiff's evidence tends to show that he suffered a fracture of the fibula, with a rupture of the tendons of the ankle; that he

was not able to go out of the house for two months, and that he used crutches for about nine months; that he was totally disabled from work for about three months; that he was a whisky broker, a manufacturer of extracts and flavors for liquors, and also of Tamaric Medicinal Bitters; and that his earnings amounted to \$1,500 to \$2,000 a year.

The defendant's evidence tends to prove that in August, 1900—the exact date is not stated, but it was within 30 days after the date of the accident—the plaintiff was seen walking around; that at times he would have his crutches, and then he would forget them; that sometimes he would have one crutch, under his right arm, and at other times the crutch would be under the left arm, and again he would not have any; that he was seen walking on the Morgan-Ford Road, about a mile from his home, within a month after the date of the accident. The plaintiff himself said that about three weeks after the accident he went to the place of the accident, using his crutches in doing so, and measured the width of the sidewalk and the depth of the hole. The defendant's testimony showed that the city kept up the macadamized portion of the street, occupying 50 feet in the center thereof, but had never graded or undertaken to improve in any way the remaining portion of the street; that on the north side of the street there were no houses, and on the south side of the street there were only four houses in the distance of 1,200 feet; that there were 10 or 15 acres of the abutting property, which was used for agricultural and truck gardening purposes; that the city officers supposed the property owners had put in the granitoid sidewalk; that there was no hole or ditch or depression in the dirt pathway west of the granitoid sidewalk; that some one had put in the drain pipe aforesaid, and had not made it as wide as the granitoid sidewalk, thus leaving the dirt pathway 18 inches narrower on each side thereof than the granitoid sidewalk, and that the water had washed out a hole at each end of the pipe or drain; that the dirt pathway was rough, had hollows in it, and, whilst pedestrians used it, people generally used the macadamized portion of the street.

At the request of the plaintiff the court instructed the jury, *inter alia*, as follows: "(1) If the jury find from the evidence in this case that Arsenal street, at the places mentioned in the evidence, was an open, public, traveled street within the city of St. Louis; and if the jury find from the evidence that there was, at said times, a sidewalk on the south side of Arsenal street, graded and paved west from Portis avenue, with granitoid, about 160 feet, and that thence west to Kings highway there was a sidewalk unpaved; and if the jury find from the evidence that said sidewalk was used by the traveling public on foot; and if the jury find from the evidence that at the west end of

the said granitoid in said sidewalk there existed a hole or depression; and if the jury find from the evidence that said hole or depression rendered the use of the said sidewalk dangerous, and was an obstruction to travel thereon by the traveling public; and if the jury find from the evidence that on the 29th day of July, 1900, the plaintiff was passing along said sidewalk, and that whilst so doing he stepped into said hole and fell, and sustained injuries to his person thereby; and if the jury find from the evidence that the city of St. Louis, by its officers or agents having charge of keeping said street and sidewalk in repair, knew, or by the exercise of ordinary care could have known, of said condition of said street in time to repair the same by the exercise of ordinary care, before the plaintiff's injury, and neglected to do so; and if the jury further find from the evidence that plaintiff, at the time of his injury, was exercising ordinary care—then he is entitled to recover." The defendant excepted to the giving of said instruction, and now assigns the same as error. At the close of the plaintiff's case, and again at the close of the whole case, the defendant demurred to the evidence. The court overruled the demurrers, and the defendant excepted, and now assigns said ruling as error.

1. The decisive question in this case is whether the city is liable for the accident to the plaintiff, which occurred within the limits of Arsenal street, but on the portion thereof which the city had never undertaken to improve or to invite the public to use. Arsenal street, prior to the separation of the city and county of St. Louis, was a county road 80 feet wide. The 50 feet occupying the central part thereof was macadamized. The 15 feet on each side of the macadamized portion remained in a state of nature. After the city had acquired jurisdiction of the street, it continued to keep up the improved portion thereof, but never at any time graded the other portions of the street, or threw the same open to public travel, or invited the public to use the street. Such unimproved portions were rough, full of holes, grown up with weeds, and in no sense an improved street or sidewalk. Beginning at Portis avenue, and running westwardly for a distance of 160 feet, there had been a 6-foot granitoid sidewalk for about eight years before the accident. There is no evidence in the record showing who constructed the same. The city's engineer said he supposed the property owners had done so. At any rate, there is no evidence showing that the city had either done it, or had given its permission for it to be done. The granitoid sidewalk from Portis avenue, for a distance of 100 feet, extends along an unimproved vacant lot. For 25 feet it is in front of an improved lot, and then for 25 feet westwardly it is in front of a lot that is used solely for agricultural purposes. Between Portis avenue and Kings highway, a distance of 1,200 feet, there are only four

houses. The balance of the abutting property, amounting to 10 or 15 acres, is used solely for agricultural and truck gardening purposes. Westwardly from the west end of the granitoid sidewalk there is a worn pathway, made by persons walking over the same. Such pathway is three feet wide at the west end of the granitoid sidewalk, and at other portions is only a foot wide, and concededly is a rough place, with holes and depressions in the same, and lies much lower than the macadamized portions of the street; in fact so much lower that the testimony shows that it would take several thousand yards of filling to raise that portion of the street up to the level with the macadamized portion. The plaintiff had lived in that neighborhood seven or eight years before the accident, and had been in the habit of visiting his daughter, who lived south and east of the place of the accident, at least once a week; and he says he never used Arsenal street at this point before, and did not know of its condition. The case made, therefore, is that the street is 80 feet wide; that the city has improved and thrown open to public use the central 50 feet thereof, but has never improved or invited the use by the public of the 15 feet on each side of the improved street, but that the same has been allowed to remain in a state of nature; that some one constructed the granitoid sidewalk, and that some one put in the drain; that there is a dangerous place where the granitoid ceases and the drain was put in by reason of the drain and cover thereof not being as wide as the granitoid walk. The evidence, however, clearly shows that on the north side of Arsenal street, opposite Portis avenue, and within 160 feet of the place of the accident, there is an electric arc light, which was burning at the time of the accident, and likewise another arc light at the first or second house west of the place of the accident. The liability of a city under such circumstances has been frequently discussed by this court, but the latest and clearest exposition of the law applicable to such case is the opinion of Valliant, J., in *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168. In that case, as in this, the street was 80 feet wide; the central portion had been graded; the outside portions of the street were in a state of nature; the abutting land was used chiefly for agricultural purposes; and there were weeds growing in the portion of the street that had not been graded. There was also a worn pathway along such ungraded portion of the street, which had been caused by pedestrians walking along the same. There was a gully washed across the pathway. The plaintiff was injured by falling into the gully. The trial court nonsuited the plaintiff, and the plaintiff appealed. This court disposed of the case in the following clear and exhaustive manner: "The evidence showed that whilst the city, by ordinance established this as a public street, yet it prepared for public use only a wagon road through a part of it, leav-

ing the space that would naturally be the location of sidewalks, if sidewalks were made, in a state of nature. The first question that arises is, was the city in duty bound to make a sidewalk, or, failing to do so, was it responsible for the condition of the path? After that comes the question, was the plaintiff using reasonable care in attempting to travel that path on a dark night? A municipal corporation on which is conferred the power to establish public streets, and, when established, to construct them for public use, in the exercise of that power acts in two capacities: First, governmental; second, ministerial. When the municipality by ordinance declares that land embraced within certain lines is a public street, then when the city obtains the title to or easement in that land for that purpose, either by gift or condemnation, it becomes a public street, but it is not necessarily then opened to the public for use. And if, after that, the city passes an ordinance providing for the improvement of the street so as to render it fit for use, even then it is not, by the mere passing of the ordinance, opened for use. In passing those ordinances the city acts in its governmental, legislative capacity, and in doing so it exercises its discretion in defining the lines and extent of the street, and in declaring in what manner, and to what extent it shall be improved and given to the public for use. If, in passing an ordinance to establish a street, for example, near the suburbs, where the population is sparse, the municipal assembly should be of the opinion that a road thirty feet wide would be sufficient for the then needs of the public, but in anticipation that in the future the population would become more dense, and a street eighty feet wide would become necessary, and should provide in the ordinance for the establishment of a street of that width, no one could say that it was an abuse of its power, or an unwarranted exercise of its legislative discretion. And if, after so establishing the street, the city should, in the exercise of its legislative discretion, be of the opinion that for the time being a roadway thirty feet wide in the eighty-foot street was all that the public good required, and should pass an ordinance providing for the improvement to that extent, and no more, no one would have the right to say that the ordinance was unlawful; no one would have a right to insist that the city grade and improve more of the street than, in the exercise of its legislative capacity, it sees fit to do. In those matters the city acts in its delegated governmental capacity, and is not answerable to an individual as for neglect of duty. *Bassett v. St. Joseph*, 58 Mo. 290, 14 Am. Rep. 446; *Keating v. Kansas City*, 84 Mo. 415; *Kossman v. St. Louis*, 153 Mo. 293, 54 S. W. 513; *Smith, Mun. Corp.* § 780. But after the ordinance for the improvement of the street has been passed, and the city undertakes the work of constructing or reconstructing the street as in the ordinance is required, then the city acts in its

ministerial capacity; and if, in that capacity, it is guilty of negligence to the injury of an individual, it is liable. And so, after the city has constructed the street or the sidewalk, and has thereby invited the public to use it, the city is bound to keep it in condition to be reasonably safe for use, and is liable as for negligence if it fails to do so. *Moore v. Cape Girardeau*, 103 Mo. 470, 15 S. W. 755; *Hunter v. Weston*, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633. In the case at bar the city lawfully exercised its governmental discretion to grade and prepare for use only the wagon road in part of the street. It was not required to grade and improve the whole eighty-foot space, and build sidewalks on it, and therefore is not liable for not having done so. The path through the weeds and over the uneven surface spoke for itself, and told every one that there was no sidewalk there, and it invited no one to use it at the city's expense. The city was not responsible for the condition of that path, and therefore it will not be necessary to decide whether, by the plaintiff's own evidence, he was negligent in traveling the path under the circumstances. The circuit court took the correct view in the case." Speaking to the question here involved, this court, in *Hunter v. Weston*, 111 Mo., loc. cit. 184, 19 S. W. 1099, 17 L. R. A. 633, said: "A city is not necessarily required to open or put all its streets in a condition for public travel. *Walker v. Kansas City*, 99 Mo. 647, 12 S. W. 894. Nor is it liable for the condition of a street which exists merely on paper. *Moore v. Cape Girardeau*, 103 Mo. 470, 15 S. W. 755. 'The responsibility of the authorities for the condition of a highway begins when they have actually opened it for public travel.' *Elliott on Roads and Streets*, 456. But the mere fact of establishing a highway by judicial action does not of itself so open it to the public as to render towns liable for accidents that may occur to travelers thereon. After it is thus legally established, it is to be prepared for public use. Labor is to be performed upon it. Bridges are to be built, hills cut down, and valleys filled up; obstructions are to be removed, and rough places are to be made smooth. *Blaisdell v. Portland*, 39 Me. 113. It may be, and doubtless is, the case that there are streets and parts of streets in many cities which are not at present necessary for the convenience of the public, and that will be brought into use by the growth of the city, * * * and that all that is required in such cases is that the city shall see that, as the streets are required for use, they shall be placed in a reasonably safe condition for the convenience of travel. *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Craig v. Sedalia*, 63 Mo. 417. This alley, which was merely designated on paper, having no existence de facto, and never having been opened for public use, defendant owed plaintiff no duty in respect to it as an alley under the said

ordinances, and they are not liable in this case."

The rules thus laid down in the cases cited in no manner conflict with the principles announced by this court in *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481, and in *Walker v. Kansas City*, 99 Mo. 647, 12 S. W. 894. In the *Brennan* case the city had graded the whole street, including the sidewalk, thus throwing the whole street open to public use and travel, and inviting the public to use the same; and the accident was caused by the city failing to keep the sidewalk in repair after it had once assumed jurisdiction thereof and thrown it open to public use. In *Walker v. Kansas City*, the city had constructed a bridge, and had originally had a railing on both sides of the bridge, but several months before the accident the railing on the west side was taken away. The planks on that side were uneven, some projecting from one to two feet further out than others. Whilst in that condition, the plaintiff, while walking along the west (unprotected) side thereof, fell off of the bridge, and was injured. That therefore was a case where the city had assumed jurisdiction over the whole street, throwing it open to public use, and failed to keep it in a safe condition. In the case at bar the city fell heir to the 80-foot street, but it had never thrown open for public use any part thereof except the 50 feet in the center, and there is no question that such portion was in good condition at the time of the accident. The city had never constructed sidewalks, or thrown open to public use the portion of the street where this accident occurred. Some one had constructed a granitoid sidewalk for 160 feet. Some one had put in a drain under the dirt pathway at the west end of the granitoid sidewalk, and had left a space of 18 inches at each end of the drain narrower than the granitoid sidewalk, and thereby created a pitfall or dangerous place. But there is nothing in this record that in any manner connects the city with the construction of the granitoid sidewalk, the drain, or the dirt pathway, and therefore the city cannot be held liable for any defects therein.

The instruction given for the plaintiff, hereinbefore quoted, is radically defective, and fatal to the plaintiff's case, because it assumes that the city had opened the whole street to the public use and travel thereon, and because it assumes that, because the public had used said portion of the street as a footpath, the city was liable for defects therein. The very question in this case was whether the city had thrown that portion of the street open to public use. Mere use by the public of a portion of a street that has never been prepared for use by the public authorities, and which the traveling public have never been thereby impliedly invited to use, cannot cast upon the public the duty of keeping such portion of the street in re-

pair. It is always a governmental question whether the whole or only a portion of a street shall be prepared and thrown open to public use. After a street has been thrown open to public use, the duty devolves upon the public authorities to keep it in repair and safe for persons to travel over the same while exercising ordinary care; but mere use by the public as for a footpath of a portion of a street that has never been thrown open to public use, cannot cast such a duty on the city. The conditions and surroundings on the south side of Arsenal street from Portis avenue westwardly to Kings highway were such that the city authorities in their governmental capacity had not considered that the public necessities required the construction of a sidewalk at that point. To construct the same would have necessitated the filling of that portion of the street so as to raise it to the level of the macadamized part; and as the cost of constructing sidewalks, under the charter of St. Louis, must be paid for by the abutting property owners, the municipal authorities did not deem it necessary or reasonable to require sidewalks to be constructed at that point, where the great bulk of the abutting property was solely used for agricultural purposes. The presence of tall weeds growing on that portion of the street gave notice to persons passing along there that such portions of the street had not been thrown open to public travel. The electric arc light within 160 feet of the place of the accident clearly enabled the plaintiff to see where the grantoid sidewalk ended, and by the exercise of ordinary care he could have seen the drain, the hole or depression at the end thereof, the narrower space covered by the dirt pathway, and he could thereby easily have avoided the accident. The trial court therefore erred in giving the plaintiff's first instruction, above set out, and under the evidence adduced in this case it likewise clearly erred in overruling the demurrer to the evidence. This case is wholly unlike the case of *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528, and cases of like character, where the full width of the street had been thrown open to public use, but there was a dangerous excavation outside the limits of the street, but so near thereto as to make it dangerous for persons traveling along the street.

For the foregoing reasons, the judgment of the circuit court is reversed. All concur.

CHARITON COUNTY v. HARTMAN.

(Supreme Court of Missouri, Division No. 2.
June 6, 1905.)

1. INSANE PERSONS—CARE BY COUNTY—SUPPORT—REPAYMENT—IMPLIED PROMISE.

An order of a county court taking charge of an indigent insane person in pursuance of a statute imposing the burden on counties of supporting their indigent insane, and the fact of furnishing support pursuant to such order, did

not raise an implied promise on the part of the insane person or her guardian to repay for such support.

2. STATUTES—CONSTRUCTION.

Rev. St. 1890, § 3697, providing that, in all cases of appropriations out of the county treasury for the support, maintenance, or confinement of any insane person, the amount thereof may be recovered by the county from any person "who by law is bound to provide for the support and maintenance" of such person, if there be any of sufficient ability to pay the same, does not render the guardian of an indigent insane person liable to the county for past support furnished by the county, under the order of the county court committing such insane person to the care of the county, on the guardian's subsequently acquiring funds belonging to his ward.

Appeal from Circuit Court, Chariton County; John P. Butler, Judge.

Action by Chariton county against John T. Hartman, as guardian of the person and estate of Magdalena Miller, an insane person. From a judgment for defendant, plaintiff appeals. Affirmed.

This was a suit instituted on the 15th day of October, 1901, in the Chariton county circuit court by appellant, as plaintiff, against respondent, as defendant, seeking to recover money expended by Chariton county for the maintenance of Magdalena Miller, a person of unsound mind, of whom respondent was the legal guardian and curator.

The first amended petition upon which the case was tried, omitting caption and signature, is in words and figures as follows:

"The county of Chariton, plaintiff, sues under the provisions of section 3697, Rev. St. Mo. 1899, and for its first amended petition, for cause of action, states: That one Magdalena Miller was, on June the 13th, 1872, and for several years prior thereto had been, a resident citizen of the county of Chariton and state of Missouri, and that on the said 13th day of June, 1872, under due process of law, she was adjudged (by the county court of Chariton county) to be a person non compos mentis, or insane, and at the time of adjudication she was also an indigent person and a proper subject to be made a charge upon the county of Chariton, and that it was held and adjudged by said county court of Chariton at said time that she, said Magdalena Miller, be maintained as an indigent or poor person, at the expense of the county of Chariton, either in an asylum of this state, or at the county poor farm of Chariton county. Plaintiff further states that, in compliance with the finding and judgment of said county court, said Magdalena Miller was supported and maintained at the expense of Chariton county, Mo., at either the state insane asylum or at the county poor farm, from said 13th day of June, 1872, up to this day, and is still an inmate of the county poor farm, at the exclusive expense of the county of Chariton aforesaid, being still insane.

"Plaintiff further states that subsequent to said 13th day of June, 1872, to wit, on the 2d day of February, 1889, the above-named

defendant, John T. Hartman, was, upon his application, appointed by the probate court of Chariton county, Missouri, as guardian and curator of said Magdalena Miller, and that he qualified as such, and has ever since acted as the duly qualified and acting guardian and curator of the person and estate of said Magdalena Miller; and plaintiff further states that since his, said John T. Hartman's, appointment as such guardian and curator, he has recovered and become possessed of certain real estate and personal estate, to wit, one house and lot in the city of Brunswick, and the sum of five hundred dollars, belonging and being the property of said ward, Magdalena Miller, and which said money and property are still in the hands of or under the control of said John T. Hartman as the guardian of said Magdalena Miller as aforesaid.

"Plaintiff further states that after said John T. Hartman became possessed of said real and personal property as assets of the estate of his said ward, said Magdalena Miller, it became his duty to apply the same for the support and maintenance of his said ward, said Magdalena Miller, but said defendant, John T. Hartman, failed and refused to apply said funds and assets of his said ward to the support or maintenance of her, and also refused to reimburse plaintiff for the moneys paid by plaintiff for the support and maintenance of said Magdalena Miller from the 13th day of June, 1872, continuously up to the present date, notwithstanding the fact that he, said John T. Hartman, well knew that said Magdalena Miller was supported and maintained entirely and exclusively at the expense of Chariton county as an indigent person.

"Plaintiff further states that by virtue of the premises, and the statutes as made and provided, plaintiff is entitled to recover of defendant the amount by it expended for the care and maintenance of said Magdalena Miller during the last five years, namely, the sum of five hundred dollars, being at the rate of one hundred dollars per year, and which sum defendant has on hand or available as assets belonging to the estate of his said ward, said Magdalena Miller aforesaid.

"Wherefore plaintiff prays for judgment against defendant for the sum of five hundred dollars, to be paid out of the assets of the estate of said Magdalena Miller, and the costs of suit to be adjudged against defendant, John T. Hartman, personally, and for such further orders and judgments as may be right and proper."

To this petition, the defendant interposed a demurrer, as follows:

"The defendant comes now and demurs to plaintiff's first amended petition, and for grounds of his demurrer assigns the following reasons:

"First. Because this court has no jurisdiction of the subject of the action.

"Second. Because this court has no juris-

diction of the person of the defendant, in this: that the first amended petition shows defendant to be the duly qualified and acting guardian and curator of one Magdalena Miller, exercising authority as such under and by virtue of his appointment by the probate court of Chariton county, Missouri, and that said probate court has original jurisdiction of all matters pertaining to guardianship of insane persons in its said county.

"Third. Because there is a defect of parties defendant, in this: that the first amended petition shows that, if any cause of action exists, it is against the therein named Magdalena Miller, an insane person, and she is the proper party defendant.

"Fourth. Because said first amended petition does not state facts sufficient to constitute a cause of action."

On the 7th day of May, 1902, this demurrer was submitted to the court, and was by the court sustained, and final judgment rendered for defendant upon the demurrer, from which plaintiff in due time and form prosecuted this appeal, and the record is now before us for review.

L. N. Dempsey and L. Benecke, for appellant. J. C. Wallace, for respondent.

FOX, J. (after stating the facts). It is apparent from the record that there is but one legal proposition presented to our consideration; that is, the correctness of the action of the trial court in sustaining the demurrer to the petition filed in this cause.

Upon the consideration of the proposition presented, the demurrer must be treated as admitting every fact pleaded in plaintiff's petition to be true; hence the only question involved is, does the petition state sufficient facts which, if true, would entitle plaintiff to recover? The petition fully pleads all the facts. It is conceded by plaintiff that defendant's ward, Magdalena Miller, was on June 13, 1872, and for several years prior thereto had been, a resident citizen of the county of Chariton and state of Missouri, and that on the said 13th day of June, 1872, under due process of law, she was adjudged (by the county court of Chariton county) to be a person non compos mentis, or insane, and at the time of adjudication she was also an indigent person and a proper subject to be made a charge upon the county of Chariton, and that it was held and adjudged by said county court of Chariton at said time that she, said Magdalena Miller, be maintained as an indigent or poor person, at the expense of the county of Chariton, either in an asylum of this state or at the county poor farm of Chariton county. It is also made to appear from the allegations in the petition that defendant, John T. Hartman, subsequent to the 13th day of June, 1872, to wit, on the 2d day of February, 1889, was by the probate court of Chariton county appointed guardian and curator of said Magdalena Miller, and qualified as such, and has since such

appointment recovered and become possessed of certain real and personal estate of his ward. Upon this state of facts, is plaintiff entitled to recover? We have reached the conclusion that there could be no recovery. There is no contractual relation, either express or implied, between plaintiff and defendant, Hartman, or his ward.

The order of the county court of June 13, 1872, taking charge of Magdalena Miller as an indigent insane person, was in pursuance of the statute imposing the burden upon the counties of supporting their indigent insane, and the fact of furnishing support in pursuance of such order raises no implied promise to repay for such support. In *Montgomery County v. Gupton*, 139 Mo., loc. cit. 308, 39 S. W. 448, Brace, J., speaking for the court, thus disposed of this question: "It is well settled at common law that the provision made by law for the support of the poor is a charitable provision, from which no implication of a promise to repay arises, and moneys so expended cannot be recovered of the pauper, in the absence of fraud, without a special contract for repayment. *Selectmen of Bennington v. McGennes*, 1 D. Chipp. 44; *Benson v. Hitchcock*, Adm'r, 37 Vt. 567; *Inhabitants of Deer-Isle v. Eaton*, 12 Mass. 328; *Inhabitants of Stow v. Sawyer*, 8 Allen, 515; *Charleston v. Hubbard*, Adm'r, 9 N. H. 195. A person so relieved, whether he had or had not property, never was liable to an action for such relief at common law. *Inhabitants of Groveland v. Inhabitants of Medford*, 1 Allen, 23. 'The misjudgment of the officers of the poor as to the necessities of the person relieved raises no implied promise on the part of such person that he will repay moneys expended in his behalf.' *City of Albany v. McNamara*, 117 N. Y. 168 [22 N. E. 931, 6 L. R. A. 212]."

It is insisted by appellant that this action can be maintained under the provisions of section 3697, Rev. St. 1899. This section provides: "In all cases of appropriations out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the county from any person who, by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same." This action is nothing more nor less than one against the estate of the insane ward, and it is a misconception of the provisions of the section quoted to say that such an action is contemplated by its provisions. It is apparent that section 3697 has reference to the relation of parent and child, and where a minor child becomes insane, and the county furnishes it support and maintenance, the father, who, under the law, is bound to provide for the support and maintenance of his children, would fall within the provisions of that section, and a recovery could be maintained against him; but the statute falls far short of embracing within its provisions ac-

tions against the guardian of the ward personally, or against him as the representative of the estate. The principle announced in *Montgomery County v. Gupton*, supra, is clearly applicable to the case at bar. In that case the insane patient, Ellen Collins, had been furnished support and maintenance similar to the case at bar; subsequently an estate was discovered; she died, and the court sought, under the provisions of section 5557, Rev. St. 1889 (the same as section 3697, Rev. St. 1899), to recover against her estate for such support and maintenance. It was held that such action was not embraced within the provisions of the statute, and could not be maintained.

It may be, after the discovery of an estate of an insane patient being cared for by the county, and a guardian and curator having been appointed for such patient, some course might be pursued by the county or probate court in respect to such ward as would compel the guardian and curator to furnish its support and maintenance out of the estate in his hands; but we think it is clear that this action, under the provisions of the statute, cannot be maintained.

With these views, it results in the conclusion that the action of the trial court in sustaining the demurrer was proper, and its judgment should be affirmed, and it is so ordered. All concur.

TOOTLE et al. v. BUCKINGHAM et al.
(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. CHATTEL MORTGAGES — CATTLE—CONFUSION.

A mortgagor of certain cattle could not, by mixing other cattle of like description with those mortgaged, defeat the mortgages, either in his own favor, or in that of the subsequent purchaser of certain of the cattle under him, on the ground that a portion of the cattle sold were not the cattle mortgaged.

[Ed. Note.—For cases in point, see vol. 9 Cent. Dig. Chattel Mortgages, §§ 215, 220, 295; vol. 10, Cent. Dig. Confusion of Goods, § 13.]

2. SAME—DESCRIPTION—LOCATION.

Where the description of certain cattle mortgaged was ample in other respects, the mortgage was not invalidated by a misdescription of the location of the cattle mortgaged.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 96.]

3. SAME—BONA FIDE PURCHASER.

Where, at the time an owner of cattle sold them to one under whom defendants claimed, he told the purchaser that the cattle were mortgaged to plaintiffs' assignor, and for that reason the sale would be only for cash to pay such debt, and the purchaser agreed to pay cash, but maneuvered to get possession, and surreptitiously removed the cattle to another county, where they were afterwards replevied, he was not an innocent purchaser thereof.

4. SAME—FOREIGN JUDGMENTS—EFFECT.

Under Const. U. S. art. 4, § 1, requiring full faith and credit to be given to the judicial proceedings of sister states, a foreign judgment in replevin would be given the same effect in Missouri as if it had been rendered by a Missouri court having jurisdiction.

5. SAME—RES JUDICATA.

Plaintiffs, the assignees of a debt secured by a chattel mortgage on certain cattle, delivered the notes and mortgages to their assignor for collection, and it brought replevin to recover the cattle; but, on its attorney stating that such assignor held the claim for collection only, the judge rendered judgment for defendant for the value of the cattle replevied. *Held*, that such judgment was not *res judicata* of plaintiffs' right to the cattle or their proceeds.

6. SAME — JUDGMENTS — ENFORCEMENT — INJUNCTION.

Plaintiffs, being the holders of mortgages on certain cattle, delivered them to their assignor for collection; and in replevin, brought in the name of such assignor, plaintiffs procured a bond, and agreed to indemnify the sureties. The cattle were sold after being taken under the writ for \$4,500, but judgment was rendered against the plaintiffs' assignor, in the replevin suit for \$6,000, the value of the cattle, on the ground that plaintiffs' assignor had no capacity to maintain replevin, which judgment was subsequently acquired without consideration by defendants, who had purchased the cattle from a fraudulent vendee of the mortgagor under a title subsequent to the mortgages. *Held*, that the judgment against plaintiffs' assignor in the replevin suit represented the cattle, and that plaintiffs, being entitled thereto, were entitled in equity to an injunction restraining defendants from enforcing such judgment.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Suit by Milton Tootle and others against E. J. Buckingham and others. From a decree in favor of plaintiffs for less than the relief demanded, certain defendants and the plaintiffs appeal. Affirmed.

Johnson, Rusk & Stringfellow, for appellants.

R. A. Brown and Scarritt, Griffith & Jones, for respondents, cited *Snorgrass v. Moore*, 30 Mo. App., loc. cit. 235; *Bell v. Hoagland*, 15 Mo. 360; *Hickerson v. City*, 58 Mo. 61; *Spradling v. Conway*, 51 Mo. 51; *Baldwin v. Davidson*, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460.

VALLIANT, J. This is a suit in equity, aimed to adjust the claims of the plaintiffs in a controversy growing out of certain cattle transactions in Kansas. The substantial facts stated in the petition are as follows: The plaintiffs, as partners, in November, 1898, acquired by purchase from one of the defendants (the Bohart Commission Company), for a valuable consideration, certain negotiable promissory notes, secured by two chattel mortgages covering 243 head of cattle in Kansas. The notes and mortgages were made by one Curtis, who was then the owner of the cattle, dated November 5, 1898, and the mortgages were duly registered as required by the laws of Kansas. Afterwards, on November 18, 1898, in breach of the condition of the mortgages, Curtis sold and delivered 200 head of the cattle to one Gillett, who, without consideration, delivered them to one Buckingham, who removed them to another county in Kansas, to wit, Wabaunsee county. The plaintiffs, on learning of the

breach, delivered the notes and mortgages to the Bohart Company, from whom they had purchased them, for the purpose of suit and collection. The Bohart Company went to Kansas and instituted an action of replevin in its own name against Buckingham in Wabaunsee county, based on the mortgages, to recover possession of the 200 head of cattle. The Kansas law required the plaintiff in such suit to give bond with resident security, and, to meet this requirement, the plaintiffs in this suit, Tootle, Lemon & Co., procured a correspondent of theirs, resident in Kansas, to become the surety, and agreed to indemnify him in the matter, which was done. Under the writ of replevin the sheriff found and seized 190 head of the cattle, and delivered them to the Bohart Company, who immediately shipped them to St. Joseph, where they were sold in the market for \$4,500 cash, which sum the Bohart Company placed in the plaintiffs' bank to the credit of a suspense account, and it was there when this suit was filed. Pending the suit in Kansas the plaintiffs in this suit discovered that there were two other mortgages on these cattle, prior in time to the two they had bought from the Bohart Company, and in order to clear up their title they bought those also. They are called the "Cooke Mortgages." In May, 1899, the replevin suit came on for trial in Kansas, and in his opening statement the attorney for the plaintiff said that the plaintiff the Bohart Commission Company was not the real owner of the notes and mortgages, but held them only for collection, whereupon the court decided that the plaintiff was not entitled to prosecute the suit, and rendered judgment for the defendant Buckingham for the return of the cattle, or for \$6,000, their value. Buckingham immediately assigned the judgment to the Central Savings Bank of St. Joseph and its receiver. On November 14, 1898, four days before Gillett bought the 200 head of cattle, he executed his notes for \$8,000 to the Gillespie Commission Company, and a mortgage on these 200 head of cattle, or cattle of the same description, to secure the same, which notes and mortgage the Gillespie Company transferred to the Central Savings Bank. When Curtis sold the cattle to Gillett, it was with the understanding that it was to be a cash sale, and Curtis intended to use the cash in payment of the Bohart mortgages then held by the plaintiffs in this suit; but Gillett got possession of the cattle without paying anything for them, and he and Buckingham shipped them to Wabaunsee county. After this suit was filed, the defendants Shoup, McDonald, Townsend, Robinson, and the Hax Realty Company purchased from the receiver of the Central Savings Bank the \$6,000 Kansas judgment, and, on their petition, were made parties defendants herein. The prayer of the petition is that the defendants be required to interplead touching their interest in the cattle or the pro-

ceeds; that plaintiffs be decreed to have the first right to the fund in the bank, and the benefit of the \$8,000 Kansas judgment; that the Bohart Company be decreed to pay plaintiffs out of what it owes on the \$8,000 judgment the balance due them; and that the other defendants be enjoined from attempting to collect that judgment. The separate answer of defendants Shoup and others set up their title, as purchasers of the assets of the Central Savings Bank from the receiver, to the \$8,000 Kansas judgment, and the Gillespie notes and mortgage, and denied that the cattle involved in the replevin suit and covered by the Gillespie mortgage are the same cattle covered by plaintiffs' mortgages; that the notes covered by the Cooke mortgages were paid off and discharged before they came into plaintiffs' possession, and plaintiffs paid nothing for them; that, if plaintiffs had any title to the cattle in the replevin suit, they have already realized it by accepting the \$4,500 for which the cattle were sold in St. Joseph, to which sum these defendants assert no claim, but do assert that they own and are entitled to collect the \$8,000 Kansas judgment; that the Bohart Commission Company, the principal in that judgment, is insolvent. The answer also states that at the trial of the replevin suit the attorney for the plaintiff in that suit, in his opening statement, said that his client had no interest in the notes or mortgages, except that it held them for collection for the owners, Tootle, Lemon & Co., and that upon that statement the court rendered judgment for the defendant Buckingham. The Bohart Company filed an answer admitting the allegations of the petition, and joining in the prayer. Defendant Curtis filed an answer admitting the execution of the notes and mortgages to the Bohart Company for \$7,722, and that they were unpaid, and stated that as to all other matters in the petition he had no knowledge or sufficient information to form a belief. Buckingham, who was a nonresident of Missouri, and was served with process in Kansas, filed no answer. The cause came on to be heard on the pleadings and proofs, and the court rendered a decree finding the issues for the plaintiffs, and decreed that the plaintiffs were entitled to the proceeds of the cattle sold in St. Joseph, then amounting to \$4,890.75, to be credited on the Curtis notes, and were also entitled to the interest of the defendants in the \$8,000 Kansas judgment, and enjoined the defendants Shoup and others from attempting to collect that judgment from the principal or his sureties, and enjoined the Bohart Company from paying the same to them, and rendered judgment against them for costs. The decree dismissed the suit as to Buckingham on the ground that service on him in Kansas did not bring him into court. The defendants Shoup and others appealed from the decree against them, and the plaintiffs appealed from so much of the decree as dismissed the bill as against Buck-

ingham. We will consider the defendants' appeal first, as that covers all that is material in the controversy.

1. The first contention is that the Cooke mortgages were satisfied before they were transferred to the plaintiffs, and that plaintiffs paid no valuable consideration for them. That is not a very material question, because, if the plaintiffs' title to the cattle is good by virtue of the Bohart mortgages, it is sufficient, since the notes secured by those mortgages are more in amount than the value of the cattle in dispute, and in that view the Cooke mortgages would be significant only of an older outstanding title until the plaintiffs had acquired possession of them. The evidence shows that there were negotiations between Curtis and the Baxters, on the one hand, and Cooke, on the other, looking to a trade of the steers covered by their mortgages for a lot of calves, and the terms were agreed on, but the terms were not carried out in the essential particular of making the cash payment; that there had been only \$194 paid on the \$3,080 note, and nothing paid on the other. The evidence also shows a consideration for the transfer, in the form of a release by the plaintiffs to Cooke of another mortgage, which seems to have been satisfactory to him, whatever its value to him may have been.

2. It is also contended that the cattle covered by the Bohart mortgages are not the same cattle that were sold to Gillett and taken in the replevin suit. There was a great deal of evidence on this point, which we deem it unnecessary to review in detail. After going through it all, we have no doubt of the correctness of the finding of the chancellor. There was evidence tending to show that at the time Curtis sold to Gillett there were a large number of other cattle of the same general description which Curtis had put in the herd with those covered by the Bohart mortgages, which Curtis had bought from the Baxters, but that evidence does not show that the Baxter cattle could not easily be distinguished from the others. Curtis could not, by mixing other cattle of like description with those he had mortgaged to Bohart, defeat the Bohart mortgages, either in his own favor, or in that of a subsequent purchaser under him. *Adams v. Wildes*, 107 Mass. 123; *Fuller v. Paige*, 28 Ill. 358, 79 Am. Dec. 879; *Jones on Chat. Mort.* § 481. There is a misdescription in the Bohart mortgages of the cattle in one particular. They are described as being two miles north of Durham, in Marion county, Kan., whereas they were never in that county. Curtis bought the cattle from the Baxters, and they were then in Morris county, where Curtis and the Baxters lived. The intention was to move the cattle to Marion county to feed, but they had not been moved when the Bohart mortgages were given, and when the

sale to Gillett occurred. In other respects the cattle were correctly and sufficiently described. At the date of these transactions the statute of Kansas relating to registration of chattel mortgages (2 Gen. St. Kan. 1897, § 1, c. 120) was as follows: "Section 1. Every mortgage or conveyance intended to operate as a mortgage on personal property which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated, or if the mortgagor be a resident of this state, then of the county of which he shall at the time be a resident." These Bohart mortgages were registered in conformity to the requirements of that statute in Morris county, which was the county of the mortgagor's residence, and the place where the cattle were at the time, and where they were when Gillett took them. Besides, Gillett was not an innocent purchaser. Curtis told him while he was negotiating the purchase that the cattle were mortgaged to the Bohart Commission Company, and for that reason the sale would be only for cash to pay Bohart. Gillett agreed to pay cash, but maneuvered to get possession, and surreptitiously removed the cattle to Wabaunsee county, where they were afterwards caught by the writ of replevin. The fraudulent scheme is also shown by the fact that four days before his purchase Gillett executed the mortgage to the Gillespie Company, which that concern transferred to the Central Savings Bank, and which is the mortgage under which these defendants now claim. Under the circumstances the misdescription as to location, the description in other respects being ample, was immaterial. The finding of the chancellor that the 200 head of cattle carried away by Gillett, and found under the writ of replevin, were covered by the Bohart mortgages, was in accordance with the weight of the evidence.

3. Defendants' next proposition is that the replevin suit in Kansas settled the whole controversy. We are required by our federal Constitution to give full faith and credit to the judicial proceedings of a sister state. U. S. Const. art. 4, § 1. We will therefore give to the judgment of the Kansas court in the replevin suit the same force and effect we would give it if it had been rendered by a court having jurisdiction of the suit in this state. The court had jurisdiction to render judgment for defendant if, in its opinion, the facts stated by the plaintiffs' attorney in his opening statement were such that the plaintiffs were not entitled to recover. Such is our law. *Pratt v. Conway*, 148 Mo. 291, loc. cit. 299, 49 S. W. 1028, 71 Am. St. Rep. 602;

St. Louis v. Babcock, 156 Mo. 154, 56 S. W. 732. And such seems also to be the law of Kansas. *Lindley v. Ry.*, 47 Kan. 432, 28 Pac. 201; *Ry. v. Hartman* (Kan. App.) 49 Pac. 109. And in such case the judgment is not open to collateral attack on the suggestion that the court erred in its opinion. We will therefore take this Kansas judgment at its full face value, as we would if it had been rendered by one of our own courts. But it is not the doctrine in this state that every possible issue that might have been tried under the pleadings in a given case is conclusively presumed to have been tried, and the matter become *res adjudicata*. Only the matters that were actually considered by the court are settled by the judgment. For our rulings on this point, see cases cited in the brief for respondents. The evidence shows that the only point decided by the Kansas court was that a mere agent holding the mortgage and notes for collection for his principal could not in his own name maintain an action of replevin for the chattels mortgaged. The record shows that Tootle, Lemon & Co. made application for leave to come in and interplead for the cattle, but that their application was denied. That ruling only meant that Tootle, Lemon & Co. could not litigate with Buckingham in that case. There was therefore no decision affecting the plaintiffs' title to the cattle, and none affecting that of Buckingham, except that the Bohart Commission Company, who had no title to the cattle, was not entitled to take them out of his possession. There was no adjudication in that suit of the question of the title of these plaintiffs to the cattle.

4. We come now to the last and serious question in the case; that is, has a court of equity the power to grant the plaintiffs relief against the collection of the \$6,000 money judgment in Kansas? The Bohart Company is insolvent, but the judgment is good against the sureties on the replevin bond. These plaintiffs are obliged to indemnify those sureties for their loss. Therefore, if the defendants collect the judgment, they in effect collect it from those plaintiffs. From the whole record in the case, we have no hesitation in holding that the 200 head of cattle in question belonged to the plaintiffs in this suit, and that they were fraudulently taken away by the man under whom these defendants claim. Now, by an untoward conjunction of affairs, the defendants are in a position, if left free to execute their Kansas judgment, to, in effect, make these plaintiffs pay for their own cattle; and that, too, to those who derive their only title from the man who fraudulently deprived the plaintiffs of the cattle. It cannot be said that there was any fraud perpetrated in the concoction of the judgment, because that judgment fell upon the defendant in that case without any action on his part. The only activity displayed by him was in the transference of it after it was rendered. The

plaintiffs have skillfully woven into their bill the idea that they are invoking the power of the court of equity to trace their cattle into the money for which they were sold in St. Joseph, and which they bring into court as a trust fund as the subject of the litigation. But the defendants just as skillfully decline that issue by disclaiming any interest in that fund. They are perfectly willing for the plaintiffs to have that money, and only ask that they be let alone to collect their Kansas judgment according to its tenor and effect. That is the point in the case. If equity is powerless in the premises—if it cannot restrain the defendants in the collection of that judgment—then justice is defeated in this case by the forms of law. In the exercise of its jurisdiction to restrain a party in the collection of a judgment at law on the ground of fraud, the equity court has always held that it would consider only the charge of fraud in obtaining the judgment, not of fraud in the cause of action, or fraud in the form of perjury in the evidence by which it was established; and the reason given was that the law court which tried the case was competent to judge if there was fraud in the cause of action or perjury in the evidence. This is not a cause, however, in which the plaintiffs are assailing the judgment. It is a case in which the judgment stands in the place of the cattle, and parties who are not entitled to the cattle are in position, if left alone at law, to enforce it against those to whom the cattle rightfully belong. Suppose the cattle had been kept in Kansas to abide the judgment in the replevin suit, and when the judgment was rendered they had been turned over to Buckingham, and he had turned them over to these defendants; is there any doubt but that these plaintiffs could have recovered them? But the cattle were not left there—they were shipped away by Bohart—and there is nothing left in Kansas to represent them but the \$8,000 judgment. Is not that judgment, therefore, in the eye of equity, the cattle? If the cattle had been put into the possession of the sureties on the replevin bond in Kansas to hold for their indemnification, and if, when the judgment was rendered, they had delivered the cattle to Buckingham in satisfaction thereof, the plaintiffs in this suit could have recovered them from him in an action at law, or, if the plaintiffs could have shown that delivery to him would jeopardize their remedy at law, they might have had direct relief in equity. And in such case, if the sureties had made way with the cattle, so that they did not have them to respond to the judgment, and had paid that money alternative, the plaintiffs could have recovered the amount from him, or before each payment, upon a showing that he was insolvent, could have enjoined the payment to him. Thus, in any view of the case, the money judgment, in the ab-

sence of the cattle, is the alternative of the cattle. And the defendants stand in no better light than Buckingham, under whom they claim, stood. The judgment was transferred to the Central Savings Bank to secure the old debt, and without present consideration, and these defendants bought the assets of the bank after this suit was begun. The fact that these cattle were shipped from Kansas by Bohart, and sold in St. Joseph, and the money paid into the plaintiffs' bank, does not make the situation different from what it would have been if the cattle or their price had never come into the plaintiffs' hands, because, if they have that judgment to pay in Kansas it means, in effect, turning the money they have received, and more besides, over to these defendants, Buckingham's assignees.

Our conclusion is that the Kansas judgment represents and stands for the cattle, and as these plaintiffs, as against these defendants, would be entitled to the cattle, so they are entitled to that judgment, and defendants have no right to collect it.

As to the plaintiffs' appeal, there is no necessity to discuss it. Since it conclusively appears that Buckingham has sold all of his interest to these other defendants, a judgment against him would be of no consequence.

The judgment of the circuit court is affirmed. All concur.

HOLMES et ux. v. MISSOURI PAC. RY. CO.
(Supreme Court of Missouri. June 1, 1905.)

1. INFANTS — INFANT SUI JURIS—QUESTION FOR JURY.

The question whether a child was *sui juris* is, when the evidence is all one way, and such that there can be but one answer, a question for the court, but otherwise it is for the jury.

2. SAME—EVIDENCE.

In an action for the death of an eight year old child killed at a railroad crossing, *held*, that the question whether the child was *sui juris* was one for the jury.

In Banc. Appeal from Circuit Court, Johnson County; Wm. L. Jarrott, Judge.

Action by C. W. Holmes and wife against the Missouri Pacific Railway Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

The following is the opinion of VALLIANT, J., in Division No. 1:

"Plaintiffs are husband and wife. Their child, eight years old, was struck and killed by a locomotive engine drawing a passenger train on defendant's road at the crossing of Warren avenue, in the city of Warrensburg. The petition charges negligence on the part of defendant's servants in charge of the engine, in this: that they failed to give a signal, by bell or whistle, of the approach of the train; that they saw, or by the exercise of ordinary care would have seen, the

child in a position of danger in time to have avoided the accident by the use of ordinary care, yet failed to do so. The answer was a general denial, and three affirmative pleas: First, negligence on the part of those having charge of the boy, in 'permitting him to unnecessarily go over defendant's track at the time and place of the accident, well knowing that defendant's train was due to pass about that time'; second, negligence of the child himself in 'undertaking to cross defendant's track while the train was in plain view, and known by him to be approaching said crossing'; third, that the child knew that the train was coming, and deliberately waited until it was within a short distance of him, and then recklessly attempted to cross immediately in front of the engine. Reply, general denial.

"The evidence on the part of the plaintiffs tended to show as follows: Defendant's railroad runs east and west through Warrensburg, which is a city of the third class. Warren avenue crosses the railroad at right angles in a thickly populated part of the city. The passenger station and side track of defendant are just east of Warren avenue. The train in question, headed east, approached the Warren avenue crossing from the west, running fast. The child at the same time, headed north, approached the crossing from the south, running along the east sidewalk of Warren avenue. The engine and the child reached the point of crossing at the same instant. The child was struck by the cow-catcher or the pilot beam, and was killed. The engine stopped 150 feet east of the crossing. The child and his brother, who was one year older, lived with their grandmother on Warren avenue, south of the railroad. They went to school every day. Their road to and from school was across this track. They were therefore familiar with the location. Their grandmother and their teacher had frequently warned them to be careful to look out for trains when they crossed the track. On this day the two brothers were going north along the east side of Warren avenue, starting from a point 270 feet south of the railroad. They were running—the elder in the lead. The elder got safely across, but barely escaped, while the younger was struck and killed. There was a freight train standing on a side track just east of the crossing, 'with steam on and puffing,' and the attention of the boys was attracted to it as they ran along. The passenger train from the west approached the crossing at a swift speed, without giving any signal by bell or whistle. The last signal given was at the Ft. Scott crossing, a quarter of a mile west of Warren avenue. The situation was such that the engineer would have seen the boys if he had looked at any time while he was traversing a distance of 500 or 700 feet before reaching the crossing, when they were from 130 to 150 feet of it, and they would have seen the locomotive if they had looked when they and

the locomotive were within the same relative distances. There was no evidence tending to show that this child saw the train coming, but he would have seen it if he had taken the precaution to look in that direction. He was therefore guilty of negligence, if a child of his maturity or lack of maturity is chargeable with negligence.

"At the close of the plaintiffs' evidence the court instructed the jury to find for the defendant. From the judgment on the verdict rendered in conformity to that instruction the plaintiffs appeal.

"It is unnecessary to set out the testimony at more length or in more detail. What is above stated tends to show that defendant's servants in charge of the locomotive were guilty of negligence in failing to give the signal required by law, and it points to that negligence as the proximate cause of the accident. It also tends to show that the engineer, seeing the children running into peril, aiming as if to cross in front of the train, could have averted the accident by stopping the train, or at least by sounding the whistle. It also tends to show conduct on the part of the deceased child that would have justified the court in giving the instruction given, on the theory of contributory negligence, if it had been the conduct of a person of mature years. This conduct on the part of the deceased child affects the plaintiffs' case based as well on one of the charges of negligence specified in the petition as on the other, if it affects it at all. Running on or in dangerous proximity to the railroad track without looking or without heeding was an act which united with the negligence of the engineer to produce the result, and although, as a general rule, the engineer, when he saw a person running towards the track, had a right to presume that that person would use his eyes and see the train, and stop to let it pass, yet if he could see, from the size of the person approaching, that it was a child too young to be counted on to exercise the required discretion, he had no right to act on that presumption. The main question, therefore, in this case, is, was this child of sufficient maturity to be held accountable for his imprudent act, as for contributory negligence? A question of this kind is sometimes one of fact, and sometimes one of law. If the facts are such that reasonable men cannot differ in opinion about them, it is a question of law for the court to decide; but, if reasonable men might reach different conclusions on the facts, then it becomes a question which the court should submit to the jury. In this case the court took it to be a question of law, and so decided it. We have said that it is sometimes a question of fact, and sometimes a question of law; and such is the form of expression frequently used by law writers on this subject, and in a certain sense it is correct. Strictly speaking, however, the question of whether a child is old enough to be held responsible for his con-

duct, as for contributory negligence, is always a question of fact, appealing to common sense, rather than to the science of law, for an answer. But when the evidence is all one way, and such that there can be but one answer to the question, the court should decide it without submitting it to the jury.

"This case is therefore reduced to this question: Was it so manifest that this child was of an age and attainments sufficient to understand and appreciate the consequences of his imprudence that there could be no two honest and reasonable opinions about it? If yea, the judgment was right; if nay, it was wrong. There is little if any difference of opinion among law writers on this subject, and not much difference in the forms of expression in stating opinions. In 7 Am. & Eng. Ency. L. (2d Ed.) p. 405, and following, it is said: "Thus what would be ordinary care for one person might be culpable negligence in another, and conduct which on the part of a person of full age and average capacity would be held contributory negligence, as a matter of law, might be ordinary care in a child of tender years. Hence it follows that children so young as to be non sui juris cannot be guilty of contributory negligence. And children who have attained an age where they are not wholly irresponsible are not required to exercise the same care and prudence that would be demanded of an adult similarly situated, but only the care of a child of equal age, and ordinary childish care and prudence. And even when a child has reached years of discretion, and become, as a matter of law, responsible for his conduct, no higher degree of care will be expected of him than is usually exercised by persons of similar age, judgment, and experience. * * * And conversely a much higher grade of care and watchfulness must be exercised to avoid injuring children than would constitute ordinary care towards an adult; that is, what is ordinary care towards an adult of full capacity may be culpable negligence towards a child. As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, where the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and, if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law exacts for determining what is ordinary care in a person of full age and capacity." Beach on Contrib. Neg. § 117, says: " * * * It is a question of capacity, and it has been found a very difficult question, and has been in many courts a very fruitful source of controversy, as to what age is sufficient to constitute an infant sui juris. Unless the child is exceedingly young, it is usually left to the jury to determine the measure of care required of the

particular child in the actual circumstances of the case. Where there is no doubt as to the capacity of the child, at one extreme or the other, to avoid danger, the court will decide it as a matter of law. Thus courts have held, as a matter of law, children of various ages from one year and five months to seven years non sui juris.' The author then goes on to discuss the subject of negligence of parents, or of persons in loco parentis, imputable to the infant; discussing *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, and cases that have followed it, holding that where the injury to the child is the result of the negligence of the defendant, combined with that of the parents, the plaintiff cannot recover. One of the pleas of the defendant in this case is based on that theory. 1 *Thomp. on Neg.* § 443, says: "The question whether in a particular case an injured child, not wholly irresponsible, exercises the care and caution usually looked for in other children of like age and capacity, is generally for the jury." Among the cases cited by that text-writer is *Burger v. Ry.*, 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379, which was the case of a boy nine years and ten months old, of whom it was said by this court: "It must be conceded that, for a boy of his age, plaintiff was shown to possess unusual capacity. * * * It may also be conceded that the act of plaintiff, when measured by the standard applied to an adult person of ordinary prudence, was a negligent act." Judge Macfarlane, speaking in that case for the court (loc. cit. 249, 20 S. W. 439, 34 Am. St. Rep. 379), said: "A boy may have all the knowledge of an adult respecting the dangers which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which are possessed by the ordinarily prudent adult person. Hence the rule is believed to be recognized in all the courts of the country that a child is not negligent if he exercises that degree of care which under like circumstances would reasonably be expected of one of his years and capacity. Whether he used such care in a particular case is a question for the jury. Beach on Contributory Negligence, § 117; *Eswin v. Railroad*, 96 Mo. 290, 9 S. W. 577; *O'Flaherty v. Railroad*, 45 Mo. 70, 100 Am. Dec. 343; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Meibus v. Dodge*, 38 Wis. 800, 20 Am. Rep. 6; *Railroad v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320." That is the doctrine of this court, announced in many other decisions. *Spillane v. R. R.*, 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580; *Ruschenberg v. R. R.*, 161 Mo. 70, 61 S. W. 628; *Campbell v. Ry.*, 175 Mo. 161, 75 S. W. 88. If the law is correctly stated in the quotations from the above named text-writers, and in our own decisions above cited on this subject, how can we say that the court was justified in refusing to submit this question to the jury? Is it not a question on which there might be an honest

difference of opinion among reasonable men?

"The learned counsel for respondent refers to the fact that this child had been going four years to school. If so, he must have commenced at the age of four years, for he was only eight when the accident occurred. But can the court say with certainty, as a matter of law, that in those four years he had learned prudence? It is also argued that the child's grandmother and teacher had often warned him of the danger in crossing the railroad, and therefore he was not ignorant of the danger. But as above quoted, this court has said: 'A boy may have all the knowledge of an adult respecting the dangers which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them.' The argument for respondent on this point might even lead some minds to the opposite conclusion to which it has led the counsel for respondent. The teacher and the grandmother had better opportunity to know the boy and know his capacity than did the trial court, yet they seem to have apprehended that he did not have sufficiently mature judgment to avoid this very danger, and they showed their anxiety for his safety by warning him. If he had heeded the warning, he would not have run into the danger, but do children always heed warnings? Or can we say with the certainty of law that when a child has been warned of a danger he is as to that danger like a person *sui juris*? One of the pleas of defendant is that the parents were negligent in allowing the child to go on the street across the track unattended. That plea looks both ways. If he was too young to be allowed to go out on the street by himself, he was not of sufficient maturity to be adjudged, as a matter of law, chargeable with contributory negligence; and, if he was of sufficient maturity to be so adjudged, then his parents were not negligent in allowing him to go out on the street alone. It is therefore a proposition on which even the defendant's pleading suggests a doubt, and invites a verdict on the fact.

"Another one of defendant's arguments is that the child knew the train was coming, saw it, and yet jumped right in front of it. In one of its pleas the defendant says the child saw the engine coming, purposely waited until it got close to him, and then recklessly ran in front of it. Much stress is laid on that argument in respondent's brief. But that also is liable to lead some minds to a conclusion the opposite to that for which it is advanced. There is nothing to suggest a suspicion that the child wanted to commit suicide. If, therefore, as the learned counsel think, he saw the train coming, waited until it was close, and then tried to beat it over the crossing, rushing headlong and heedlessly into imminent danger, his act was very suggestive of a lack of that prudence which we would expect to be shown by a person old enough to take care of himself. If the evidence justifies the inference that the counsel

for respondent draws, we could account for the act, if it were committed by a person of mature years and good sense, only on the ground of intentional suicide; but when committed by a child it suggests only a lack of understanding of the danger, or a lack of such prudence as comes only with years.

"In what is above said we have not intended to express any opinion on the question of fact, but only to show that it is a question of fact about which there may reasonably be differences of opinion, and it is a question that ought to have been submitted to the jury. The court erred in giving a peremptory instruction to find for defendant.

"The judgment is reversed, and the cause remanded to be retried according to the law as herein expressed.

"BRACE, C. J., concurs. MARSHALL, J., dissents. LAMM, J., not sitting. A majority not concurring, the cause is transferred to the court in banc."

O. L. Houts and Chas. E. Morrow, for appellants. R. T. Bailey, for respondent.

PER CURIAM. The foregoing opinion by VALLIANT, J., in Division No. 1, is adopted as the opinion of the court in banc. BRACE, O. J., and GANTT, LAMM, and VALLIANT, JJ., concur. MARSHALL and FOX, JJ., dissent. BURGESS, J., not sitting.

FIDELITY & DEPOSIT CO. OF MARYLAND v. SCHUCHMAN et al.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. JUDGMENTS — CORRECTION — POWER OF SUPREME COURT.

Under Rev. St. 1899, c. 8, art. 9, § 795, providing that judgments shall not be set aside for irregularity on motion, unless such motion be made within three years after the term at which judgment was rendered, the Supreme Court will not ordinarily, on writ of error, direct the correction of the judgment, if no steps to that end have been taken in the trial court, but will do so where the writ of error was sued out within one year after the judgment, and at the time of hearing more than three years have elapsed after the term at which the judgment was rendered, so that otherwise the plaintiff in error would be without remedy.

2. BONDS — JUDGMENT — SECURITY FOR FURTHER BREACHES.

Under the express provisions of Rev. St. 1899, c. 6, art. 1, § 473, a judgment for the penalty of a bond securing the performance of covenants should provide that it shall stand as security for further breaches, and it is error to provide that upon payment of the damages already accrued the judgment shall be satisfied.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Bonds, § 253.]

Error to St. Louis Circuit Court, Franklin Ferris, Judge.

Action by the Fidelity & Deposit Company of Maryland against Gustavus Schuchman and others. There was judgment for plaintiff for part of the relief demanded, and it brings error. Reversed.

Robt. L. McLaran, for plaintiff in error.
Barclay & Fauntleroy, for defendant in error.

MARSHALL, J. This is a proceeding in equity for the correction and reformation of a certain indemnifying bond for \$20,000, given by the defendant Schuchman to the defendant Viernow, dated June 30, 1897, and by the defendant Viernow assigned to the plaintiff on the 15th of September, 1898. The prayer of the petition is that the bond be corrected and reformed, and that the plaintiff have judgment for \$20,000, the penalty of the bond, and that execution issue for the sum of \$3,940 damages for the breach of the bond and for interest from March 30, 1899. The circuit court entered a judgment correcting the bond as prayed, and further ordered "that the plaintiff recover of the defendant Gustavus Schuchman, the sum of \$20,000, the penalty of the bond sued on, together with its costs and charges herein expended, and that its damages be assessed at the sum of \$5,104.55, which includes an attorney's fee of \$500; and it is further ordered and adjudged that plaintiff have execution against said defendant Gustavus Schuchman for said sum of \$5,104.55, its damages so assessed as aforesaid, together with its costs, and that the judgment be satisfied upon the payment of said sum." The abstract of the record shows that the defendant Schuchman filed a motion for new trial, that the same was overruled, and that on the 1st of February, 1902, said defendant appealed the case to this court, and was given time in which to file a bond and a bill of exceptions. The records of this court show that no such appeal was ever filed in this court, and that no steps whatever were taken thereon in this court. The return of the circuit clerk to the writ of error herein certifies the fact to be that no appeal bond and no bill of exceptions were filed in said cause. The judgment appealed from was rendered by the circuit court on the 22d of February, 1902. Thereafter, on the 20th of January, 1903, the plaintiff sued out this writ of error, and now asks this court to reverse the judgment and remand the cause to the circuit court, with directions to re-enter the judgment so that it shall read that the plaintiff have execution for the damages assessed, and that the judgment shall remain as a security for further breaches of the bond, instead of reading that the judgment be satisfied upon the payment of the damages.

Ordinarily this court would not grant the relief sought, but would leave the parties to their statutory remedy, under section 795, art. 9, chapter 8, Rev. St. 1899, to have the judgment corrected by the trial court, on motion, for irregularity. Under the statute aforesaid such action cannot be taken in the trial court after the expiration of three years after the term at which the judgment was rendered. That time has now expired. The writ of error herein was sued out within one year after the judgment was entered, in conformity to

section 837, art. 12, c. 8, Rev. St. 1899. Unless, therefore, the plaintiff is granted the relief sought in this proceeding, it will be remediless in the premises. The bond sued on is such a bond as is contemplated by section 473 et seq., art. 1, c. 6, Rev. St. 1899, and is a bond conditioned to do a collateral thing. It is, therefore, such a bond as the statute contemplated shall be merged in the judgment and execution issued for the amount of the damages assessed, and the judgment shall stand as security for further breaches. The judgment of the circuit court, therefore, to the effect that the plaintiff should recover the penalty of the bond, that execution should issue for the damages assessed, and that upon payment of the damages the judgment shall be satisfied, did not comply with the requirements of the statute. The plaintiff is, therefore, entitled to the relief sought, and, under the circumstances, that relief can only be granted by this court under this writ of error, and to prevent a failure of justice the relief should be granted.

The case is here upon the record proper, and the point involved appears upon the face of the record proper. The facts shown by the record proper are: That in May, 1896, Robert Rutledge, as trustee, leased to the Tacoma Building Company, for a term of 99 years, certain premises in the city of St. Louis. The lease, *inter alia*, required that the lessee should pay the taxes, and should erect a building on the premises to cost not less than \$100,000. The defendant Viernow was the principal, if not sole, owner of the stock of the Tacoma Building Company. To secure the performance of the terms of the lease, the building company executed to the lessor a bond, and the plaintiff herein became the surety on the bond. Thereafter Viernow transferred all his interest in the building company to the defendant Schuchman and took from him the indemnifying bond here sued on. The building company failed to comply with the terms of the lease, in that it failed to pay the taxes for the year 1896, amounting to \$2,801.12. The lessor brought suit against the building company and the plaintiff as surety, and recovered damages for \$3,165.84. The surety paid the judgment, and thereupon Viernow assigned to the plaintiff the bond he had taken from the defendant Schuchman, and the plaintiff brought this suit upon the same, with the result hereinbefore stated.

It thus appears that the lease was for a term of 99 years, and that the bond given by the building company to the lessor, on which the plaintiff was surety, was conditioned for the faithful performance by the building company of the terms, conditions, and covenants of the lease, and would therefore continue during the term of the lease. It further appears that the bond given by the defendant Schuchman to Viernow, when the latter sold and assigned his interest in the building company to the defendant, was a similar obligation and

would run for a similar length of time. It is therefore manifest that, as the bond was merged in the judgment, the liability of the defendant would be materially diminished if the obligations of the bond were permitted to be discharged upon the payment of the damages assessed for a single breach of the terms of the bond. The obligations of the lease were continuing, and might or might not be met by the obligor. The bond was conditioned for the faithful performance of the terms and conditions of the lease by the lessee, and was, therefore, coextensive with the lease, and continued as long as the lease ran. By paying the damages assessed for the single breach of the bond, the obligor in the bond could not discharge all of the obligations assumed by the bond. The judgment of the circuit court here complained of would have the effect of so discharging him, if allowed to stand. The judgment was not such a judgment as the circuit court is required by the statutes to enter in such cases. *Burnside v. Wand*, 170 Mo. 531, 71 S. W. 337, 62 L. R. A. 427.

The judgment is therefore reversed, and the cause remanded, with directions to the trial court to set the same aside and to re-enter it for the penalty of the bond and for the amount of the damages assessed, and to further provide therein that the judgment shall stand as security for further breaches. All concur.

STATE ex rel. GAULT et al. v. GILL et al.
(Supreme Court of Missouri. June 1, 1905.)

1. SCHOOL DISTRICTS—ORGANIZATION—STATUTORY PROVISIONS—CONSTRUCTION.

In view of the history of Rev. St. 1899, § 9860, providing that "any city, town or village," the plat of which has been previously filed in the recorder's office, may be organized into a single school district, first adopted in Gen. St. 1865, p. 274, c. 47, § 1, by inserting the word "incorporated" before the word "city," and then expressly repealed by Act March 21, 1870 (Laws 1870, p. 127), and a new section enacted by eliminating the word "incorporated," which has since been in force as embodied in section 9860, the section applies to unincorporated and incorporated villages, and any village, incorporated or unincorporated, the plat of which has been filed in the recorder's office, may be organized into a school district.

2. SAME.

Rev. St. 1899, § 9861, which provides for the organization of a common school district into a village district, with the special privileges granted by the statutes, authorizes the organization of any common school district into a village district; and the fact that the village in the district is unincorporated and the plat thereof defective does not affect the validity of a village district organized from a common school district in the manner provided by law.

3. SAME—PETITION TO CHANGE INTO VILLAGE DISTRICT—DUTY OF DIRECTORS—ORDERING ELECTION—NOTICES—WITHDRAWAL.

Where the directors of a common school district received a proper petition requesting an election on the question whether the district should be changed into a village district, as authorized by Rev. St. 1899, § 9861, and they ordered an election and gave notice thereof as

required by the section, a majority of the board could not thereafter order the withdrawal of the notice of election; the duty of the board in ordering an election and giving notice thereof being mandatory and ministerial.

In Banc. Appeal from Circuit Court, Jackson County; Shannon O. Douglass, Judge.

Quo warranto proceedings by the state, on the relation of J. W. Gault and another, against E. B. Gill and others, to oust defendants from the offices of school directors of a school district. From a judgment for defendants, relators appeal. Affirmed.

Ward & Hadley, for appellants. Frank P. Sebree, Silver & Brown, and E. B. Gill, for respondents.

BRACE, C. J. Quo warranto to oust defendants from the offices of school directors of the school district of Dallas, in Jackson county, Mo. Appeal from the Jackson county circuit court. Judgment below for the respondents, and the relators appeal.

On the 13th of May, 1903, and for many years prior thereto, there was a common school district in said county, duly organized as school district No. 4, township 48, range 33, in which there resided about 50 qualified voters, and in which there was an unincorporated village called Dallas, a plat of which had been duly executed, acknowledged, and recorded in the office of the recorder of deeds of said county on the 15th of January, 1903. By section 9861, art. 2, c. 154, Rev. St. 1899, it is provided: "Whenever it may be desired to organize a common school district into a city, town or village school district, with special privileges granted under this article, the board of directors shall, upon the reception of a petition to that effect and signed by ten qualified voters who are resident taxpayers of the district, order an election held for that purpose, and shall give notice of such election by notices posted in five public places within the district for fifteen days prior to the day of such election, said meeting to be held at 2 o'clock p. m. at the public school house in said district, if there be one, but if there be no public school house, then at such place within the district as may be designated in the notices; and when said meeting is assembled, it shall elect a chairman and secretary, who shall keep a correct record of the proceedings of said meeting, and turn the same over to the board, properly signed and attested by the chairman, and the board shall have a copy of the same entered upon the district records. Said election may be held at an annual or at a special meeting, and the order of business under this section shall be as follows: First—To organize as a city, town or village school district; those voting for the organization shall have written or printed on their ballots 'For Organization,' and those voting against the organization shall have written or printed on their ballots 'Against Organization'; and each person desiring to

vote shall advance to the front of the chairman and deposit his ballot in a box to be used for that purpose. When all present shall have voted the chairman shall appoint two tellers, who shall call each ballot aloud, and the secretary shall keep a tally and report to the chairman, who shall announce the result; and if a majority of the votes cast are 'For organization,' the chairman shall call the next order of business. Second—To elect six directors, as follows: Two shall be elected for three years, two for two years and two for one year, and each director shall be elected separately, and the result announced in the manner prescribed for organization. If said election is held at a special meeting, from then until the next annual meeting shall be taken as one year, so far as relates to the terms of the directors elected. The directors chosen must comply with the requirements of section 9864."

On the 18th of May, 1903, J. W. Gault, Johnson Young, and C. M. Schock constituted the board of directors of said district, and at a board meeting held on that day at the schoolhouse in said district, at which all of them were present, there was presented to and received by said board a petition signed by 15 qualified voters and resident taxpayers of said district, as follows: "To the School Board of District No. 4, Township 48, Range 33, in Jackson County, Missouri: We, the undersigned, qualified voters and resident taxpayers of said district, desiring to organize said school district into a village school district, with special privileges granted under article 2 of the school laws of said state, respectfully petition you to order an election held in said district for that purpose in manner and form as provided by law." Thereupon it was ordered by said board that an election be held at the schoolhouse in said district on the 29th of May, 1903, for the purpose of voting on the proposition to organize said school district into a village school district, to be known as the "Dallas School District," and thereupon they caused notices thereof on that day to be duly posted as required by the statute aforesaid. Afterwards, on the 23d of May, 1903, the said Gault and Young, two of said directors, met and ordered that the notices aforesaid for the election aforesaid of May 29, 1903, be withdrawn, and that notices should be put up to that effect, which was accordingly so done, and several of the prior notices taken down. On the 29th of May, 1903, 26 of the qualified voters and resident taxpayers of said district, in pursuance of the notices first aforesaid, assembled at the schoolhouse in said district, organized, and held an election on the proposition aforesaid in the manner required by the statute aforesaid, at which 26 votes were cast "For Organization," and none against it. Whereupon the respondents, in accordance with the requirements of said statute, were duly elected directors of said district, and within four days thereafter, as

required by section 9864 of said article, to wit, on the 1st day of June, 1903, duly qualified as such, and organized as the board of directors of said district, and since have claimed the right to exercise the functions of the board of directors of the school district of Dallas, within the county of Jackson, as alleged in the information. Afterwards, on the 26th of June, 1903, this proceeding was instituted, on the information of the prosecuting attorney of said Jackson county, at the relation of J. W. Gault and Johnson Young, in which ouster of the respondents is sought on the ground that common school district No. 4, township 48, range 33, in Jackson county, was not by the proceedings aforesaid legally organized into a village school district, with the special privileges granted under article 2, c. 154, Rev. St. 1899, first, because the village of Dallas was not incorporated; second, because the plat of said village was only a partial one, and included less than a moiety thereof; and, third, because the order of May 18th for the election held on May 29th was rescinded by the order of May 23d.

The argument in support of the first two of these grounds is based exclusively upon section 9860 of said article, by which it is provided that, "any city, town or village, the plat of which has been previously filed in the recorder's office of the county in which the same is situated, may, together, with the territory which is or may be attached thereto, be organized into a single school district, and, when so organized, shall be a body corporate," etc. The terms of that section of the article apply as well to unincorporated villages as to those that are incorporated, and the history of the section shows that such was the intention of the Legislature; for, while the word "incorporated" preceded the word "city" in the section as originally adopted (Gen. St. 1865, p. 274, c. 47, § 1), that section as it then read was expressly repealed by an act approved March 21, 1870, and a new section enacted in lieu thereof, in which the word "incorporated" was eliminated (Sess. Acts 1870, p. 127), and ever since the section has read as it does now, and from that date until the year 1889 that section was the only one providing for the organization of territory into a district to be governed by the provisions of article 2. But by an act approved June 11, 1889 (Laws 1889, p. 249), a new section was enacted, carried into the revision of 1889 as section 8084, and into the revision of 1899 as section 9861, as hereinbefore set out; and since 1889 we have had in the statute provision made, by section 9860 of article 2, for the organization of "any village, the plat of which has been previously filed in the recorder's office, and the territory which has or may be attached thereto," into a single school district; and by section 9861 of article 2 provision made for the organization of "any common school district" into a village

school district. Thus we have two separate and distinct organizations provided for, the result the same in each—a single school district governed by the provisions of article 2. To the first is essential a village, and a recorded plat thereof, that the territory to be organized may be defined; to the second, only an organized common school district, whose territory is already defined, and which needs no plat for that purpose. The proceeding in question was not to organize the village of Dallas, with the territory which is or may be attached thereto, into a single school district, as provided for in section 9860, but to organize common school district No. 4, township 48, range 33, into a village school district, with the special privileges granted under article 2, as provided for in section 9861 of that article, and in strict accordance with the provisions of which the village school district of Dallas was organized and the respondents duly elected directors thereof. To such an organization a recorded plat of the village of Dallas was not essential, nor the village itself, for that matter, as distinguished from any other part of the district. As a village it could cut no figure in the organization of the new district under section 9861, except to give it a name. The fact that Dallas was not an incorporated village and that the recorded plat thereof may have been a defective one in no way affected the validity of the organization in question.

Nor do we think the validity of that organization was at all affected or impaired by the action of Gault and Young on the 23d of May, in ordering the notice of the election to be withdrawn and causing other notices to that effect to be posted. Upon receiving the petition of the 15 qualified voters and taxpayers of the district, the law imposed upon the board of directors the purely ministerial duty of ordering an election and giving notice thereof in the manner prescribed by the statute, in the performance of which duty they were invested with no discretion, and when they had performed that duty they became functus officio in the matter, which then passed into the hands of the qualified voters of the district, and it was for them, and not for the directors, or any number of them, to determine how it was to be disposed of.

We find nothing in the able and ingenious argument of counsel for relators to lead us for a moment to doubt the correctness of the conclusion of the court below, and its judgment will be affirmed. All concur, except BURGESS, J., absent.

STURGEON v. MUDD.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. DEED OF TRUST—FORECLOSURE—EXTENSION OF TIME—CONSIDERATION.

A mere promise by the beneficiary of a deed of trust, unsupported by a valuable considera-

tion, to grant an extension of time for the payment of the debt or to postpone a sale under the deed, is unenforceable against such beneficiary.

2. SAME—SUIT TO REDEEM—SECURITY.

Rev. St. 1899, § 4343, permits the grantor of a deed of trust to redeem within 12 months after foreclosure, and section 4344 declares that no party shall have the benefit of the preceding section unless he shall have given security to the satisfaction of the circuit court for the payment of the interest to accrue after the sale and for all damages and waste that may be occasioned or permitted by the party whose property is sold. *Held*, that a bill to redeem from foreclosure of a deed of trust, not filed within 12 months after the foreclosure sale, and failing to allege that plaintiff gave or attempted to give the security required by section 4344, was fatally defective.

3. EXTENSION OF TIME—REFUSAL TO COMPLY.

Where the beneficiary of a deed of trust, after the commencement of foreclosure proceedings, agreed to extend the time of payment and stop such proceedings in case the grantor of the deed made certain payments, etc., but thereafter discovered that the property was subject to liens prior to the deed, which the grantor had concealed, he was justified in refusing to perform such extension agreement.

4. SAME—JUDGMENTS—RES JUDICATA.

Where, in a suit in equity by the beneficiary of a deed of trust to have a prior incumbrance enforced against land covered thereby other than the land embraced in the deed of trust, the grantor of the deed set up by way of cross-bill a contract with such beneficiary to extend the time of payment of the deed and to dismiss the foreclosure proceedings, and prayed affirmative relief, and the court heard the whole case so made, and denied the grantor such relief, such decree was res judicata of the grantor's subsequent right to redeem under such contract.

Error to Circuit Court, Audrain County.
E. M. Hughes, Judge.

Bill by H. H. Sturgeon against Alexander Mudd. From a decree in favor of defendant, plaintiff brings error. Affirmed.

W. W. Botts, for plaintiff in error. Warner Lewis, for defendant in error.

MARSHALL, J. This is a bill in equity for leave to redeem 220 acres of land lying in Audrain county, Mo., and being the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 33, tp. 51, R. 5 W. The circuit court dismissed the plaintiff's bill, and gave judgment in favor of the defendant on his counterclaim, and after proper steps the plaintiff appealed.

The gist of the petition is that in the year 1893 the plaintiff borrowed \$3,500 from the defendant (which the evidence shows was used to purchase a part of the land involved herein), and executed a deed of trust to secure the payment thereof, with interest at 7 per cent., the petition alleging that the principal was to fall due in April, 1900; that the plaintiff made default in the payment of the interest due in April 1899, and informed the defendant of his inability to pay the same, and asked him to grant an extension of time, which the defendant agreed to do, and in violation of his agreement pro-

ceded and foreclosed the deed of trust, and became the purchaser thereof for the sum of \$3,000, when the plaintiff says the land was worth \$6,000. The petition further states that, after the advertisement of the notice to foreclose the deed of trust had begun to run, the defendant agreed with the plaintiff to stop the sale if the plaintiff would deed the land to the defendant, upon condition that the defendant should hold it, apply the rents therefrom to the payment of the principal and interest, and give the plaintiff a bond to reconvey it to him at any time within three years, which agreement, the petition alleges, was duly reduced to writing and signed by the defendant. The petition further avers that the defendant repeatedly declared to divers persons who were likely to bid on the land that he was not foreclosing the deed of trust for the purpose of acquiring plaintiff's land, and did not want the money, but only wanted it safely invested, and that the defendant, on the 29th of April, 1899, made to the plaintiff a second proposition in writing, to the effect that he would stop the sale on condition that the plaintiff paid him \$500 on account of the principal debt, together with all past-due interest and \$6, the costs of advertising the sale, or in lieu thereof the plaintiff should deed the land to the defendant and the defendant should give a title bond to deed the land to one Patterson at a specified time after June 1, 1899. The petition further alleges that he accepted said proposition, and prior to the foreclosure tendered to the defendant a deed to the land, but that the defendant refused to accept the same or to carry out the agreement, and caused the deed of trust to be foreclosed and became the purchaser thereof, declaring, however, that his purpose in so doing was simply to make his loan more secure, and because the taxes on the land were less than the taxes on the loan. It is further alleged that, relying upon the declarations aforesaid of the defendant, the plaintiff surrendered the possession of the land to the defendant on the strength of the defendant's promise that he would permit the plaintiff to redeem the land at any time within three years after the foreclosure. The petition further alleges that the defendant has since had the possession of the land and enjoyed the rents, issues, and profits thereof, which it is averred amounted to \$400 a year. It is further averred that the land originally belonged to the plaintiff's father, Robert Sturgeon, and that prior to his death, which occurred in 1881, he had placed a deed of trust on this land, together with other land then owned by him, to secure a note for \$1,000, but that at the date of the execution of the deed of trust from the plaintiff to the defendant neither of the parties had any actual knowledge of the existence of said deed of trust; that by reason of the existence of said prior deed of trust, and by reason of the defendant's declarations, acts,

and promises, other persons were deterred from bidding on the land at the foreclosure sale, and the defendant was enabled to become the purchaser thereof at the price of \$3,000 which is alleged to be a grossly inadequate price; that, after defendant obtained possession of the land, he was informed of the existence of the prior deed of trust, and that he purchased the prior deed of trust for \$1,500, for the purpose of protecting the plaintiff's title to the land; and that the heirs of Robert Sturgeon afterwards paid the defendant the amount so expended by him, and said prior deed of trust became thereby fully satisfied and paid. The petition alleges that the defendant is estopped from now claiming to be the absolute owner of the land, and also alleges that the defendant has only an equitable mortgage thereon, and that at the time of the foreclosure of the deed of trust, the plaintiff's debt to the defendant amounted, with interest, to \$3,745. The prayer of the petition is that the defendant be required to account to the plaintiff for the rents, issues, and profits, and that the plaintiff be permitted to redeem the land upon the payment of the balance due of the debt.

The answer admits the execution of the deed of trust from the plaintiff to the defendant, but alleges that the debt was evidenced by notes dated March 8, 1893, one for \$500 due in two years, one for \$750 due in three years, one for \$1,000 due in four years, and one for \$1,250 due in five years, and that all of the said indebtedness was past due when the deed of trust was foreclosed on the 5th of May, 1899, and the plaintiff failed and refused to pay the same, and in consequence the defendant caused the deed of trust to be foreclosed and became the purchaser of the land. The answer then avers that the plaintiff did not surrender the possession to the defendant, and that defendant obtained possession after the foreclosure sale by means of a suit in ejectment against the plaintiff, which suit the plaintiff kept in court as long as he could by means of continuances and change of venue, but finally failed to defend when the case was set for trial. The answer further alleges that the plaintiff fraudulently represented to the defendant that the land was free and clear of all prior incumbrances when the defendant made the loan to the plaintiff; that after the defendant purchased the land at the foreclosure sale he discovered for the first time that there was a prior incumbrance on the land, and that he instituted a suit in equity, to which the plaintiff was made a party defendant, for the purpose of having said prior incumbrance enforced against the land covered thereby, other than the 220 acres embraced in the plaintiff's deed of trust; that he would have been willing, at any time before he purchased the first deed of trust, to reconvey the land to the plaintiff upon the payment of his debt, but that the

plaintiff neglected and refused so to do, and, on the contrary, the plaintiff in said suit in equity to have the first deed of trust enforced against said other land, set up all the facts stated in his petition herein, and asked affirmative relief that he be permitted to redeem said 220 acres of land so sold under the plaintiff's deed of trust; and that said matters were fully tried and considered by the court in said case, and the relief asked by the plaintiff herein, being the defendant in said other case, was expressly denied by the court; and the defendant pleads the same as *res adjudicata* of this action. The answer then concludes with a counterclaim, asking judgment against the plaintiff for the unpaid balance due on the said four notes.

The reply is a general denial.

The case made is this: Robert Sturgeon owned 475 acres of land. He had incurred the same for \$1,000. After his death the plaintiff inherited 80 acres of the land, and purchased 140 acres thereof from his brother John. In order to pay his brother therefor, he borrowed \$3,500 from the defendant, and executed a deed of trust on the whole 220 acres to secure the same. The deed of trust was dated March 8, 1893, and the debt secured was evidenced by the four notes described in the defendant's answer. The whole debt, therefore, according to the terms of the deed of trust, fell due in March, 1899. The plaintiff says that upon the trial of this case there was introduced a document in the nature of a bond, dated February 27, 1897, whereby the time for the payment of the deed of trust was extended to March, 1900; but no such document appears in the abstract of the record, counsel stating that it had been lost or misplaced. In March or April, 1899, the plaintiff was unable to pay anything on account of either the principal or interest, and so informed the defendant, and asked for an extension of time. The plaintiff says that the defendant first agreed to extend the time if the plaintiff would give a chattel mortgage on some stock to secure the payment of the annual interest which fell due on the 8th of March, 1899, but that instead of so doing the defendant sent to the plaintiff a letter containing the advertisement of the foreclosure sale, which was to take place on the 5th of May, 1899, and that, upon his remonstrating with the defendant, the defendant then agreed to extend the time if the plaintiff would pay up all the interest and \$6, the costs of the advertisement, together with \$250 on account of the principal; that he "located" the \$250, and then informed the defendant that he was ready to carry out the arrangement, but that the defendant refused so to do, unless the plaintiff would pay \$500 on the principal, together with the interest and cost of advertising, and that thereupon he agreed thereto, and that the defendant signed a written stipulation that he would stop the sale on said terms, and if the plaintiff did not

comply therewith he should deed the land to the defendant; that by reason of the existence of the prior mortgage the plaintiff was unable to raise the money required, and so on the 4th day of May, the day before the time set for the foreclosure sale, he and his wife executed a deed to the land and tendered the same to the defendant, but that the defendant refused to accept the same and proceeded with the sale. The defendant admits the execution of the agreement, but says that he subsequently discovered that there were judgments against the plaintiff, and that there was outstanding this first deed of trust, and therefore he was not willing to take a deed from the plaintiff, but had become uneasy about his money and had lost confidence in the plaintiff, and hence he insisted upon proceeding with the foreclosure sale and became the purchaser thereat. Afterwards the defendant instituted a suit in ejectment to get possession of the land. The plaintiff caused the same to be postponed for about a year by means of continuances and change of venue, but ultimately failed to appear and defend the action, and the defendant obtained judgment in ejectment against the plaintiff and thereby got possession. The defendant further showed the facts to be as stated in his answer with reference to the suit in equity therein described, in which suit the plaintiff set up all the facts stated in his petition herein and asked for an accounting and leave to redeem, with the result that the court decided against him, and the plaintiff acquiesced in the judgment, and the same is now a final judgment and is unappealed from. Upon this showing the trial court dismissed the plaintiff's bill herein, and entered judgment for the defendant for the balance due on the notes evidencing the plaintiff's indebtedness to the defendant, and the plaintiff appealed.

There is no equity in the plaintiff's bill or in the case made. Conceding all the facts stated in the petition, it is fatally defective, in this: that even though it be true that, when the plaintiff was unable to meet the payment due in March, 1899, whether the same be simply the interest, as the plaintiff claims, or the principal and interest, as the defendant claims, he applied to the defendant for an extension of time, and the defendant in writing agreed thereto, or in pursuance of said agreement of plaintiff, offered to convey the land to the defendant upon the defendant executing a bond to convey the same to the plaintiff or to Patterson at any time within three years, nevertheless the petition does not state a cause of action, because it fails to allege that there was any consideration moving from the plaintiff to the defendant to support the promises and agreements alleged. A mere promise, unsupported by a valuable consideration, to grant an extension of time for the payment of a debt, or to postpone a sale under deed of trust, is not sufficient in law

to bind the person promising. *Garnier v. Papin*, 30 Mo. 243; *McGlothlin v. Hemry*, 59 Mo. 213. In addition to this, section 4343, c. 52, Rev. St. 1899, permits deeds of trust or mortgages to be foreclosed by the act of the parties, and in such cases permits the mortgagor to redeem at any time within 12 months; but section 4344 provides that no party shall have the benefits of section 4343 until he shall have given security to the satisfaction of the circuit court for the payment of the interest to accrue after the sale, and for all damages and waste that may be occasioned or permitted by the party whose property is sold. This was the law of this state in force at the date of the foreclosure of the deed of trust in question, and there is no allegation in the petition that the plaintiff gave or attempted to give the security required by section 4344. Furthermore, this action was not begun within 12 months after the foreclosure sale. That sale was had on the 5th of May, 1899, and this action was not begun until the 19th of December, 1901, and there is no evidence that in the meantime the plaintiff offered to redeem the land.

Aside from this, however, the case made does not entitle the plaintiff to the relief sought. It is immaterial whether the whole debt was due at the time of the foreclosure of the mortgage, or whether only the interest was at that time due; for it is conceded that under the terms of the deed of trust any failure to pay any installment of interest entitled the mortgagee or cestui que trust to foreclose. For the purposes of this case it may be conceded that the defendant first agreed to renew or extend the notes, and to withdraw the notice for the sale under the deed of trust, if the plaintiff would secure the past-due interest and pay the costs of the advertisement; or that he subsequently refused so to do, and demanded a payment of \$250 on account of the principal, in addition to the payment of the past-due interest and the costs of advertising; or that he subsequently enlarged his demand, so as to require the payment of \$500, together with the past-due interest and the costs of advertising, and that he gave the plaintiff the option to convey the land to him in lieu thereof, to be held as security for the debt and under a promise or bond to reconvey at any time within three years. This states the case as strongly in favor of the plaintiff as the facts warrant under any view that may be taken of them, and without regard to any conflict in the testimony. Yet this does not entitle the plaintiff to the relief sought, for the reason that it appears that at the time the defendant made, or is said to have made, such promises and agreements, he was ignorant of the fact that there was a prior deed of trust on the land, and also ignorant of the fact that there were judgments outstanding against the plaintiff which were liens on the land. The plaintiff knew those facts and concealed their existence from the defend-

ant. Such conditions completely changed the circumstances under which the promises or agreements had been made, and warranted the defendant in refusing to carry out any promise he had made, or in refusing to take a conveyance from the plaintiff; for such a conveyance would leave the land subject to the liens of the judgments, whereas the foreclosure under the deed of trust would cut out the judgments and leave the defendant to take the course he afterwards adopted to procure a decree in equity charging the first deed of trust upon other land than that covered by the plaintiff's deed of trust to the defendant, or, rather, requiring the sale of the other land covered by the first deed of trust before resort could be had to the land covered by the plaintiff's deed of trust. Upon the discovery of the true state of facts the defendant had a legal right to refuse to carry out the promises he had made in ignorance of the true facts, especially when the plaintiff had concealed their existence from the defendant, as he admits he did.

Moreover, there is a sharp conflict in the evidence as to whether the defendant ever agreed to reconvey the land to the plaintiff in the event the plaintiff deeded the land to the defendant, instead of having the deed of trust foreclosed. The chancellor had all the parties before him, and had a better opportunity to judge of their credibility than this court could possibly have; and as there are no physical facts which would aid in the solution of the question of which told the truth, this is a case where this court must defer to the finding of facts by the chancellor. In addition to all this, the plaintiff has had two opportunities of having the question here involved adjudicated—first, when the ejectment suit was brought against him by the defendant; and, second, when the suit in equity to have the first deed of trust paid out of other land than the land in controversy was brought against him. In the ejectment case, the plaintiff resorted to dilatory tactics, but failed to set up the matters here relied on, or even to attend the trial of the case on its merits. In the equity case, the plaintiff set up all the facts now pleaded by him in substantially the same form he now pleads the same, and asked affirmative relief. The court heard the whole case and decided the issues thus made against the plaintiff. Thus the plaintiff has had at least two days in court, prior to the institution of this suit, in which to have the matters here complained of adjudicated, and has had a complete adjudication thereof. The plaintiff, however, seeks to avoid the effect of the prior adjudication by saying that the purposes of the two suits were essentially different, and therefore the former judgment is not a bar to this action. In this, however, the plaintiff is in error; for, whilst the relief sought by the defendant in the suit in equity against the plaintiff was to have the first deed of trust paid out of the land other

than that covered by the plaintiff's deed of trust, nevertheless the plaintiff set up all these matters by way of a cross-bill in that action, and asked affirmative relief. Thus the whole controversy, pertaining to the whole land, was before a court of equity, and that court had ample power and jurisdiction to do full justice between the parties, and to render such a decree as to the court seemed equitable and right. The plaintiff submitted to that decree, and cannot now be heard to assert any right that was then adjudicated.

These considerations necessarily lead to the conclusion that the petition states no cause of action, that the plaintiff is not entitled to the relief sought upon the merits of the case, and that the plaintiff's right, if any such ever existed, has been adjudicated in the prior suit.

The judgment of the circuit court is for the right party, and is affirmed. All concur.

ST. LOUIS & S. RY. CO. v. LINDELL RY. CO. et al.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. MUNICIPAL CORPORATIONS — STREETS — ACQUISITION — EVIDENCE.

Subsequent to the construction of a railway track a street was laid out as a public highway across the railway right of way. The company did not dedicate the portion of the right of way as a part of the street, nor was it condemned for street purposes, but the city opened and graded the street across the right of way, laid water and sewer pipes thereunder, built sidewalks, etc., and made it as much a part of the street as any other portion thereof. The cost of the improvements was paid by the company. The public used it for a highway for about 18 years. *Held*, that the street across the company's right of way constituted a public highway.

2. SAME — STREET RAILROADS — PERMISSION TO OPERATE LINES ON STREETS.

A city may permit a street railway company to construct and operate a line on a public highway, though it crosses the right of way and tracks of another railway company, Const. art. 12, § 20, reserving to a city the right to permit the operation of street railroads on its streets.

Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action by the St. Louis & Suburban Railway Company against the Lindell Railway Company and others. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

Jefferson Chandler, for appellant. Boyle, Priest & Lehmann, for respondents.

MARSHALL, J. This is a bill in equity to enjoin the defendants from crossing the tracks of the plaintiff on Hamilton avenue, in the city of St. Louis. Upon final hearing the trial court dissolved the injunction and dismissed the bill, and the plaintiff appealed. This being a proceeding in equity, the facts will be stated in the course of the opinion.

1. The decisive question in this case is, whether Hamilton avenue is a public highway or street in the city of St. Louis. All other questions are subsidiary to this main question, and the solution of the main question carries with it the determination of the greater portion of the contention of counsel for plaintiff in this case.

All the parties hereto are street railway companies in the city of St. Louis, organized under the laws of this state. The plaintiff is a successor or grantee of the old St. Louis & Florissant Railway Company. In 1870, the St. Louis & Florissant Railway Company was a steam railway operated upon a narrow-gauge track. The eastern terminus was at a point almost midway between Grand avenue on the east, Vandeventer on the west, Olive on the south, and Washington avenue on the north. Its western terminus was Florissant, in St. Louis county. Defendant acquired its own right of way, which, at the point here involved, was 30 feet wide. At that time nearly the entire route of said railway lay outside of the city of St. Louis. When the city and county of St. Louis were separated and the limits of the city were extended, the locality involved in this case became a part of the city. At that time, and for many years afterwards, there were no streets in that portion of the city where Hamilton avenue now is, and very few houses of any character or description. About 1875 the owners of the property in the neighborhood of Hamilton avenue subdivided their land and platted it, laying it off into city lots, and making them about the right of way of the old railroad company. Thereafter the locality rapidly increased in population and importance. At a time, not definitely stated, but which all the evidence shows to have been about 18 years before the institution of this suit, streets were projected running north and south, and crossing the right of way of said railway company. Among them was Hamilton avenue. That street was laid out as a public highway 80 feet wide. It ran north and south, and crossed plaintiff's right of way at right angles. The plaintiff and its predecessors never dedicated by deed or plat the portion of the right of way as a part of Hamilton avenue, nor was the same ever condemned for street purposes. But the city of St. Louis opened and graded the street for its full width across the plaintiff's right of way, laid water pipes thereon beneath the surface, constructed sewers thereunder, built sidewalks, and in all respects made it, so far as appearance and use was concerned, as much a part of the street as any other portion thereof. Electric wires were strung on and over the same, and the city every year sprinkled it, just as it did other public streets. The cost of construction of the street and sidewalk and of the sprinkling was assessed against the plaintiff or its predecessors as an abutting owner, and it was paid by the plaintiff and its predecessors.

sors. On each side, to the east and west of Hamilton avenue, the plaintiff or its predecessors placed signs on the right of way lying to the east and west of Hamilton avenue, which read: "Private Right of Way. Keep Off the Tracks." During all said period of 18 or 20 years, while the city was so using and treating it as a part of the public highway, Hamilton avenue, including the portion of the plaintiff's 30-foot right of way aforesaid, was opened to public use, and was used generally by citizens for all the purposes for which streets are commonly used. During all that time neither the plaintiff nor its predecessors objected to such use, or claimed that it was not a public highway. On the contrary, the plaintiff and its predecessors paid all of the charges, special taxes, and assessments which were levied against the remaining part of its private right of way, and which were levied by the city for the improvement of Hamilton avenue, including the portion of said 30-foot strip. Originally the track of the plaintiff and its predecessors at said point was a T rail, and plaintiff and its predecessors placed a board crossing thereat, but subsequently the plaintiff removed the T rail from within the limits of what is claimed to be Hamilton avenue, and substituted therefor a girder rail, such as the city ordinance requires shall be used by street railroads. The remaining portions of the plaintiff's track outside of Hamilton avenue, and other streets that are in the same condition as to being public highways, and which portions lie entirely within the limits of the plaintiff's right of way, still have T rails thereon. At no time until shortly before the institution of this suit had the plaintiff or its predecessors claimed or asserted that Hamilton avenue did not include the portion of said 30-foot strip aforesaid. In fact, the plaintiff does not now claim that it is not a public highway for all the uses to which a public highway can be legitimately applied or devoted, except for the construction of a rival street railway thereover.

A public highway may be acquired over property of a private individual by, first, a grant or deed; second, a dedication by plat or deed; and, third, by acts in pais, which in law amount to a dedication. *Heltz v. St. Louis*, 110 Mo. 618, 19 S. W. 735; *Meiners v. St. Louis*, 130 Mo. 274, 32 S. W. 637; *Buschmann v. St. Louis*, 121 Mo. 523, 26 S. W. 687. The question in this case is, whether or not the conduct of the plaintiff and its predecessors amount to a dedication by acts in pais, and whether or not the acts of the city constitute an acceptance of the dedication.

The testimony clearly and conclusively shows that the city treated the said portion of said strip as a part of Hamilton avenue for nearly 20 years before this suit was instituted, and that it used it for all the purposes for which a street on, under, and above the surface is commonly used. The plaintiff knew of such use by the city, consented

thereto, and paid the assessments for the improvement of it as a street in like manner and degree that any other abutting owner pays for the improvement of a street. There is scarcely an act that could be performed by a city with reference to a street that has not been performed by the city with reference to Hamilton avenue, including the strip in controversy. The plaintiff, however, contends that a dedication, whether by deed, grant, plat, or acts in pais, must be, and necessarily is, of the whole right to the property, and that there is, and can be, no dedication in this case, because the plaintiff and its predecessors have always used it as a part of its right of way. This contention is untenable. It was, and is, clearly within the power of a city to lay out, establish, condemn, or acquire a street to cross a right of way of an existing railroad company. The street thus acquired is subject to the paramount right of the existing railroad company, but the two uses of the land for, first, a railroad right of way, and, second, for street purposes, are consistent, compatible, and legal uses. *Railroad v. Chicago*, 166 U. S. 233, 17 Sup. Ct. 581, 41 L. Ed. 979, and *Railroad v. Gordon*, 157 Mo., loc. cit. 77, 37 S. W. 742. This is necessarily true, for otherwise a street could never be projected across a railroad, nor could the city acquire the right of way to have a street cross a railroad, even though it sought to do so by condemnation. Yet section 4 of article 12 of the Constitution expressly reserves the power and right of eminent domain in such cases, and authorizes a proceeding by a city to condemn the right to construct and maintain a street across the right of way of an existing railroad. In fact, the plaintiff concedes the city could have acquired such a right in this case if it had proceeded by condemnation. If it had proceeded by condemnation, it would have acquired only the same right it did acquire by a dedication, by the plaintiff, by acts in pais. Such a dedication did not in any manner impair the plaintiff's right to use the property as a right of way, nor did it amount to a breach of trust by the railroad of its right to the land covered by the right of way.

The plaintiff, however, contends that under the decision of this court in *Railroad v. Totman*, 149 Mo. 657, 51 S. W. 412, title to railroad property can never be acquired by adverse possession under the statutes of this state where such possession began since the taking effect of the Revised Statutes of 1865. That case held that a railroad right of way constituted property devoted to a public use, and therefore the statute of limitations did not run against the railroad and in favor of one who had taken possession of a portion thereof; in other words, that such a possession, under our statutes, does not constitute adverse possession, and can never ripen into a title by limitation. The conclusion reached in that case met with

the approval of this division of this court, and nothing has appeared since to cause the court to change the conclusion then announced. But the doctrine there announced in no manner determines the question here involved. The question here is, not whether the city acquired title by limitation, but whether the plaintiff and its predecessors dedicated the 30-foot strip aforesaid to public use as a street by acts in pais. A dedication by acts in pais may be a perfectly valid dedication although the city has not been in the possession and enjoyment thereof for a period of time necessary to constitute title by limitation. In other words, the two legal propositions depend upon totally different principles. The conclusion is irresistible that the plaintiff and its predecessors dedicated that portion of its 30-foot strip lying within the limits of Hamilton avenue to public use as a street, subject to its right to maintain and operate its railroad thereon. Being dedicated as a public street, it passed at once to the control of the public authorities for all purposes for which any public street may lawfully be used. Elliott on Roads & Streets, p. 133.

2. The next question in this case is, whether, Hamilton avenue being a public street, the city of St. Louis had a right to authorize the defendants to construct and maintain street car tracks on the same. The plaintiff contends that the question of the necessity for the acquisition of a right of way for a railroad is a judicial question, and must be decided by the courts, and is beyond the power of a municipality or of the Legislature to determine. In the abstract, where a railroad company seeks to condemn private property for a railroad right of way, the use to which it is to be devoted is a judicial question. But this rule of law is not determinative in this case, for the defendants are not seeking to condemn plaintiff's property for a right of way, but are claiming a right to run over the streets by virtue of an ordinance duly enacted by the city of St. Louis authorizing them to do so. Given the premise that Hamilton avenue is a public street, it follows that the defendants could not condemn a right of way over the same, for section 20 of article 12 of the Constitution expressly reserves to a city, town, or village the right to say whether or not a street railroad shall be operated on any of its streets. Street railroads constitute a legitimate use of a public street. *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398. Such railroads are simply another method of transporting citizens over the streets, and it has been held that they may not only be legally authorized on the street, but that their presence thereon does not constitute an additional servitude. The infirmity of the plaintiff's whole contention upon this branch of the case consists in its failure to differentiate between an ordinary acquisition of a right of way over private prop-

erty by means of the exercise of the right of eminent domain, and the construction of a street railroad on an existing street under and by virtue of the authority and permission of the city. Under the facts in judgment here it is impossible to escape the conviction that the plaintiff and its predecessors intended to dedicate the portion of its right of way lying within the limits of Hamilton avenue to public use as a street, subject to its right of way thereover, and, being a public street, it was within the power of the city to permit the defendants to construct, maintain, and operate a street railway over the same, and that the plaintiff is not now in a position to claim that such a street railway, even though it be a rival railway, could only be constructed across plaintiff's right of way after a right so to do had been acquired by condemnation.

The judgment of the circuit court is right, and is affirmed. All concur.

JOHN A. TOLMAN CO. v. HUNTER et al.
(Kansas City Court of Appeals. Missouri.
June 28, 1905.)

1. APPEAL—FINDINGS—CONCLUSIVENESS.

In an action on a guaranty, a finding on an issue as to a change of the contract without the knowledge of the guarantors, which was submitted by proper instructions, and having evidence to support it, will not be disturbed, though the principal evidence was given by deposition.

2. GUARANTY — ALTERATION—DISCHARGE OF GUARANTORS.

Where a contract of guaranty was changed without the knowledge of the guarantors, that the indebtednesses accrued before the alteration cannot preclude the guarantors from insisting on their discharge, as the alteration makes a new contract, which abrogates the original.

Appeal from Circuit Court, Henry County: W. W. Graves, Judge.

Action by the John A. Tolman Company against Harry L. Hunter and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lindsay & Hinkle, for appellant. C. A. Calvird and P. A. Parks, for respondents.

ELLISON, J. This is an action on a contract of guaranty. The judgment in the trial court was for the defendants.

It appears: That plaintiffs made a contract of employment of one Cary E. Hunter as "a traveling salesman and otherwise." That he was to collect money for them in the territory over which he traveled. That he would repay to plaintiffs whatever money they might advance to him. That he was to be paid a commission on his sales, and was to bear his own expenses. After a period of near one year he quit the service, in debt to plaintiffs \$740. The answer contained two defenses: First, that plaintiffs got Hunter to enter their service by false and fraudulent representations; and, second, that

plaintiffs and Hunter changed the terms of the contract between them, in a material respect, without the consent or knowledge of defendants, guarantors. The first defense was peremptorily taken out of the case by the trial court, and the second was submitted to the jury by proper instructions.

1. The plaintiffs assign two principal causes for reversal of the judgment: First, that there is no evidence to sustain the defense of a change in the contract, and thereby, they contend, the verdict has no support. We have gone over the evidence, and find that, if that given in support of the allegation of a change is to be believed, there was abundant support for the verdict. Whether it was evidence worthy of belief is not for us to say, since, under our system, that is a matter exclusively for the jury.

2. But the principal evidence in the cause was given by deposition, and since the jury had no opportunity for seeing and hearing the witnesses, and had no means of observing their conduct and manner while testifying, plaintiffs claim that the rule permitting a jury to judge of the evidence and its weight should not be applied, or at least should be somewhat relaxed. But the case is one at law, and an appellate court is without authority to weigh evidence, whatever embarrassment the jury may labor under in determining the issues upon which the evidence bears. There is no additional power in an appellate court, arising from the fact that the evidence before a jury was given by deposition, though, in cases where the question whether an appellate court should interfere, is exceedingly close, the fact that the evidence was through the medium of depositions might be of some persuasive force in coming to a conclusion.

3. It is finally urged by plaintiffs that, notwithstanding there may have been a change of the contract without defendants' knowledge or consent, yet, as it was shown that the indebtedness of Hunter accrued to them before the alteration, no harm was done defendants, and they cannot take advantage to themselves on account of such change having been made. We are cited to the cases of *School Dist. v. Levins*, 147 Mo. 580, 49 S. W. 507, and *Kansas City v. McGovern*, 78 Mo. App. 518, in support of the point. We think they have no application. They relate to the rights of third parties who had no hand or lot in the change, and are founded on a rule altogether different from that governing this case. Here the change was made by the parties now seeking to enforce liability in the face of their own wrongful interference with the contract. The rule in this class of alterations is fundamental, and finds constant application. If the alteration is made, a surety is discharged, though such change worked no harm, or was even for the surety's benefit. The alteration makes a new contract, which abrogates the original. The original, being

thus set aside, can bind no one; and, since the new or changed contract has not had the assent of the parties sought to be charged, it cannot bind them. 2 Brandt on Suretyship & Guaranty; *Warden v. Ryan*, 37 Mo. App. 468; *Leavel v. Porter*, 52 Mo. App. 640.

A careful examination of the points as presented satisfies us that the judgment should be affirmed. All concur.

STATE ex rel. SCHOOL DIST. NO. 1, TP. 51, R. 17, HOWARD AND CHARITON COUNTIES, et al. v. MILLER, County Clerk.

(Kansas City Court of Appeals. Missouri.
June 28, 1905.)

1. SCHOOL DISTRICTS — ORGANIZATION—REVIEW—COLLATERAL ATTACK.

Where a school district had been recognized as an existing district by both state and county for several years, the validity of its organization could not be attacked in a collateral proceeding to compel a county clerk to extend certain taxes over the land therein, to which proceeding the school district was not a party.

2. SAME—MANDAMUS.

Where a school district, though irregularly organized, had existed and been recognized both by the state and county as an existing district for many years, a taxpayer was barred by laches from obtaining mandamus to contest the validity of its organization.

Appeal from Circuit Court, Chariton County; John P. Butler, Judge.

Mandamus by the state, on the relation of School District No. 1 of Township 51, Range 17, of Howard and Chariton counties, and others, against Herbert H. Miller, clerk of the county court of Chariton county. From a judgment denying the writ, relators appeal. Affirmed.

T. Shackelford and E. W. Henry, for appellants. R. B. Caples and Crawley & West, for respondent.

MILLISON, J. The relator school district seeks to compel the respondent county clerk of Chariton county to assess and extend the taxes on property in certain territory claimed by relator, as was certified by it on the 12th of May, 1903. The object of relator is to subject certain territory to taxation as a part of said district. The trial court refused a peremptory mandamus, and relator appealed.

It appears that prior to 1896 the territory composing the relator district was partly in Chariton and partly in Howard counties. The territory now in dispute lies wholly in the former county. In 1896 the territory now in dispute, with some not in dispute, organized into a separate district known as District No. 2. The relator attacks the regularity and legality of the proceeding whereby such District No. 2 was attempted to be organized. But it appears in the case that

such District No. 2 did in fact exist from 1896 down to the present time; that it had officers, built a schoolhouse, carried on a school, and received its share of the school taxes during that time.

We will concede (and thereby rid the case of much detail of statement) that District No. 2 was irregularly organized. But the fact remains that for many years it was an existing district operating under the laws and filling all the functions of a school district, and that it was recognized by both state and county, the former in the apportionment of school funds, and the latter in taxation and other matters arising from the relation of county and school district affairs. This proceeding is not a direct attack upon the existence of the district. It is merely seeking to compel the performance of an alleged ministerial duty by the respondent, as county clerk, to extend taxes for school purposes for the relator over and upon certain lands. District No. 2 is not a party to the proceeding, and its existence as a district only arises in a collateral way. That it exists in fact, and has been exercising the functions above stated, is beyond question. We therefore hold that in this proceeding its rights as a district to tax the territory in question cannot be questioned. *Burnham v. Rogers*, 167 Mo. 17, 66 S. W. 970; *Fredericktown v. Fox*, 84 Mo. 59; *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; *State ex rel. v. Board of Equalization*, 108 Mo. 241, 18 S. W. 782; *State ex rel. v. Buhler*, 90 Mo. 560, 8 S. W. 68. And, not being a party, such proceeding should not be had as would blot out its existence without an opportunity to be heard. *School Dist. v. Smith*, 90 Mo. App. 215.

Again, recurring to the length of time District No. 2 has been exercising the functions of a regular school district and no proceedings taken to oust it of the privileges and functions thus exercised, we regard it as not an unwise exercise of that discretion with which the courts are intrusted, in considering the propriety of an extraordinary writ of this nature to refuse it on account of the long delay. *Stamper v. Roberts*, 90 Mo. 683, 3 S. W. 214. Judge Norton's view in that case is applicable here. He said: "Conceding for the purposes of this case, without determining the question, that the change thus made was irregular and in excess of the powers conferred, the question still remains whether, under the facts of the case, a court of equity should interpose its injunctive and restraining process. The proceedings to establish this new district occurred in April, 1880; this suit, assailing its validity, was brought in 1894. In the meantime the new district was in fact organized, and has remained so organized, unchallenged by plaintiff, except so far as his protest in paying school taxes assessed against him may be regarded as challenging it. In view of these facts, and the further fact that during an in-

terval of four years the de facto existence of the district was recognized and parties interested have adapted themselves to the changed conditions of things, presumably for school purposes, and incurring expenses necessarily incidental to conducting a school, we are fully justified in affirming the judgment of the circuit court on the ground, if on no other, that plaintiff, by his laches, has allowed a condition of things to exist for years which would make it inequitable to grant the relief prayed for."

The conclusions we have reached make unnecessary a review of the brief of relator, or of suggestions advanced in oral argument. For, notwithstanding the position taken, the considerations we have set out above, in the circumstances developed by the record, lead to an affirmance of the judgment. All concur.

GRIMES v. THORP.

(Kansas City Court of Appeals. Missouri.
June 26, 1905.)

1. SLANDER—WORDS IMPUTING LARCENY.

A statement: "I know I never got all my rent corn off of the ground that Joe Grimes had rented. The corn that Joe Grimes sold to Teidgen was my corn, and I am satisfied that Grimes stole my corn"—made by defendant concerning plaintiff, did not necessarily mean that plaintiff was defendant's tenant on shares, and that the corn referred to had been in his possession as tenant, undivided, and hence imputed a larceny, and was slanderous per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 45-52.]

2. SAME—EXEMPLARY DAMAGES—EVIDENCE—INSTRUCTIONS.

Where, in an action for slander, the petition asked exemplary damages, and evidence was received which was admissible only on such issue, and not for the purpose of proving the truth of the slanderous charge or actual damages, an instruction that "in making up their verdict" the jury might consider the facts and circumstances admitted in evidence, as produced by both parties, was erroneous.

3. SAME—JUDGES OF LAW.

In a civil action for slander, an instruction that the jury were themselves the judges of the law, as well as of the facts, was error.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 356-364.]

Appeal from Circuit Court, Cedar County.

Action by Joseph B. Grimes against Benjamin Thorp. From a judgment for plaintiff, defendant appeals. Reversed.

W. C. Hastin and Woodruff & Mann, for appellant. Cole, Burnett & Williams and Thos. L. Nelson, for respondent.

ELLISON, J. The plaintiff brought his action against defendant, charging in four counts that the latter had slandered him. The third and fourth were dismissed by the court, and a verdict for plaintiff was had on the first and second; the finding being for both compensatory and exemplary damages

on each count, aggregating \$2,000. Defendant appealed.

1. The first count states the slander as that plaintiff used this language: "Yes; I did accuse Joe Grimes of stealing my corn, and he did steal it, and, by God! I can prove it." The second count sets out that, while plaintiff was residing on defendant's farm as his tenant, he spoke of plaintiff to one Charles W. Stevenson the following false and slanderous words, to wit: "I know I never got all my rent corn off of the ground that Joe Grimes had rented. The corn that Joe Grimes sold to Teidgen was my corn, and I am satisfied that Grimes stole my corn." The words charged in the first count are conceded to be slanderous *per se*. But it is said that those in the second count are not slanderous, but that they carry along with them a meaning which shows that they could not be. *Trimble v. Foster*, 87 Mo. 49, 56 Am. Rep. 440. The point made is that plaintiff was defendant's tenant on the shares, and that plaintiff, being in possession of the corn, undivided between landlord and tenant, could not be guilty of larceny. That, however, does not appear from the language used. The utterance does not show the corn was not the specific property of defendant. The language used does not disclose that a larceny could not have been committed. The mere fact that it was "rent corn" does not show it.

2. The petition asked for exemplary damages, and there was evidence offered and admitted in behalf of plaintiff to sustain damages of that nature, and so the jury awarded such damages. But there was likewise evidence in plaintiff's behalf showing mitigating circumstances on the question of such damages. In such state of case, the court gave for plaintiff instructions 3 and 5—the former as to the first and the latter as to the second count—in which the jury were told that, "in making their verdict," they might take into consideration the facts and circumstances admitted in evidence as produced by both parties. A part of the evidence admitted was only competent on account of the claim for exemplary damages, and not for the purpose of proving the truth of the slanderous charge or actual damages. By those instructions the jury were authorized to consider evidence on the charge of uttering the words and of the amount of compensatory damages, which was not applicable thereto, but only applicable to exemplary damages. The instructions should not ignore matters of mitigation (*Callahan v. Ingram*, 122 Mo. 355, 363, 373, 26 S. W. 1020, 43 Am. St. Rep. 583) when exemplary damages are asked, and mitigating circumstances appear to rebut or lessen malice. In the case just cited, and that of *Jones v. Murray*, 167 Mo. 47, 66 S. W. 981, it was held that, while evidence of intention and motive was admissible on the question of malice and exemplary damages, yet the jury should be cau-

tioned that such evidence should not be considered as a defense to the utterance of the words, nor to reduce compensatory damages. So it is made clear that these two elements—guilt in uttering the false words, with the consequent compensatory damages, and exemplary damages—may become distinct matters, and they should not be confounded and confused in instructions as in this case; the result being that the jury may have allowed evidence applicable to one to have had an influence in determining the other, to which such evidence did not apply.

3. Error was committed in giving an instruction at the instance of the plaintiff that "the jury are themselves the judges of the law of slander as well as of the facts, and they are not required to accept the instructions given by the court as being conclusive of what the law of slander is." In libel cases, whether civil or criminal, the jury, under the direction of the court, determines the law and the fact. *Sands v. Marquardt* (decided this term) 87 S. W. 1011. That is to say, the court may instruct the jury as to the law of libel in an advisory, but not mandatory, way. The jury cannot be directed peremptorily to find a verdict of guilty in a criminal prosecution for libel, nor for plaintiff in a civil suit, if they believe certain facts, for they are the judges of the law as well as the fact. This is the effect of the law as stated by Judge Johnson in the *Sands Case*, and is undoubtedly the view of the Supreme Court, as is shown in the cases of *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361, and *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457. In criminal prosecutions for either libel or slander, the jury determine the law and fact. Section 2262, Rev. St. 1899.

4. But in civil actions for slander no such innovation on the ordinary mode of trial by jury prevails. *Heller v. Pulitzer Pub. Co.*, *supra*. It was therefore error in the trial court to instruct the jury that they were the judges of the law, and that they were not bound by the instructions of the court. Such high and exceptional function does not rest with such body in civil actions for slander.

5. As the right and power lodged with a jury to determine the law of libel were called into being in the interest of defendant, and as a restraint upon the authority of judges to direct verdicts of guilty upon the belief of certain facts, it is argued by plaintiff that, since the instruction here was given at the instance of the plaintiff, it had the effect of helping instead of harming defendant, in that it gave the jury the privilege of finding for him, even though they could not have done so but for that instruction. We may concede that, but the fact remains that the instruction likewise gave the jury the authority to disregard the instructions in defendant's behalf, and themselves determine, in the face of such instructions, that he was

guilty of slander, and mulct him in damages therefor. So we hold such instruction in civil actions for slander to be erroneous, whether given at the instance of the plaintiff or defendant.

The judgment will be reversed, and the cause remanded. All concur.

STATE ex rel. ORR, Treasurer, v. GATES.
(Kansas City Court of Appeals. Missouri.
June 26, 1905.)

APPEAL—RECITALS IN RECORD — CONTRADICTION BY AFFIDAVIT.

A recital in the record on appeal that an affidavit for an appeal was filed on the day the judgment appealed from was rendered is overcome by the affidavit showing that it was sworn to on a subsequent date after the adjournment of court, necessitating the dismissal of the appeal.

Appeal from Circuit Court, Carroll County; Jno. P. Butler, Judge.

Action by the state, on the relation of Thomas A. Orr, treasurer and ex officio collector of revenue, against Joseph W. Gates, for the collection of delinquent taxes. From a judgment for defendant, relator appeals. Dismissed.

W. J. Allen and James McCann, for appellant. Nichols, Pistole & Neville and Jas. F. Graham, for respondent.

ELLISON, J. The plaintiff brought this action to recover taxes alleged to be due the city of Carrollton. The trial was had before the court without a jury, and resulted in fa-

vor of the defendant, for whom judgment was entered.

The trial was had and judgment rendered on September 24, 1904, and the record recites that on that day an affidavit for an appeal was filed, and that the appeal was granted. The clerk indorsed on the back of the affidavit that it was filed on that day. But the affidavit itself shows that it was sworn to on October 13, 1904, that being after the adjournment of court. The record stating that the affidavit was filed on September 24th would ordinarily control. It would import absolute verity, unless overcome by some other record of superior probative force. It is well established in this state that though the record recites due and proper service of summons, if the writ itself, with the return of the sheriff, contradicts such recital, the latter will control. So in this case, though the record recites the filing of an affidavit on September 24th, it must yield to the affidavit itself showing October 13th as the date. *Cloud v. Pierce City*, 86 Mo. 357; *Blodgett v. Schaffer*, 94 Mo. 652, 7 S. W. 436; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74; *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674; *Williams v. Monroe*, 125 Mo. 574, 28 S. W. 853; *Bell v. Brinkmann*, 123 Mo. 270, 27 S. W. 374. The recital in the record as to the filing of an affidavit for an appeal on September 24, 1904, must be held to be the sort of affidavit shown by the paper itself. *Laney v. Garbee*, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391.

The appeal must be dismissed. All concur.

STATE v. CRAIG.

(Supreme Court of Missouri, Division No. 2
July 3, 1905.)

1. HOMICIDE — INSTRUCTIONS — MURDER IN FIRST DEGREE.

A person indicted for murder in the first degree, and convicted of a lesser degree of homicide, cannot complain of an instruction as to murder in the first degree.

2. DYING DECLARATIONS—ADMISSIBILITY.

Though deceased, when advised of a change for the worse, said that he did not feel any worse, and that he could not afford to die, his statement thereupon made that he believed he was about to die, and that he had been told by the doctors that he was about to die, and made it as his dying statement, was admissible; it appearing that he had confidence in his physician, and the circumstances tending to show that his opinions as to his recovery had undergone a change, and his death having occurred within three hours after the statement was made.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 429-437.]

Appeal from Criminal Court, Buchanan County; Benj. J. Castell, Judge.

Robert S. Craig was convicted of manslaughter, and he appeals. Affirmed.

F. F. Harl, K. G. Porter, and O. F. Strop, for appellant. H. S. Hadley, Atty. Gen., and John Kennish, for the State.

BURGESS, P. J. Defendant was tried and convicted at the June term, 1903, of the criminal court of Buchanan county, of manslaughter in the fourth degree, and his punishment fixed at two years' imprisonment in the penitentiary, upon an information filed by the prosecuting attorney of said county charging him with murder in the first degree, for having, on the 3d day of November, 1902, at said county, stabbed and mortally wounded with a knife one Walter J. Lincolnhoeger, from the effects of which stabbing and wounding, on the 16th day of November, 1902, the said Lincolnhoeger died. The defendant, Robert S. Craig, at the time of the homicide, was a blacksmith in the city of St. Joseph, Mo., and had in his employ as such the deceased, Lincolnhoeger, and one Philip O. Lucas. Craig and deceased had a difficulty over the location and arrangement of a forge. It seems from the evidence that Lincolnhoeger had placed in position the bellows which was to be used in the operation of the forge, but which did not work well, and Craig was dissatisfied over it. He made some remark to the effect that the bellows did not work to suit him, when Lincolnhoeger retorted, "I guess everybody is damned fools that hangs bellows that way." Craig then walked over to where Lincolnhoeger was standing, and said, "Don't talk back to me in my shop." Deceased replied, "Come outside, and I will whip you in a minute." Craig then said, "I won't go out to fight you." After saying this he (Craig) went into a closet connected with the shop, came out in a few seconds with a big knife

in his hand, went around the closet to where deceased was, and said to him: "You big son of a bitch, shut up now, or I will make you shut up." He then struck at deceased with the knife, and at about the same time deceased struck at him with his fist. Craig cut and stabbed deceased four or five times, when deceased struck him a blow with his fist and knocked him down. Deceased then ran out of the shop, and came near running into a carriage team that was being driven along the street. The driver saw him running out, and a man following him, and checking his team, he (the driver) heard deceased say, "Mr. Craig, please call me a doctor." To this defendant replied (prefixing the remark with a vulgar epithet), "You ought to bleed to death." The next day, in talking about the difficulty, defendant was shown to have said in the hearing of two persons, in answer to a question as to how the difficulty happened: "Oh, you know my beastly temper. My temper got the best of me." When deceased ran out in the street, Lucas went out to him, and he requested Lucas to get him a doctor; at the same time stating that he was bleeding to death. Lucas took him to a doctor, and his wounds were examined and given surgical attention. The examination disclosed a gash on his left arm just above the elbow; a stab wound on the left side below the arm, and further down another stab between the ribs; a stab wound on the right side between the fourth and fifth ribs; and one or two scratches that did not require attention. It was found that the stab wound on the right side had penetrated through the chest wall and punctured the lung tissue to a depth of about three-quarters of an inch.

The deceased, after his wounds were dressed, was removed to a hospital. His condition seemed to improve at the hospital until the 16th day of November, 1902, when about 7 o'clock in the morning of said day he began to change for the worse. The attending physician arrived about 9 o'clock, discovered the change in the patient's condition, and sent for the prosecuting attorney and his assistant. After they arrived, the doctor advised the deceased of the change in his condition. The deceased answered that he did not feel any worse. The doctor testified: "I said: 'Walter, you are a very sick man, and the chances are all against your getting well. You are sinking now.' He looked at me and said: 'Doctor, am I going to die?' I said: 'Walter, I don't believe you can possibly get well.' He said: 'I can't afford to die.'" The prosecuting attorney then interrogated him, and he made a written statement of the facts concerning his condition, saying he believed he was about to die, and also as to the facts concerning the difficulty between him and the defendant, which statement the prosecuting attorney reduced to writing, read the same over to him, and he signed it. The declaration was signed about

11 o'clock a. m., and deceased died about 1:20 p. m., the same day. The paper read as the dying declaration of deceased was as follows:

"Walter Lincolnhoeger, believing I am about to die, make this statement at 10:55 a. m., this 16th day of November, 1902. On Nov. 3rd, 1902, Bob Craig cut me with a knife. He called me a big son of a bitch. I called him no name. We had an argument first and then we decided to let the argument drop. He went to the closet and then he came out with the knife. I went into a corner to wash and soon he came out, called me the name and he reached up his hand and I saw it was fight. When he pulled his glasses off I knew it meant fight. I don't know who struck first, I think we struck about the same time. He cut me with the knife. I never at any time had any weapons in my hand. I was cut four or five times. I tried to defend myself as best I could. I am 26 years old this month. After our first argument and when we agreed to drop the matter I supposed everything was settled—went to the corner to wash myself and he went to the closet. He soon came out and took his glasses off, called me a son of a bitch and had his big knife. I was taken entirely by surprise and defended myself as best I could. I am told by the doctors I am about to die and make this as my dying statement. [Signed] W. J. Lincolnhoeger."

The defendant, as witness in his own behalf, testified in substance that, immediately before the difficulty, Lincolnhoeger was angry because the bellows put up by him was not satisfactory to the defendant, and began quarreling with the defendant, applying vile epithets to him, and daring him to go outside the shop to fight; that defendant tried to quiet Lincolnhoeger by telling him that he did not want to have any trouble; that, as defendant went back in the shop to get his coat to go home, Lincolnhoeger, using a vile epithet, struck defendant, and then, seizing defendant by the throat, pushed him back in the corner over the sink, and that Lincolnhoeger, while so holding defendant by the throat and striking him with his fist, reached for a rasp which was in a box within his reach, and that then he (the defendant) got his knife out of his pocket and began cutting Lincolnhoeger, who finally knocked him down, and that that ended the fight. The defendant denied making the statement as testified to by the carriage driver, and also denied that he said the day after, in the presence of two other persons, in answer to a question as to how the fight happened, that "my beastly temper got the best of me."

The first point presented for our consideration upon this appeal is the insistence of the defendant that, as there was no evidence of murder in the first degree, the giving of instructions upon that offense was tantamount to the court telling the jury that there was

some evidence of murder in the first degree, which necessarily would have the effect of prejudicing the defendant's rights. The argument is that it is well known that all verdicts are the result of compromises, and it is insisted that the submission of instructions on murder in the first degree, although the defendant was found guilty of a lesser offense, necessarily and logically assisted in causing the verdict of guilty of some offense. Whatever the rule may be in other jurisdictions, it is well settled in this state that, although a person be indicted for murder in the first degree, and convicted of a lesser degree of homicide, he cannot be heard to complain of an instruction on murder in the first degree because not found guilty of that offense. In *State v. Fritterer*, 65 Mo. 422, the defendant was indicted for murder in the first degree, and was convicted of murder in the second degree, and it was ruled that the effect of the verdict was to acquit the defendant of murder in the first degree; that he had not, in any view that could be taken of the case, been injured or prejudiced by any supposed error in the instructions for murder in the first degree. In *State v. Sansone*, 116 Mo. 1, 22 S. W. 617, it is said: "The first objection made by defendant to the instructions is that the court erred in giving an instruction for murder in the first degree, but, as he was virtually acquitted of that offense, by the verdict of guilty in the second degree, the supposed error cannot injure or prejudice him, and it certainly constitutes no ground for reversal." *State v. Dunn*, 80 Mo. 698.

The principal question in this case, and one upon which the defendant chiefly relies for reversal of the judgment, is the act of the court in admitting in evidence a paper writing as the dying declaration of the deceased, which defendant contends was error. It has always been ruled in this state that, in order to justify the admission of dying declarations, the impression of impending and immediate death and absence of any hope of recovery is essential to the admission of such declaration. The evidence in this case discloses that the deceased had been fatally stabbed; that he seemed to improve in the first instance, from the time the stabbing occurred until the morning of the 16th day of November; that about 7 or 8 o'clock in the morning of said day there began a change for the worse in his condition; and that his physician arrived about 9 o'clock, noticed the change in the condition of the deceased, and advised him of that fact. He answered the doctor, saying he did not feel any worse. The doctor said: "Walter, you are a very sick man, and the chances are all against your getting well. You are sinking now." Testifying further, the doctor said: "He looked at me and said: 'Doctor, am I going to die?' I said: 'Walter, I don't believe you can possibly get well.' He said: 'I can't afford to die.'" Witness Motter testified that

he (the deceased) said at the same time, "Well, I will be ready for the big show." Said witness also testified that the lips of the deceased were then blue, that his breast was rising and falling, that he was gasping for breath, and that he died within two hours thereafter. Deceased declared in the statement itself, which the evidence shows was written down as he made it in answer to questions asked, that he believed he was about to die, that the doctor told him he was about to die, and that he made that as his dying statement. This was read over to him, and he signed it. It is true that, when the doctor told him he could not get well, he said he could not afford to die, which would seem to indicate that he had not then abandoned all hope of recovery; but that he came to a different conclusion, and believed that his end was near at hand, is clearly indicated by the statement itself, in which he says, "Believing I am about to die, make this statement at 10:55 a. m., this 16th day of November, 1902." He died about 1:20 p. m. the same day. While deceased said nothing as to when he expected to die, the question was not asked him, nor was it necessary for the admission of the declaration in evidence that he should have made a formal statement that he was without hope of recovery; but "It is not enough that the declarant should have thought that he should ultimately never recover. The declaration should be made under an impression of almost immediate dissolution." *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405, and authorities cited. *State v. Nocton*, 121 Mo. 537, 26 S. W. 551, in so far as the evidence preliminary to the introduction of the dying declaration of the deceased in that case was concerned, was much the same as in the case at bar, and it was held admissible. In that case there is quoted with approval from 1 Greenleaf on Evidence (14th Ed.) § 158, the following: "It is essential to the admissibility of these declarations, and it is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death, but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind. The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence, though, in the absence of better testimony, it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending. It is the impression of almost immediate dissolution, and not

the rapid succession of death, in point of fact, that renders the testimony admissible." 3 Russell on Crimes (9 Am. Ed.) *250; 6 Am. & Eng. Encyclopædia of Law, p. 108 et seq., and cases cited. In the recent case of *State v. Brown* (not yet officially reported) 87 S. W. 519, the same subject was again under consideration, and the Nocton Case was followed with approval. While deceased's remark that he did not feel any worse, in reply to his attending physician's statement that the chances for his recovery were all against him, and that he was then sinking, would seem to indicate that he was somewhat surprised, and this, together with his further remark that he could not afford to die, after being told by the physician that he could not possibly get well, tend to show that he was not then apprehensive of immediate dissolution, it is also shown by the evidence that, when informed that he could not get well, he said, "I will be ready for the big show," and that his lips were then blue, his breast rising and falling, and that he was gasping for breath; that he then made the statement itself, which the evidence shows was written down as he made it in answer to questions asked, and read over to and signed by him, in which statement he said he believed he was about to die, that the doctors told him he was about to die, and that he made it as his dying statement; that he died within less than three hours thereafter—all of which tends strongly to show that at the time of making the declaration his feelings and opinions respecting his recovery had undergone a change, in consequence, in all probability, of the statement of his physician, in whom he had confidence, that he could not possibly get well and was then sinking, and that the declaration was made under a sense of impending dissolution. There was no error committed in admitting the declaration in evidence.

With respect to the contention that the evidence shows a case of perfect self-defense, and that the verdict of the jury was not justified by the evidence, it is only necessary to say in regard to the first proposition that it was for the consideration of the jury, under the evidence and the instructions of the court, and that the verdict of the jury was well warranted by the evidence.

Finding no reversible error in the record, we affirm the judgment. All concur.

STATE v. ETCHMAN.

(Supreme Court of Missouri, Division No. 2.
June 20, 1905.)

1. COURTS—CREATION OF CRIMINAL COURTS—VALIDITY.

Since Const. art. 6, § 1, which provides that the judicial power of the state shall be in the Supreme Court, criminal courts, and other courts enumerated, and section 31, which declares that the General Assembly has no power to establish criminal courts except in counties

having a population exceeding 50,000, contemplate that the Legislature, except as restricted, will make appropriate provisions for the establishment of criminal courts as the necessities of the case may require, an act creating a criminal court for a county having a population exceeding 50,000 is not obnoxious to article 4, § 53, subd. 32, prohibiting the passage of any special law where a general law can be made applicable.

2. SAME—IMPOSITION OF SPECIAL BURDENS ON OFFICERS AND TAXPAYERS—EFFECT.

An act creating a criminal court for a county is not void because it imposes special duties on the sheriff and clerk of the court, and incidental expenses to the county; the power to provide for the necessary incidents of the court being implied from the power to establish it.

Error to Criminal Court, Buchanan County; B. J. Casteel, Judge.

Gabe Etchman was convicted of crime, and he brings error. **Affirmed.**

On the 4th of April, 1903, the grand jury of Buchanan county, Mo., returned an indictment against the plaintiff in error, charging him with setting up in said county on March 31, 1903, certain gambling tables and devices, two of which were a chuck-a-luck table and a crap table. On arraignment on April 6, 1903, a plea of not guilty was entered, which was withdrawn on June 27th, and a plea of guilty entered in its stead. Thereupon the court assessed the punishment at six months in the county jail. A motion in arrest of judgment was filed, but the record is silent as to any disposition of said motion. On August 12, 1904, a writ of error was sued out in this court, and the clerk of the lower court, in obedience thereto, has forwarded a certified copy of the record proper in said cause, which is now before the court for consideration.

Charles C. Crow, for plaintiff in error. H. S. Hadley, Atty. Gen., and Frank Blake, for the State.

FOX, J. (after stating the facts). The same questions, with the exception noted, involved in this case, were decided by this court in *State v. Rosenblatt*, 88 S. W. 975, and *State v. Etchman*, 83 S. W. 978, except the one proposition now presented in this case, as to the constitutionality of the act creating the criminal court of Buchanan county. The act creating the criminal court of Buchanan county will be found in Rev. St. 1899, p. 2508, § 1. It provides: "Pursuant to sections 1 and 31 of article VI of the Constitution, and to a notice [set out in full] a court of record is hereby established in the county of Buchanan, said county having a population exceeding 50,000 inhabitants, and to be designated and called the Criminal Court of Buchanan County."

There is but one proposition presented in the record in this cause, and that is embraced in the contention of plaintiff in error that the act as herein noted, establishing the Buchanan county criminal court, is void and unconstitutional. The grounds upon which this contention is predicated may be briefly stat-

ed as follows: (1) Because it is in conflict with subdivision 2 of section 53, art. 4, of the Constitution, which provides: "The General Assembly shall not pass any local or special law * * * regulating the affairs of counties, cities, townships, wards or school districts." (2) Because it is in conflict with subdivision 15, § 53, art. 4, providing that no local or special law shall be passed "creating offices, or prescribing the powers and duties of officers in counties, townships, election or school districts." (3) Because it is in conflict with subdivision 17, § 53, art. 4, of the Constitution, providing that no local or special law shall be passed "regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing method for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate." (4) Because it is in conflict with subdivision 32, § 53, art. 4, of the Constitution, which prohibits the passage of any local or special law "where a general law can be made applicable; and whether a general law could have been made applicable in any case is hereby declared a judicial question."

Learned counsel for plaintiff in error has presented the question involved in this controversy in its strongest light, and it is not out of place to say that about all has been said in his oral argument and brief now before us that can be said upon this proposition, yet, after a careful consideration of all the authorities, we are unable to give our assent to the contention so ably presented by counsel.

The origin of the power in the legislative branch of the government of this state to create and establish criminal courts is found in section 1, art. 6, of the Constitution, which provides: "The judicial power of the state, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in the Supreme Court, the St. Louis Court of Appeals, circuit court, criminal courts, probate courts, county courts and municipal corporation courts." Following this provision of the Constitution, we find that section 31, art. 6, of the Constitution, places a limitation upon the power of the General Assembly to establish and create criminal courts. It provides: "The General Assembly shall have no power to establish criminal courts except in counties having a population exceeding 50,000." It is apparent that while section 31, art. 6, as above noted, limits the power of the General Assembly in respect to the establishment of criminal courts, yet it is equally clear that it fully recognizes the power of the General Assembly to establish such courts in counties having the required population. We have, then, as applicable to the proposition now under consideration, first, a constitutional provision vesting the judicial

power of the state in certain designated courts—among them, criminal courts; secondly, by a provision in the same Constitution, we have a full and express recognition of the power of the General Assembly to establish criminal courts in counties having a population exceeding 50,000. The act of the General Assembly establishing the Buchanan county criminal court was enacted in pursuance of the constitutional provisions above referred to, and the fair and reasonable interpretation of such provisions, as applicable to the grant of power to the General Assembly to pass the act creating such court, must furnish the solution of the proposition now confronting us.

This leads us to inquire as to what rule of construction should be adopted in the interpretation of the constitutional provisions involved in this proceeding. After diligent search, we are unable to find any rule which is more practical than the one announced by that eminent jurist and author, Mr. Story, in his work upon the Constitution. He thus states it: "Every word employed in the Constitution is to be expounded in its plain, obvious, and common-sense meaning, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." 1 Story, Const. § 451. The General Assembly of this state, fully recognizing the power granted by the organic law of this state to create and establish criminal courts, in harmony with the rule as announced by Mr. Story, proceeded in a practical way to exercise such power, and put the constitutional provisions into full force by the creation and establishment of the Buchanan county criminal court, which county, it is conceded, had a population of more than 50,000.

It is insisted by plaintiff in error that the act creating the Buchanan county criminal court is a local or special law, and is in conflict with subdivision 32 of section 53, art. 4, of the Constitution, which prohibits the passage of any local or special law where a general law can be made applicable. In other words, to restate the contention in this cause, it is urged that the only way in which the General Assembly can exercise the power recognized by the Constitution to establish criminal courts is by an enactment establishing and creating criminal courts in every county in the state having a population of more than 50,000. We are unable to agree

with counsel upon this insistence. We are unwilling to believe that the framers of the Constitution, in recognizing the power of the General Assembly to establish criminal courts in counties having a population of more than \$50,000, meant to say to the lawmaking power that "you can only exercise this power providing you establish a criminal court in every county in the state possessing the required population, regardless of any local conditions or demands for the establishment of such courts." If section 31, art. 6, of the Constitution, is to be given a reasonable and practical interpretation, the power recognized in the General Assembly to establish criminal courts in counties having a population exceeding 50,000 does not necessarily mean that the Legislature, in the exercise of such power, must include every county in the state. The presumption must be indulged that the framers of the Constitution could foresee the common wants of the people of this state, and that there would be in some counties large and populous cities, and a demand for the creation of separate criminal courts, while in other counties of the required population, purely agricultural, with small cities and villages, there would be no need or demand whatever for a separate criminal tribunal. That is the only practicable and reasonable construction that can be given the provisions of the Constitution now under consideration. To hold otherwise would not be in harmony with the rule indicated by Mr. Story, for if, in pursuance of the powers recognized by the Constitution, the General Assembly must establish criminal courts, if at all, in every county in the state, regardless of any need or demand for them, then such provision would fall far short of being of that "practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings."

Buchanan county had a population of more than 50,000, and the act assailed in this proceeding, creating the Buchanan county criminal court, was simply appropriate legislation, in the exercise of a recognized power by the Constitution, and which the Constitution, by its terms, contemplated would be exercised by the General Assembly, and therefore cannot be held to be either special or local, within the true intent and meaning of the Constitution. In *Kenefick v. City of St. Louis*, 127 Mo. 10, 29 S. W. 841, Barclay, J., very clearly and concisely announced the true rule as to legislation of this character. He said: "Legislation which is necessary or appropriate to carry into effect a positive command of the organic law, or is required or directly contemplated by its terms, cannot justly be held to be either special or local, within the true intent and meaning of the Constitution. Legislation of that description is, indeed, merely the machinery to put the Constitution into full force." To the same effect is *Spaulding v. Brady*, 128 Mo., loc.

cit. 638, 31 S. W. 104, McFarlane, J., speaking for the court in that case, said: "The doctrine has been recognized by this court that legislation which is authorized by the Constitution itself cannot be regarded as local or special, within the meaning of the constitutional prohibition, though its application is purely local. *State ex rel. v. Walton*, 69 Mo. 556; *Kenefick v. St. Louis*, 127 Mo. 1, 29 S. W. 838, and cases cited. The principle contained in the observation of Judge Lewis in *State ex rel. v. Shields*, 4 Mo. App. 259, that 'no law can be either local or special, within the meaning of the Constitution, which results directly or indirectly from a specific constitutional requirement,' is the sound basis upon which these decisions rest." The command of the Constitution is that the judicial power of the state shall be vested in certain courts, including criminal courts. This requirement contemplates that the legislative branch of the state government will make appropriate provisions in creating and establishing courts in which such judicial power is to be vested. "No law can be either special or local within the meaning of the Constitution, which results directly or indirectly from a specific constitutional requirement." *Ewing v. Hoblitzelle*, 85 Mo. 64; *State ex rel. v. Shields*, 4 Mo. App. 259; *Whallon v. Gridley*, 51 Mich. 503, 16 N. W. 876. "Nor can the efficient operation of the functions of a department of the state government be in any manner subject to the control or dependent upon the action of the citizens of any particular locality in the state. In the nature of things, the act in question is not, and cannot be, a special or local law." *State ex rel. Hughlett v. Hughes*, 104 Mo., loc. cit. 470, 16 S. W. 490.

The proposition involved in this case is by no means a new one. The precise question here presented has been in judgment before this court. In *Ex parte Renfrow*, 112 Mo. 591, 20 S. W. 682, the constitutionality of the creation of the criminal court of Greene county was challenged. While the proposition in this cause was not thoroughly presented in the briefs of counsel, nor was the question fully reviewed by this court in the decision of that case, however, it was suggested in the briefs that the act establishing the Greene county criminal court was violative of the provisions of the Constitution in regard to special legislation. Responding to that suggestion, this court said: "There is nothing in the suggestion that the act in question is obnoxious to the provisions of the Constitution in regard to special legislation. The Legislature plainly has power to provide for a criminal court in any county of the state having a population exceeding fifty thousand." In *State ex rel. v. Yancy*, 123 Mo. 391, 27 S. W. 380, the constitutionality of the act creating the Greene county criminal court was directly involved. The question was fully presented in the briefs of counsel. This court, speaking through Burgess, J.,

fully responded to the contentions of counsel in that case. In discussing the proposition, he said: "The act in question is in no sense special or local, within the meaning of the Constitution, because of the fact that it creates a court at one particular location. The same could as well be said with respect to all other courts in the state, to which all persons, without regard to habitation, appeal for the redress of wrongs done them, and the adjustment of their rights. The court created by the act in question has original jurisdiction of all crimes committed within the county of Greene, as well, also, as of any criminal case that may be taken thereto by change of venue from any other court in the state having criminal jurisdiction, it matters not where it may be. Its judge is commissioned and paid by the state, and, it matters not where the court may be held, it is a criminal court for the state—as much so as the criminal court of St. Louis, Kansas City, or St. Joseph." During the course of the opinion, emphasizing the correctness of the conclusions reached as to the validity of the act assailed, the principles as applicable to the interpretation of the act were clearly stated. It was said: "Whether an act of the Legislature be a local or general law must be determined by the generality with which it affects the people as a whole, rather than the extent of the territory over which it operates; and, if it affects equally all persons who come within its range, it can neither be special nor local, within the meaning of the Constitution. Moreover, the general power of the Legislature to establish criminal courts in counties having a population exceeding fifty thousand is clearly recognized by section 81, art. 6, of the Constitution, as by prohibiting the establishing of criminal courts in such counties, by express terms, having a population of less than fifty thousand people, is a recognition of the power to establish them in counties having a population exceeding fifty thousand. When there is a specific grant of power conferred by the Constitution upon the Legislature upon any certain or particular subject, an act passed in pursuance of such grant will not be held unconstitutional upon the ground that it is local or special legislation. *State ex rel. v. County Court*, 50 Mo., loc. cit. 324, 11 Am. Rep. 415; *State ex rel. v. Watson*, 71 Mo. 470; *Ewing v. Hoblitzelle*, 85 Mo. 64. The fact that notice was given of the intended application to the Legislature for the passage of a law creating the court in question, and of a court similar in all respects in Buchanan county, did not change the law, and was in all probability done through an abundance of caution—certainly not because it was a necessary prerequisite." This case was approvingly quoted in *Kenefick v. St. Louis and Spaulding v. Brady*, *supra*. We are of the opinion that the law was correctly announced in the Yancy Case, and see no legal reason for departing from the conclusions

therein reached. The criminal court of Buchanan county is by no means a mere county court. As was said in *State ex rel. Hughlett v. Hughes*, "It is pre-eminently a state court, affecting in its operations all the citizens of the state; deriving its power directly from the organic law of the state, and law passed by the Legislature in pursuance thereof." While it may be said that the territory in which the court is held is limited, every citizen of the state is interested in the administration of the law, and the offenses of which the court has jurisdiction are those, presumptively, that affect the peace and dignity of the entire state. It is in truth and in fact a criminal court of the state of Missouri, and in no sense is it to be classed as a local court, nor is the law which created it a special or local law, within the meaning of the provisions of the Constitution.

Counsel for plaintiff in error earnestly insists that the criminal court created by the act involved in this proceeding was not in pursuance of an express command of the Constitution, and undertakes to draw a distinction between the enactment of a law in obedience to an express command of the Constitution, and one enacted in pursuance of an implied grant of power. As applicable to this case, we are of the opinion that no such distinction exists. While the constitutional provisions in respect to the establishment of criminal courts do not expressly command the Legislature to create such courts, that they contemplate by their terms the creation of them is beyond question, and the principles as herein announced are as applicable to the constitutional provisions in their present form as they are in cases where the express command is given to enact the legislation. It was expressly ruled in *Kenefick v. St. Louis* that in either case—where the legislation was in pursuance of a positive command of the organic law, or is required or directly contemplated by its terms—the enactment cannot justly be held to be either special or local, within the true intent and meaning of the Constitution.

The cases of *State v. Hill*, 147 Mo. 63, 47 S. W. 798, and *Ashbrook v. Schaub*, 160 Mo. 107, 60 S. W. 1085, do not conflict with the principles announced in *Ex parte Renfrow* and *State ex rel. v. Yancy*, nor with the conclusions as announced in the case at bar. An examination of the *Hill* and *Ashbrook* Cases, cited by plaintiff in error, makes it manifest that the questions involved in those cases are entirely dissimilar to the proposition presented by the record in this cause. The validity of the act creating the Buchanan county criminal court was in no way assailed or challenged. The only question presented by these cases was the amendment to the act establishing the criminal court of Buchanan county, approved March 1, 1897 (Laws 1897, p. 79), which undertook to empower the judge of the criminal court of Buchanan county, when called upon, to preside and try causes

pending in the circuit courts of the state. With the announcement of the conclusions that this amendment was in conflict with the Constitution, which prohibited the enactment of a special law where a general law could be made applicable, we are entirely satisfied, but that is not this case. That amendment was clearly violative of the constitutional provisions noted, for the reason that it undertook to select one judge of a criminal court of this state, and confer upon him powers not given to any other judge of the criminal courts of the state. It will be observed that this amendment does not rest upon the same foundation as the act of the General Assembly establishing the criminal court of Buchanan county, for it is apparent there is no constitutional provision commanding such legislation, or in which, by the terms of the constitutional provision, such legislation is required or contemplated; hence we must keep in view, upon this proposition, the distinction between the enactment of a law in pursuance of a constitutional provision requiring or by its terms contemplating such enactment, and legislation upon subjects about which the organic law of the state is absolutely silent. The mere fact of the statement by the learned judge in *Ashbrook v. Schaub* that the act creating the Buchanan county criminal court was a special law, and enacted in accordance with the provisions of section 54, art. 4, of the Constitution, cannot be treated as overruling the prior decisions upon that subject. The Buchanan county criminal court act was calculated to mislead as to the nature and character of the legislation. It is clear that the General Assembly, through abundance of caution, undertook to comply with the provisions of the Constitution in respect to special legislation, but that by no means makes it a special or local law. The remarks of the court in the *Ashbrook-Schaub* Case must therefore be treated as mere obiter, and in no way changing the principles of law as applicable to this case, which were so clearly and correctly announced in *State ex rel. v. Yancy*. It is obvious that *State v. Hill* did not overrule *State ex rel. v. Yancy*, nor was it so regarded by the judges who wrote the opinions in those cases. *Sherwood, J.*, who wrote the *Hill* Case, fully concurred with *Burgess and Gantt, JJ.*, in the *Yancy* Case; and, on the other hand, *Burgess and Gantt, JJ.*, concurred with *Sherwood, J.*, in the *Hill* Case. Therefore it is made apparent that the court fully recognized that there was no conflict in the principles announced in those cases.

Upon the remaining propositions urged by counsel for plaintiff in error, "that the act is unconstitutional because it imposes duties on the sheriff and clerk of the court, and incidental expenses on the county not common to all sheriffs, clerks, and counties throughout the state," it is sufficient to say that, having held that the act creating the criminal court was constitutional, the power ex-

ists by implication to provide for every necessary incident, without which it could not become properly organized. *Ex parte Mar-maduke*, 91 Mo., loc. cit. 262, 4 S. W. 91, 60 Am. Rep. 250; *State ex rel. v. Mason*, 155 Mo. 486, 55 S. W. 636; *Sutherland*, Stat. Const. § 341; 2 *Beach*, Pub. Corp. § 1314; *State v. Wilson*, 87 Tenn. 697, 11 S. W. 792; *Moulton v. Reid*, 54 Ala. 325; *Parker v. Way*, 15 N. H. 51; 9 *Bacon's Ab.* 219, 220; *People ex rel. v. Eddy*, 57 Barb. 593.

The validity of the act establishing the Buchanan county criminal court has for many years been fully recognized by the bench and bar as well as the people of this state. It is therefore important that we be not unmindful of the repeated admonition to courts, when they are called upon to pronounce the invalidity of an act of the Legislature passed with all the forms and ceremonies requisite to give it force, that they approach the question with great caution. The "presumption is in favor of the constitutionality of this act, and, before this court would be warranted in holding it invalid because in conflict with the Constitution, it should be satisfied of its invalidity beyond a reasonable doubt." *Ewing v. Hoblitzelle*, 85 Mo. 64; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *State v. Addington*, 77 Mo. 110; *State v. Railroad*, 48 Mo. 470.

We have thus given expression to our views upon the validity of the act creating the Buchanan county criminal court, which results in the conclusion that such act is a valid and constitutional law, and that the criminal court of Buchanan county, organized in pursuance of it, is a legally constituted tribunal.

The judgment in this cause should be affirmed, and it is so ordered. All concur.

SLUDER v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri. June 1, 1905.)

1. CONSTITUTIONAL LAW—DELEGATION OF POWER—MUNICIPAL CORPORATIONS.

The granting to a municipal corporation of power to pass all necessary ordinances for the protection of the safety of citizens is not an infringement of the maxim that legislative power may not be delegated.

2. SAME—POLICE POWER—REGULATION OF STREET RAILROADS.

Scheme & Charter of St. Louis, art. 10, § 1, gives the municipal assembly power to determine by ordinance all questions arising with reference to regulating or controlling street railroads; and by article 3, § 26, the mayor and assembly have power by ordinance to establish, etc., all streets, and to regulate the use thereof. An ordinance of the city of St. Louis provides that the motorman propelling a street car shall keep a vigilant watch for vehicles, and, on the first appearance of danger therefrom, shall stop the car as soon as possible. *Held*, that such ordinance is a valid exercise of the city's police power, and an acceptance or agreement of a street railroad company is not necessary to give the ordinance binding force.

3. STREET RAILROADS—NEGLIGENCE—BREACH OF ORDINANCE.

A breach of the requirements of the ordinance amounts to negligence, for the results

of which a street railroad company is liable to an individual.

4. SAME—DEGREE OF CARE REQUIRED.

The ordinance is not void on the ground that it exacts a higher degree of diligence and care than the common-law rule of ordinary care.

[*Ed. Note.*—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 155.]

5. SAME—IMPUTED NEGLIGENCE.

Where plaintiff contracted with a livery stable keeper for a carriage to convey him to a certain place, and, when the carriage and driver called for plaintiff, he merely told the driver where he was going, and gave no other directions, any negligence of the driver was not imputable to plaintiff on the theory that the relation of master and servant existed.

6. SAME—CONTRIBUTORY NEGLIGENCE.

Where plaintiff was being driven in a closed carriage, on a dark winter night, by a driver who was not known to plaintiff as a negligent or reckless driver, and the first knowledge that plaintiff had of danger from a street car was when, looking through the window of the carriage, he saw a car rapidly bearing down on him, he was not guilty of contributory negligence.

7. PERSONAL INJURIES—DAMAGES.

In an action for injuries to a physician, which interfered with his practice, it was proper to permit him to testify as to his earnings for that month in the previous year.

8. STREET RAILROADS—COLLISION—EVIDENCE.

In an action for injuries to one whose vehicle was run down by a street car, it was proper to permit him to testify as to the rate of speed at which the car was running; such testimony not being given as an expert.

9. SAME—EVIDENCE AS TO SPEED.

Where, in an action for injuries received by plaintiff in a collision between his vehicle and defendant's street car, the actual physical facts, not controverted by defendant, tended to show an excessive speed of the car, the admission of plaintiff's testimony as to his opinion as to the speed of the car was no ground for a reversal.

Marshall, J., dissenting in part.

In Banc. Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by Greenfield Sluder against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Morton Jourdan, Sears Lehmann, Geo. W. Easley, and Boyle, Priest & Lehmann, for appellant. Campbell & Thompson, for respondent.

GANTT, J. This is an action for damages for personal injuries caused by the collision of one of defendant's street cars with a livery carriage in which plaintiff was riding, at the crossing of McPherson avenue by Boyle avenue, on which last-named avenue the defendant company owned and operated a double-track street railway, in the city of St. Louis. Plaintiff recovered judgment in the circuit court for \$6,000, and defendant appeals.

The petition, in substance, states that on or about the 27th day of December, 1901, about 7:15 o'clock in the evening of that day, the plaintiff, a physician, was being driven in a hired livery carriage west along McPherson avenue (a street running east and

west) at its intersection with Boyle avenue (a street running north and south), in the city of St. Louis, and that the lamps on the said carriage were lighted and burning brightly; that at said time and place, and as such carriage in which plaintiff was riding was crossing defendant's south-bound or western street railway track, one of defendant's cars, propelled by electricity and south bound on said track, with great speed, force, and violence, struck and collided with said carriage, driving plaintiff's right arm into his floating ribs, fracturing the large bone of plaintiff's right forearm, inflicting a body blow on plaintiff's body opposite the solar plexus, rendering plaintiff unconscious, and seriously hurting, bruising, and crushing plaintiff's back and body. "And plaintiff avers that at the time of receiving said injuries there was in force in the city of St. Louis an ordinance known as 'Ordinance 19,991,' approved April 3, 1900, which ordinance defendant, long prior to the happening of the accident complained of, accepted, and agreed to be bound by the terms and provisions thereof; that section 1760 of said ordinance, in substance, provides that all street cars after sunset shall be provided with signal lights; that no car shall be drawn at a greater speed than eight miles per hour, and that the conductor, motorman, gripman, driver, or any other person in charge of each car, shall keep a vigilant watch for all vehicles, either on the track or moving towards it, and, on the first appearance of danger to such vehicle, shall stop the car in the shortest time and space possible. And plaintiff avers that though, at the time of receiving said injuries aforesaid, it was long past sunset and dark, yet defendant had negligently failed to provide said car with signal lights, or to place a headlight on said car; that defendant's servants, in violation of said provision of said ordinance, were running said car southwardly on Boyle avenue towards McPherson, at the time said injuries were inflicted, and immediately prior thereto, at a careless, negligent, and dangerously high rate of speed, to wit, at a rate of speed far in excess of eight miles per hour; that defendant's servants in charge of said car, in violation of the provisions of said ordinance hereinabove referred to, negligently failed to keep a vigilant watch ahead for vehicles moving toward the track upon which said car was running, and negligently failed to stop or to attempt to stop or check the speed of said car in the shortest time and space possible, when they saw, or by the exercise of ordinary care or diligence could have seen, the vehicle in which plaintiff was riding, in a position of danger, in time to have stopped said car before striking said vehicle, or to have so checked its speed as to have avoided said collision; and, for another and further assignment of negligence, plaintiff states that, at the time and place of receiving said injuries aforesaid, defendant's servants in charge of said car negligently

ly failed to sound the gong or to give warning of said car's approach." The answer of the defendant was a general denial and the following defense: "Second. Further answering, defendant says that whatever injuries plaintiff sustained, if any, were caused by his own negligence, in suffering and permitting the driver of said carriage to drive in front of the approaching car, when, by looking, he might have seen, or by listening he might have heard, said car approaching, and have avoided the said accident." The reply was a general denial.

The facts developed in the trial were, in substance, the following: On the evening of December 27, 1901, the plaintiff was, and for some time prior thereto had been, a practicing physician in St. Louis. On that evening he ordered a carriage from the Palace Livery Company—a livery stable owned by Charles H. Wilcox, in the city. Wilcox sent a two-horse hack or carriage in charge of one of his drivers (Thomas Cavanaugh) to plaintiff's residence, with directions to call for the doctor. When plaintiff got into the carriage he directed the driver to take him to a house on Westminster Place (the third from the corner of Forty-Fourth street), and gave no other orders. The driver drove onto McPherson avenue, which runs east and west, to Boyle avenue, which runs south, beginning at Olive street. The first street south of Olive street crossed by Boyle avenue is Westminster avenue. Boyle avenue is 37 feet wide from curb to curb, and McPherson is 40 feet in width. On Boyle avenue the defendant company has a double-track street railway from Olive street, which crosses both Westminster and McPherson as it goes south. At the northeast corner of Boyle and McPherson there is a brick house facing south on McPherson avenue, and standing back 30 feet from the north line of McPherson, with its west side flush with the building line on the east side of Boyle avenue. On the opposite corner to the west or the northwest corner of Boyle and McPherson was a vacant lot, and on the southwest corner, and fronting on McPherson, was the residence of Mr. Jones. It was a dark, windy night, a little foggy—a dark and cloudy night. The driver of plaintiff's carriage sat upon the top seat, outside, and on the front of the carriage, and was driving west on McPherson avenue, on the north side thereof and about seven or eight feet from the north curbstone, in a slow trot. The lamps on the carriage were lighted. Plaintiff sat on the back seat of the carriage, and on the south side. The testimony of the plaintiff was to the effect that as the carriage neared Boyle avenue a car passed going south, and the driver checked up a little, and went forward in a little dog trot, and as he started across the track he heard the click of the wheels on the rails, and heard the driver slap the horses, and he looked out of the north window of the carriage, and saw a car at about what seemed to

him 50 or 60 feet distant. He had hardly seen the car when it struck the carriage, and he received the injuries of which he complains. Cavanaugh, the driver, testified that he was proceeding west on McPherson in a slow trot, on the north side of the street, and when he got within 7 or 8 feet of the east rail of defendant's tracks a car passed south, and then he looked both ways, and saw no car coming, and drove on to cross the tracks, and after he got on the west track he suddenly discovered another car coming south, and only about 10 or 12 feet from him. He tried to get out of its way but it came so fast he couldn't do so, and it struck his carriage—the front part of it. He was thrown from the carriage onto the vestibule of the car, right at the feet of the motorman. He testified he looked north before attempting to cross, and saw no car. No bell or gong was sounded. The only light on the street car was a single incandescent bulb, with a reflector, at the top of the car. The force of the blow cut the horses loose from the carriage, and they ran west on McPherson avenue. The car drove the carriage across McPherson avenue to a position differently estimated from 20 to 40 feet south of McPherson avenue, and the rear platform of the car, when it stopped, stood over the crossing on the south side of McPherson. Two eyewitnesses testified in behalf of defendant, to wit, young Masterson and the motorman, Middleton. The motorman testified he first discovered the carriage when he was very close to the north line of McPherson avenue; that his car was about 5 or 10 feet from the north crossing when he first saw it. Asked if a carriage was 25 feet from the east line of Boyle avenue, going west, on the north side of McPherson avenue, how far down or from what point on Boyle avenue he could first see that carriage, he answered, "About fifteen feet" from the north crossing of McPherson avenue; that is, he couldn't see around the corner further east than that, on account of the building on the corner; that the building was very close to the corner. Asked what there was to prevent him from seeing the carriage at a further distance than five or ten feet from it, he answered he was looking both ways to see if anything was approaching: That he had to look in more directions than one. There was liable to be carriages coming from other directions. He testified his car was running four or five miles an hour. He testified to seeing the boy (Masterson) on a pony about Westminster Place, a block north of McPherson. The boy was a little ahead of his car, riding south in a slow trot. He rang the gong for him near Westminster, or a little south of it. Masterson testified he remembered the incident of the car striking the carriage. He was riding a pony belonging to Watkins, a liveryman, going south on Boyle. He first noticed the car before he got to Westminster Place. He heard it come around the corner

from Olive street onto Boyle. He was riding then close to the track, but pulled away from it. The bell did not ring, nor the gong sound, after it passed Westminster. It did ring two or three times between Olive and Westminster. He looked back, and the light on the car was very dim. He could see the light, but it was very dim. The car was gaining speed all the time. It was going at a pretty good gait—about 15 miles an hour. "I was riding as fast as the pony would go." He testified he ran his pony off into McPherson avenue, and, after the collision, caught the two horses that were attached to the carriage, and brought them back; that the car stopped on the south crossing of McPherson and Boyle avenues. Plaintiff testified it looked as if it was going 20 to 25 miles an hour. Mrs. Fenley says it was going very fast, and she noticed no effort to check the speed. Mitchell testified it was going nearly 20 miles an hour. Cavanaugh says about 25 miles an hour. On the other hand, the motorman and conductor placed the speed at 4 miles an hour. The plaintiff (himself a physician) and Dr. Harvey G. Mudd testified to the nature of the injuries received, and their evidence tended to show not only serious injuries, causing much pain and suffering, but a loss of time from his practice, entailing a large pecuniary loss.

The instructions will be noted in the course of the opinion.

1. The first proposition advanced for a reversal of the judgment in this case is that the court erred in not requiring plaintiff to elect upon which assignment of negligence he would proceed to trial.

This contention is based upon the assumption that the petition blends causes of action *ex delicto* with causes of action arising *ex contractu*; and this, in turn, is predicated upon the principal insistence in this case, to wit, that section 1760 of Ordinance 19,971, approved April 8, 1900, and commonly known as the "Vigilant Watch Ordinance," from the fact that it provides that the motorman or other employé propelling a street car in said city shall keep a vigilant watch for all vehicles either on the track or moving towards it, and, on the first appearance of danger to such a vehicle, shall stop said car in the shortest time and space possible, could only be passed under the power of the city to contract, and could not be passed under its police power to protect the lives, limbs, and property of those using its streets in the pursuit of their lawful business, but could only control defendant and render it liable for its violation when it accepted it and agreed to be amenable to it, and hence a suit for its violation would be *ex contractu*, whereas the other acts of negligence were torts, either at common law or by statute or ordinance, and *ex delicto*.

In the solution of this contention, fundamental principles must be invoked. That the people, in the Constitution of the state,

or the Legislature, in the exercise of its general legislative power, when not restricted by the federal or state Constitutions, may grant municipal corporations the power to pass all necessary ordinances for the protection of the safety of their citizens and their property, is the settled law of this state, and such a delegation of power is no infringement of the maxim that legislative power cannot be delegated. *State v. Field*, 17 Mo. 529, 59 Am. Dec. 275; 1 *Dillon on Munic. Corp.* § 308, and cases cited; *State ex rel. v. Francis*, 95 Mo. 49, 8 S. W. 1; *Morrow v. Kansas City* (in banc at this term, not officially reported) 85 S. W. 572; *State ex rel. v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798.

The freeholders' charter of the city of St. Louis, adopted August 22, 1876, has all the force and effect of a legislative charter. *Kansas City v. Oil Co.*, 140 Mo. 468, 41 S. W. 943; *City of St. Louis v. Gleason*, 15 Mo. App. 25; *Id.*, 93 Mo. 33, 8 S. W. 348. By section 1 of article 10 of the scheme and charter of St. Louis, it is provided that the municipal assembly shall have power by ordinance to determine all questions arising with reference to street railroads in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating or controlling them after their completion. Under section 26, art. 3, of said charter, "the mayor and assembly shall have power within the city by ordinance not inconsistent with the Constitution or any law of this state or of this charter * * * to establish, open, vacate, alter, widen, extend, pave or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves and public grounds and squares; * * * to construct and keep in repair all bridges, streets, sewers and drains and to regulate the use thereof," etc. Elsewhere the charter gives the city power to declare and abate nuisances, and pass ordinances for the general welfare. Thus we find that the people of Missouri, by their organic law, have expressly delegated to the city of St. Louis the power to regulate the use of its streets, and pass all needful ordinances expedient in maintaining the peace, good government, health, and welfare of the city. *State ex rel. v. Murphy*, 130 Mo. 22, 31 S. W. 594, 31 L. R. A. 798; *St. Louis & Meramec Riv. Ry. Co. v. Kirkwood*, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300; section 20, art. 12, Const. 1875.

Discussing section 26 of article 3 of the St. Louis charter (2 Rev. St. 1879, p. 1585), in *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 467, 13 Sup. Ct. 990, 37 L. Ed. 810, the Supreme Court of the United States said: "It is given power to own and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word 'regulate' is one of broad import. It is the word used in the

federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds as it did by Ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used." Judge Dillon, in his *Municipal Corporations*, § 713, says: "Resulting from the power over streets, and to protect the safety of citizens and their property, municipal corporations may control the mode of propelling cars within their limits; may prohibit steam cars and regulate the rate of speed."

It is not, then, to be questioned that under the comprehensive grant in its charter the city of St. Louis has the police power to regulate the use of its streets by street car companies for the protection of the public which uses them for the paramount purpose for which they are established, to wit, for travel thereon; and, so long as they are streets, the city itself cannot appropriate them even to another public use which would wholly or practically deprive the public of the right to travel thereon. *Lockwood v. Railroad*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547; *Knapp & Co. v. Railroad*, 126 Mo. 26, 28 S. W. 627.

Looking, then, to the ordinance which requires of street railway companies that their motormen and other servants propelling their cars on the streets keep a vigilant watch for vehicles and persons on their tracks or approaching them, it is too clear for argument that in enacting said ordinance it was exercising its governmental police power under its authority over and to regulate the use of said streets, and not its proprietary right to contract for its municipal advantage as such. That St. Louis and the other cities of this state have the power to regulate the speed of trains running along or across their highways has been asserted by this court on numerous occasions, and this is expressly conceded by defendant both in the briefs of its counsel and in the oral argument. This question was thoroughly examined and so decided in *Jackson v. R. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650. In that case, Burgess, J., collates the decisions of this court from an early period down to the promulgation of the opinion in that case, and reference only need be made to that case for them. Counsel earnestly labor to show that there is a distinction between an ordinance regulating the speed of cars in and across the streets, and one requiring the motorman to exercise a vigilant watch for vehicles and pedestrians—especially children—on the track of such street railways, or moving toward it; but it is obvious that both spring from the same power to regulate the use of the streets for the protection of the traveling public, their lives, limbs, and property,

and both alike fall within the recognized domain of a police law. In *Bluedorn v. Ry. Co.*, 108 Mo. 443, 18 S. W. 1104, 32 Am. St. Rep. 615, Judge Black, speaking for this court in banc, said: "Our attention has not been called to any provision of the charter of the city of St. Louis which gives the city power, in terms, to regulate the speed of railway trains; but the charter, among other things, gives the mayor and assembly power to regulate the use of streets; to regulate or prevent the carrying on any business which may be dangerous or detrimental to the public health; to declare, prevent, and abate nuisances on public or private property, and the causes thereof; and to pass all such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures." "It is well to bear in mind that laws and ordinances regulating the speed of railroad trains are police regulations, purely." *Grube v. R. R.*, 98 Mo. 331, 11 S. W. 736, 4 L. R. A. 776, 14 Am. St. Rep. 645; *Knobloch v. R. R.*, 81 Minn. 402, 13 N. W. 106; *Railroad v. Deacon*, 63 Ill. 91; *Thorpe v. R. R.*, 27 Vt. 140, 62 Am. Dec. 625. Indeed, Judge Redfield says: "We should entertain no doubt of the right of the municipal authorities of a city or large town to adopt such an ordinance, without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdiction." 2 Redfield on Railways (5th Ed.) 577, 578.

But it is unnecessary to look for support for a proposition so universally conceded as that ordinances regulating the speed of trains in cities are referable to the police power, and that such regulation is based upon the obvious necessity of compelling those who use powerful and dangerous agencies on the public thoroughfares to be careful that they do not injure others who have an equal right to the use of the highway, and the obvious fact that a train of cars moving slowly can be much more readily stopped, to prevent a collision, than one moving at a rapid speed. On identically the same principle is the ordinance for a vigilant watch based. Since the adoption of electricity and cables as the motive power, the danger to pedestrians and those traveling in vehicles on the streets is greatly multiplied; and it is a wise and salutary provision that requires the motorman in charge of these ponderous and rapidly moving cars to carefully watch that they do not run over pedestrians, old men, women, and children, who have an equal right to the use of the streets, and such an ordinance falls as clearly within the police power as does the speed ordinance. Being, then, the exercise of the police power, the ordinance does not depend upon the acceptance of the street car companies to make it obligatory upon them to obey it, but it is a municipal law enacted by the city in its governmental

capacity, of which all who come within its scope are bound to take notice, and it has the full force and effect of law within the limits of the corporation. *Jackson v. Grand Ave.*, 118 Mo. 218, 219, 24 S. W. 192. Being a police power, it was and is not within the power of the city to contract it away, or to bind itself not to exercise it whenever the public good or exigencies require its exercise. This is so universally recognized that it is unnecessary to refer to precedents to establish it.

But, say counsel, even if this be conceded, the power is coupled with a power to prescribe limited punishment by fine, penalty, or imprisonment for disobedience, only, and no civil liability to any third party injured by a violation of the ordinance can result therefrom. This contention finds support in the decisions in *Fath v. R. Co.*, 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; *Byington v. R. Co.*, 147 Mo. 673, 49 S. W. 876; *Murphy v. Lindell Ry. Co.*, 153 Mo. 252, 54 S. W. 442. All the subsequent cases are bottomed upon the *Fath* Case, in which, although unnecessary to the decision of the case, arguendo it was held "that it is beyond the power of a municipal corporation by its legislative action directly to create 'a civil duty enforceable at common law,' for this is an exercise of the power of sovereignty belonging alone to the state." In *Jackson v. Ry. Co.*, 157 Mo. 635 et seq., 58 S. W. 32, 80 Am. St. Rep. 650, Burgess, J., reviewed all the authorities upon which the doctrine above announced in the *Fath* Case was bottomed, and showed conclusively that those decisions had reference to that class of cases in which private persons sought to avail themselves of a violation of ordinances which the city had passed for its own protection, and for which the city was primarily liable, such as the ordinances requiring owners to remove ice and snow upon the sidewalks adjoining their premises, and ordinances of a similar character, and pointed out that those cases were different from those founded upon the violations of ordinances enacted under the police power for the protection of lives and property, which all cities in this state have the right to pass as police regulations, and which relate primarily to the duty of those whose conduct they regulate for the benefit of persons traveling on the streets, who have a right to rely upon the observance of such ordinances. The line of demarcation is clearly drawn between the two classes of ordinances in the *Jackson* Case, and is abundantly sustained by authority in other states and by the text-writers. Thus in 1 *Shearman & Redfield on Negligence*, § 13, it is said: "The violation of any statutory or valid municipal ordinance established for the benefit of private persons is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence brought by a person belonging to the protected class if the other elements of actionable negligence concur."

In *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47, cited with approval by this court in *Bluedorn v. Ry. Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615, and *Jackson v. Ry. Co.*, 157 Mo. 636, 58 S. W. 32, 80 Am. St. Rep. 650, the distinction was clearly drawn and emphasized, and the authorities throughout the Union collected and distinguished. The opinion in *Jackson v. Ry.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, however, answers the contention of defendant fully on this point. As to the criticism of the opinion in that case as obiter on this proposition, the contrary is the fact. In that case the learned counsel for defendant, in the second paragraph of their brief, made the point that "the petition did not state a cause of action, because it did not show the existence of a civil duty owed by defendant to deceased, and enforceable against it at common law," and there was no allegation of a contract between defendant and the city to comply with the regulations pleaded. *Jackson v. Ry. Co.*, 157 Mo., loc. cit. 624, 58 S. W. 32, 80 Am. St. Rep. 650. Not only was the point fairly and ably presented, but counsel for defendant were right in assuming that the obiter in the *Fath Case* was to be followed, and that, if the street car company in St. Louis could not be held amenable to the police regulations of said city, then no reason existed why railroad companies in other cities should not avail themselves of this exemption for violations of like police regulations, unless, forsooth, they had signified their consent to be amenable thereto. So that counsel were not only justified in making the point, but we would have been wanting in respect to counsel, had we not considered the point and decided it.

It is urged also that until the *Jackson Case* no one had questioned the *Fath Case*, and that this court had followed the latter case in several decisions. This is true, but we duly considered these decisions, and in our opinion they were not in harmony with an unbroken line of decisions, from *Karle v. Ry. Co.*, 55 Mo. 476, down to *Prewitt v. Railroad Co.*, 134 Mo. 615, 36 S. W. 667, in all of which it had been held that the running of a railroad train through the corporate limits of a city in excess of the speed prescribed by ordinance was negligence per se, and a cause of action resulted to any person injured by such violation of the statute. Vide cases cited in *Jackson v. Ry. Co.*, 157 Mo., loc. cit. 641, 58 S. W. 32, 80 Am. St. Rep. 650. *Jackson v. Ry. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, has received the approval of this court in *banc* in *Weller v. Ry. Co.*, 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592, and the principle upon which it stands has been reiterated in *Hutchinson v. Ry. Co.*, 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710, and *Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 65 S. W. 767, and *Cox v. R. Co.* (Mo. Sup.) 74 S. W.

858; and we see no reason for regarding it longer as an open question in this state.

Fath v. Ry. Co., 105 Mo., loc. cit. 545, 16 S. W. 913, 13 L. R. A. 74, and the subsequent cases of *Byington v. Ry. Co.*, 147 Mo. 673, 49 S. W. 876, *Murphy v. Lindell Ry. Co.*, 153 Mo. 253, 54 S. W. 442, *Sanders v. Southern Electric Ry.*, 147 Mo. 411, 48 S. W. 855, and *Holwerson v. St. Louis & Suburban Ry. Co.*, 157 Mo. 245, 57 S. W. 770, 50 L. R. A. 850, which announce the doctrine that no cause of action can arise to a person injured from the violation of such an ordinance as this, should no longer be followed. Since the promulgation of the opinion in *Jackson v. Ry. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, the St. Louis Court of Appeals have followed it in various cases. *Gebhardt v. Transit Co.* (Mo. App.) 71 S. W. 448; *McLain v. St. L. & S. Ry. Co.* (Mo. App.) 73 S. W. 909; *Moore v. St. Louis Transit Co.* (Mo. App.) 75 S. W. 699; *Sepetowski v. Transit Co.* (Mo. App.) 76 S. W. 693.

There was no misjoinder in uniting the several grounds of negligence in one petition. The failure to keep a vigilant watch out for vehicles was not a cause of action arising out of contract, and it was not necessary to prove the company's acceptance of the ordinance.

This brings us to the next insistence of defendant, to wit, that the ordinance exacts a higher degree of diligence and care than the common-law rule of ordinary care, and imposes a harsher one, and for that reason is not in harmony with the general laws of the state, and hence void. This objection to the ordinance in question was urged by the same learned counsel in the St. Louis Court of Appeals in *Sepetowski v. Transit Company*, 76 S. W. 693, 102 Mo. App. 119, but that court held that, "properly construed, it is but declaratory of the common-law duty of corporations operating street railways in populous cities," and that conclusion is in harmony with the decisions of this court. *Riska v. Union Depot R. Co.*, 180 Mo. 168, 79 S. W. 445. It was said by Judge Sherwood in *Lamb v. Ry. Co.*, 147 Mo., loc. cit. 204, 48 S. W. 659, 51 S. W. 81, that although there was no ordinance of the city of Pleasant Hill regulating the speed of engines, and requiring the ringing of the bells on the engines, and although, in his opinion, the 80 rods statute did not apply in such cities: "But while we say this, at the same time we say that, outside of the statute, and under the principles of the common law, a railroad corporation would not perform its full duty of ordinary care unless those employed on a switching engine engaged in its customary avocation should ring its bell, or, if necessary, take any other precaution adapted to the exigency, which, like the mercury in the thermometer, determines to what degree prudence shall rise in order to reach the mark of ordinary care." The same prin-

ciple is enunciated in *Holden v. Missouri Ry. Co.*, 177 Mo. 456, 76 S. W. 973, wherein the rule announced in *Hicks v. Railroad*, 64 Mo., loc. cit. 430, that "in running through towns and cities, and over public crossings, they are expected to be more careful than at other places where not so likely to injure persons or property," is approved, as was the rule announced in *Frick v. Railroad*, 75 Mo., loc. cit. 609, to the effect that "a less degree of vigilance will ordinarily be required between the streets of a town or city than will be required at a street crossing or when running longitudinally in a street." Indeed, so apparent is the duty of the driver or motor-man in charge of cars moving on the rapid transit lines maintained by street car companies to keep a constant and vigilant lookout for persons and vehicles, that a failure to do so would be regarded as negligence, and a failure to exercise ordinary care, in the absence of an ordinance. Certainly such an ordinance is not out of harmony with anything in the Constitution or laws of this state. But learned counsel urge that, if it does not require more than ordinary care, then there is no excuse for its existence. It is a novel argument against the validity of a statute that it conforms to the laws of the state, and requires the same prudence that the general laws of the state exact—particularly so when the charter of the city commands that its ordinances shall be in harmony with the Constitution and laws of the state. We can see no merit in this contention.

Our conclusion is that this ordinance was the exercise of a police power clearly vested in the city for the protection of the lives and property of its citizens on its streets; that it exacts no more than ordinary care, when the conditions and circumstances to which it is applicable are considered, and that a breach of its requirements is negligence; that the acceptance or agreement of the defendant company was not at all necessary to give said ordinance the binding force of a valid municipal law within the limits of the city.

2. A second insistence is that the eighth instruction given in behalf of plaintiff was erroneous. That instruction is in the words following: "(8) The court instructs the jury that the carriage and horses used by the plaintiff at the time of the accident belonged to a livery stable keeper; and if they further believe from the evidence that the driver of the carriage was an employé of the livery stable keeper, and that the plaintiff hired said carriage, horses, and driver from said livery stable keeper, and exercised no control over the movements of said carriage or the handling of said horses, except to give the driver his destination, then the jury are instructed that the driver was not the servant of the plaintiff, and, although they may find from the evidence that the plaintiff's said injury was contributed to by the negli-

gence or want of ordinary care of said driver, without any co-operation on the part of the plaintiff, yet the jury cannot impute such negligence of said driver to the plaintiff; and if they find that the injury was caused both by the negligence of defendant, as explained in the foregoing instructions, and the negligence of said driver, they will yet nevertheless find for the plaintiff." The objection to this instruction is twofold: First, that the driver, in the circumstances detailed in evidence, was the servant of, and under the control of, plaintiff, and therefore the driver's negligence was plaintiff's contributory negligence; second, that it ignores plaintiff's own personal contributory negligence in failing to look out for his own safety, in permitting the driver to drive into obvious danger.

As to the first, counsel for defendant do not insist upon the doctrine of *Thorogood v. Bryan*, 65 English Common Law Reports (8 M. G. & S.) 114, wherein it was ruled "that a passenger upon the vehicle of a common carrier who sustains an injury which is the result of the concurrent negligence of those in charge of such vehicle and third persons is so identified with the former as to be chargeable with their negligence in an action against the latter, and therefore only entitled to recover damages from his former carrier." The doctrine of that case was afterwards repudiated by the Court of Appeal in England in the case of *The Bernina*, 12 L. R. Prob. Div. (1887) 58, and other cases, and by this court in *Becke v. Ry. Co.*, 102 Mo. 548 et seq., 13 S. W. 1053, 9 L. R. A. 157, in which *Brace, C. J.*, reviewed all the English and American decisions on this point. The decision in *Becke v. Ry. Co.* has been repeatedly followed by this court. *Dickson v. Ry. Co.*, 104 Mo. 491, 16 S. W. 381; *O'Rourke v. Lindell Ry. Co.*, 142 Mo. 352, 44 S. W. 254. And such has been the uniform ruling of our courts of appeal. *Hunt v. Railroad*, 14 Mo. App. 160; *Keitel v. Railroad*, 28 Mo. App. 657; *Munger v. Sedalia*, 68 Mo. App. 629; *Profit v. Ry. Co.*, 91 Mo. App. 369. The distinction claimed between the *Becke Case* and this is that the driver in this case was subject to the orders of plaintiff, and if plaintiff had the right to control the driver, and failed to exercise it, he is responsible for the driver's act. It is well that we determine at the outset what relation plaintiff and the driver, *Cavanaugh*, bore to each other. We think it is plain that *Dr. Sluder* contracted with *Wilcox*, the owner of the *Palace Livery Stable*, to transport him to the residence of his patient, on *Westminster avenue*, near *Forty-Fourth street*. In the performance of his part of the contract of conveyance, *Wilcox* sent his carriage and driver. The carriage and horses were in the control of *Wilcox*, through his agent and driver, all the time it was occupied by plaintiff—just as much so as if *Wilcox* himself had driven it—and it is a confusion of legal principles to

say that under such circumstances the relation of master and servant existed between plaintiff and Wilcox, or that of principal and agent. Nor was such relation created between plaintiff and Cavanaugh, Wilcox's driver. The evidence shows that plaintiff ordered the carriage to take him to the house on Westminster, and, when the driver came, simply told him where he was to go, and gave no other directions, and assumed no control over Cavanaugh as to the management of his team, or the route he was to take. This identical question arose in *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583, and the Supreme Court of that state held the relation of master and servant was not created by a mere contract like this for a conveyance. Said the court: "Whether the hack and driver were hired at a public stand or of a private person could make no difference, nor whether the party furnishing them was engaged in the business of a common carrier of passengers or not. It would not do to say that one who buys a passage from New York to Liverpool sustains the relation of master to the officers and crew and owners of the steamer on which he embarks. No more would it do to say that one who buys conveyance for his own person or his family from place to place within the same city, or to an adjoining city, thereby assumes the relation of master to a servant, or liability for his acts uncommanded and uninterfered with by him." The court then proceeds to show that *Thorogood v. Bryan*, upon which the defendant rested in that case, stood upon "indefensible ground"; citing *Little v. Hackett*, 118 U. S. 366-375, 6 Sup. Ct. 391, 29 L. Ed. 652, and many other cases. In *Railroad Company v. Steimbrenner*, 47 N. J. Law, 161, 54 Am. Rep. 126, it appeared that plaintiff hired a coach and horses, with a driver, from one Merkins, to take his family on a particular journey. In the course of the journey, in crossing a railroad track, the coach was struck by a passing train, and the plaintiff was injured. In his action against the company for damages, it was held that the relation of master and servant did not exist between plaintiff and the driver, and that the negligence of the driver co-operating with that of the persons in charge of the train which caused the accident was not imputable to the plaintiff, as contributory negligence, to bar his action; that while a passenger in a hired coach might by words or conduct at the time so encourage a special act of rashness or careless driving as to commit an act of negligence which would bar a recovery, in order to impute contributory negligence to the passenger it must arise from his own conduct, and the negligence of the driver alone, without some co-operating negligence on his part, could not be imputed to the passenger in virtue of the simple act of hiring. Such is the settled doctrine in England. In *Quarman v. Burnett*, 6 M. & W. 489, the defend-

ants were the owners of a carriage, and were accustomed to hire horses and a coachman of a job mistress for a day or a drive, for which the job mistress charged and received a certain sum. The defendants generally had the same horses, and always the same coachman. As a gratuity they gave the coachman two shillings for each drive, and provided him a livery hat and coat. He had driven the defendants one day, and on his return, after the defendants had alighted, the coachman left the horses and carriage unattended. The horses ran off, and ran against the plaintiff's chaise, threw him out, and injured him and damaged the chaise. Plaintiff sued the owners of the carriage, but it was held the driver was not the servant of the owners of the carriage, but of the job mistress, who alone was liable for his negligence. Without citing further authorities, we think the instruction was correct, in advising the jury that the driver in this case was not the servant of Dr. Sluder, so as to make the latter guilty of the driver's contributory negligence, if any.

We have examined with care the long list of cases cited by defendant to sustain its proposition that the demurrer to the evidence should have been sustained on the ground that, while the driver's negligence is not imputable to plaintiff, yet the plaintiff was guilty of negligence in permitting the driver to go upon the track in the face of obvious danger. Without reviewing each of these cases it must suffice to say that each of them contains some element of express sanction by the injured party of the driver's negligent conduct, or some circumstance showing the plaintiff was in a position to see or know the danger to himself or herself, and made no effort to protect herself. In almost every one of them the plaintiff was driving in an open vehicle with the driver in broad daylight, and in nearly all of them the accident occurred at steam railroad crossings, known to the plaintiff to be notoriously dangerous. In no one of them are the facts such as appear in this case. Dr. Sluder was riding in a close carriage on a dark winter night. There was no evidence that the driver was a negligent or reckless driver, and that such a fact was known to Dr. Sluder. On the contrary, the evidence was that the driver was proceeding in a slow trot until he was about to cross Boyle avenue, when he checked his team, and the first knowledge Dr. Sluder had that they had reached the railroad crossing was the click of the tires on the rails, and then, looking through the carriage window to the north, he discovered a car rapidly bearing down on his carriage, and not over 50 feet distant. Almost instantly it struck the carriage and inflicted his injuries. To say that he was guilty of co-operating negligence in sanctioning the want of care of the driver, if, considering the darkness of the night, the failure of the servants of the company to sound the

gong or ring the bell, and the very indifferent light on the car, he was negligent, would be to disregard all the reasons upon which the rule that the negligence of the driver is not to be imputed to the passenger is based. The facts of this case do not bring it within the reasoning of any of the cases which are cited as exceptions to the rule itself. Plaintiff was not outside, with the driver, where he could see and advise the driver as to the crossing. He was not situated so that he could have jumped out of the carriage after discovering his peril on the approach of the car. From the inside of the close carriage he could not even have communicated with the driver, and directed him to stop or to rush his team after he saw the car, or, by the exercise of ordinary care under the conditions then confronting him, could have seen it, in time to have averted his injury. *Lake Shore Co. v. Boyts* (Ind. App.) 45 N. E. 812; *Brickell v. R. R.*, 120 N. Y. 291, 24 N. E. 449, 17 Am. St. Rep. 648. We find no evidence of negligence on the part of the plaintiff which would have justified an instruction driving him to a nonsuit.

As to the instruction 8, it was dealing with one question, to wit, whether the negligence of the driver was imputable to plaintiff, and it was not erroneous; nor was there any error in refusing defendant's instructions which made plaintiff responsible for the driver's negligence. There was no evidence even tending to show any contributory negligence on the part of the plaintiff, and hence it was not error to decline to tender that issue to the jury in any other way than to advise them he was not to be charged with any negligence of the driver, in view of the facts developed on the trial. *East Tenn. R. R. v. Markens*, 88 Ga. 62, 13 S. E. 855, 14 L. R. A. 281.

3. The point is also made that the court erred in permitting plaintiff to testify to his earnings for the corresponding months of the previous year. The evidence on this point is as follows: "Q. What were you earning at that time, doctor? I was earning for the month of December, I think, about \$2,000 to the month. For the months corresponding of the previous year to the time I was disabled, I earned \$3,500." To this counsel for defendant objected. "The Court: Wait a minute, doctor. You have answered the question? Ans. There is no way except by comparing with previous times. Question. Was that an average month? (Objection. No ground stated.) The Court: He can answer. (Exception saved.) That was the best month of the year. December, January, and February always are." It will be observed no objection was made when the question which elicited the answer was asked. No motion was made to strike it out. The only exception saved was to the question, "Was that an average month?" The evidence had previously shown that the doctor was incapacitated to practice his profes-

sion 11½ weeks, and we have heard no reason stated why it was not competent for the physician himself to testify what his actual monthly practice averaged him. It was not guesswork, but actual knowledge, to which he was testifying. It was not remote, but the value of his profession to him for the immediate months during which he was disabled, and we agree with him that the best evidence was the actual earnings of the month in which he was injured.

4. As to his testimony as to the rate of speed at which the car was running, he was competent to testify to what he saw, not as an expert. His judgment may, under the circumstances, have been of little weight; but the objection to it went to its weight, and not its competency. At all events, in view of the actual physical facts not controverted by defendant, its admission is no ground for a reversal of the judgment. He had testified he was familiar with the speed of trains running 20 or 25 miles an hour, and that, in his judgment, it was running about that fast.

We have considered all the propositions advanced for a reversal of the judgment, and, in our opinion, there was no reversible error committed on the trial, and the judgment is affirmed.

BRACE, O. J., and BURGESS, VALLANT, FOX, and LAMM, JJ., concur.

MARSHALL, J. I am unable to concur in all that is said in the majority opinion in this case, and feel that it is my duty to express my reasons therefor, not with any idea that it will do any particular good at this time, but for the purpose of placing myself on record with respect to the main question discussed and decided in this cause. There are many principles of law stated in the majority opinion with which I fully concur, and, for the purpose of clearly defining my attitude in this case, I deem it best at the outset to state wherein I concur and wherein I dissent.

The following principles of law have passed into axioms, and I wish distinctly to be understood as fully agreeing to them. They are as follows: First. I agree that the charter of St. Louis has all the effect of a legislative charter. Second. I agree that under the charter of St. Louis that city has the power to control the use of its streets, to abate nuisances, to regulate the running or speed of railroads inside of the corporate limits, and, under the general welfare clause, to pass such ordinances, not inconsistent with the provisions of the charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, "and to enforce the same by fines and penalties, not exceeding \$500.00, and by forfeitures not exceeding \$1,000.00." Third. I agree that the city cannot appropriate the streets to any

use that will practically deprive the public of the use of the streets. Fourth. I agree that the state may lawfully delegate a portion of its police power to the city, and the city may exercise that power within its corporate limits. Fifth. I agree that the city ordinance under discussion in this case (being section 1760 of the municipal code of St. Louis, commonly known as the "Vigilant Watch Ordinance") is a valid police regulation, and within the power of the city to enact, and, as such, is binding upon all individuals and corporations using the streets, and needs no acceptance by any such persons or corporations to make it binding as a police regulation. Sixth. I agree that the city cannot contract away its police power, or bind itself by contract not to exercise it. Seventh. I admit that there is an irreconcilable conflict between the case of *Karle v. Railroad*, 55 Mo. 476, and the cases following it, and the case of *Fath v. Railroad*, 105 Mo. 545, 16 S. W. 913, 13 L. R. A. 74, and the cases following it, and that for some unexplainable reason these two lines of cases have been running along through the Reports when they could not be reconciled, and when they both depend upon the same principles of law, and cannot logically be distinguished or differentiated. But I do not think any of these matters are at all decisive of the question involved in this case.

On the other hand, I deny: First. That the Legislature of the state could constitutionally delegate to the city power to enact a law that would create a right of civil action between citizens *inter sese*. Second. I deny that the power conferred by the charter of St. Louis upon the city to regulate the use of its streets, to abate nuisances, to regulate the speed of railroads, or the general welfare clause, confers upon the city the right to create such a civil cause of action between citizens *inter sese*. Third. I deny that such a right of action between citizens *inter sese* can arise out of a mere police regulation. Fourth. I deny that even if such a power is conferred by the charter of St. Louis, or if such power can arise out of a mere police regulation, the city of St. Louis has even attempted to exercise such a power. On the contrary, I assert that no such a law has been enacted by the city, and that no intention so to do can be properly gleaned from the vigilant watch ordinance, or from any other ordinance that the city has enacted. Fifth. I deny that the discussion of the question here involved was unnecessary to the decision of the case of *Fath v. Railroad*, 105 Mo. 545, 16 S. W. 913, 13 L. R. A. 74, and assert that, if such discussion was unnecessary to the decision of that case, it is likewise unnecessary to the decision of the case at bar, for the two cases are identical in this respect. Sixth. I deny that the vigilant watch ordinance is simply declaratory of the common law, and assert that, if it is, it adds nothing to the common law, and, moreover,

assert that it is not in the power of the city to pass an ordinance that is simply declaratory of the common law. Seventh. I deny that the cases from other jurisdictions cited in the majority opinion herein, and in *Jackson v. Railroad*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, can be properly considered authority or precedent for the decision of this case, because the laws in such other jurisdictions either expressly permit the delegation by the state of legislative powers to a city, or the state statutes expressly give the right of action to citizens *inter sese*, arising out of a violation of a municipal police regulation, or else such cases were not carefully considered, and are inaccurate, illogical, and unscientific. Moreover, I assert that, under the Constitution and laws of this state and the decisions of this court, the power to make a law that will afford a right of civil action between citizens *inter sese* cannot be delegated to a municipality.

These general principles, and this separation of those things in the majority opinion which I agree to and which I dissent from, reduce the discussion of this case to a narrow compass. The discussion naturally divides itself into three principal considerations, to wit: First. Can the Legislature delegate to a city the power to enact a law that will afford the basis of a civil action between citizens *inter sese*? Second. Can such a right of action arise out of a mere police regulation? And subsidiary to this inquiry, can there be any logical, reasonable, and scientific distinction made between the violation of the vigilant watch ordinance, and a violation of the ordinance requiring citizens to remove ice from the sidewalk in front of their property, or a violation of any other police regulation? Third. If the city of St. Louis has such a power under its charter, has it enacted any such law, or has it simply enacted police regulations, and prescribed penalties for the violation thereof, and are such penalties the sole remedy afforded by such regulations, and have the courts the right to punish the offender in any other manner than is prescribed by such regulations?

1. Can the Legislature delegate to a city the power to enact a law that will afford the basis of a civil action between citizens *inter sese*? Section 1 of article 4 of the Constitution prescribes that "the legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled, 'The General Assembly of the State of Missouri.'" This court, in *Opinion of Supreme Court Judges on Township Organization Law*, 55 Mo. 298, said: "It is admitted, I think, by all, that this power to legislate and enact laws cannot be delegated by the General Assembly to any other body, or, in other words, there can be no statute or law passed without the will of the General Assembly of the state, expressed in the legal form." In *State ex rel. v. Wilcox*, 45 Mo., loc. cit. 461, this court said: "It

is undoubtedly true that, under our form of government, laws must be enacted by the legislative bodies to which the legislative power is committed by the Constitution. The legislators cannot divest themselves of the responsibility of enacting laws by a reference of the question of their passage to their constituents." American & English Enc. of Law (2d Ed.) vol. 6, p. 1020, lays down the doctrine as follows: "To the legislative department of government is confided the authority, under the Constitution or frame of government, to make, alter, or repeal laws. * * * It is a doctrine frequently reiterated by the courts that the functions of the Legislature must be exercised by it alone, and cannot be delegated." The same author says: "The term 'legislative power' means the power or authority, under the Constitution or frame of government, to make, alter, or repeal laws." 18 Am. & Eng. Enc. of Law (2d Ed.) p. 822. "The legislative power is defined as that of one of the three great departments into which the powers of government are distributed—legislative, executive, and judicial—which is concerned with enacting or establishing, and incidentally with repealing, laws." State v. Hyde, 121 Ind. 26, 22 N. E. 644; Evansville v. State, 118 Ind. 441, 21 N. E. 267, 4 L. R. A. 93. This doctrine is so axiomatic in the law of this state that further citation of authority is unnecessary. Section 4151, c. 45, Rev. St. 1899, prescribes that "the common law of England, and all statutes and acts of Parliament made prior to the fourth year of the reign of James I, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force, for the time being, shall be the rule of action and decision in this state, any law, custom or usage to the contrary notwithstanding." Blackstone defines law to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 Chitty's Blackstone, p. 29. In Badgley v. St. Louis, 149 Mo. 122, 50 S. W. 817, this court had before it the validity of the section of the charter of St. Louis which provides that whenever the city shall be liable in an action for damages, by reason of the unauthorized and wrongful acts, or of the negligence, carelessness, and unskillfulness of any person or corporation, and such person or corporation shall be liable to an action on the same account by the party injured, such person shall be joined in the suit against the city for damages, and no judgment shall be rendered against the city unless judgment is also rendered against such person. It was noted in the case that said provision of the charter was not in conflict with any express statute of the state. Yet it was held that the provision of the charter was unconstitutional, because it prescribed a different rule of civil

action in the city of St. Louis from that which obtains in any other part of the state. In St. Louis v. Howard, 119 Mo. 41, 24 S. W. 770, 41 Am. St. Rep. 630, the validity of the provision of the city charter which prohibited the establishment or operation of any stone quarry, brickkiln, soap factory, slaughterhouse, bone or rendering factory within the distance of 300 feet of any dwelling house built or inhabited before such opening, location, or erection, without the consent, in writing, of the owner and occupant or occupants of every such house, was involved. And it was held that the provision as to the consent of the owner or occupant of such house was an unconstitutional delegation of power to the people. In St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, the city ordinance prohibiting the erection of a livery stable on any block without the consent of the owners of one-half of the ground in such block was held to be an unconstitutional delegation of legislative power.

There are two kinds of powers which may be conferred upon a municipality. The first is commonly called a "legislative power," and the second a "police power." The term "legislative power," as so applied to a city, however, means only the power to pass rules and regulations for the government of the municipality, the conduct of its officers, and the conduct of the citizens with respect to the municipality. In no sense does the term "legislative power," when used in reference to a municipality, mean the right to enact a law that will be the rule of civil action between citizens inter sese. The power to regulate the actions of citizens between each other, that may be exercised by the municipality, arises entirely out of the police power, and a right of civil action cannot arise out of a mere police regulation. Thus the power of St. Louis, under its charter, to regulate the use of its streets, to abate nuisances, to regulate the running and speed of railroad cars or other vehicles, or to pass ordinances for the peace, good health, and welfare of the city, is a mere police power; and paragraph 14 of section 26 of article 3 of the city charter gives the city only the power to enforce such regulations by fines and penalties not exceeding \$500, and by forfeitures not exceeding \$1,000, and nowhere confers or attempts to confer upon the city the right to enact a law that will afford the basis of a civil action between citizens inter sese for the violation of such regulations. Thus it is obvious that, under the Constitution and laws of this state, it is beyond the power of the Legislature to delegate to a city the power to create such a right of civil action, and it was clearly beyond the power of the board of freeholders who framed the charter of St. Louis to confer such a power upon the municipal assembly. I deem further discussion of this branch of the case unnecessary.

2. Can such a right of action arise out of a mere police regulation? And subsidiary to this inquiry, can there be any logical, reasonable, and scientific distinction made between a violation of the vigilant watch ordinance and a violation of the ordinance requiring citizens to remove ice from the sidewalk in front of their property, or a violation of any other police regulation? Tiedeman, in his excellent work on State & Federal control of Persons & Property, vol. 1, § 1, says, "The private rights of the individual, apart from a few statutory rights, which, when compared with the whole body of private rights, are insignificant in number, do not rest upon the mandate of municipal law as a source." Blackstone defines the police power to be "the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Blackstone, Com. 162. Tiedeman sums up the power as follows: "It is to be observed, therefore, that the police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil law maxim, 'Sic utere tuo ut alienum non lædas.'" Tiedeman on State, etc., Control, p. 4.

The controlling and underlying principle governing all police regulation is that, in all organized society, certain natural rights must be modified or abridged so that there may not be a conflict between citizens in their intercourse with each other. Inasmuch as no citizen can compel any other citizen to forego the exercise of his natural rights, the power is held to exist in the government to prescribe such regulations as will prevent such conflicts; and such police regulations contemplate a penalty for the violation thereof, and are almost universally accompanied with such penalties. Police regulations are rules which the government prescribes for the conduct of the citizens, and the citizen is answerable to the government for the violation thereof. This power is very different from a legislative power. Under the latter is embraced all the power of the state to prescribe rights and duties of citizens *inter sese*, and to afford remedies to the citizens for all violations of such laws by any other citizen. Under the Constitution of this state, all legislative power is vested in the General Assembly, and cannot be by it delegated to a municipality. Because of the recognized distinction between a mere police regulation and a legislative power, it is held almost universally that the former can be delegated, while the latter cannot. The legislative powers conferred upon municipalities in this state are limited to the right of the municipality to enact rules for the government

of the city, its officers, and of the citizens with respect to the government. Regulations concerning the use of streets; the erection of buildings; the licensing and carrying on of various kinds of business; the abating of nuisances; the opening and operating of stone quarries, slaughterhouses, soap factories, vitriol factories, etc.; the establishment of a system of weights and measures; the manufacturing and sale of articles of food; prohibiting the running of animals at large; regulating the speed of vehicles, and requiring the establishment of signals therefor; prohibiting the construction of wooden buildings; prescribing precautions against fire; providing for the peace, good government, health, and welfare of the city and the citizens thereof—are mere police regulations, and the power to enact the same is usually conferred upon municipalities. But it was never contemplated that a violation of any such regulations should afford a right of a civil action by one person against another. On the contrary, it was not only contemplated, but is expressly provided, in nearly every instance, that the power conferred in this respect upon a municipality, can be enforced only by a fine or forfeiture.

In *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242, this court held that the ordinance of the city of St. Louis which required the owner of the abutting property to remove ice from the sidewalk in front thereof was a mere police regulation, and that a violation thereof afforded no basis for a civil action by the person injured against the abutting owner. But in *Jackson v. Railroad*, 157 Mo., loc. cit. 637, 58 S. W. 32, 80 Am. St. Rep. 650, a distinction was drawn between a police regulation requiring such abutting owner to remove ice from the sidewalk, and a police regulation regulating the speed of railroad trains within the corporate limits. And it was there said that the distinction consisted in this: that it is the duty of the city to keep its sidewalks reasonably safe for travelers, and that it is responsible in damages for failure so to do, and that the city had no power to shift this responsibility upon an abutting owner without his consent, "because in no sense a police regulation," while the regulation of speed of trains within the corporate limits of the city is a police regulation. In other words, the distinction was stated to be that, where the duties enjoined are due to the municipality or public at large, a violation of the police regulation affords no foundation for such a civil action, but that where the police regulation is intended to regulate the action or conduct of persons, citizens, or corporations among themselves, a violation thereof will afford a basis for such an action. I do not think such a distinction can logically or scientifically be drawn. Both such regulations arise out of the police power of the city. The power of the city to compel a property owner to remove ice from the sidewalk in

front of his property derives its force solely from the police power of the city. So the power to regulate the action and conduct of citizens inter sese, so that each may have proper regard for the rights of the other, arises solely from the police power of the city. The principle upon which the liability of a city for failure to remove snow and ice from sidewalks rests is that the snow and ice constitute a nuisance, and that it is the duty of the city to remove nuisances from its streets. The principle upon which speed ordinances or vigilant watch ordinances rests is that trains that are run at a high rate of speed or without proper care amount to a nuisance on the street. The duty to prevent or remove such nuisances rests upon the city. The duty can no more be evaded or shifted in the one case than in the other. Under its police power the city can require the abutting owner to remove the snow and ice from the sidewalk, and can prevent the railroad from running its trains in such manner as to be a nuisance. But the power of the city to punish a violation of such regulations is limited both by the general law and by the charter of the city to a fine or penalty or a forfeiture.

It is worthy of note in this connection that the distinction made in the Jackson Case, supra, between the liability of one person to another for the violation of the ordinance requiring the one to remove ice from the sidewalk, and the violation of the speed ordinances of the city, is said to exist only as to such instances of municipal police regulation. In none of the other respects wherein a city is authorized to enact police regulations is such a distinction made. The same section of the charter which confers upon the city the right to regulate the use of its streets confers upon it, also, all the power it has to enact any other police regulation, and in none of the other instances in which the city is authorized to enact such regulations does the duty provided for rest primarily or at all upon the city, but they all relate to matters concerning the conduct and action of the citizens inter sese, and are enacted purely upon the principles underlying the rule of "*sic utere tuo ut alienum non lædas.*" Thus the city is given power in the same section to regulate the erection of buildings; the carrying on of various kinds of business; the abating of nuisances; the opening and operating of stone quarries, slaughterhouses, soap factories, vitriol factories, etc.; a system of weights and measures; the manufacture and sale of articles of food; the running of animals at large; the erection of wooden buildings; the taking of precautions against fire; and for the peace, good government, health, and welfare of the city and the citizens thereof. None of these are duties or matters devolving upon the city in its corporate capacity. They are all matters which affect the citizens of the city in their relation to each other. And the

city, as a political body, has no other interest in the matter, and no other duty cast upon it, except to control the conduct of the citizens among themselves. All such matters stand exactly upon the same footing and rest exactly upon the same legal principles as the regulating of the speed of railroads or vehicles on the streets or in the city. If the violation of one of such police regulations affords the basis of a civil action by one who is injured by such violation, then the violation of any of them affords the same right. I am totally unable to comprehend upon what rule of construction a legitimate, scientific, and logical distinction can be made between a violation of any such regulation and the violation of an ordinance which requires the abutting owner to remove ice from the sidewalk in front of his premises. In my judgment, no such distinction exists, and, if the violation of one of such police regulations affords a right of action by the person injured, then the violation of any other affords a similar right.

The majority opinion in this case is expressly based upon the proposition that the "vigilant watch ordinance" is a police regulation, and that the city had no power, except its police power, to enact such an ordinance. The doctrine that the violation of the speed ordinances of the city constitutes negligence per se, and affords a right of civil action to the person injured, was first announced in this state in *Karle v. Railroad*, 55 Mo. 476. The subject was not discussed or scientifically considered in that case, and no authority or precedent in the law was cited in support of it. The only thing said about it in that case was in passing upon instructions given by the lower court to that effect, and this court disposed of the whole subject by simply saying: "The three instructions which declared a failure of the defendant to observe the regulations of the city ordinance in relation to the speed of trains, keeping of headlights, and ringing the bell, to be negligence per se were undoubtedly correct. These were violations of an express law, and, of course, amounted to negligence." Thus it will "be observed that the court treated a municipal regulation as an express law," without in any manner discussing the power of the Legislature to delegate to the city the right to enact a law to that effect. The court in that case did not place its decision upon the ground that the ordinance was a police regulation, nor did it attempt to justify the position taken on the ground that a mere police regulation can give rise to a right of civil action. On the contrary, the court assumed, unwarrantably, I believe, that it was within the power of the city to enact a law on that subject, or, otherwise stated, that the city had a legislative power in that respect. *Karle v. Railroad*, supra, was followed by *Wyatt v. Railroad*, 55 Mo. 489, and the ordinance was there also treated as a law passed by competent legislative authority. The law

was not held to be justified by or properly referable to the police power of the city, nor was the subject in hand discussed in that case. The Karle Case was also followed by Norton v. Ittner, 56 Mo. 352, but there was no discussion of the principles involved, further than to say, "Negligence may be asserted, as a matter of law, where there has been a breach of law or a city ordinance, as in Karle v. Railroad, 55 Mo. 476." The rule laid down in the Karle Case was quoted in Stoneman v. Railroad, 58 Mo., loc. cit. 505, but the subject was not discussed, and the validity of such an ordinance was not involved in that case, because the action was brought under the state statute in reference to the killing of animals. The Karle Case was also cited in Doss v. Railroad, 59 Mo., loc. cit. 37, 21 Am. Rep. 371, but not upon the proposition here involved, for there was no such question in that case. The same is true of Meyers v. Railroad, 59 Mo. 230. The Karle Case was also cited in Evans v. Railroad, 62 Mo., loc. cit. 58, but the point here under discussion was not involved in that case, for the reason that the negligence there complained of was a violation of the state statute requiring the ringing of the bell or the sounding of the whistle. The Karle Case was also referred to and cited upon other points in Maher v. Railroad, 64 Mo., loc. cit. 276, but there was no question of the violation of the city ordinance involved in that case, and there was no discussion of that subject in that case. The same is true of Kelly v. Railroad, 70 Mo. 604. The Karle Case was also cited in Zimmerman v. Railroad, 71 Mo., loc. cit. 484, but not upon the point under discussion, and there was no city ordinance involved in that case, but the negligence complained of was a violation of the state statute. The Karle Case was also cited in Yarnall v. Railroad, 75 Mo., loc. cit. 584, but not upon the point here involved, and there was no city ordinance involved in that case, the negligence complained of being common-law negligence. The Karle Case was also cited and followed in Bowman v. Railroad, 85 Mo., loc. cit. 538, but there was no discussion of the subject beyond what was said in the Karle Case, and the question was not otherwise discussed or decided. The Karle Case was also cited in Sullivan v. Railroad, 88 Mo., loc. cit. 183, but that was an action for common-law negligence, and there was no ordinance involved, and the subject therefore was not discussed. The reference in that case was to other principles decided in the Karle Case. Karle v. Railroad was cited and followed in Keim v. Railroad, 90 Mo., loc. cit. 321, 2 S. W. 427, but there was no discussion of the subject, and the ordinance was not attributed to the police power of the city, but, on the contrary, the opinion expressly stated that the ordinance had been accepted by the defendant. The Karle Case was cited in Muehlhausen v. Railroad, 91 Mo. 846, 2 S. W. 315, but upon a different

point from that here involved. There was no city ordinance involved in that case, but the violation of the state statute regulating the running of cars was involved. The Karle Case was also cited in Dunkman v. Railroad, 95 Mo. 244, 4 S. W. 670, but not upon the point here involved, for there was no such question in that case. The same is true of Hudson v. Railroad, 101 Mo., loc. cit. 29, 14 S. W. 15. The Karle Case was also cited and followed in Hanlon v. Railroad, 104 Mo., loc. cit. 387, 16 S. W. 234, but the subject was not discussed further than to say, "It is well settled that a failure to observe such reasonable and wholesome requirements constitutes negligence in itself;" and Karle v. Railroad, supra, and Murray v. Railroad, 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601, were cited as authority for the proposition. In the last case cited the only thing said of the ordinance was, "The evidence shows beyond all controversy that there was no flagman at the crossing, and this violation of the ordinance was negligence per se." The Karle Case was also cited in Spillane v. Railroad, 111 Mo. 565, 20 S. W. 293, but not upon the question here involved, and that question was not discussed in that case. The Karle Case was also cited in Prewitt v. Eddy, 115 Mo., loc. cit. 302, 21 S. W. 742, but not upon the point here involved; that case going off on the humanitarian doctrine. The Karle Case was also cited in Mitchell v. Bradstreet Co., 116 Mo. 247, 22 S. W. 353, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592, but not upon the point here involved, for there was no such ordinance involved in that case. The Karle Case was also cited and followed in Gratiot v. Railroad, 116 Mo., loc. cit. 463, 21 S. W. 1094, 16 L. R. A. 189, but there was no further discussion of the subject than to say that a violation of the city ordinance regulating the speed of trains is negligence per se. The Karle Case was also cited in Moore v. Railroad, 126 Mo., loc. cit. 278, 29 S. W. 9, but not upon the point here involved, for there was no such ordinance involved in that case. The same is true of Scott-Force Hat Co. v. Hombs, 127 Mo. 403, 30 S. W. 183. Karle v. Railroad, supra, was also cited in Lloyd v. Railroad, 128 Mo., loc. cit. 607, 29 S. W. 153, 31 S. W. 110, but the negligence charged in that case was a violation of the state statute requiring the bell to be rung or the whistle sounded, and no such ordinance was involved. In Erwin v. Railroad, 96 Mo. 295, 9 S. W. 579, the whole discussion of the subject consisted of this: "A violation of the ordinance is, as we have often said, negligence per se. Keim v. Railroad, 90 Mo. 314, 2 S. W. 427, and cases cited." In Schlereth v. Railroad, 96 Mo., loc. cit. 515, 10 S. W. 66, the question was not discussed further than to say, "And it is an established law of this court that the violation of municipal ordinances which regulates the rate of speed, etc., of trains, is negligence per se. Keim v. Railroad, 90 Mo. 314, 2 S. W. 427,

and cases cited." In *Grube v. Railroad*, 99 Mo., loc. cit. 336, 11 S. W. 737, 4 L. R. A. 776, 14 Am. St. Rep. 645, it was said: "There can be no doubt that the state has power to regulate the speed of trains and to make other reasonable regulations for the movement of locomotives and trains of cars in cities, towns, and other crowded places. Such regulations concern domestic government, and are but the exercise of the police power of the state. *Railroad v. Deacon*, 63 Ill. 91; *Railroad v. State*, 51 Miss. 137; *Knobloch v. Railroad* (Minn.) 18 N. W. 106; *Tiedeman on Lim. of Police Power*, § 194. The power to enact such regulations may be delegated to cities and towns. *Merz v. Railroad*, 88 Mo. 672, 1 S. W. 382." In *Kelny v. Railroad*, 101 Mo., loc. cit. 77, 13 S. W. 809, 8 L. R. A. 783, the subject was disposed of by saying that "the violation of municipal ordinances which regulate the speed of trains is negligence per se, and that every person on the public street in the municipality has the right to presume that the railroad will obey such ordinances." *Drain v. Railroad*, 86 Mo. 574, was based upon a violation of a city ordinance, but the validity of such ordinance was not discussed or decided. The questions discussed by this court in that case were contributory negligence and excessive damages. *Dickson v. Railroad*, 104 Mo. 491, 16 S. W. 381, was based partly upon a violation of a city ordinance. No question appears to have been raised as to the validity of the ordinance. But on the contrary, its validity seems to have been assumed by counsel (104 Mo., loc. cit. 498, 16 S. W. 381), and the only remark made by this court on the subject was, "The failure to station a watchman at the crossing, when required by ordinance, has been held negligence per se" (104 Mo., loc. cit. 501, 16 S. W. 383).

I have thus reviewed at painful length the cases in which the doctrine under discussion has been referred to by this court prior to the case of *Jackson v. Railroad*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650. The doctrine was first announced in the *Karle Case*, and, as above pointed out, it was there treated as an "express law," which it was assumed, without argument, that the city had the power to enact. No attempt was made in that case to place it upon the police power of a city. That case is the foundation for the whole doctrine, and the subsequent cases reviewed herein have simply followed it. In fact counsel do not seem to have questioned the power of a city to enact a law on the subject. Like the court, they seem to have assumed that the city possessed such a legislative power. It is only lately that counsel and the courts have awakened to an appreciation of the principles involved in the question. The first case in which the suggestion was made that the city had the right, under its police power, to enact such a regulation, was *Merz v. Rail-*

road, 88 Mo. 672, 1 S. W. 382. This was followed by a like suggestion in *Grube v. Railroad*, 98 Mo. 330, 11 S. W. 736, 4 L. R. A. 776, 14 Am. St. Rep. 645. In *Prewitt v. Railroad*, 134 Mo. 615, 36 S. W. 669, the matter was disposed of by saying: "The power of a city, under its charter, to pass such an ordinance, as a police regulation, is not questioned." Prior to the *Merz Case* it seems to have been assumed that such regulations were enacted in pursuance to a legislative power. In *Grube v. Railroad*, 98 Mo., loc. cit. 336, 11 S. W. 736, 4 L. R. A. 776, 14 Am. St. Rep. 645, it was expressly held that the state had the power to enact laws regulating the speed of trains, etc. It was said in that case that such regulations are an exercise of the police powers of the state, and that such police powers may be delegated to cities and towns, and *Merz v. Railroad*, 88 Mo. 672, 1 S. W. 382, was cited as authority. In the *Merz Case*, 2 *Dillon on Municipal Corporations*, § 713, and 2 *Redfield on Railways*, 577, 578, were quoted. Both of said authors, in the sections quoted, were discussing the police powers of a city to regulate the running of trains, and both stated the universally admitted doctrine that a city had such a police power. But neither author, in the sections quoted, was dealing with the question here in hand. The question of whether a civil right of action could arise out of a violation of such a police regulation was not discussed or considered by those authors in the sections quoted. In *Grube v. Railroad* the same condition existed, and it was assumed without discussion that the violation of a police regulation would afford a civil right of action between citizens inter sese. In *Bluedorn v. Railroad*, 108 Mo., loc. cit. 444, 18 S. W. 1105, 32 Am. St. Rep. 615, this court, in speaking of such city ordinances, said, "It is well to bear in mind that laws and ordinances regulating the speed of railroad trains are police regulations, purely," and cited *Grube v. Railroad*, supra; *Knobloch v. Railroad*, 31 Minn. 402, 18 N. W. 106, *Railroad v. Deacon*, 63 Ill. 91, *Thorpe v. Railroad*, 27 Vt. 140, 62 Am. Dec. 625, *Dillon on Municipal Corporations*, and *Redfield on Railways*, above referred to, and held that a city had the authority, under its general police power, to enact such ordinances. There was no other or scientific discussion of the proposition in that case.

Thus it appears that prior to the decision in *Jackson v. Railroad*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, there had been no attempt made to discuss or decide the question here involved, upon legal principles. The *Jackson Case* was decided by *Division No. 2* of this court. *Hutchinson v. Railroad*, 161 Mo. 255, 61 S. W. 635, 852, 84 Am. St. Rep. 710, was decided by this court in banc prior to the decision of the *Jackson Case*, and it was held that a violation of the city ordinance limiting the rate of speed of a railroad train "was negligence per se, and if it

was the cause of the accident, the defendant was liable, unless the deceased contributed to the result by her own negligence. This proposition has been so often and so elaborately discussed and demonstrated, and, as a rule of law, so often declared, by this court, that it is now only necessary to restate it and cite some of the decisions in which it is discussed." And some of the cases hereinbefore digested, beginning with *Karle v. Railroad*, supra, and ending with *Prewitt v. Railroad*, 134 Mo. 615, 38 S. W. 667, were cited, but there was no discussion of the principles according to scientific rules in any of those cases. *Jackson v. Railroad*, supra, was cited in *Weller v. Railroad*, 164 Mo., loc. cit. 205, 64 S. W. 148, 86 Am. St. Rep. 592, and the matter was disposed of in a single sentence as follows: "It is asserted that plaintiff's first instruction is erroneous, in that it based her right of recovery upon the violation of an ordinance of the city, but as the right to maintain this action upon that ground was recognized by this court in its former opinion, and the question expressly ruled adverse to that contention in the recent cases of *Jackson v. Railroad*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, and *Hutchinson v. Railroad*, 161 Mo. 248, 61 S. W. 635, 852, 84 Am. St. Rep. 710, it is unnecessary to say more upon that subject." *Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 65 S. W. 737, was an action for damages caused by falling into an elevator shaft on the inside of the defendant's place of business. There was a city ordinance relied on, which required elevator shafts to be provided with a railing or guard to prevent persons from falling into them. The validity of the ordinance was not discussed further than to say, "The validity of the ordinance in question, the obligation of the defendant to obey it, and his liability for failure so to do, are propositions of law clearly established." 165 Mo., loc. cit. 541, 65 S. W. 740. But it was said that the provisions of the ordinance had not been read in evidence, and were therefore not properly in the case, and that "the whole ordinance might have been dropped out of this case entirely without affecting its merits."

Thus it appears that neither prior to the *Jackson Case* nor subsequent thereto, until this case, was there any attempt made in any of the cases cited to discuss the question whether the violation of a municipal police regulation can afford a basis for a civil action between citizens inter sese. And this case is the first case in which that question has been attempted to be discussed upon legal principles by this court in banc. For this reason I do not consider that the cases referred to have settled the proposition.

At the outset of this discussion, therefore, I desire to repeat that, in my judgment, a municipality has complete power to enact police regulations limiting the speed and regulating the running of trains, as also to

enact other police regulations necessary to the peace, health, and welfare of its citizens, and the like. But I think the power of a city under its police power is limited to punishing a violation of such police regulations by fines, forfeiture, and imprisonment, and cannot afford the basis of a right of civil action between citizens among themselves. I have already indicated that, in my judgment, no valid distinction can be made between police regulations, no matter what their purpose may be, and that the distinction made in *Jackson v. Railroad*, supra, between ordinances requiring abutting owners to remove ice from the sidewalk, and ordinances regulating the speed of trains or the manner of running trains, is untenable, for both derive their whole power and authority from the police power. For this reason, I think that the decision in *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242, and in *Jackson v. Railroad*, supra, cannot both stand together. The decision in *Jackson v. Railroad* is based upon the case of *Karle v. Railroad*, and the other cases hereinbefore analyzed in this state, and upon the doctrine laid down in 2 *Dillon on Municipal Corporations* (4th Ed.) 713, and 2 *Redfield on Railways* (5th Ed.) 578, which, as above pointed out, relate only to the police power of a city to regulate the speed of trains, and do not pertain to the question of whether such ordinances can afford a basis of civil action between citizens inter sese, and upon the following cases in other jurisdictions, to wit: *Knobloch v. Railroad*, 31 Minn. 402, 18 N. W. 106; *Railroad v. Deacon*, 63 Ill. 91; *Thorpe v. Railroad*, 27 Vt. 140, 62 Am. Dec. 625; *Railroad v. Haggerty*, 67 Ill. 113; *Mason v. Shawneetown*, 77 Ill. 533; *Hayes v. Railroad*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Sherman & Redfield on Negligence* (5th Ed.) § 13; *Railroad v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; *Railroad v. Curtis*, 87 Ga. 416, 13 S. E. 757; *Railroad v. Stebbing*, 62 Md. 504; *Correll v. Railroad*, 38 Iowa, 120, 18 Am. Rep. 22; *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Railroad v. Reidy*, 66 Ill. 45; *Railroad v. Voelker*, 129 Ill. 540, 22 N. E. 20; *Piper v. Railroad (Wis.)* 48 N. W. 165; *Railroad v. Terry*, 42 Tex. 451; *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47; *Wright v. Railroad*, 4 Allen, 283; and the majority opinion in the case at bar cites no other authority upon the proposition.

A short review of the cases cited from other jurisdictions, and the doctrine stated by the text-writers referred to, is necessary and pertinent to the inquiry at hand:

Knobloch v. Railroad, 31 Minn. 402, 18 N. W. 106, was an action for damages for killing the plaintiff's cow. One of the acts of negligence relied on was a violation of a city ordinance limiting the rate of speed to four miles an hour. The power of a city to enact such an ordinance, and the question whether it was a law enacted under legislative power,

or simply a police regulation, was not discussed or decided. The defense was solely that the ordinance was void because it was unreasonable and in restraint of trade. No other point was made or decided in that case. The case therefore is of no value in determining the question here under discussion.

Railroad v. Deacon, 63 Ill. 91, was an action for damages for killing the plaintiff's horse. An ordinance limiting the speed of railroad trains, and providing a penalty for the violation thereof, was relied on. The defense was that the ordinance impaired the contract of the defendant's charter. It was held that the charter was accepted subject to the power of the city to pass police regulations, that the Legislature had granted power to cities and towns to pass ordinances regulating the speed of cars, and that the state statute provided that railroad companies should be liable for all damages sustained by running trains at a greater rate of speed than is permitted by the ordinance of any city or town. Thus it appears that in that state there is a state statute which makes a violation of a city speed ordinance a cause of civil action in favor of the party injured. There was no other discussion or decision of the question in that case.

Hayes v. Railroad, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410, was an action for damages for failure to fence the railroad tracks as required by the city ordinance. The court pointed out that there was a general law of the state which conferred upon cities the power to require railroads to fence their tracks, and make a company failing to comply with the city ordinance liable for all damages to cattle and horses, "in like manner and extent as under the general laws of this state relative to the fencing of railroads," and also a state statute which requires a railroad to keep a flagman at street crossings, and to provide protection against injury to persons and property. In discussing the question whether an action for a violation of such regulations would lie in favor of a third person, the Supreme Court of the United States referred to *Atkinson v. Newcastle Waterworks Co.*, L. R. 2 Exch. Div. 441, which qualifies the broad doctrine stated by Lord Campbell in *Couch v. Steele*, 3 E. & B. 402, and accepts the limited doctrine announced by Lord Cairns, "That whether such an action can be maintained must depend on the purview of the Legislature in the particular statute, and the language which they have here employed," and held that, under the state statute and the city ordinance passed pursuant to legislative authority, such a right of action would lie in that case. It is manifest that that case cannot be taken as affording support to the *Jackson Case*, or the majority opinion herein, for there is no such state statute in this state as there is in Illinois, and under the decisions in this state the Legislature cannot delegate its legislative power to a city. In this connection it is

proper to note that in *Couch v. Steele*, 3 E. & B. 402, Lord Campbell held that an act of Parliament which made it a duty of a shipowner to keep a proper supply of medicine on hand, and provided a specific punishment for the breach of that duty, afforded also a private right of action for such breach.

Atkinson v. Newcastle Waterworks Co., L. R. 2 Exch. Div. 441, was an action for damages against the waterworks company for a breach of its statutory duty to keep its pipes at all times charged with water at a sufficient pressure to extinguish fire, in consequence of which the plaintiff's premises were burned. The statute prescribed a penalty for a violation of the duty imposed, and it was held that its liability was limited to that penalty, and that the statute gave no right of action to the plaintiff; and the rule laid down by Lord Campbell in *Couch v. Steele* was questioned, distinguished, and declared to be no authority in that case.

Thorpe v. Railroad, 27 Vt. 140, 62 Am. Dec. 625, was an action for damages for killing stock, based upon a violation of a state statute requiring the railroad to have cattle guards at all crossings. The right of the Legislature to enact such a law was discussed, but there was no such ordinance involved in the case, and no discussion as to the power of the municipality to enact an ordinance that would confer a right of private action.

Railroad v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320, as far as can be gleaned from the report, was a common-law action of negligence. On the trial the plaintiff introduced a city ordinance requiring the railroad to keep a flagman at certain crossings, and making it his duty to prevent the running of the trains at a greater rate of speed than four miles an hour, and to protect the lives of persons passing along the street. The ordinance provided also a punishment for the engineer to run at a greater rate of speed. There was also a state statute which made it the duty of the railroad, when approaching a street crossing, to ring the bell and to check the speed of the train, so as to be able to stop the same if there should be anything on the crossing. The court treated the state statute and the city ordinance as of equal dignity, and said they were both referable to the general police powers, but added "that the style of the charge touching the city ordinance was too absolute and unconditional. In treating them as law, without any reference to the jury of the question of fact as to whether there were such ordinances before them, and perhaps as to whether they were reasonable." Thus it appears that the power of a city to enact such ordinances was assumed, but that the violation of them would not be treated as negligence per se, and that the defendant might show that such ordinances were unreasonable. This case is of little value in this state.

Railroad v. Curtis, 87 Ga. 416, 13 S. E. 757, was an action for damages arising out of

a violation of an ordinance which prohibited the train, engine, or cars to obstruct any street longer than five minutes. The plaintiff's horse, having become frightened at the engine, was injured. The trial court instructed that a violation of the ordinance would be negligence, as a matter of law, and the Supreme Court said such a violation was negligence per se. But the question was not further discussed either upon principle or precedent.

In *Railroad v. Stebbing*, 62 Md. 504, the trial court instructed the jury that a violation of a municipal speed ordinance was negligence per se. The Supreme Court held this instruction to be error, and, without discussing the power of a city to enact such ordinances, said: "This ordinance is general, and is for the protection of the public generally; but the neglect or disregard of the general duty thereby imposed for the protection of every one can never become the foundation of a mere personal right of action until the individual complaining is shown to have been placed in position that gave him particular occasion and right to insist upon the performance of the duty to himself personally. The duty being due to the public, composed of individual persons, each person specially injured by the breach of duty thus imposed becomes entitled to compensation for such injury. But he must have been in position to entitle him to the protection that the ordinance was designed to afford, and he must show how and under what circumstances the duty arose to him personally, and how it was violated by the negligence of the defendant to his injury." And it was held that the instruction given for the plaintiff was a mere abstraction, and therefore well calculated to mislead, in that it did not require the jury to find any causal connection between the negligent act in running the train in violation of the ordinance and the injury complained of. And the court said: "In the abstract form in which the instruction was given, and from the terms employed, the jury may have inferred that the defendant was liable merely because of the fact that the train was running at forbidden speed, and that such liability was wholly irrespective of any contributory negligence on the part of the plaintiff." And accordingly the judgment was reversed for this error.

Correll v. Railroad, 38 Iowa, 120, 18 Am. Rep. 22, was an action for damages resulting from a violation of a municipal speed ordinance. It was distinctly stated that "the power of the city of Vinton to pass the ordinance is not questioned." The court held that there was no difference between a state statute and a municipal ordinance, and that a violation of the duty imposed by either afforded a right of civil action.

In *Pennsylvania Co. v. Hensell*, 70 Ind. 569, 36 Am. Rep. 188, it was said: "The force and effect of a city ordinance regulating the run-

ning and management of railroad trains within the limits of the city, upon a civil action against a railroad company, like the case before us, is a question upon which the authorities are not entirely in accord. But the weight of authority is overwhelmingly to the effect that the failure to perform any duty imposed, either by a statute or an ordinance, is negligence per se, and entitles the injured party to recover, provided the failure was a proximate cause of the injury." And *Thompson on Negligence*, 419, 1232, and *Shearman & Redfield on Negligence*, §§ 484, 485, were cited as authority. The judgment in that case was reversed because of the failure to show that the violation of the ordinance was the proximate cause of the injury.

Railroad v. Reidy, 66 Ill. 43, was an action under the state statute which made railroad companies liable for all damages done to stock in any incorporated city where the train was running at a greater rate of speed than the ordinance of the city permitted. As this depended upon the state law, and not upon the validity of a city ordinance, it might be unnecessary to say more of the case, but it is noteworthy that such a violation is treated as only prima facie evidence of negligence, and not as negligence per se.

Mason v. Shawneetown, 77 Ill. 533, involved the right of a city to pass an ordinance authorizing the issuance of bonds for the purpose of constructing a levee, and hence is not applicable to the case at bar. It may be noted, however, that the doctrine is laid down in Illinois that, where a city is authorized to pass an ordinance, such ordinance has the same force and effect as a law passed by the Legislature. In other words, the doctrine does not seem to obtain in that state that legislative powers cannot be delegated to a city.

In *Railroad v. Voelker*, 129 Ill. 540, 22 N. E. 20, a recovery was asked for the violation of the statutory duty to ring the bell and sound the whistle, and for a violation of the city speed ordinance, and for common-law negligence. The power of a city to enact such ordinances was not discussed, but the case turned upon the contributory negligence of the plaintiff. Aside from this, as heretofore noted, there is a state statute in Illinois which authorizes a private right of action where a municipal speed ordinance or police regulation governing the running of the railroad trains has been violated.

Piper v. Railroad (Wis.) 46 N. W. 163, was an action for damages based upon the violation of a state statute regulating the speed of railway trains in cities, and therefore throws no light upon the question here involved, and that question was not discussed in that case.

Railroad v. Terry, 42 Tex. 451, was an action for damages for killing the plaintiff's mare and colt in consequence of running at a greater rate of speed than was permitted

by the city ordinance. The right of the city to enact such an ordinance was not raised, discussed, or decided in that case.

In *Wright v. Railroad*, 4 Allen, loc. cit. 290, it was held that in a common-law action for negligence a city ordinance regulating the speed of a street car might be introduced in evidence as bearing upon the question of the use of due care by the defendant. But the power of a city to enact such an ordinance was not discussed and the ordinance was not counted upon in that case.

Bott v. Pratt, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47, was an action for damages caused to the plaintiff by the defendant leaving his horse unhitched in the street in violation of a city ordinance. The court treated the ordinance as of the same nature and dignity as a state statute, and held that "the analogy between statutes and the ordinances of cities is, of course, not to be extended beyond the proper limits of municipal jurisdiction. But in matters properly of local cognizance it is necessary and eminently proper that such powers should be committed to the municipality, to be exercised through ordinances which shall be subordinate to and consistent with the general laws, or in proper cases be authorized to take their place"—and therefore held that a municipal regulation is as binding within the city as any statute or law of the state, and that the Legislature may authorize the city to pass such a law or may pass it itself. This case also draws the same distinction between ordinances regulating the speed of railroads, or other police regulations, and ordinances requiring the owner of the abutting property to remove ice from the sidewalk, as is drawn in the *Jackson Case*. It is only necessary to say that no such legislative powers can in this state be delegated to a city.

Siemers v. Eisen, 54 Cal. 418, was an action for damages caused by the defendant leaving his horse unhitched on the street, in consequence of which the horse ran away and injured the plaintiff. A city ordinance forbidding the leaving of animals unhitched on the streets was offered in evidence, although the action was not based upon the ordinance. The court discussed the question of the liability of an individual to another for a failure to perform a duty imposed upon him by statute or through legal authority, and held such a violation to be negligence in the eye of the law, but the power of a city to enact such an ordinance was not discussed or decided—much less the power of a city by ordinance to make evidence of a common or statutory liability.

The foregoing analysis of the cases cited in support of the doctrine laid down in the *Jackson Case* and in the case at bar fully demonstrates that such cases arose in states where it is held competent for the Legislature to delegate legislative powers to municipalities, or where there was a state statute expressly conferring a right of action upon

one citizen against another for a violation of any municipal regulation, or where it was assumed, without discussion, that a private right of action could arise from a violation of a municipal police regulation, equally as well as where such right of action was expressly conferred by state statute or by the common law. Therefore the prior decisions in this state and in other jurisdictions do not accurately, logically, and scientifically discuss or decide the questions here involved.

The text-writers have attempted to state a safe legal principle upon which to rest the decisions on this subject. Thompson on Negligence (2d Ed.) vol. 1, § 12, in discussing this question, says: "In considering this question, it is therefore to be kept in mind that there are many statutes and municipal ordinances which forbid the doing of acts, the violation of which does not necessarily give any right of action in favor of private individuals; the offense being against the public, to be redressed in the one case in a criminal prosecution, or in an action brought in behalf of the state by the Attorney General, and in the other by a prosecution in a municipal court. And it may be stated as a general proposition, though there may be difficulty in some cases in applying it, that the violation of a statute or municipal ordinance is not of itself a cause of action grounded upon negligence, in favor of an individual, unless the statute or ordinance was designed to prevent such injuries as that suffered by the individual claiming the damages, and often not then; the question depending upon judicial theories and surmises." The learned author then points out that, although the statute or ordinance may prohibit the doing of an act, to the end of promoting the public safety, such legislation is not exclusive, but that it may be simply declaratory of the common law, and that it is only exclusive where the Legislature creates the right or imposes the duty and gives a remedy, in which event, that remedy alone must be pursued. The same author, in section 4510, vol. 4, cited the rule laid down by this court in *Blue-dorn v. Railroad*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615, that the violation of a municipal speed ordinance is negligence *per se*, but does not undertake to discuss the question on legal principles. As heretofore pointed out, *Dillon on Municipal Corporations*, § 713, and *Redfield on Railways*, p. 578, discuss only the power of a city to enact a police speed ordinance, but do not discuss the question here involved. *Shearman & Redfield on Negligence* (5th Ed.) § 13, draws no distinction between a violation of a state statute and a municipal regulation, and advocates the doctrine that they afford a right of action to the citizen injured against the offender, whether the statute or ordinance gives such a right, or simply imposes a penalty by way of a fine for its violation, but points out that while this rule obtains in Georgia, Indiana, Missouri, Wisconsin, Min-

nesota, and Colorado, and such violation is in these states treated as negligence per se, it is held in New York and Pennsylvania that such violation of a statute or ordinance is not negligence, as a matter of common law, but "only some evidence of negligence," and concludes that it is wrong to instruct the jury that mere proof of such negligence entitles the plaintiff to recover, or, in other words, that it is not negligence per se, but only prima facie evidence. The author, however, does not discuss the power of a city to create such a private right of action, any more than to say that, if the statute or city ordinance was established for the benefit of private persons, it would afford such a right of action. Cooley on Torts (2d Ed.) p. 784, is frequently misquoted as supporting the doctrine stated in the Jackson Case and in the case at bar. An examination of the discussion by that author, beginning on page 780 and extending to page 790, discloses, however, that he was speaking of a violation of a state law, and not of a city ordinance, and that he did not consider the question of the power of a city to create such a private right of action under its police power. The language employed by the author which has been misapplied is: "If the duty imposed is obviously meant to be a duty to the public, and also to individuals, and the penalty is made payable to the state or to an informer, the right of an individual injured to maintain an action on the case for a breach of the duty owing to him will be unquestionable." This language was employed in the paragraph in which it is stated that, "where the statute imposes a new duty where none exists before, and gives a specific remedy for its violation, the presumption is that this remedy was meant to be exclusive, and the party complaining of the breach is confined to it." The author also points out that if a remedy exists at common law, and a new remedy is given by statute, and there are no negative words in the statute indicating that the new remedy is to be exclusive, the presumption is that it was intended to be cumulative, and the party injured may proceed either under the common law or under the statute.

The foregoing review of the cases in this state and of the adjudications in other states clearly shows that the distinction made in the Jackson Case between the right of one person to maintain a civil action against another for a violation of an ordinance requiring the removal of ice from the sidewalk, and for the violation of a speed ordinance, or such an ordinance as that under consideration in this case, cannot be logically maintained upon legal principles. The power of a city to enact both classes of such ordinances arises out of the police power of the city alone. But it is said in the Jackson Case that inasmuch as it is the duty of a city to keep its sidewalks in a reasonably safe condition for the public to travel there-

on, and inasmuch as the city cannot shift this responsibility to the abutting owner or to any one else, therefore there is a difference between a violation of an ordinance requiring the abutting owner to remove ice, and an ordinary police speed ordinance, in that in the former case no right of action is conferred upon third persons, while in the latter case such a right is conferred. It is manifest to my mind that the duty of the city is the same in both instances, and that the purpose of the ordinance is the same in both instances. Permitting the ice to remain on the sidewalk is a nuisance on the public highway. So, also, permitting a railroad or a citizen to travel at such a rate of speed on the highway as to endanger the safety of other persons thereon is a nuisance. The liability of the city is the same in both cases. Its liability arises solely from its failure to remove a nuisance from the highway, or from its permitting citizens to create a nuisance on the highway. In the one instance the nuisance is created by an act of God. In the other instance it is created by the citizen. And the liability of the city arises solely out of its obligation to keep its highways free of nuisances. The city cannot shift this responsibility in either case, and can shift it as much in the one case as in the other. It has frequently been held that under its police power the city can compel the abutting owner to remove the ice and snow from the sidewalk. So, also, the city can prevent railroad trains from running on its highways, or from so running as to be a nuisance. The underlying principle in both instances is the preservation of the safety of the citizens in using the highway. I am therefore clearly of the opinion that there can be no accurate, logical, or scientific distinction drawn between such ordinances, and therefore that this court must either recede from its opinion in the Norton Case, or from the opinion in the Jackson Case.

This brings me to a consideration of the other line of cases above referred to, which have run along through the Reports of this state at the same time with the cases hereinbefore analyzed. This line of cases consists of *Fath v. Railroad*, 105 Mo. 545, 16 S. W. 913, 13 L. R. A. 74; *Senn v. Railroad*, 108 Mo. 152, 18 S. W. 1007; *Moran v. Pullman, etc., Co.*, 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543; *Sanders v. Railroad*, 147 Mo. 411, 48 S. W. 855; *Murphy v. Railroad*, 153 Mo. 253, 54 S. W. 442; *Holwerson v. Railroad*, 157 Mo. 245, 57 S. W. 770, 50 L. R. A. 850. And these decisions in this state are in harmony with the decisions in other jurisdictions. *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Railroad v. Ervin*, 89 Pa. 71, 83 Am. Rep. 726; *Kirby v. Boylston Ass'n*, 14 Gray, 249, 74 Am. Dec. 682; *Flynn v. Canton Co.*, 40 Md. 812, 17 Am. Rep. 603; *Jenks v. Williams*, 115 Mass. 217; *Vandyke v. Cincinnati*, 1

Disn. 532; *Knuppel v. Knickerbocker Ice Co.*, 87 N. Y. 488; *Moore v. Gadsden*, 93 N. Y. 12; *Connor v. Electric Traction Co.*, 173 Pa. 602, 34 Atl. 238; *Railroad v. Dalton* (Ky.) 43 S. W. 431; *Railroad v. Wood* (Ky.) 52 S. W. 796; *Atkinson v. Newcastle, etc., Co.*, L. R. 2 Exch. Div. 441; *Taylor v. Railroad*, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457.

In *Fath v. Railroad*, *supra*, the question of the power of a city to create "a civil duty enforceable at common law" was first discussed scientifically in this state, and it was there said that, although the subject had been incidentally touched upon in several instances, the validity of the ordinance had never been adjudicated by this court. And it was there pointed out that, upon principle and precedent, such a duty could not be created by a mere police regulation, but that the city had power under its police powers to create an obligation on the part of its citizen to perform certain of the duties which rested upon the city, and to enforce the performance of such duties by fines, forfeitures, and imprisonment, but could not create a right of civil action among citizens inter sese for the violation of an ordinance, and that it was only in cases where the defendant had made a contract with the city, for a valuable consideration, to be bound by such regulations, that a civil liability could arise. It was pointed out exhaustively that such was the weight of authority in England and America. The subsequent cases above referred to in this state have followed and amplified the doctrine there laid down. But it was said in the *Jackson Case*, and is said in the majority opinion in this case, that the discussion of the subject in the *Fath Case* was obiter, because in that case it appeared that the defendant had accepted or agreed to be bound by the provisions of the ordinance. It is also said in the *Jackson Case* and in the majority opinion in this case that the *Rhode Island*, *Pennsylvania*, *Maryland*, and *Massachusetts* cases above cited are not decisive of the question here involved, and belong to the same class of cases to which *Norton v. St. Louis*, *supra*, belongs, and that they were all cases of violation of a city ordinance requiring the removal of ice and snow from the sidewalk. As hereinbefore pointed out, if the discussion of the subject in *Fath v. Railroad* was obiter, the discussion of the subject in this case is likewise obiter, because in both instances the defendant had accepted or agreed to be bound by the provisions of the ordinance. But whatever may be said on the question of obiter, the fact remains that the legal principles and precedents referred to and set out in those cases must be considered in the final settlement of this case. Those principles have been fully stated in the *Fath Case*, and the cases before cited which follow it, so that an exhaustive review of those cases is not here necessary. In view, however, of what was said in the *Jackson Case* and is said in this case as to

the adjudications in other jurisdictions upon this subject, it is necessary to briefly analyze these decisions:

Taylor v. Railroad, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457, was an action for damages against an abutting owner, arising out of a violation of a city ordinance requiring such owner to remove ice and snow from the sidewalk. The opinion was written by Judge Cooley, and he said that the plaintiff claimed that the duty imposed was for the benefit of persons using the sidewalk, and inured to each citizen injured, and referred to the fact that the plaintiff relied upon the English case of *Couch v. Steele*, 3 E. & B. 402. The learned judge, however, followed the later English case of *Atkinson v. Waterworks Co.*, L. R. 2 Exch. Div. 441, and said that, in order to entitle the plaintiff to recover, it must appear that the duty imposed was to individuals rather than to the whole public of the city, for, if it was only a public duty, "it cannot be pretended that a private action can be maintained for a breach thereof. A breach of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages." It was then pointed out that the duty enjoined was to the whole public, and not to individuals, and it was said: "If the duty to keep sidewalks free from obstructions is a duty to individual travelers desiring to use it, it is as much broken when the walk is wholly obstructed as when it is capable of use, but is dangerous, and an action will as much lie by one who is compelled to go around an obstruction as one who slips and falls in a dangerous place. Moreover, as the lot owner is required to keep the walk free from all nuisances, an individual traveler, who can maintain the proposition that this is a duty to him, must be entitled to bring suit whenever the existence of a nuisance diminishes either the comfort or the safety of the use of the walk by him. This view of the obligation of the lot owner would add greatly to his common-law liabilities, and it is not easy to draw the line which should definitely limit and confine his liabilities." It was accordingly held that only a public duty was enjoined, and that a right of private action could not arise out of a violation of the duty.

In *Knuppel v. Knickerbocker Ice Co.*, 84 N. Y. 488, it was pointed out that in the earlier New York cases it had been held that a violation of a city speed ordinance was negligence per se, and afforded a right of action to the person injured against the person violating the ordinance, but that the later cases in that state had overruled that doctrine, and held that the violation of such an ordinance is "some evidence of negligence," and therefore such a violation of such an ordinance did not afford a right of civil action.

Moore v. Gadsden, 93 N. Y. 12, was an action for damages against an abutting owner

for failure to remove snow and ice from the sidewalk as required by the city ordinance. The court said, "The ordinance of the city is a police regulation, but is not of itself sufficient to give a cause of action to the party injured by the act in violation of its terms."

Connor v. Electric Traction Co., 173 Pa. 602, 34 Atl. 238, was an action for damages arising out of a violation of a city ordinance regulating the running of street cars. It was contended that a violation of the ordinance was negligence per se, but the Supreme Court said: "Failure to comply with the provisions of such an ordinance is not necessarily negligence per se. It is merely evidence of negligence."

Jenks v. Williams, 115 Mass. 217, was a bill in equity to enjoin the owner from constructing or maintaining bow windows or other projections into the street contrary to the city ordinance, in consequence of which the plaintiff's adjoining property was diminished in value. It was held that the ordinance was intended for the benefit of the public, and conferred no distinct rights on individual citizens or owners of property, and that a private action would not lie for the violation of the ordinance.

Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502, was an action for damages arising out of the violation of a municipal ordinance requiring the abutting owner to remove any snow and ice from the sidewalk. The subject is discussed with such clearness and force by Chief Justice Durfee that the following excerpt therefrom is justified. He said: "The plaintiffs base their right to maintain this action on the authority of cases which they claim hold that where a person is required by statute to do an act, and neglects to do it, any person specially injured by the neglect is entitled to recover his damages in an action on the case if no other remedy is given, and that, too, even when the statute imposes a penalty for its violation. *Couch v. Steele*, 3 E. & B. 402, 411; *Gen. Steam Nav. Co. v. Morrison*, 13 C. B. N. S. 581, 594; *Caswell v. Worth*, 5 E. & B. 849; *Atkinson v. New Castle, etc., Co.*, L. R. Exch. 404; *Aldrich v. Howard*, 7 R. I. 199. It has been doubted, however, whether the cases go so far as is claimed. This doubt is expressed in *Flynn v. Canton Co. of Baltimore*, 40 Md. 812, 17 Am. Rep. 603, and in that case the attempt is made to confine the liability to cases in which the neglected duty is prescribed for the benefit of particular persons, or of a particular class of persons, or in consideration of some emolument or privilege conferred or provision made for its performance, and to show that it does not extend to a duty imposed without consideration, and for the benefit of the public at large; the only liability for the neglect of such a duty being the penalty prescribed. And this view is supported by strong, if not irrefutable, authority. *Hickok v. Trustees of*

Plattsburg, 16 N. Y., note on page 161; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Biglow v. Inhabitants of Randolph*, 14 Gray, 541; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434. But even supposing the liability is not subject to any such qualification, then, inasmuch as the neglected duty was not enjoined by statute, but by a municipal ordinance, the question arises whether in this respect an ordinance is as effectual as a statute. There are many things forbidden by ordinance which are nuisances or torts, and actionable as such at common law. The question does not relate to them. The defendant has not done anything injurious to others which she was forbidden to do. She has simply left undone something beneficial to others which she was required to do under a penalty in case of default. The thing required was not obligatory upon her at common law. It was a duty newly created by ordinance, which, but for the ordinance, she might have omitted with entire impunity. The question is whether a person neglecting such a duty is subject not only to the penalty prescribed, but also to a civil action in favor of the person specially injured by the neglect. If the liability exists, it is quite a formidable one. A fall on the ice is often serious in its consequences. The damages resulting from it may amount to thousands of dollars. And under the ordinance the liability, if it exists, may be visited either upon the owner or the occupant of the abutting premises, or upon any person having the care of them. And further, if the liability exists under the ordinance in question, it exists, *pari ratione*, under every ordinance prescribing a similar duty. To hold that it exists is therefore to recognize, outside the Legislature, a legislative power, as between individuals, which, though indirectly exercised, is nevertheless in a high degree delicate and important. This we ought not to do, unless upon principle or precedent our duty to do it is clear, for we do not suppose that the creation of new civil liabilities between individuals was any part of the object for which the power to enact ordinances was granted. In some of the cases the origin of the liability upon a statutory duty is ascribed to the statute of Westminster II, c. 50; 2 Inst. 485, 486. See *Couch v. Steele*, 3 E. & B. 402, 411; *Aldrich v. Howard*, 7 R. I. 199, 214. This chapter, however, relates only to statutes. It does not extend to municipal ordinances. But even if the liability has its origin in the common law, we do not find that it has ever been held to extend to a neglect of duty enjoined simply by a municipal ordinance, and we think there are reasons, apparent from what we have already said, why it should not extend to it. The power to enact ordinances is granted for particular local purposes. It includes or is coupled with a power to prescribe limited punishments by fine, penalty, or imprisonment for disobedience. No power is given to annex any civil liberty.

The power, being delegated, should be strictly construed. It would seem, therefore, that the mere neglect of a duty prescribed in the exercise of such a power should not be held to create, as a legal consequence, a liability which, within the power, could not be directly imposed." It will be observed that the court discussed the whole subject of the power of a city to enact such police regulations, and of the right of citizens to maintain an action for the violation thereof. No distinction is made in the discussion between municipal ordinances requiring the abutting owner to remove ice and snow from the sidewalk, and municipal ordinances regulating the use of streets or the running of trains, or the driving of vehicles on the streets. And the difference is pointed out between ordinances which are intended for the benefit of the whole community, or of all persons composing the community, and ordinances which are passed for the benefit of particular persons, or a particular class of persons, or in consideration of some emolument or privilege conferred. It is obvious that speed ordinances or ordinances like the vigilant watch ordinance are passed as much for the benefit of the whole public as are ordinances for the removal of ice and snow from the sidewalk, and that neither class of ordinances can accurately be said to have been passed for the benefit of particular persons or classes of persons.

Railroad v. Ervin, 89 Pa. 71, 33 Am. Rep. 726, was an action for damages growing out of a failure of the railroad company to obey a municipal ordinance which required it to place a cap-log eight inches high on the side of the wharf or passageway, in consequence of which the plaintiff's horse and cart fell into the river and were lost. The court held that no right of action was conferred in favor of the plaintiff by the ordinance, and that, as no right of action at common law existed, the plaintiff was not entitled to recover. Speaking of such ordinances, the court said: "Would disobedience of this regulation of itself subject the company to such charge and action? This question would seem almost to answer itself, for, if it be affirmed, then may civil duties and civil remedies be given or taken away by ordinance—a power as yet quite beyond the reach of municipal legislation. The national or state Legislature may do this, for it is the supreme power, and, as such, can make that immoral which was before indifferent, and that neglect which was before prudence, but the city of Philadelphia has no such power. Its ordinances are but police regulations enforceable by penalties recoverable by actions of debt or otherwise, as may be prescribed, but, if not so enforced, they come to nothing. An ordinance may forbid the maintenance by my neighbor of a cess-pool upon his premises, and it may, by penalty, compel him to abate it; but, whether it does so or not, I may, if I am damaged

thereby, have my common-law action against him, but if I am not damaged I am without remedy. In this the ordinance neither helps nor hinders. This is a matter well settled by *Spencer, J.*, in the case of *Vandyke v. City of Cincinnati*, 1 Disn. 532: "Thus, I conclude, then, that the ordinance imposed upon Harrison a public duty alone, which can only be enforced by a penalty prescribed, a nonperformance of which does not subject him to a civil action at the suit of the person injured." In arriving at this conclusion the learned justice uses the argument I have thought proper to adopt; that is, an ordinance cannot create a civil duty enforceable at common law. For, if a city council has power so to do—if it has the power to create such an obligation, it must also have the power to restrict it; in other words, to prescribe the sole consequence arising therefrom; but it will, we apprehend, be conceded that a power like the one here indicated is wholly beyond the provisions of such a body. There are, indeed, cases where such ordinances have been received in evidence in common-law actions for negligence, but they are generally such as enter into the case itself, or enforce a common-law duty."

The case of *Vandyke v. Cincinnati*, 1 Disn. 532, referred to in the case last analyzed, discusses the question here involved, and holds that a civil right of action cannot arise out of such an ordinance, saying: "The effect of this would be to invest a municipal corporation with the highest attribute of sovereignty—that of creating, limiting, and directing the most important rights and interests of individuals in the community, and dictating their relation to each other; a power that no Legislature, under our Constitution, can depute to or confer upon another. I conclude, then, that the ordinance imposed upon Harbeson a duty to the public alone, which can only be enforced by the penalty prescribed, and the nonperformance of which does not subject him to a civil action at the suit of a private person."

Kirby v. Boylston Market Co., 14 Gray, 249, 74 Am. Dec. 682, was an action for damages for personal injury received by the plaintiff from falling on the sidewalk in front of the plaintiff's market house in Boston. It was held that individuals who sustain injuries from nuisances created or obstructions unlawfully placed by another person in the public highway may maintain an action against him to recover compensation therefor, independent of any statute or ordinance, but that an abutting owner cannot be made liable to a personal action by the party injured because of the failure to obey a municipal ordinance requiring such abutting owner to remove ice and snow from the sidewalk, and that the person violating such ordinance is subject to prosecution under the ordinance alone.

Railroad v. Dalton (Ky.) 43 S. W. 431, was an action for damages, based partly upon a

violation of a municipal speed ordinance. The court reviewed the prior decisions in that state which held that a violation of such a speed ordinance could not afford a civil right of action, and which further held that such ordinances were not competent evidence of common-law negligence, and also reviewed some of the decisions in other states, and said: "Without attempting to harmonize these apparently conflicting authorities, the true rule seems to us to be that announced by the superior court. There can be no recovery of damages in this state against railroad companies in cases of this kind, except because of negligence. This is a question of fact to be established by proof. Negligence cannot be fastened on the carrier by some local police regulation. Punishment may be imposed for violation of such ordinances, but in civil suits there are well-defined methods of establishing the facts which authorize a recovery, and we cannot depart from this method without doing violence to well-settled principles." And speaking of such ordinances being used as evidence of common-law negligence, the court said, "It would seem clear that the introduction of the ordinance could serve no purpose save almost necessarily to mislead the jury."

Railroad v. Wood (Ky.) 52 S. W. 796, was an action for damages for the killing of plaintiff's horse. The action was based upon a violation of a city ordinance limiting the speed of the train. The court said: "In our opinion, the court erred in admitting the ordinance in evidence. It was essential, in order to recover, that the negligence of the appellant be established independent of the fact that the ordinance prohibited the running of trains through the streets of the city at a greater rate of speed than twelve miles an hour. This is no longer an open question in Kentucky, as it was adjudged in *Railroad v. Dalton*, 48 S. W. 431, that such an ordinance is not admissible as evidence upon the trial of a case like the one under consideration, and is misleading and prejudicial to the rights of the defendant. To the same effect is *Dalfinger v. Fishback*, 12 Bush, 474."

Flynn v. Canton Co., 40 Md. 312, 17 Am. Rep. 603, was an action for damages growing out of a violation of a municipal ordinance requiring the abutting owner to remove ice from the sidewalk. The court reviewed the former decisions in that state, and also reviewed at length the cases of *Couch v. Steele*, 3 E. B. 402, and *Atkinson v. Waterworks Co.*, L. R. 2 Exch. Div. 441, and pointed out the difference between a law which is enacted for the benefit of particular individuals or a particular class of individuals (e. g., the act of Parliament requiring shipowners to furnish a sufficient supply of medicine, which was involved in *Couch v. Steele*, supra) and a law that was enacted for the benefit of the

whole community, such as was involved in *Atkinson v. Waterworks Co.*, supra, and held that a civil right of action inures to the individual damaged by the violation of the first class, but that such a right of action does not inure to any individual in the second class, and the violation of such a law can only be punishable by fine and penalty. I believe that this is the true distinction as to state laws, and I further believe that, under the Constitution and decisions in this state, the power to enact such laws is vested solely in the Legislature, and that the delegation to a municipality of a police power does not confer upon it the right to create a right of civil action, but that this right is limited to forbidding such acts or offenses, and to punishing them by fine, forfeiture, and imprisonment. This view is clearly within the rule laid down by Lord Cairns in *Atkinson v. Waterworks Co.*, supra, where he said: "But I must venture, with great respect to the learned judges who decided that case, and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell justify the broad, general proposition that appears to have been there laid down—that, where a statutory duty is created, any person who can show that he has sustained injuries from the nonperformance of that duty can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must to a great extent depend on the purview of the Legislature in the particular statute, and the language which they have there employed." This doctrine, read in connection with the doctrine which obtains in this state, that the legislative power cannot be delegated to a municipality, in my judgment, solves the question under discussion here. If a violation of mere police regulations of a city can confer a right of action among citizens *inter sese*, the result would be that a citizen in a city would have a right of action against another citizen of the city, while a resident of any part of the state outside of such city would not have a right of action against another resident of such part of the state for the neglect of a duty that resulted in the same character of injury to the other person. This would make the law different in a city from what it is in the country. The law would not be uniform throughout the state, and hence, under the decision in *Badgley v. St. Louis*, supra, such city law would be unconstitutional. Again, if a city has the power to create such a right of action among citizens, it has the right to prescribe how much the person injured by its violation shall recover from the offender. Under such a power St. Louis might provide for a recovery of \$10,000, Kansas City for a recovery of \$5,000, and Cedar City for a recovery of \$25,000. So that the law would be different in the several cities of the state, and outside of the cities the resident of the country would

have no such law for his protection. Laws cannot be so localized or so different in the different parts of the state.

3. If the city has such a power under its charter, has it enacted any such law, or has it simply enacted police regulations, and prescribed penalties for the violation thereof, and are such penalties the sole remedy afforded by this regulation, and have the courts the right to punish the offender in any other manner than is prescribed by such regulation?

The vigilant watch ordinance, here involved, is one of the 12 provisions contained in section 1670, art. 6, c. 23, of the municipal code of St. Louis. Section 1772 of the same article provides that any person, corporation, company, etc., violating or failing to comply with any of the provisions of that article, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$5, nor more than \$500. Bearing in mind the provisions of paragraph 14 of section 26 of article 3 of the city charter, which limits the right of the city to enforce the police regulation it may enact by fines and penalties not exceeding \$500, and by forfeitures not exceeding \$1,000, and bearing in mind the penalty prescribed by section 1772, aforesaid, the question here involved must be solved. It is perfectly obvious that, in enacting the vigilant watch ordinance, or regulation, the municipal assembly was proceeding under the power conferred by the charter aforesaid, and that it was simply attempting to pass a general police regulation that would regulate the duty of all persons, corporations, and companies, with respect to the whole body of citizens, and was not undertaking to pass any ordinance that would inure to the benefit of any particular individual or any particular class of individuals. In other words, the city was exercising its delegated police power, and did not, and did not attempt to, create any right of civil action between citizens inter sese, but intended that any person violating any of the police regulations contemplated by said article should be guilty of a misdemeanor, and upon conviction be fined not less than \$5 nor more than \$500. In my judgment, no other penalty or liability can attach to or arise out of a violation of such ordinance. From time immemorial the general and better rule of law has been that where a new duty is imposed, and the act imposing it prescribes a specific punishment for its violation, no other punishment can be inflicted therefor; and the courts have no power to enlarge, alter, or change the punishment prescribed. *King v. Marriott*, 4 Modern Rep. 144, was an indictment against the defendant for keeping an alehouse without a license. The statute prescribed that no person should keep an alehouse, but such who shall be admitted thereto, under a penalty of three days' imprisonment without bail, and not to be discharged without giving a recognizance, with two sure-

ties, to do so no more. It was objected that an indictment would not lie because the offense was not a common-law offense, but a new duty imposed by statute, and that the statute prescribed the offense should be prosecuted by information, and that an indictment was not provided by the statute. It was there said, "Now, where a law makes an offense, and points out the method of prosecution, it must be punished according to such method, and not otherwise;" and accordingly the indictment was quashed. The same ruling was made in *Stevens v. Watson*, 1 Salk. 45; *Rex v. Pensax*, 1 Bar K. B. 127; and *Rex v. Wright*, 1 Burr. 544. In *Hartley v. Hooker*, Cowper, 524, it was held that "wherever a new offense is created by statute, and a special jurisdiction out of the course of common law is prescribed, that special jurisdiction must be strictly followed, or all the proceedings will be a nullity." *Sutherland on Statutory Construction*, § 208, lays down the rule that "when a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the lawgiver, it will not be presumed that he intended that it should extend further than is expressed, and humanity would require that it should be so limited." *Sedgwick's Statutory & Constitutional Law* (2d Ed.) p. 341, says: "Where a precise remedy for the violation of a right is provided by statute, it often becomes a matter of interest to know whether the statutory remedy is the only one that can be had, or whether it is to be regarded as merely cumulative; the party aggrieved having also a right to resort to his redress for the injury sustained at common law or independent of the statute. In regard to this we have already noticed the rule that where a statute does not vest a right in the person, but only prohibits the doing of some act under a penalty, in such a case the party violating the statute is liable to the penalty only; but, where a right of property is vested by virtue of the statute, it may be vindicated by the common law, unless the statute confines the remedy to the penalty." The same author, at page 343, says: "But on the other hand, it is a rule of great importance, and frequently acted upon, that where, by a statute, a new right is given and a specific remedy provided, or a new power and also the means of executing it are provided by the statute, the power can be executed and the right vindicated in no other way than that prescribed by statute." *Endlich on Interpretation of Statutes*, § 465, says: "If the statute which creates the obligation, whether public or private, provides in the same section or passage a specific means of procedure for enforcing it, no other course than that provided for can be resorted to for that purpose."

Smith on the Modern Law of Municipal Corporations, vol. 1, § 547, thus states the rule: "If the manner of enforcing ordi-

nances is prescribed by statute or charter it is a cardinal rule that no other method can be resorted to." And in support of the text the author cites *Ewbanks v. President*, 36 Ill. 177; *King v. President*, 3 Ill. 305; *Israel v. President*, 2 Ill. 280; *Weeks v. Forman*, 16 N. J. Law, 237; *Williamson v. Commonwealth*, 4 B. Mon. 146; *State v. Zeigler*, 32 N. J. Law, 262; *Hart v. Mayor, etc.*, 9 Wend. 571, 24 Am. Dec. 165; *Mayor v. Murphy*, 40 N. J. Law, 145; *City Council v. Ashley Phosphate Co.*, 34 S. C. 541, 13 S. E. 845; *Santa Cruz v. Railroad*, 56 Cal. 143. This is the rule that has obtained in this state ever since the case of *Riddick v. Governor*, 1 Mo. 147, was decided. In that case it was said: "It is an uncontrovertible maxim of law that a statute imposing a penalty for a new-created offense or for a breach of duty, and defining the particular mode in which and before what tribunal the penalty shall be recoverable, must be strictly pursued." The court then pointed out that the act under consideration imposed a new duty upon sheriffs, and prescribed a penalty for its violation, and the method to be pursued to impose such penalty, and the tribunal to try the cause, and said: "We are at once led to the conclusion that they—the lawmakers—intended to provide specifically an adequate remedy for the neglect of each particular duty thereby created, and a different construction would subject the sheriff to a liability which we cannot reasonably suppose he ever intended to incur." This rule was followed in *Ellis v. Whitlock*, 10 Mo. 781; *State v. Canton*, 43 Mo. 51; *Moore v. White*, 45 Mo. 206; *Parish v. Railroad*, 63 Mo., loc. cit. 286; *Railroad v. Railroad*, 149 Mo., loc. cit. 253, 50 S. W. 829; *Fusz v. Spaunhorst*, 67 Mo., loc. cit. 264.

The first canon of construction of a statutory law is that "an affirmative enactment of a new rule implies a negative of whatever is not included or is different, and, if by the language used a thing is limited to be done in the particular form or manner, it includes a negative that it shall not be done otherwise." *Ex parte Joffee*, 46 Mo. App. 360; *Sutherland, St. Const.* § 140; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Cooley's Const. Lim.* pp. 78, 79, 93, 94. To the same effect is *Elliott on Railroads*, § 711. The same rule obtains in other jurisdictions. In *City of Rochester v. Campbell*, 123 N. Y., loc. cit. 414, 25 N. E. 939, 10 L. R. A. 393, 20 Am. St. Rep. 760, the Court of Appeals said: "It is a familiar rule in the construction of statutes that, where a new right is created or a new duty imposed by statute, if a remedy be given by the same statute for its violation or nonperformance the remedy given is exclusive." *Am. & Eng. Enc. of Law* (2d Ed.) vol. 26, p. 658, thus states the rule: "It is a well-settled rule of law that penal statutes are to be construed strictly. This rule is said to be founded on the tenderness of the law for the rights of individuals, and on

the plain principle that the power of punishment is vested in the Legislature, not in the judicial department. * * * The rule under consideration applies not only to the statutes which impose as a punishment any penalties, pecuniary or otherwise, or forfeiture of money or other property, or of vested rights, or provide for the recovery of damages beyond just compensation to the party injured, whether such penalties, forfeitures, or damages are to be enforced and recovered at the suit of the state or of the private individual." The same author, at page 671, says: "A statute instituting a new remedy for an existing right does not take away a pre-existing remedy without express words or necessary implication. A new remedy is cumulative, and either may be pursued. But when a statute gives a right or remedy which did not exist at common law, and provides a specific method of enforcing it, the mode of procedure provided by the statute is exclusive, and must be strictly pursued."

To my mind the city ordinance (section 1670) which regulates the speed of cars, and includes what is called the "Vigilant Watch Ordinance," imposes a new duty outside of the requirement of the common law, and is much more stringent than the common law. It cannot, therefore, be said that the vigilant watch ordinance is simply declaratory of the common law, and therefore affords an additional remedy to that afforded by the common law. The ordinance is a penal ordinance creating new duties of a general nature, applicable to all of the citizens of St. Louis, and not intended for the benefit of any particular individual or particular class of individuals. The ordinance prescribes the only penalty which the charter of St. Louis authorizes the municipal assembly to provide for the violation thereof. There is nothing in the letter, the spirit, or the context of the ordinance which furnishes any color to the claim that the city intended to confer a private right of civil action for a violation of it. It is strictly and truly a police regulation, intended for the government of street railroads in their relation to the city and to the whole body of citizens, and carries with it its own punishment for the violation of it. The courts cannot vary, enlarge, extend, modify, or in any manner change the specific penalty prescribed by the ordinance for the violation thereof.

For the foregoing reasons, I am unable to concur in the majority opinion in respect to the matters herein discussed. It is a matter of sincere regret to me in every instance when I feel compelled to disagree with my brother judges upon questions of law. I have great respect for the doctrine of stare decisis, but I have greater respect for the fundamental principles of law; and, where no property rights are concerned, I think error never can become right, however long it may have existed and been followed. The

principles of law are founded upon the truest sense of right and wrong, and error is incompatible with right. As herein indicated, I believe this is the first time the questions herein discussed have been thoroughly considered on legal principles and according to the science of law in this state. And because the opinion in this case will foreclose further discussion of those questions, at any rate during the time I will have the honor to be a member of this court, I have felt constrained, once for all, to examine at such great length, and with all the care and skill I possess, the authorities and decisions bearing on this question, and to announce my conviction that the rule laid down by the majority opinion in this case will enlarge the rights of municipalities and of citizens inter sese, and produce much litigation that is wholly beyond the contemplation of the common law and the statutes of this state.

With the greatest respect and best feeling for my brother judges who have reached a different conclusion, I express the foregoing as my deep-seated conviction of the right concerning the questions discussed.

ROBBINS v. BOULWARE.

(Supreme Court of Missouri, Division No. 2.
June 20, 1905.)

1. HOMESTEAD — WIDOW'S RIGHTS—SALE OF FREE FOR DECEASED HUSBAND'S DEBTS.

The fee of the homestead of a widow subject to her right is liable to sale by order of the probate court for payment of debts of the deceased husband.

2. ESTATES OF DECEDENTS—PROCEEDINGS OF PROBATE COURT—SALE OF LAND—PETITION—AFFIDAVIT.

Though the statute requires that a petition for the sale of lands of a decedent for payment of debts be verified by affidavit, the absence thereof is a mere irregularity, and, the parties interested being in court by due process, the irregularity does not render the proceedings void, or subject to an attack collaterally.

3. SAME—PROCESS—PUBLICATION OF NOTICE.

Rev. St. 1879, § 148, requiring notice of proceedings for the sale of land of a decedent for payment of debts to be published four weeks in some newspaper before the term of court, does not require the publication for the four weeks immediately preceding the term of court.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1405.]

4. SAME — ADMINISTRATOR'S SALE — NOTICE—INSUFFICIENT NOTICE — JUDGMENT — COLLATERAL ATTACK.

Though only twenty-two days' notice was given of an administrator's sale, when the statute required four weeks' notice, the probate court having found, in its order of sale, that the notice had been published for four weeks, it could not be attacked collaterally because of insufficiency of the notice.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1449-1454, 1554.]

5. SAME—AFFIDAVIT OF PUBLICATION—SUFFICIENCY—COLLATERAL ATTACK.

The probate court, in an order for the sale of lands of a decedent, having found that

due publication had been made of the notice of the sale, the order was not subject to collateral attack, though the proof of publication was made by the publishers as a firm.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1449-1454, 1554.]

6. ADMINISTRATOR'S SALE—DELAY IN APPLICATION.

Where the first administration on an estate was by a son of deceased, who made no application to sell the real estate for payment of debts, and after his removal and the placing of the estate in the hands of the public administrator the widow immediately proceeded to have the land set off as a homestead, which was done, and it remained in her possession up to the time of her death, though an application by the public administrator to sell the land subject to the homestead was not made until 11 years after decedent's death, an heir could not complain on the delay in the application, in an ejectment suit brought 25 years thereafter.

Appeal from Circuit Court, Clark County; E. R. McKee, Judge.

Ejectment by Anna B. Robbins against M. Q. Boulware. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Appellant has filed an abstract of the entire record in this cause. In the brief, however, there is no detailed statement as to the contents of the abstract, but we find, after a careful consideration of the record, and a verification of it, that the respondent has made a fair statement of the general outlines of this cause, and with some modifications we have adopted it.

This is an action in ejectment, brought by plaintiff, now appellant, against the defendant, now respondent, to recover five-eighths interest in and to 49½ acres in the north-west quarter of section fifteen (15), township sixty-three (63) north, range six (6) west, situate in Clark county, Mo. It is admitted and agreed by counsel: That the common source of title is William N. Brown. That he died on the 31st day of December, 1877, intestate, seised of the land, and that he left as his heirs at law his children, Newton A. Brown, Daniel E. Brown, Henry B. Brown, Rhoda Davis, Nettie Bash, Minnie Barclay, and Anna B. Robbins. That he left his widow, who died July 26, 1891. That \$100 is the reasonable rental value of the premises per year. That the defendant has been in the possession of this real estate since March 1, 1896. William N. Brown, the common source of title, died intestate December 31, 1877, leaving surviving him his widow, Mary A. Brown, and appellant and other heirs at law. That thereafter, at the May term, 1878, of the probate court of Clark county, Mo., Henry D. Brown was duly appointed administrator of said estate, gave bond, and entered upon the discharge of his duties as such up to the February term, 1888, of said court, when, upon the application to said court by A. D. Lewis, a creditor of said estate, by petition, upon due notice to said Henry D. Brown, such proceedings were had in said court that letters heretofore granted to him were by the said court revoked on account of

his failure to discharge his duties as such administrator and for failure to pay off the legal demands allowed against said estate. That thereafter, and on November 30, 1888, no one of kin appearing to administer, the probate court of Clark county, Mo., duly appointed Henry C. Schaffer, public administrator of said county, to take charge of and administer said estate. On application of Mary A. Brown, widow, at the November term, 1888, of said probate court, by petition, such proceedings were had in said court that at the February term, 1889, the whole of said real estate was set off to her as her homestead herein, which she occupied as such up to the date of her death, which occurred July 26, 1891. Henry C. Schaffer, public administrator in charge of said estate, on December 1, 1888, filed his petition praying for the sale of said real estate, subject to the homestead rights of the widow therein, and on the 24th day of December, 1888, at the November term of said court, an order of publication was directed and ordered by said court notifying all parties interested that at the next February term, 1889, of said court, and on the first day of said term, being the second Monday in February, 1889, and the 11th day of said month, an order would be made to sell the whole or such part as may be necessary to pay the debts of said estate unless the contrary be shown. At said February term, 1889, the order of sale was duly made by an order of record in said probate court. That thereafter the said administrator, after having the same appraised by three disinterested persons at the price of \$300, as shown by said appraisement, in pursuance of the terms of said order, and at the May term of said court, after having advertised the same, sold said land at public vendue, and E. H. Connable, being the highest and best bidder therefor, became the purchaser thereof, and same was duly sold to him for the sum of \$400. The sale was duly reported to the court, and said sale was approved, and deed regular on the face of it, containing all the necessary statutory averments, ordered made to him for said real estate, which was done May 25, 1889. On the 7th day of December, 1895, the said E. H. Connable, for a valuable consideration, executed, acknowledged, and delivered to respondent, M. Q. Boulware, a deed for said premises, and respondent has had possession thereof, according to the admission in the record, since March 1, 1896. This presents in a general way what was done in respect to the sale of this land. As to the defects disclosed by the record in the petition, and insufficiency of the publication of notice of application for sale and notice of sale, and the proof of publication, we will fully treat of them during the course of the opinion. This case was, by agreement, tried before the court, no instructions asked or given by either party, and the finding and judgment was for respondent and against the appellant, and the latter brings

this case here for review by appeal from the judgment of the lower court.

Berkheimer & Dawson, for appellant. T. L. Montgomery and W. M. Boulware, for respondent.

FOX, J. (after stating the facts). Numerous errors are assigned by appellant as grounds for the reversal of this judgment. The legal propositions submitted to us for consideration by learned counsel for appellant may thus be briefly stated: (1) It is insisted that the land in controversy, being the homestead of the widow, was not subject to sale under the order of sale by the probate court during the lifetime of the widow. (2) That the sale of the real estate by the administrator was void, for the reason that the truth of the allegations of the petition was not properly verified by affidavit of the administrator. (3) That the probate court did not acquire jurisdiction of the persons interested in said land by reason of the insufficiency of the notice of publication and the proof thereof by the publishers; hence the order of sale was void and of no force and effect. (4) That the sale by the administrator is inoperative to pass the title by reason of the insufficiency of the notice of such sale. (5) That there was unreasonable delay in the application to the probate court for the sale of this land, and for that reason this sale should not be upheld. We will treat the propositions in the order named.

Upon the first proposition involved in this controversy, the question as to the right to sell this land in controversy, which was the homestead of the widow, by order of sale of the probate court, for the payment of the debts of William N. Brown, must be treated as settled, and no longer an open question in this state since the conclusions of this court were announced upon that proposition in the case of *Keene v. Wyatt*, 160 Mo. 1, 60 S. W. 1037, 63 S. W. 116. It will be observed that this case expressly disapproved the rulings in the cases of *Broyles v. Cox*, 153 Mo. 242, 54 S. W. 483, 77 Am. St. Rep. 714, and *In re Powell's Estate*, 157 Mo. 151, 57 S. W. 717, cited by appellant in this cause, so far as such rulings were in conflict with the conclusions reached in *Keene v. Wyatt*, *supra*.

The next insistence on the part of the appellant is directed to the absence of the signature of the officer administering the oath to the administrator and the affidavit attached to the petition for the sale of real estate. The affidavit is in proper form, and duly signed by the administrator, and blank space for the signature of the probate judge, who presumably would administer the oath. It is insisted that this failure in respect to the affidavit was fatal to the petition, and rendered the order of sale made in pursuance to this prayer void. We are unable to assent to this contention on the part of the ap-

pellant. In *Rugle v. Webster*, 55 Mo. 246, there was a petition presented to the county court of Polk county, which was exercising probate jurisdiction, for the sale of certain lands belonging to the estate of the deceased. While the petition made all the necessary averments, it was defective in not being accompanied with an account of the administration and a list of the debts owing to and unpaid by the estate, and remaining unpaid, as the statute in force at that time required. The affidavit as to the truth of the allegation in the petition, which the statute required to be made, was not made by the administrator in person, but was made by an attorney instead. The court upon this petition ordered the sale of the land, and the sale was made in pursuance of it, and at the next term of the county court of Polk county the sale was approved. The deed by the administrator, which was regular in form, was executed and acknowledged to the purchaser at the administrator's sale in pursuance to the sale made. The heirs of the deceased in that case brought suit in ejectment as in this case to recover the land, and it was urged that the failure of the administrator to make the affidavit and to accompany his petition with an account of the administration and list of the debts due to and unpaid by the estate were such defects in the petition as rendered the order made upon it void. Wagner, J., speaking for the court, in response to the contentions made in that case thus clearly stated the law: "Although the proceedings may have been irregular, and the affidavits not made in literal compliance with the law, yet they are not such jurisdictional facts as would render them wholly void. Sufficient cause might have existed for a reversal in a direct proceeding brought for that purpose, but certainly there is no ground for a collateral impeachment. In the case of *Overton v. Johnson*, 17 Mo. 442, it was held that the accounts, lists, inventories, and appraisements which the statute requires to be filed with a petition for the sale of a decedent's real estate are not necessary to give the court jurisdiction, and that a failure to file them would not render the sale void. The court, speaking through Gamble, J., said: 'The jurisdiction is acquired by filing a petition praying the court to do an act or make an order which, under the statute, the court is competent to do. Whether the petition is in proper form, or sets forth sufficient facts, or is accompanied with the proper evidence, the court will decide in the exercise of its jurisdiction.' It was for the court, when the petition was presented, to determine its sufficiency, and, if it made an erroneous decision, the proper remedy was by appeal." To the same effect is *Wilkerson v. Allen*, 67 Mo. 502, where the same question arose as to the sufficiency of the affidavit, and it was again held that it was a mere irregularity, and was not such a jurisdictional fact as would render the pro-

ceeding void. These cases are fully supported in other jurisdictions. *Coon v. Fry*, 6 Mich. 506; *Overton v. Cranford*, 52 N. C. 415, 78 Am. Dec. 244; *Trumble v. Williams*, 18 Neb. 144, 24 N. W. 716; *Kleinecke v. Woodward*, 42 Tex. 311; *Myers v. Davis*, 47 Iowa, 329. Probate courts of Missouri are established by the organic law, the Constitution of the state, and their judgments and proceedings are entitled to the same credit and presumptions accorded to those of general jurisdiction. *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572. The order of sale by the probate court in this cause is predicated upon the allegations in the petition; and, while there is a requirement by the statute that the petition be verified by affidavit, the absence of such affidavit, in our opinion, was a mere irregularity, and did not deprive the probate court of jurisdiction of the proceedings. If the parties interested in said land were in court by due process, the absence of the affidavit in due form was a matter that could be contested upon the presentation of the petition; but that such irregularity does not render the judgment and proceeding void and subject to an attack in a collateral proceeding we think is too clear for discussion. There is a broad distinction between the proposition involved as presented in this case and the questions involved in the cases of *Barhydt & Co. v. Alexander & Co.*, 59 Mo. App. 192, and *Kincaid v. Griffith*, 64 Mo. App. 673, cited by appellant. In those cases it will be observed that it was a proceeding under the statute to revive a judgment procured before a justice of the peace, and the affidavit required to be filed was the very basis of the proceeding, without which there could be no jurisdiction. Hence, in order to confer jurisdiction, it was essential that an affidavit in substantial compliance with the statute should be first filed.

This leads us to the consideration of the third proposition, which is the most vital one presented by counsel for appellant—as to the sufficiency of the process by which the parties interested in the sale of the land in controversy were brought into the probate court. It is insisted by appellant that the publication of the notice of application for sale of the real estate in the issues of the paper of January 11, 18, 25, and February 1, 1889, notifying all parties in interest to appear on the second Monday of February, which was February 11th, was not a compliance with the provisions of the statute, and was insufficient to give the probate court jurisdiction of the persons interested in said estate. This publication was made under the provisions of section 148, Rev. St. 1879, which, so far as it is applicable to this case, provides that "the notice shall be published for four weeks in some newspaper in the county in which the proceedings are had . . . before the term of court at which said order will be made." It is argued by appellant that.

in order to comply with the statute above cited, it was necessary in this case that there should have been a publication in the issue of the paper of February 8, 1889. In other words, it is insisted that this statute means that the publication of the notice shall be for the four weeks immediately preceding the term of the court, and in support of this insistence we are cited to the case of *Young v. Downey*, 145 Mo. 250, 46 S. W. 1086, 68 Am. St. Rep. 568. We cannot agree to this contention by the appellant, and the case to which our attention is expressly directed furnishes no support for such contention. This statute simply requires that the publication of the notice shall be for 4 weeks—or, in other words, 28 days—before the term of the court at which the petition for the order of sale is to be presented. The mere fact that 10 or 11 or 20 days should elapse between the last publication and the term of the court by no means vitiates the publication of the notice. The statute does not provide that the publication of the notice shall be for the 4 weeks immediately preceding the term of court, but it simply provides that it shall be published for 4 weeks before the term of the court; and if the publication is made for 4 weeks, or 28 days, and if 10 or 20 days elapse between the last insertion of the publication and the term of court to which the application is to be made, this is a publication of the notice in compliance with the statute herein referred to, as much as if the publication had been made for the 4 weeks, or 28 days, immediately preceding the term of court to which the petition would be presented. In the case of *Young v. Downey*, supra, it was simply said that the first publication was on September 18, 1876, while the October term of the probate court began on the 2d day of that month, so that the length of time from the first publication to the first day of court was only 24 days, 4 days less than 4 weeks. It was there held that the requisite notice was not given, and the court was without jurisdiction to make the order of sale. With the announcement of the conclusions in that case we are entirely satisfied; but that is not this case. The publication of the notice in the proceeding now under investigation was for four weeks before the term of the court to which the publication was to be made for the sale of the real estate, and it is apparent between the date of the first publication of the notice on January 11th, 1889, to the first day of the term of the court, which was February 11th, 1889, there was a period of 31 days, and the notice of publication in this case does not fall within the class of publications denounced by this court in *Young v. Downey*. The publication of the notice in this case fully complied with the statute. *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849; *Ratliff v. MaGee*, 165 Mo. 468, 65 S. W. 713; *Young v. Downey*, 145 Mo. 250, 46 S. W. 1086, 68 Am. St. Rep. 568;

Young v. Downey, 150 Mo., loc. cit. 324, 51 S. W. 751.

This brings us to the fourth contention of appellant, in which it is insisted that the administrator's sale was inoperative to pass the title to the purchaser of this land for the reason that the notice of said sale was not given in accordance with the statute in force at the time the sale took place. It may be conceded that only 22 days' notice was given of this sale, when in fact the statute required 4 weeks' notice prior to said sale in some newspaper printed in the county where the land was situated, if there be one. It must be observed in the discussion of this proposition that at the May term of the probate court of Clark county, Mo., Henry C. Shaffer, administrator of the estate of William N. Brown, deceased, made his report of the sale of this real estate. In said report the administrator states that he "did, on Saturday, the 25th day of May, 1889, between the hours of ten o'clock a. m. and five o'clock p. m. of that day, at the south door of the court house in the city of Kahoka, in said county, and during the sitting of the probate court held in and for said county, expose to sale at public auction to the highest bidder, upon the terms mentioned in said order, the real estate above described, having had the same first duly appraised by William McDermott, R. M. Boulware, and R. J. Wood, three disinterested householders of said county, they having first been duly sworn as appears by the affidavit of said appraisers and their certificate of appraisement herewith filed, marked 'Exhibit A,' and having given four weeks' notice of the estate to be sold, and of the time, terms, and place of sale by advertisement published in the *Gazette-Herald*, a newspaper published in this state, as appears by the affidavit of E. B. Christy, the publisher thereof, herewith filed, marked 'B'; and at said sale aforesaid E. H. Connable was the highest and best bidder for five hundred and fifty dollars, and the same was stricken off to him." This report of sale as made by the administrator was by the probate court of Clark county, by an order entered of record, duly approved and confirmed, and the administrator was ordered to execute, acknowledge, and deliver to said E. H. Connable a deed in due form of law, conveying to said E. H. Connable all the right, title, and interest which the deceased had in the same at the time of his death. By the notice of publication heretofore considered, all of the parties interested in said estate were in court at the time of the approval of this report. The approval of the report was a final judgment, from which an appeal would lie, and the record discloses that no appeal was taken. Under that state of facts we are simply confronted with this proposition: The probate court having found and adjudged that the notice of sale had been published for four weeks, and said judgment

being by a court whose judgments and decrees are entitled to the same credit and presumption as courts of general jurisdiction, can it be attacked in this collateral proceeding, and held void for the reason that insufficient notice of the sale of the real estate had been given by the administrator? We have reached the conclusion that it cannot, and this conclusion is based upon the rulings of this court from its very earliest history down to the present time. It was said by this court at a very early period of its organization in *McNair v. Hunt*, 5 Mo. 176, in discussing the question of notice of sales, that: "It appears from the cases cited that in Spain thirty days' notice were at some remote period required, and probably still are; but for what reason the crown of Spain could require thirty days' notice to be given in this then colony I am unable to see. But, even if that were the law, I should say that the fact of the sale was merely voidable, and could not be now questioned in a collateral suit." The order of sale in cases of this character occupies the same relation to a sale by an administrator that a judgment or decree does to an execution sale by a sheriff. *Evans v. Snyder*, 64 Mo. 518. In the case of *Curd v. Lackland*, 49 Mo. 453, it was expressly ruled that the insufficiency of the notice of sale by a sheriff was simply an irregularity, and, where the deed was regular upon its face, that such sale was not inoperative by reason of the insufficiency of the notice of sale. In the case of *Jackson v. Magruder*, 51 Mo. 55, it was said by this court that: "The judgment of the county court approving the report of sale cured the defect, if any, in the advertisement. That was a final judgment, from which an appeal might be taken, and it could not be impeached in a collateral proceeding like this." In *Young v. Schofield*, 132 Mo. 668, 84 S. W. 497, while the point involved in this case was not in judgment before the court in that case, the rule announced in the cases herein referred to that the failure to give the usual and proper notice under sheriff's sale at most amounts to but an irregularity was fully recognized. *Gantt, J.*, speaking for this court, thus expressly recognized such ruling. He said: "But, granting that the failure to notify John C. Young of the issuance of the execution in Marion county was a noncompliance with the statute, as it undoubtedly was, was it such a failure as amounted to anything more than an irregularity? We are of the opinion that it was not, and in this we do but follow frequent rulings as to the usual notice not being given of ordinary sheriff's sales. *Draper v. Bryson*, 17 Mo. 71, 57 Am. Dec. 257; *Curd v. Lackland*, 49 Mo. 451. See, also, *Harness v. Cravens*, 126 Mo. 260, 28 S. W. 971." We take it that it is unnecessary to pursue this subject further; that where the judgment of the probate court is regular, and recites that proper and legal notice was given for four weeks prior to the

sale, such judgment cannot be assailed in this collateral proceeding; and if the plaintiff was injured by reason of the conduct of the parties in procuring the order of sale and the sale being made upon insufficient notice, those were wrongs that must be remedied by a direct proceeding to set aside the judgment and sale.

The same may be said as to the complaint of appellant as to the proof of publication by *Christy & Waggener*, the publishers of the paper in which the publication was made. The probate court, in its order of sale of this real estate, expressly recites the fact to be that due publication of the process had been made; and that recital is no more open to controversy in a collateral proceeding than where it occurs in a judgment of the circuit court. The affidavit as made by *Christy & Waggener* was in proper form; the defect being that they, as a firm, undertook to make oath as to the matters contained in the affidavit. This was purely an irregularity, and the recital in the order of sale and the judgment approving the sale cannot be held void by reason of such irregularity. In *Raley v. Guinn*, 76 Mo. 271, plaintiffs resorted to ejectment to recover land in Schuyler county under a tax deed executed by the collector of said county on the 11th of February, 1887, at a sale which occurred on the 6th of October, 1874. *Henry, J.*, speaking for the court, proceeding to discuss the questions involved, says: "The first point made by defendant's counsel is that the judgment is a nullity, because the printer failed to attach to a copy of the paper his certificate, under oath, of the due publication of the delinquent list for the time required by law. This the statute (section 185, Wag. St.) requires, and also that he shall deliver it to the collector, who, at the time judgment is prayed, is required to file it as a part of the record of the court." The learned judge, in disposing of the point as raised, during the course of the opinion thus expressed the views of the court, upon that question: "The county court of Schuyler county by its judgment found, and it is expressly recited therein, that the collector had given due notice; and that recital is no more open to controversy than where it occurs in a judgment of the circuit court. By the express terms of the statute the judgment of the county court has the same force and effect as one rendered by the circuit court, and that a judgment of the latter reciting 'that defendant was duly served with process' cannot be collaterally assailed is too well settled to require any citation of authorities to support the proposition. *Voorhees v. Bank of the United States*, 10 Pet. 449, 9 L. Ed. 490, a leading case on the subject, has been followed in this, and in most, if not all, the states of the Union." We have carefully considered the cases cited by appellant as to the essential requisites to an affidavit, and an examination of the cases makes it manifest that they have no application to the case

at bar. Where the affidavit furnishes the basis of the action, as in the cases heretofore referred to, the revival of judgments before justices of the peace, and in attachment proceedings, it may be said that it must substantially comply with the requirements of the law; but it certainly will not be seriously contended that the affidavit to a proof of publication is of such character as makes it essential that the law shall be literally complied with in order to confer jurisdiction upon a court. The affidavit to a publication by the publisher of it is merely to inform the court that such publication was duly made; and if a court of competent jurisdiction, when it comes to pass upon the question, expressly recites that the order of publication was properly published, that ends the contest as to the truth of that fact in a collateral proceeding.

In a very early period of the history of this court, commencing with the case of *Speck v. Wohlien*, 22 Mo. 310, very strict rules were announced in respect to the observance of the provisions of the statute in the administration of estates in the probate court. However, this rule, which prevailed for a number of years in this state, has been abandoned on the ground that the same presumption of validity must be entertained in respect to the judgment and orders of the probate court in matters of administration of estates as are accorded to the judgments and orders of the circuit court. That we may fully appreciate the advanced position of this court upon the subject of proceedings and judgments of the probate court, a brief quotation from the case of *Camden v. Plain*, 91 Mo. 129, 4 S. W. 86, will be justified. In speaking of the probate court of Johnson county in that case it was said: "Said court was a court of record, having exclusive original jurisdiction within that county in all cases arising under the general laws of the state relating to the administration of estates; and when in such a case, wherein it became necessary to determine a question of fact, that court, thus having jurisdiction of the subject-matter, also in the manner required by law, by its order of publication over all persons having an interest in the determination of that question of fact, renders judgment thereon, such judgment must be conclusive on all parties in interest in collateral proceedings. The doctrine that the judgments and orders of probate courts are entitled to the same presumptions of verity as is accorded to courts of general jurisdiction proceeding according to the course of the common law has been, by the recent decisions of this court, well established, and may now be said to be placed beyond question." To the same effect is *Covington v. Chamblin*, 156 Mo. 587, 57 S. W. 728. It was there announced in no doubtful terms that "the order approving the sale of the real estate in question was a final judgment of the probate court, impervious to collateral attack, and

subject to impeachment in a direct proceeding for that purpose only, for defects apparent upon the face of the record going to the jurisdiction of the court or for fraud."

It is finally urged as a reason why the judgment in this case should be reversed that there was unreasonable delay in the application for the sale of the real estate by the administrator. It is sufficient to say upon this proposition that we have carefully examined the disclosures of the record in this cause. It is apparent that this case was not tried in the lower court upon the theory that there was any unreasonable delay in the application for sale of the real estate, and the question is now presented for the first time. The record shows that the first administration upon the estate in controversy was by Brown, a son of the deceased; that he did not make any application to sell it; and it is further disclosed that upon complaint to the probate court his letters of administration were revoked. Upon the removal of Brown as administrator the widow of the deceased immediately proceeded in the probate court to have the land in controversy set out to her as a homestead, which was done, and she remained in possession of the homestead up to the time of her death. We are unable to see any injury resulting to the heirs of the deceased, who were claiming this land, by reason of the delay in the application to sell it. When we consider the entire record, the delay in the institution of this suit and assertion of claim to the property in dispute, the appellant is in no position to make complaint as to any delay in the administration of her father's estate.

This case was submitted to the court without the aid of a jury, no instructions were asked or given, and, finding no reversible error upon the record as presented, the judgment should be affirmed, and it is so ordered. All concur, except BURGESS, P. J., not sitting.

SMITH v. FORDYCE et al.

(Supreme Court of Missouri, Division No. 2.
June 20, 1905.)

1. INJURIES TO SERVANT — PETITION—EVIDENCE—VARIANCE.

In an action against a railroad for injuries to a car repairer, the petition alleged that it was the duty of defendant to place cars on a certain switch track which led to a mine, and which was downgrade toward the main line, so that they would not roll onto the main line, and to have placed at the intersection of the switch a derailing switch to prevent the escape of cars, but that, after plaintiff had gone under a car on the main line to repair it, a car that had been placed on the switch track, and negligently left in position so that it was likely to run down, and in such condition that it could not be managed or controlled, started to go onto the main line and caused the injury to plaintiff. The evidence showed that the car was moved by employes of the mine, and that they removed the block which held it in place, whereby it started, and that they were unable to stop it because the brake was loose and the

brake wheel was covered with timbers, so that they could not reach it, and it was shown that there was no derailing switch. *Held*, that there was no failure of proof because of the fact that there was no allegation in the petition as to the moving of the car by the mining crew.

2. SAME—EVIDENCE—SUFFICIENCY.

In an action for injuries to a car repairer, injured by the escape of a car from a switch track, *held* that the evidence warranted a finding that the brake on the car had not been set when the car was set out.

3. SAME — FURNISHING APPLIANCES—DUTY OF MASTER.

A railroad company is not bound in its duty toward its servants to adopt every new invention, although it is an improvement; but it is merely its duty to use reasonable care in procuring and keeping its appliances in good condition.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 181-184, 212-227.]

4. SAME—QUESTION FOR JURY.

In an action for injuries to a car repairer from the escape of a car from a switch track, *held* a question for the jury whether defendant should have had a derailing switch at the junction of the switch track and that where the accident happened.

5. SAME—ASSUMPTION OF RISK.

A car repairer at work on a car on the main line of a railroad does not assume the risk of injury from a car escaping from a switch track and running onto the main line.

6. SAME — TRIAL — INSTRUCTIONS — REQUESTS.

Where defendant, in an action for injuries to a servant, desires to have the question of assumption of risk submitted to the jury, it is his duty to pray an instruction to that effect.

7. SAME — NEGLIGENCE — EVIDENCE — COMPETENCY.

In an action for injuries to a car repairer by a car escaping from a switch track onto the track where he was at work, it was competent to show the absence of a derailing switch at the junction of the switch track and the other track, and that such a device was in common use by defendant.

8. SAME—KNOWLEDGE OF WITNESS.

In an action for injuries to a servant employed by a railroad, a witness was properly permitted to testify as a practical railroad man engaged in the construction and repairing of tracks, and having three years' experience, as to the purpose of a derailing switch and as to where one should be placed.

9. SAME — PROXIMATE CAUSE—CONCURRING NEGLIGENCE.

Where a railroad company failed to provide a derailing switch at the junction of a switch track and the main track, and a car was set out on the switch track, which was down-grade, and the brake was loose, the car being blocked and the brake wheel so obstructed with timbers that it could not be reached, and employes of a mining company which used the switch track negligently moved the car, whereby it ran onto the main track, injuring a servant, the negligence of the mine employes did not relieve the railroad of responsibility for the proximate cause of the injury.

10. PERSONAL INJURIES—MEASURE OF DAMAGES—INSTRUCTIONS.

Where, in an action for personal injuries, the court instructed that in finding for plaintiff the jury might allow him such damages, not exceeding the amount claimed in the petition, as they believed he had sustained, the instruction was not objectionable for failing to give the elements of damage; no instruction on such matter having been requested by defendant.

11. SAME—EXCESSIVE DAMAGES.

In an action for injuries to a strong and active man of 26 years, whereby he lost the use of his left arm, a verdict for \$7,500 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 383.]

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by Jesse J. Smith against Samuel W. Fordyce and another, as receivers of the Kansas City, Pittsburg & Gulf Railroad Company, and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

S. W. Moore, Cyrus Crane, and J. W. McAntire, for appellants. Howard Gray and Cole & Burnett, for respondent.

GANTT, J. This is an action, commenced in the circuit court of Jasper county, Mo., against the defendants, as receivers for the Kansas City, Pittsburg & Gulf Railroad Company, to recover damages for injuries received by the plaintiff while in their employ as a car repairer. The petition alleges the incorporation of the defendants as a railroad company, the appointment of the defendants Fordyce and Withers as receivers by the Circuit Court of the United States for the Western District of Missouri, their qualification as such, and their possession of the said railroad and its engines and cars at the times mentioned in the petition; that while said receivers were operating said railroad plaintiff was in their employment as a car repairer, and as such it was his duty to go about the freight and passenger cars of the defendants and repair the same along the line of said railroad; that Joplin was and is a station on the line of said railroad, and near said city and station there was a switch leading from the main line of said road to a lead and zinc mine known as the "Bankers' Mine"; that the said receivers were using said switch under the order of said court to haul cars of coal and other property out to said mine and for other purposes; that from the place where said cars were left at said mine to be unloaded to the main line of the road was down-grade, so that cars left standing on said switch at said mine, unless fastened in some way, would run down to the main line track and other switches with great force and speed, thereby placing plaintiff, while employed in his work of repairing cars on said track, in great danger, and placing all other employes of the defendants and passengers on said road in great danger from said cars starting from said point on said switch and running down and out upon the main line and switches with said great force and speed; that it was the duty of said receivers to have placed at or near the intersection of said switch with the main line what is commonly known as a "derailing switch" or some other means of obstruction, so that, if cars did escape at said switch

at said mine and roll down to the main line, they would not run out on the main line, but would be stopped or derailed; that the defendants negligently failed to take any precaution to prevent said cars from starting, when left at said mine, and running down said grade, and out onto the main line and the other switches and spurs of said railroad at said point so operated by the said receivers. "Plaintiff states that on the _____ day of October, 1899, one of the freight cars operated by the defendants as receivers had become out of repair, and the same was attached with their train on the track so operated by said receivers at or near said station on said railroad, and it was the duty of plaintiff to go to said car and under the same for the purpose of repairing it, so that it could be used by defendants in the transportation of freight over said road; that in pursuance of his duty he went upon said track and under said car for the purpose of repairing the same; that, while he was at work performing his duty as repairer as aforesaid, a car that had been placed at said mine by said receivers and negligently left in a position so that it was allowed to run down said switch, and in such condition that it could not be managed or controlled, started and rolled down said switch, increasing its speed as it went, until it reached the main line of said road under great speed, and on account of the negligence of the defendants in failing to have a derailing switch as aforesaid, or using other means at the point mentioned to prevent said car from rolling on said track with great speed, and on account of the negligence of defendants in leaving said car in said situation and condition, it ran with great force into the train to which the car which plaintiff was repairing was attached, and caused the car that plaintiff was repairing to run over plaintiff, thereby breaking and mangling his left arm, so that about four inches of bone next to the shoulder had to be removed, and leaving the plaintiff permanently injured for life; that plaintiff suffered great pain in body and mind from said wound and injury, and has ever since been unable to perform labor, and will always be permanently injured; that the defendant the Kansas City Southern Railway Company has become the purchaser under the order of said court of all the property of said Kansas City, Pittsburg & Gulf Railroad Company, and as a part of said purchase price the said defendant assumed the obligations of said receivers to this plaintiff. Wherefore he prays judgment for ten thousand dollars and costs." The answer was, first, a general denial; second, an assumption of the risks by said plaintiff of said injuries; third, that the said car which collided with the train under which plaintiff was working was set in motion by the acts of third parties over whom defendants had no control, without the knowledge or consent of defendants or either of

them. Plaintiff's reply denied all the new matter set up in the answer. The cause went to trial, and a verdict was rendered on the 23d of January, 1902, in favor of plaintiff, for \$7,500. At the same term of court motions for new trial and in arrest of judgment were filed, heard, and overruled, and defendants duly excepted, and took their appeal to this court.

The evidence developed the facts as follows: That the plaintiff was a young man, 26 years of age at the time he was injured, and as a result of his injuries he had about an inch and a half of the bone taken from his arm between his shoulder and elbow, and that on account thereof he has no use of his arm below the elbow, and it hangs at his side perfectly useless to him. That prior to his injury plaintiff was a car repairer and inspector in the employ of the defendant receivers, and had been so employed about two months, and had had altogether about nine years' experience. At Joplin, where the accident occurred, the yards are very near the station, and a mile and a quarter south of the depot there was a switch track, leading east from the main line to and furnishing switching accommodations to the Bankers' mine, at that time operated by the Missouri Lead & Zinc Company. This switch or spur track had no outlet to the east. Near the middle of it, it was on a level space called "the hump," and from this level space the grade declined both to the east and to the west. The injury to plaintiff occurred on the 23d of October, 1899. On the previous Saturday the defendant's employes had placed on this spur track a car load of timbers which had been shipped to the mining company. These timbers were loaded on a car with side boards. On account of the width of the car and its load, it could not be pushed in on the spur track more than 600 feet from the main line because of the power house or shed, built so near the track that this car thus loaded could not pass. There was evidence on the part of the defendants that, when they set this car out and left it, the brakeman set the brake on it and put a stick of wood under the wheel at the west end. The car remained in this position until the following Monday. On the part of the plaintiff there was evidence to show that the timbers with which the car was loaded were piled up about and over the brake, so that the servants of the mining company, when they went to move this car, could not work the brake or twist it at all, because the logs were on it, and that it was not set. It seems that on Monday the mine superintendent, wishing to get the car past the coal bin and further east, telephoned the railroad company to send a switch engine to move the car; but there was delay in sending the switching crew, and so the superintendent of the mining company sent his own employes to move the car west, though one of the witnesses said they intended to move

it east, so that the track could be moved and adjusted further from the obstructing building. Some four or five of these mine employes, armed with crowbars and pinch bars, went to this car to move it. One of them kicked the stick of wood from under the wheel, and the car started slowly down the switch towards the main line. One of the employes then got on the car and attempted to use the brake, but found the brake was covered with the timbers so that it could not be used. They then attempted to stop the car by throwing sticks of wood in front of the wheels; but this proved unavailing, and the car continued to run down the switch, increasing its speed as it went, and passed onto the main line, and then onto a switch where a freight train was standing, one of the cars of which the plaintiff was at that time repairing, and struck this train and caused one of the cars to run over the plaintiff, inflicting the injuries for which he brings this action. There was evidence offered by the plaintiff tending to show that the defendant company had in use along this road and at points of this character a device known among railroad men as a "derailing switch," which is adapted to the purpose of preventing cars, when escaping from one of these switches, from coming out on the main line or track, and evidence showing that no such device or derailing switch had been provided for this switch, and no other device to prevent cars escaping on this switch from coming onto the main line. There was also evidence tending to show that the employes of this mine had been in the habit of moving cars on this switch backwards and forwards, and that the company knew they were in the habit of so doing, as cars left at one place would be found 200 yards distant when the company wanted to get them again.

At the close of the evidence the court gave the following instructions for the plaintiff: Instruction No. 1: "The court instructs the jury that it was the duty of the defendants to furnish the plaintiff a reasonably safe place in which to perform his work, regard being had to the nature and character of his employment and the kind of work he was engaged in; and it was also the duty of the defendant to keep its tracks, switches, and cars in a reasonably safe condition, so that plaintiff could perform his labor about them in reasonable safety, regard being had, as above stated, to the nature of his employment. And if the jury believe from the evidence that on the 23d day of October, 1899, and for some time prior thereto, the defendants had a switch leading from the main line of their road, near the station at Joplin, out to a place known as the 'Bankers' Mine,' and that cars left standing on said switch by the defendants, their agents or employes, were liable to escape from the persons moving the same, with the knowledge and consent of the defendants, and run down said switch, and

out on the main line of said road and other switches at said station, then it was the duty of the defendants to have taken ordinary care and precaution to have so fixed its switch and cars on the same, if the same could be done by exercising reasonable care, so that if a car did escape on said switch at said mine, or get away from those in charge of it, that it could not roll down said switch, and out onto the main line and other switches of the defendant, if the jury believe by so doing it would probably endanger persons rightfully on said track or switches, and if the jury believe from the evidence in this case that the plaintiff, under the direction of the conductor in charge of a freight train belonging to the defendants, and standing on a switch at the station at Joplin, went under said train for the purpose of repairing a car therein, and that in so doing he was exercising ordinary care and caution, and that prior thereto the defendants, while operating said railroad through their servants or employes, had left a car standing on said switch at said mine, and that said car was left there without the brake being set, or so loaded that the brake could not be set or used in moving said cars, and that the defendants knew that the employes at said mine were liable to attempt to move said car, and that the defendants carelessly and negligently left said car standing in such condition and at such a point on said switch that if it started or was started by the employes at said mine, that it could not be controlled, and that the defendants carelessly failed to put in a derailing switch, or use any other means to prevent cars while so being moved from rolling out on said main line, in case they escaped, and that while plaintiff was at work a car which had been standing at said mine, and which had been left standing as aforesaid, and without the brake being in such a condition that it could be used, got away from the persons moving it, and started and ran down said switch, and out onto the main line, and then onto the switch where plaintiff was working, and thereby caused said car to run over the arm of the plaintiff and injure him, and that said injury was caused by the carelessness and negligence of the defendant in leaving said car standing on said track in such a condition, and by their carelessness and negligence in failing to put in a derailing switch, or using other means to prevent cars from rolling down said switch, then the finding should be in favor of said plaintiff." Instruction No. 2: "The court instructs the jury that ordinary care is such care as a person of ordinary prudence and caution would usually exercise under the same situation and under the same circumstances." Instruction No. 3: "In determining whether plaintiff exercised reasonable care in going under the car on the switch to repair the same under the circumstances shown by the evidence, you are instructed that he was only required to exercise such care as a care-

ful and prudent car repairer would have exercised under like circumstances." Instruction No. 5: "The court instructs the jury that, if they find a verdict for the plaintiff, they may allow him such sum for his damages, not exceeding \$10,000, as they believe he has sustained by reason of the injuries, if any, to his left arm caused by the collision described in the evidence."

The court gave the following instructions for the defendants: Instruction No. 1: "If plaintiff's injuries were the result of a mere accident, then plaintiff cannot recover. The court instructs the jury that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony, and if they believe from the evidence that any witness has willfully sworn falsely to any material fact, then they are at liberty to disregard the whole or any part of the testimony of such witness." Instruction No. 2: "You are instructed that merely because plaintiff was injured while in the employ of defendant does not of itself entitle him to recover in this action, but before, under any circumstances, plaintiff can recover, he must prove also by the greater weight of the credible testimony that his injuries were caused by the negligence of the defendant of the character pleaded in the petition and submitted to your consideration. If there was no such negligence, then your verdict must be for the defendant."

The refused instructions will be noted in connection with the assignments of error. At the close of all the evidence the defendants interposed a demurrer to the evidence, which was overruled by the court.

1. The stress of the argument for a reversal of the judgment in this case is that the demurrer to the evidence should have been sustained, because there was a total failure of proof of the cause of action alleged, and not a mere variance, which was not a surprise to defendant. The petition by way of inducement avers the ownership by defendants of a switch track leading from its main line near Joplin to a lead and zinc mine, known as the "Bankers' Mine," which they used to haul cars of coal and other supplies to said mine, and that from the place where said cars were left at said mine to be unloaded said switch track was down-grade to the main line, so that cars left standing on said switch track at said mine, unless fastened in some way, would run down to and on the main line track and other switches with great force and speed, thereby endangering the lives of the employes of defendants engaged in work on said main line and passengers on said railroads; that it was the duty of said receivers to place said cars at said mine on said switch so that the same would not become loose and roll down to the main line, and to have placed at or near the intersection of said switch with the main line what is commonly known as a "derailing switch," or some

other means of obstruction, so that, if the cars did escape from said switch at said mine and roll down to the main line, they would not run out to the main line, but would be stopped or derailed. Having then alleged that plaintiff on the — day of October, 1899, in pursuance of his duty as car repairer for defendants, went under a car of defendants, attached to one of its trains on its track near Joplin, to repair the same, it is averred that while so engaged "a car that had been placed at said mine by said receivers and negligently left in a position so that it was likely to run down said switch, and in such condition that it could not be managed or controlled, started and rolled down said switch, increasing its speed as it went, until it reached the said main line of said road under great speed; that on account of the negligence of the said defendants in failing to place a derailing switch or using other means at the point mentioned to prevent said car from rolling on said track with great speed, and on account of the negligence of defendant in leaving said car in said situation and condition, said car ran with great speed and force into the freight train to which that car that the plaintiff was repairing was attached, and caused the same to run over plaintiff, thereby breaking his arm." The contention is that by the foregoing allegation the plaintiff charged an injury due alone to the fact that the car on the mine switch, without human agency, got loose and rolled of its own accord down the switch track, and onto the main track, and thence to a collision with the car which plaintiff was repairing, and that the evidence discloses an entirely different state of the facts; that plaintiff in his evidence in chief merely testified as to what he was doing at the time the accident happened, and to the extent of his injuries, and knew nothing of the starting of the car or the cause thereof; and that the testimony of Mr. Eagan, for the plaintiff, refuted the allegation of the petition, because he testified that the employes of the mining company went to this car with the purpose of moving it, so they could fix the track, and thereby let it go past the power house; that he found the car blocked at the west end; that he moved this block, and that on this account and by the efforts of the men assisting him the car was set in motion, and after it started these employes of the mining company were unable to stop either with the brake on the car or with the timbers which they threw in front of it to check its progress; that thus the plaintiff's own evidence proves an entirely different cause of action than that alleged by him, and that the car was left by the defendants in a safe and secure position, and was set in motion by the act of third parties without the knowledge or consent of defendants, just as they alleged in their answer. In support of this position defendants cite us to numerous cases decided by this court that it is fundamental that

plaintiff can only recover on the cause of action stated in the petition, and insist that the facts in evidence in this case show that the cause of action stated in plaintiff's petition was unproved in its entire scope and meaning. The rule invoked by defendants is unquestionably the law of this state, as attested by the authorities cited. *Waldhier v. Railway Co.*, 71 Mo. 514; *Well v. Posten*, 77 Mo. 284; *Raming v. Metropolitan Co.*, 157 Mo. 477, 57 S. W. 268; *Feary v. Railway Co.*, 162 Mo. 75, 62 S. W. 452.

The question arises, then, have the defendants properly construed the petition in the case, and ought the court to have sustained the demurrer to the evidence on this ground. It is evident that the circuit court took a different view of the scope of the petition. By its first instruction for the plaintiff it instructed the jury "that it was the duty of the defendants to furnish the plaintiff a reasonably safe place in which to perform his work, regard being had to the nature and character of his employment, and to keep its tracks, switches, and cars in a reasonably safe condition, so that he could perform his labor about them in reasonable safety; and if the defendants left the car standing on the said switches at said mine without the brake being set, or loaded so that the brake could not be set or used in moving the car, and that the defendant knew that the employees of the said mine were likely to move this car, and left it in such condition that, if they did move it, it could not be controlled by them, and in addition carelessly failed to put in a derailing switch, or use any other means to prevent cars while so being moved from rolling out on said main line, in case they escaped, and that by reason of such negligence said car did roll out on said main line, and struck the train under which plaintiff was working, and thereby injured him, then he could recover." On this point, to wit, the total failure of proof to sustain the allegations of the petition, defendants rest their contention on the fact that the car did not move of its own volition, but remained stationary until the mining crew moved the block from under the wheel, and insist that it was wholly incompetent to show under the petition that the car was started down the switch track by the endeavor of the mining crew to move it back a short distance to the west, whereas the essential averments as to negligence were threefold, to wit: That the car was "left in a position so it was likely to run down said switch, to wit, left standing on the brink of a downgrade in the direction of the main line"; and, second, "in such a condition that it could not be managed or controlled," to wit, left with the brake loose and so covered by the ends of the heavy timbers that those moving it could not get to the brake to set it, so as to check or retard the movement of the car when started; and, third, the failure to have "a derailing switch or other means to prevent the car from go-

ing out upon the main track," when once started downgrade, by whatever means it was started. The court admitted testimony to show that the mining crew was endeavoring to move the car back a little to the west, in order that that track might be moved farther away from the power house, and thereby permit the car to be moved on east to the mine, and in this connection offered evidence that it was the custom and habit of the defendants to place loaded cars for the use of the mine on this switch or spur track, and to permit the mining crew to move said cars backwards and forwards thereon for their convenience in unloading the same. That the car was attempted to be so moved did not and could not have misled or surprised the defendants at the trial, because the defendants alleged in their answer that it was set in motion by the acts of third parties, over whom they had no control, without their knowledge or consent. The testimony admitted by the court as to the attempt of the mining crew to move the car was introduced preliminary to the evidence tending to show the three acts of negligence above set out, upon which plaintiff based his right of recovery. That there was any failure of proof to show that the car was located at the brink of the downgrade leading west towards the main track without the brake having been set, and with the brake so covered up with the logs with which the car was loaded, is too plain for discussion. Neither was there any failure to show that there was no derailing switch provided at the junction of this switch with the main track, or any other means to prevent wild cars from running from the switch onto the main track. The evidence of the plaintiff tending to show that the car was set in motion by the mining crew, moreover, was to contradict the allegation in the answer that it was set in motion by third parties, over whom defendants had no control, and without the knowledge and consent of defendants.

Looking at the case as it was developed on the trial it might probably have been better for the plaintiff to have alleged the fact that the car was moved by the mining crew for the purpose above indicated, and with the consent and knowledge of the defendants; but the question we are now dealing with is whether there is a total failure of proof, and not a mere variance, of which the defendants took no advantage by filing an affidavit of surprise. We think there was no such complete failure of proof as defendants insist upon. A failure of proof, within the meaning of our decisions, occurs when the petition and answer are unproven in their entire scope or meaning; and a variance, as provided by section 635, Rev. St. 1899, has reference to discrepancies between the issues made by the pleadings and the evidence in support of them. It is obvious, we think, when the whole petition is read, that the plaintiff did not seek to recover merely be-

cause a loose car started and ran down the track; but the burden of this case is that this car was left standing on the brow of this downgrade in the direction of the main line, with a brake, not only loose, but so covered with the logs that whoever should attempt to set it in motion could not control it or manage it, so as to prevent it from running down onto the main track, in the absence of a derailing switch at the point of junction. It may be conceded that the car would not have moved of its own gravity so long as the block remained under the west wheel; but the taking out of that block and the starting of the car was only one fact in the history of the case, and the contention of the plaintiff was, and so the jury were instructed, "that the defendant left this car standing on said switch, where it was likely to escape from the persons moving the same with the knowledge and consent of the defendants, with the brake loose and so covered up with the ends of the logs that they could not control or manage the same." It is evident that the mere starting of the car was not the sole cause of plaintiff's injuries, but the negligent placing of the car with such insecure brakes that it could not be controlled or managed when started, coupled with the want of a derailing switch, which produced the injury. While it may be said that if the car had not been started the injury would not have occurred to plaintiff, it can as truly be said that if the brake thereon had been set, or even if it had not been covered by the ends of the logs, so that it could not be set, still the accident would not have occurred, because the car could have been controlled and managed by the mining crew; or, on the other hand, if they had failed to stop it with the brake, if there had been a derailing switch or other device to prevent it running out upon the main track, still plaintiff would not have been injured. In a word, it was a question under the petition and the evidence, and it was so submitted to the jury, whether the injury would not and could not have happened but for the negligent condition in which the car was left at the place mentioned in the petition, together with the want of a derailing switch; and hence it is apparent that it was not the mere starting of the car which was the sole cause of the injury to plaintiff, nor was that relied upon as the sole basis of recovery, but it was the other negligent acts in connection with the starting which contributed to the plaintiff's injury, and his undoing would not have occurred except for the presence and coexistence of these contributing causes. *Lore v. American Mfg. Co.*, 160 Mo., loc. cit. 625, 627, 61 S. W. 678; *Bassett v. City of St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446. It is a settled principle of law in this state that if damage or injury is caused by the concurring force of a defendant's negligence and some other force for which he is not responsible, including "that act of God" or super-

human force intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage. It is also agreed that if the negligence of the defendant concurs with the other cause of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated the interference of the other or superior force which, concurring with his own negligence, produced the damage. *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808, and cases cited.

Able counsel for defendant earnestly and ingeniously labor to sustain the proposition that plaintiff's cause of action rests entirely upon the allegation that the car started, and supplement the averment with the words "of its own accord"; but in so doing they ignore the three plain assignments of negligence upon which the action is bottomed, in the absence of which no injury would have resulted to plaintiff by the starting of the car which ran off of the spur track onto the main track and collided with the train under which plaintiff was working repairing a car for defendant. In such circumstances the fact that another element of causation intervened, to wit, the attempt of the mining crew to move the car west a short distance to permit the track to be moved far enough from the power house to allow the car to pass on to its destination, the lumber yard of the mine, did not break the legal connection between the brakeless condition of the car and the placing of it on the brink of the sharp downgrade toward the main track and the injury which flowed to the plaintiff. The leaving of a car so heavily loaded on the brow of the downgrade without setting the brake thereon, and covering the brake with heavy timbers so that it could not be used to stop or retard the speed of the car, furnished ample evidence of negligence on the part of the defendants, concurring with the starting of the car by the mining crew, to justify the jury in reaching their verdict. The law imposed upon the defendants the duty of using reasonable care that this heavy loaded car should not be left without brakes set, or so covered up that they could not be used, at the head of this decided downgrade, and they create an unusual or extraordinary risk to its employees and passengers on its main track. The averments of the petition, moreover, were sufficiently broad to admit the evidence as to the starting of the car by the mining crew, even if defendant had not expressly tendered the issue that the mining crew started it without the knowledge or consent of defendants, and the further proof that it was the common usage and practice of the mining crew to move cars set in on this spur track for the use of the Bankers' mine, with the knowledge and acquiescence of defendants, and thus meet the defense set

up of interference by persons for whom defendants were not responsible. We think the trial court correctly interpreted the pleadings in admitting such evidence, and that it did not tend to establish a case outside of the pleadings.

Pursuing the same line of argument, defendants next insist that the absence of the derailing switch was not the cause of the accident. In support of this contention they assert that defendant's brakeman set the brake of this car Saturday evening, and that this was undisputed. On the contrary, the witness Eagan testified that, when his crew went to the car to move it west, he kicked the block out, and the car immediately started, and he climbed on to stop it, and the brake was in such a fix he could not stop it; "that the brake was all loose—the shoes." Mr. Davis, the foreman of this crew, a witness for defendants, testified that the brakes were loose and covered by the timbers, so that they could not be worked. It is true that the defendants' brakeman testified he set the brake Saturday before he left the car; but on cross-examination he gave as his reason that he always set the brakes when he left a car in that way. It was for the jury to find whether in fact he set the brakes or did not. The fact that he testified that he set the brake did not require the jury to so find, or the circuit court or this court to assume that it was an undisputed fact. In the light of his whole examination, in connection with the fact that it was loose on Monday and so covered by the logs that no one could twist the brake rod, the jury were authorized to find that he did not set it. There was evidence, also, that at this time the Frisco Railroad did switching on this track, but there was no evidence that the Frisco Company moved this car; and when it is considered that no car could have gone east on this switch track without pushing this car east, and that it was not possible to get this car by the power house on account of the great width of its load, and it was found on Monday just where it was left on Saturday, the suggestion as to the Frisco Company would seem to have no weight whatever.

Learned counsel for the defendants urge that, because the car had stood there all day Sunday, the absence of a derailing switch was in no sense the cause of the injury, and say: "Suppose there had been a derailing switch, if the mining employes had desired to run this car out on the main track, what was to prevent them connecting up the derailer, so that the car could pass over the switch?" And they assert that no railroad company can be required to take such precautions as will absolutely prevent the possibility of accident from malicious interference with cars on its tracks, and cite us to *Fredericks v. Railway Co.*, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306. It seems quite obvious to us that this argument is dehors

the record. Here there was ample evidence to go to the jury to establish that this spur track was largely, if not principally, used to accommodate the mine company; that cars were set in on it, loaded with supplies for the mine; and that with the knowledge and acquiescence of defendants the mining company's employes were in the habit of moving the cars backwards and forwards to the place of unloading; and if such was the fact it was not a malicious interference with the car, but something likely to occur and to be expected, and a circumstance to be guarded against by having the brake properly set, or at least in such condition that the mining crew could set it when moving the car, as much so as if its own servants were sent to move it, and the court did not permit a recovery upon the proof alone of the absence of a derailer, nor of the negligent condition of the brake, but required the concurrence of both. Nor did the court assume as a matter of law that it was negligence not to have a derailing switch, but left it to the jury to say whether, in the light of all the circumstances, a derailing switch or other like device should not have been provided.

Learned counsel for the defendants devote much time and space to the enforcement of the proposition that the master is not required to furnish any particular kind of appliances, that he has a right to transact his business in his own way, and, if he sees fit to use machinery of an old pattern, that it is not a matter of complaint for the servant. With this contention the plaintiff refuses to take issue, because he insists that the trial court did not hold to the contrary. The rule is well settled in this state that there is no obligation on the part of the master to furnish absolutely safe appliances, nor is a railroad bound to adopt every new invention, though an actual improvement it may be; but it is the duty of the company to use reasonable care and precaution in procuring and keeping its appliances in good condition and order, and it cannot remain wholly indifferent to the improvements of the day. *Huhn v. Railway Co.*, 92 Mo. 440, 4 S. W. 937; *Hamilton v. Coal Co.*, 108 Mo. 364, 18 S. W. 977. In these cases it is left to the jury to say whether under all the facts and circumstances it was negligent in the company not to have had a derailing switch at the junction of this switch track with the main track of the defendant's line. There was evidence in this case tending to show that derailing switches were in general use by the defendants on their line of railroad at the time of the injury to plaintiff, and that it was a common device used for the purpose of preventing cars escaping on to the main tracks from switches. The fact that there was no derailing switch was not negligence per se, and it was not so treated by the court. As said by this court in *Jones v. Railroad Co.*, 178 Mo. 548, 77 S. W. 896, 101 Am. St. Rep. 484: "Since the law imposes on the master

no higher degree of care than that which it denominates 'reasonable,' it does not require him to furnish absolutely safe, or even the best known, appliances. Yet, when his conduct in this respect is on trial, it is proper for the jury to know what appliances are in common use in that kind of business. It has been said by a very high authority that in the operation of a dangerous business the master is guilty of negligence if he fails to furnish the best, well-known, and reasonable attainable implement. *Mather v. Billston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464. We do not understand that case as laying down any stricter rule in reference to the master's duty in that respect than that it was to do all that a reasonably prudent master, mindful of the dangerous character of his business, would ordinarily do to protect the lives of his servants. That is the law in this state." We do not, therefore, say that the defendants in this case were negligent because the side track was not equipped with the derailing switch, although it is quite evident that, if it had been so equipped, this accident would not have occurred. Therefore, the question of whether the spur track in this case was a reasonably safe appliance without a derailing switch was a question for the jury, and such was the view taken by the circuit court, and it was left to the jury to find whether the injury to plaintiff resulted in part on account of the absence of a derailing switch, and was properly submitted to them in connection with the other fact that the car was left with the brake unset and so covered up by the logs that it could not be used to regulate the speed or stop the car if it was started.

In view of the foregoing conclusion, it is unnecessary to discuss seriatim the various objections to the first instruction given on behalf of the plaintiff, inasmuch as it conforms to the views already expressed, with the exception of the last point made against it, which is that it ignores the assumption of the risk by the plaintiff. It will be conceded that the question of assumption of the risk of this car running down on him while at work repairing a car in the yards near Joplin by the plaintiff was not presented to the circuit court in any instruction asked by counsel for defendants, unless it may be said it was included in the demurrer to the evidence. Treating it as presented by this peremptory instruction, we have no hesitancy whatever in holding that plaintiff did not, under the facts of this case, assume any such unusual and extraordinary risk. This identical point was ruled adversely to defendants' contention in *Jones v. Railroad*, 178 Mo., loc. cit. 543, 77 S. W. 894, 101 Am. St. Rep. 434, in which Judge Valliant, speaking for this court in banc, said: "Proof, therefore, of the mere fact that the servant was injured in the master's service, is not sufficient to make out a prima facie case for the plaintiff. To that extent the authorities

cited in the brief for appellant sustain those propositions. *Yarnell v. Railroad*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Murphy v. Railroad*, 115 Mo. 111, 21 S. W. 862. But when cars are found running loose and unattended on the main track at a time and place when and where they are liable to cause the wreck of a regular train, it cannot be said that the danger so incurred is one of the usual and ordinary hazards incident to the business. It is not a usual and ordinary occurrence in a prudently managed business for cars to be found running loose in that manner. It does not ordinarily occur, unless some one has neglected his duty; and it is not, therefore, a risk assumed by the servant. * * * It was the duty of the master to use reasonable care to prevent those cars escaping, and therefore, when they are found running loose, so as to imperil the life of the servant who was in the due performance of his duty, the presumption is that the master did not use reasonable care to hold his cars on the side track, and the burden is on him to prove that he performed his duty in this respect. It devolves upon him to explain the occurrence. It was not attempted on the part of defendants to prove that cars with good brakes and the brakes properly set were liable to escape under conditions that might reasonably be anticipated. On the contrary, when confronted with the fact that the side track was not equipped with a derailing switch, the defendant offered evidence to prove, and now contends, that with good brakes, and the brakes properly set, the cars were secure under ordinary conditions. But, if the brakes were not set or the car blocked, they were liable under ordinary conditions to do just what these cars did. Therefore, when it was shown they did escape, the presumption arose that there was something wrong, either with the brakes or the setting." All of which applies with equal force to the facts developed in this case, and the jury have found the brakes were not set, and the car left on the brow of a descending grade to the main track, and that there was no derailing switch. It is clear that plaintiff, who had no notice of the placing of the car or that the brakes on it were left loose and unset, did not assume the risk of its running down upon him while he was engaged in an apparently safe place repairing a car for defendants. The court committed no error in not holding as a matter of law that plaintiff assumed the risk of said loose car running down upon him. And, moreover, this is a civil case, and if defendants desired, after all the evidence was in, to submit the question of fact to the jury, it was their duty to have prayed an instruction to that effect.

We are cited by counsel for defendants to *Fredericks v. Railroad Co.*, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306, on the proposition that as the car was started by the mining

crew, as they claim, without their consent or knowledge, there was no liability on part of defendants. There is little or no similarity between the facts of the two cases. In the Fredericks Case the railroad company established, not only that it had a derailing switch at the junction of the spur track with its main line, but that the cars set on the spur track were provided with proper brakes and they were all tightly set, and that a third person maliciously turned the derailing switch, so that cars from the spur track could run out on the main track, and then deliberately loosed the brake and started the car out on the main track, and that this occurred so shortly before the accident that defendant had no notice of it. The jury found that the defendant company had exercised all reasonable care to provide against the cars on the spur track getting onto the main track. That the jury properly so found there can be no doubt, but that case is the antithesis of this. Here there was no derailing switch. Here the brakes were not only not set, but so covered with heavy logs they could not be. Here, instead of the malicious interference of a third person, the mining crew, in endeavoring to move the car back a short distance to move the track, were doing what was daily being done with the knowledge and the consent, or its presumed acquiescence. The two cases could not well be more dissimilar.

2. Error is assigned in the admission of testimony. We have already held that it was competent to show the absence of the throw-off or derailing switch, the fact that such a device was in common use by the defendants themselves on the same railroad, and the purpose for which such a switch is designed. All this evidence was clearly within the issues made by the pleadings.

There was no error in permitting Eagan to testify as a practical railroad man, engaged in the construction and repairing of tracks, laying new tracks. It was not necessary that he should have been a scientific railroad man to testify what the purpose of a derailing switch is or where it should be placed. Its purpose is so simple and it is so common that three years' experience in the construction of railroads ought to suffice to teach a man of ordinary intelligence that, if there ever is any use for such a device, the junction of this spur track with defendants' main track was a proper place for it.

There was no impropriety in permitting Bensley, who had a contract with defendants for loading its cars with gravel, to detail how the cars were set in on this spur track and for what purpose, and how he moved the same back and forward in loading them. It tended to disprove the claim of defendants that they did not permit any one but their switching crew with an engine to move cars on this spur track. It went to show that the defendants did know that parties were moving cars about on this spur track from place

to place. The objections to the introduction of evidence were properly overruled.

3. The further insistence is that the court erred in refusing defendants' instructions. Of these the fourth and seventh asked the court to declare the law to be that, if the accident was caused by the act of the mining company's employes in negligently moving the car, then plaintiff could not recover. They entirely ignore the defendants' own negligence in leaving the car with the brakes loose and heavily laden on the brink of a sharp downgrade, and the fact that the mine employes were constantly moving cars set in for the mine back and forward on this track, and that their negligence, concurring with that of defendants, would not relieve the latter of their responsibility for their own proximate cause of the injury to the plaintiff. The court did not err in refusing them. The fifth and sixth sought to have the court declare as a matter of law that plaintiff could not recover on the ground that defendants had negligently failed to put in a derailing switch at the junction of this spur track with the main line. As already said, whether they were negligent in so failing was left to the jury to find under all the evidence, and consequently no error occurred in refusing them and declaring as a matter of law that it was not negligence to have failed in so doing. We think the case was fairly and well tried and properly submitted to the jury, and their verdict is supported by the evidence.

4. The fifth instruction for the plaintiff reads as follows: "The court instructs the jury that, if they find a verdict for the plaintiff, they may allow him such damages, not exceeding ten thousand dollars, as they believe he has sustained by reason of the injuries, if any, to his left arm, caused by the collision described in the evidence." This instruction is assailed on the ground that it does not define the elements of damage which the jury should take into consideration in arriving at their verdict. No instruction on the measure of damages was asked by the defendants, and no attempt was made by the defendants to point out the proper elements of damages in such a case, or to modify the general language of the instruction given for the plaintiff. In *Browning v. Railway Co.*, 124 Mo. 55, 27 S. W. 644, an instruction was given that, if the jury found for the plaintiff, they would assess her damages at such sum as in their judgment would be a fair and just compensation for the loss of her husband, not exceeding \$5,000. In that case, as in this, it was urged that the jury were not properly instructed as to the measure of damages; and *Hawes v. Stockyards Co.*, 103 Mo. 60, 15 S. W. 751, and *McGowan v. Ore & Steel Co.*, 109 Mo. 513, 19 S. W. 199, were relied upon as sustaining the objection. But it was said by this court: "The defendant asked no instruction on the measure of damages whatever. No attempt was

made by it to point out the proper elements of damage in such cases, or to modify the general language of the instruction. The instruction is not erroneous in its general scope, and if in the opinion of counsel for defendant it was likely to be misunderstood by the jury, it was the duty of the counsel for defendant to ask for modifications and explanations in an instruction embodying its views. The court is not required in a civil case to instruct on all questions, whether justified or not, and, as there is nothing in the amount of the verdict to indicate that the jury were actuated by any improper motive in their assessment, the general nature of the instruction is no ground for reversal."

It is urged, however, by counsel for defendants, that that instruction was proper in the case where a widow is suing for the loss of her husband; but no reason is assigned why a different rule should obtain between a case of that character and one like the present one. In *Wheeler v. Bowles*, 163 Mo. 398, 68 S. W. 675, where the plaintiff sued for damages resulting from the dislocation of her shoulder, and the only direction was that, if plaintiff had become permanently injured, lame, and disfigured by such dislocation, the jury would find for the plaintiff in the sum not exceeding the amount in the petition. That instruction was challenged because the elements of damages were not given to the jury, and in answer to that contention it was said: "It is urged as error that the circuit court did not instruct the jury as to the rule by which they should estimate plaintiff's damages. As to this point it is only necessary to remark that this is a civil action, and mere nondirection is no ground of error in this court. The defendant did not submit any instruction on the elements of damages; neither did plaintiff. If the defendant desired the jury restricted to certain elements, he should have offered an appropriate instruction on that subject." The instruction in this case confined the jury to the damages sustained by reason of the injuries, if any, to plaintiff's left arm, caused by the collision described in the evidence. The instruction, according to the foregoing authorities, was sufficient as a general instruction, and if there were any peculiar modifying or qualifying facts, which the defendants desired the jury to take into consideration, it was clearly their duty to have submitted them in an instruction to the court.

As to the amount of the verdict itself, the evidence shows that the plaintiff was a young man, 26 years old, strong and active, and holding a lucrative position, and by reason of this injury he has permanently lost the use of his left arm. Taking into consideration his age, health, and capacity to earn a livelihood, and the probabilities of life, and that he must henceforth go through the world hopelessly maimed, and that by the loss of this arm he is necessarily debarred

from his profession as a car repairer, it cannot be said that a verdict of \$7,500 is such as to shock the sense of justice. In *Bolton v. Railway Co.*, 172 Mo. 92, 72 S. W. 530, the plaintiff was a farmer, 35 years of age, and by the accident both bones of his lower limb were broken and the flesh lacerated. Fifteen months after the accident a large bone had not united, but the surgeon was of the opinion that the bone would finally unite. It was held that the verdict of \$9,000 was not so excessive as to authorize a setting aside of the verdict. In *Henderson v. Kansas City*, 177 Mo. 477, 76 S. W. 1045, a boy 19 years of age was deprived of his right arm and suffered great physical and mental pain. It was held that a verdict of \$8,000 was not excessive. In that case a number of verdicts that had been sustained by this court as not excessive were cited—among others, *Dougherty v. Railroad*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251, in which a judgment for \$12,000 for the loss of a left arm was affirmed. We think there is nothing in the amount of this verdict which would justify this court in interfering with it on the ground that it was excessive.

The judgment is affirmed.

FOX, J., concurs. BURGESS, P. J., not having heard the argument, takes no part in the decision.

DRAKE v. KANSAS CITY.

(Supreme Court of Missouri, Division No. 1.
June 15, 1905.)

1. MUNICIPAL CORPORATIONS — SIDEWALKS — DEFECTS—COAL HOLES—NOTICE.

Where a city permitted an adjoining property owner to maintain a coal hole in a sidewalk, and the hole and cover was of improper and unsafe construction, so that the cover was liable to be displaced, the city was not entitled, as against a person injured by a displacement of such cover, to actual notice of the defect as a condition to its liability for such injuries.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1641-1650.]

2. SAME—DUTY OF PEDESTRIANS—LATENT DEFECTS.

In an action for injuries to a pedestrian by falling into a defectively constructed coal hole in a sidewalk, a requested instruction that there was no evidence of actual knowledge on the part of the city of such alleged defective construction, "and, though the jury might believe that the hole cover and rim were defectively constructed, yet if such construction could not have been discovered by a person exercising ordinary care and prudence walking over the sidewalk, then defendant was not liable," was properly modified by striking out the quoted matter; the city being bound to look for defects, though plaintiff was not bound to discover latent defects in the walk.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1641-1650, 1654.]

3. SAME—ISSUES.

Where, in a suit for injuries to a pedestrian by falling into a coal hole, plaintiff sought

to recover on the ground that the hole and cover were defectively constructed, while defendant sought to escape liability on the ground that the cover of the hole had been displaced on the morning of the accident, and that the city had not had time to be charged with notice, a requested instruction that if the hole rim and cover were defectively constructed, yet if the cover had been displaced by some one before plaintiff fell, and because of such displacement plaintiff stepped on it and was caused to fall into the hole, defendant was not liable, was properly modified by adding a provision requiring the jury to believe that such displacement was obvious and of such a character that an ordinarily prudent person, in passing over the walk, would have observed and avoided it.

4. SAME.

Where, in an action for injuries to a pedestrian by falling into a defectively constructed coal hole, defendant claimed that the cover of the hole had been raised on the morning of the accident by the occupant of the adjoining property to let air into the cellar, and that this had caused the accident, but the evidence also disclosed that such occupant had done the same thing every day for six weeks or two months before the accident, the city was chargeable with notice of such continuing act, and was, therefore, not entitled to an instruction that, if the raising of the cover caused the accident, defendant was not liable.

5. SAME—VERDICT—PASSION AND PREJUDICE.

In an action for injuries to a pedestrian by falling into an alleged defectively constructed coal hole in a sidewalk, evidence held insufficient to establish that the verdict was the result of passion and prejudice.

Appeal from Circuit Court, Carroll County; John P. Butler, Judge.

Action by D. R. Drake against Kansas City. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. A. Laughlin and R. J. Ingraham, for appellant. Frank P. Walsh, Virgil Conkling, and El R. Morrison, for respondent.

MARSHALL, J. This is an action for \$25,000 damages for personal injuries received by the plaintiff on the 24th of May, 1900, in consequence of stepping into a coal hole in the sidewalk on the south side of Thirteenth street, between Tracy and Forrest avenue in Kansas City, and in front of house No. 1211 East Thirteenth street. There was a verdict and judgment for the plaintiff for \$15,000, and after proper steps the defendant appealed.

The petition alleges that Thirteenth street is a public highway of the defendant city and that at the time of the accident the sidewalk, as maintained by the defendant, was in an unsafe and dangerous condition, in this: "that a certain coal hole therein, being a circular aperture from one to two feet in diameter, was improperly, unskillfully, and negligently constructed, maintained, suffered, and permitted to be and remain in the sidewalk; that the cover of said coal hole was too light for the purposes for which it was used; that the rim around the under side of said cover was too shallow and not of sufficient depth for the purpose for which it was used; that the said rim was too small

in diameter, causing the said cover to be in a loose condition when put in its place; that a certain iron frame upon which said cover rested was at or near the level of the balance of the sidewalk, so that, when the covering was placed in position, said iron cover protruded above and over the balance of the sidewalk, so that said cover and frame were defective, unsafe, dangerous, and insecure, and said cover did not set firmly over said hole, and was thus liable to turn and become displaced by persons stepping upon or against the same, thus opening said hole, and entrapping and affording an unsafe and insecure footing to persons passing over the same"; that the defendant knew, or by the exercise of ordinary care could have known, of the unsafe, dangerous, and defective condition of the sidewalk, which condition existed for a length of time reasonably sufficient for the defendant to have ascertained and corrected the same; that while plaintiff was walking upon said sidewalk and exercising ordinary care, and was ignorant of the defective and unsafe condition thereof, he stepped on the cover of said coal hole, which, in consequence of the defects stated, turned in said frame, and plaintiff's leg dropped into said hole, and plaintiff fell violently upon the edge of said cover and upon the sides of said coal hole, and was injured in a manner and to a permanent extent which, it is only necessary to say, was of the most painful and serious character that could be inflicted upon a man. The answer admits the character of the defendant city, denies every other allegation of the petition, and pleads contributory negligence of the plaintiff. The case was taken on change of venue from Kansas City to Carroll county, Mo.

The case made is this: It was admitted that the place where the coal hole was located was in a sidewalk of a public street of the defendant city. The coal hole apparatus was produced in court, and by stipulation of counsel it was admitted to be in the same condition that it was in at the time of the injury, except that the rim had been surrounded by cement by the defendant. The plaintiff was a man 55 years of age at the time of the accident, and was engaged in the advertising business, earning from \$1,200 to \$1,500 a year. He lived at 1306 Michigan avenue, which was east of the place of the accident. On the day of the accident, at about 9:15 o'clock a. m., he was proceeding west on Thirteenth street on his way down town to his business, and while so doing he fell into the coal hole and received the injuries complained of. The plaintiff says that the coal hole was in the middle of the stone sidewalk, and that the top thereof was lying flat, and that he stepped upon it, and that it gave way or slipped, so that his foot went into the coal hole and he fell astride of the cover. He says he saw the coal hole before he stepped on it, and that the cover was

lying perfectly flat in its place. Mrs. Max Cohn, whose testimony was taken by the defendant, but read by the plaintiff, testified that she boarded at 1215 East Thirteenth street, the house next door to the premises in front of which the coal hole in question was located; that she occupied the third-story front room, and was sitting at the front window, and first saw the plaintiff standing in front of her boarding house, and the next she saw he was in the coal hole; that Thirteenth street, at that point, is thickly built up; that she had seen the cover over the coal hole slightly raised before the day of the accident, and sometimes it was not in its regular position. Luther B. Keebaugh, a witness whose deposition was taken by the defendant, but read by the plaintiff, testified that he lived at 1215 East Thirteenth street; that he passed the coal hole six or eight times a day for several years before the accident, and had frequently seen the cover of the coal hole out of place, with some obstruction placed over the top of the coal hole; that he had often heard the cover over the coal hole rattle when persons stepped onto it; that the cover over the coal hole stood a little above the level of the walk; that that portion of the city was thickly built up, and the street was a much traveled street. Albert Stedman, a witness for the plaintiff, testified that he was hauling brick for the building of some flats on the other side of the street; that just before the accident he noticed that the cover to the coal hole was a little off of the hole, and one side tipped down about an inch and a quarter or two inches; that it was in such condition about five minutes before the accident; that he did not see the accident, but saw the plaintiff in the coal hole immediately after he had fallen into it, and assisted him to get out of it; that the cover of the coal hole tipped towards the west and did not rest on the rim of the coal hole. J. O. Hogg, a witness for the plaintiff, testified that he was an architect and had experience in providing for coal holes and covers thereon; that he examined the coal hole in question after the accident; that there is an iron frame about a quarter of an inch thick, that is put in a coal hole cut into the stone sidewalk; that the cover was between 15 and 16 inches in diameter, and was about nine-sixteenths of an inch thick; that there was a rim below the under part of the cover; that the same extended about one-fourth of an inch above the sidewalk; that the cover did not fit tight in the frame; that the rim was too shallow, so that the cover projected above the sidewalk; that when a person stepped upon the cover it would fly up out of the frame; that the cover should have been heavier, and the rim should have been deeper, to prevent the cover from slipping. Hugh Matthews, a witness for the plaintiff, testified that he was engaged in the business of manufacturing coal holes, covers, and rims,

and was a practical machinist and molder; that the coal hole, cover, and rim in question were not properly constructed, the rim being too shallow, and that it should have had lugs on the end or side of it to keep it from slipping; that when the cover is too light, it tips easily when a person steps on it. The witness, in the presence of the jury, gave a practical demonstration by stepping on the cover of the coal hole which had been produced in court, and the cover would tip or slip when stepped on. He had never seen a coal hole like the one in question before and it was unlike the other coal holes used in Kansas City.

M. Gleason, a witness for the defendant, testified that he was a member of the police force, and at the time of the accident his beat covered the place of the accident, and that he was at that time on duty; that he did not see the accident, but he met the plaintiff as he was being carried away; that he examined the coal hole, and found the cover in position, and stepped upon it, and found that it was solid; that he had never seen the cover out of place before; that he passed the coal hole six or seven times a day, and frequently stepped on it; and that it did not tilt or slip. Jacob Miller, a witness for the defendant, testified that he lived at 1301 East Thirteenth street, and had lived there for about four years prior to the accident, and had passed by the coal hole many times; that in passing he frequently saw the coal hole open, but that there was always a chair or some kind of a guard to warn people; that he had frequently walked over the coal hole cover; and that it had never slipped or given way. Nora Miller, a witness for the defendant, testified that at the time of the accident she was living at 1211 East Thirteenth street; that the house was a four-story house and had 14 rooms, and that she kept boarders there; that she knew the coal hole in question; that on the morning of the day of the accident she propped up the cover of the coal hole from beneath with a board, so that the cover tilted or was raised at the western side thereof, the cover resting on the rim on the north and south sides; that the east side of the cover did not rest on the rim; that she so propped it up about 6 o'clock in the morning to let fresh air into the coal cellar; that she was not at home at the time of the accident, having left the house about half past 7, and did not return until about 9 o'clock, and when she returned she learned of the accident, and found the cover in its proper position resting on the rim; that for six weeks or two months before the accident she had been in the habit of so propping up the cover over the coal hole, so as to ventilate the cellar. Mrs. Miller Samuels, a witness for the defendant, testified that at the time of the accident she boarded at 1215 East Thirteenth street; that she was standing at the front window and saw the accident; that when she first saw

the plaintiff he was walking slowly towards the west, looking, she supposed, at the building in the process of construction across the street; that the cover of the coal hole at that time was lifted, and was raised about 6 to 10 inches above the rim; that she could not see what held it up; that when plaintiff reached the coal hole he stumbled or fell, she could not tell which; that she could not see where the cover went as he fell, but after his fall she saw it lying on the opposite side of the hole; that she had never observed the cover to the coal hole before that time. Mrs. Lelah Keebaugh, a witness for the defendant, testified that at the time of the accident she lived at 1215 East Thirteenth street; that she did not see the accident; that on the morning of the accident she had observed the cover to the hole; that it was raised up; that it was propped up with a stick, which left an opening of quite a space in the top of the coal hole; that she had seen the cover out of place prior to the day of the accident, had seen it raised or tilted up, and had also seen it lying on the side of the coal hole; that when one stepped heavily on the top of the coal hole, it would move slightly to one side, and if the person did not step off of it, his leg would go down in it; that the coal hole in front of her house was like the one in question here, and that, when a person stepped on one end of it, the other end would fly up. M. S. Howell, a witness for the defendant, testified that the rim of the coal hole was about flush with the sidewalk.

At the close of the plaintiff's case, the defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted.

1. The first error assigned by the defendant is the action of the trial court in overruling the demurrer to the evidence at the close of the plaintiff's case. Defendant admits that the general rule of law is that it is the duty of a city to keep the sidewalks in a reasonably safe condition for public use, and that it is liable for injuries from defects therein of which it had actual notice, or which had existed for such a length of time prior to the accident as, "by the exercise of ordinary care, it could have ascertained, and which it had a reasonable time to remedy." But defendant contends that the defect complained of in this case was a latent defect, which by an inspection of the sidewalk from the surface thereof, such as a person of ordinary care would have made under similar circumstances, could not have been discovered, and therefore this case falls within the principles announced by this court in *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210; *Baustian v. Young*, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462; and *Buckley v. Kansas City*, 156 Mo. 16, 56 S. W. 319.

This case is easily distinguishable from the three cases relied on by the defendant. In the *Carvin Case* there was no defect in the con-

struction of the water meter which caused the accident. The cause of the accident in that case was the accumulation of a small amount of dirt around the flange of the rim of the water meter, on which the cover rested, which raised the cover thereof out of its proper position, and caused it to slip when the plaintiff stepped on it. There was no structural defect in the water meter, and it did not appear that the dirt had been allowed to remain on the flange for so long a time as to impute notice to the city. In the *Baustian Case*, the sleepers under the sidewalk were rotten, the rain had washed the earth away from below the sidewalk, and when the plaintiff stepped on the plank sidewalk it gave way, and he fell. The condition of the sleepers and the gully, so washed beneath the sidewalk, were latent defects, which an inspection from the surface of the sidewalk would not have disclosed. In *Buckley v. Kansas City*, supra, the defect was a crack in the flange, which supported the glass covering over the area way, and so far as then appeared to this court the cracks were latent defects, which could not have been discovered from an examination from the surface of the sidewalk. In the case at bar, however, the defect could have been discovered from an examination or inspection of the coal hole and its cover, made from the surface of the street.

The plaintiff tried the case upon the theory of the petition that the cover to the coal hole was too light; that the rim around the bottom of the cover was too shallow and too small in diameter, causing the cover to be loose when in its place; and that the iron framework upon which the cover rested was at or near the level of the sidewalk, so that the cover when placed in position, protruded above and over the walk, and did not fit firmly over the hole, but was liable to turn and become displaced by persons stepping upon or against the same, thereby opening the hole and causing the person to fall into it. The contention of the plaintiff is that the defect complained of was a structural defect, and could have been discovered by an examination or inspection made from the surface of the sidewalk, and that it had existed from the beginning. Thus it easily appears that this case does not fall within the principles laid down in the three cases relied on by the defendant. There was ample evidence offered by the plaintiff to support the allegations of the petition and the theory upon which the plaintiff tried the case in the court below. The question, therefore, only remains whether or not the city is liable for such defects in its sidewalks.

Roe v. Kansas City, 100 Mo. 190, 13 S. W. 404, was an action for damages caused by the plaintiff falling in a trap-door on the sidewalk. It appeared that the hinges of the door had been broken, and that it was in such condition that, by stepping upon some parts of it, it would tip up, and that the accident

to the plaintiff occurred in that way. The defect on the door had existed for some months before the accident. The plaintiff recovered in the trial court, and the judgment was affirmed by this court. *Barr v. Kansas City*, 105 Mo. 550, 18 S. W. 483, was an action for damages caused by the plaintiff falling into a sewer, the cover or grating over which had been improperly constructed, and was of such a character as to make it too short and too narrow to properly cover the opening. The trial court instructed the jury that it was the duty of the city to provide a reasonably safe and sufficient covering for the hole, and that it was liable if it failed so to do. This court said: "If the city officers had actual knowledge of the displacement of the cover, and had failed to securely re-cover it within a reasonable time before the accident, they were guilty of negligence. If the hole was open and patent for such a length of time before the accident as that the city officials by the exercise of ordinary care and diligence could have discovered it, and they did not, they were guilty of negligence. * * * The hole could have been securely re-covered within the hour of the discovery of its condition. Besides, the displacement was not the result of an accident or the wrongful act of another, but the natural consequence of the defects in the original construction by the city, of which it was charged with notice from the beginning and which it was under a continuing duty to repair." This case was again before the court (121 Mo. 22, 25 S. W. 562), and it was said: "The case was submitted to the jury on two grounds of negligence of the defendant: First, a failure to provide a reasonably safe covering for the manhole; second, negligence in leaving the hole uncovered. It is now insisted, on behalf of the defendant, that there was no evidence of negligence in failing to provide a suitable covering, and hence the issue was improperly submitted to the jury." The opinion then describes the character of the manhole, and the grating or cover over the same, and then concludes as follows: "This evidence gives a perfect and complete description of the casting and the cover, and it was not necessary to call witnesses to testify in terms that the cover was too small, and therefore dangerous. Had such evidence been introduced, it would doubtless have been objected that it was not a proper case for expert evidence. The casting and its cover being described, it was for the jury to say whether the cover was reasonably safe. This casting and cover were placed on the surface of a street, where it was subject to jars from vehicles, and the conclusion that the cover was too small, or not properly supported, is a reasonable one—one which the jury could draw from the evidence. There was, therefore, no error in submitting this issue to the jury." *Benjamin v. Street Railway Co.*, 133 Mo. 274, 34 S. W. 590, was an action for damages for injuries received from

falling into a coal hole, in front of the defendant's premises, located on a sidewalk. The plaintiff stepped on the cover over the coal hole, which turned and slipped out of place, by reason of which her foot went into the hole and she was injured. The negligence charged was the improper construction of the coal hole and cover, and in all essential respects the defect complained of was as serious as that here involved. There, as here, a third person had been permitted by the city to construct and maintain the coal hole for private benefit and use. This court said: "The principle is well settled that a city, which authorizes excavations in its streets, is not entitled to the notice of the dangerous condition in which they have been left, in order to hold it liable to third persons for injuries occasioned thereby."

The theory of the plaintiff's petition and case is that the casting constituting the top and cover of the coal hole was necessarily a dangerous construction, in this: that the cover was too light; that the rim around the under side of the cover was too shallow and too small in diameter, which caused the cover to fit loosely into the iron framework; that the iron framework was at or near the level of the sidewalk, so that the top of the cover, when placed in position on the top of the iron framework, protruded over the edges thereof, and prevented it from fitting firmly over the hole, and rendered it liable to turn and become misplaced by persons stepping upon it. The evidence shows that the construction was an unusual one, and such as is not in common use in Kansas City. From the description contained in the petition and disclosed by the evidence, it is apparent that it was unlike coal holes and their covers, such as are described in other cases, where there is a flange projecting from the inside of the iron framework on which the cover rested, and where the cover fits entirely inside of the iron framework and is so constructed as to be on the level with the sidewalk. Thus it appears that in this case the construction was that there was a rim underneath the cover, and that, instead of the cover fitting into the iron framework, it rested on the top thereof, and the edges of the cover extended over the iron framework, from which it is apparent that if the cover was not of sufficient weight, or if the rim underneath it was not deep enough, as the evidence shows was the case here, the result would be that, when a person stepped on one edge of the rim, it would necessarily cause the opposite side of the cover to rise up, the rim on the bottom of the cover to become disengaged from the iron framework, and the lid to slip, so as to allow persons to be precipitated into the hole. The defects complained of were shown by the testimony of the experts to be such as would likely produce results such as happened in this case, and in addition thereto, the practical demonstration made by the witness Matthews clear-

ly showed that the construction was liable to result just as happened in this case.

It thus appears that this case is wholly unlike the three cases relied on by the defendant, and that there was sufficient evidence to take the case to the jury upon the allegations and proofs made by the plaintiff. The necessities and convenience of abutting owners may be such as to warrant a city in authorizing such owners to construct and maintain coal holes in the sidewalks, but their presence and nature necessarily call for greater care and closer inspection by the city and its officers than ordinary sidewalks demand where no such conditions exist. Where such permission is granted by the city, the duty immediately arises, both as to the city and the persons constructing the same, to use ordinary care to see that they are so constructed as to be reasonably safe for public use. If the construction is such that it is improper or unsafe, and the cover is liable to be displaced, the city is not entitled to actual notice; for it has constructive notice from the beginning. *Barr v. Kansas City*, 105 Mo. 557, 16 S. W. 483; *McGaffigan v. Boston*, 149 Mass. 289, 21 N. E. 371; *Tiedeman on Municipal Corporations*, § 298; *Roe v. Kansas City*, 100 Mo. 190, 13 S. W. 404. There was, therefore, no error in overruling the defendant's demurrer to the evidence.

2. The second error assigned is the action of the trial court in modifying and giving defendant's instruction No. 5. That instruction, as asked, was as follows: "The court instructs the jury that there is no evidence in this case of actual knowledge upon the part of any official of the defendant city of the alleged defective construction of the coal hole, rim and cover; [and though you may find and believe from the evidence that said coal hole, cover, and rim were defectively constructed, yet if you further find that such defective construction could not have been discovered by a person exercising ordinary care and prudence walking over said sidewalk, then your verdict should be for the defendant city]." The court modified this instruction by striking out the portion in brackets. It is contended that by so striking out such portion the court authorized a verdict for the plaintiff, or refused to direct a verdict for the defendant, even though the defect was a latent one. The contention is untenable. The first instruction given for the plaintiff covered the whole theory upon which the plaintiff's case was predicated, and declared that the defendant was liable if the original construction was necessarily a dangerous one, and if the coal hole in such condition had existed for a sufficient length of time for the defendant to have discovered and corrected the same. The theory of the defendant's instruction No. 5, as asked, was that, if the defect was such that it could not have been discovered by a person exercising ordinary care and prudence while walking over the sidewalk, the defendant was not li-

able, even though the original construction may have been a dangerous one. The instruction, as asked, did not correctly state the law. Persons passing along a sidewalk may or may not discover latent defects in the sidewalk, but it is no part of their duty to look for them. It is the duty of a city and its officers to look for defects. For this reason, the court properly struck out that portion of the instruction.

But, aside from this, there is really no question of latent defect in the construction. The construction, such as it was, could have been easily detected and ascertained from an inspection of the coal hole and its cover, made from the surface of the sidewalk. It did not even require the removal of the cover to the coal hole for an inspector to see that it was both an unusual and a dangerous construction. The fact that the top of the coal hole extended over the rim of the iron framework, instead of fitting firmly into the iron framework, was of itself sufficient to attract the attention of an inspector exercising ordinary care, and to cause him to examine it more closely and to condemn it. Moreover, the liability of the city in this case did not depend upon an actual notice; for it was the duty of the city from the beginning to see that the coal hole it permitted to be placed in one of its sidewalks was a reasonably safe construction. There was, therefore, no error in modifying the instruction; but, on the contrary, the instruction as given was more favorable to the defendant than it was entitled to under the plaintiff's theory of the case.* The defendant's theory of the case was that the coal hole, as originally constructed, was a safe construction, but that it was rendered unsafe by the act of Mrs. Miller, who occupied the house abutting that portion of the street, in raising the coal hole and propping it up early in the morning of the day of the accident, for the purpose of admitting air to the cellar, and that such condition had not existed long enough before the accident to impute notice to the city. This idea was expressed in defendant's instruction No. 8, which was modified and given by the court, and which instruction will be presently considered.

3. The third error assigned is the ruling of the court in modifying and giving defendant's instruction No. 8. That instruction, as asked, was as follows: "The court instructs the jury that, though you may believe from the evidence that said coal hole, rim, and cover were defectively constructed, so that the cover would slip out of place when stepped upon, yet, if you find that said coal hole had been raised up or displaced by some one before plaintiff fell, and that, because said cover was raised up or displaced, it slipped when plaintiff stepped upon it, and caused plaintiff to fall into the hole, then your verdict should be for the defendant city." The court modified this by adding: "Provided you further believe and find from the evi-

dence that such displacement was obvious; that is, that it was of such character that an ordinarily prudent person, in passing over such walk, could have observed and avoided the same." The instruction, as asked, was manifestly predicated upon the theory that Mrs. Miller had raised and propped up the cover over the coal hole on the morning of the accident, and that the city had not had time to be charged with notice thereof, and was not liable for the wrong of the witness in so doing. The criticism of the ruling of the court in this regard is that it permitted the plaintiff to recover, though the cover was so propped up, provided the position was obvious to a passer-by, and thereby broadened the issue, and authorized a recovery upon an issue not raised by the pleadings, and that the liability of a city for defects in a sidewalk caused by the acts of a third person does not depend upon whether the defect was obvious to the person injured or not; and counsel illustrate their position by saying that the instruction, as modified, would authorize a recovery where the defect was latent, but would not authorize a recovery where the defect was patent or obvious, and that the city is not liable for latent defects, but is only liable for defects which could be observed by the exercise of ordinary care.

The plaintiff did not seek to recover because of defects that were caused by the acts of a third person, and which had not existed long enough to impute notice to the defendant. In other words, the plaintiff did not ask to recover upon grounds or theories not raised by the petition. The instruction was based upon a theory of the case which was raised by the defendant, and not by the plaintiff. This case, therefore, does not come within the rule laid down by this court in *Chitty v. Railroad*, 148 Mo. 64, 49 S. W. 868, and cases of like character. The instruction, as asked by the defendant, declared the law to be that the defendant was not liable for defects caused by the act of a third person. The instruction was too broad; for a city is liable for defects in a street caused by third persons, if it permits them to remain after it has constructive notice thereof. The case made by the defendant in this regard was not simply an isolated instance of a defect in a sidewalk caused by the act of a third person; but that defect, according to the witnesses who testified to its existence, had continued every day for six weeks to two months before the date of the accident. *Carrington v. St. Louis*, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; *Fehlauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843. The city, therefore, was chargeable with notice of such continuing act of the third person in raising and propping up the cover over the coal hole, and by the exercise of ordinary care could have remedied it. The theory of the modification by the court was that the plaintiff was not entitled to recover if the defect caused by the third person con-

sisted of an obvious defect. If the defect was obvious, and the plaintiff failed to observe it and was injured, he could not recover from any one; for his act would have been the proximate cause of the injury. The act creating the defect, in such instance, would have been a remote cause. The general rule of law is that, when a third person causes a dangerous condition to exist in a highway, the city is not liable for injuries resulting therefrom, unless the condition existed for such a length of time as to impute notice to the city, or unless the city had actual knowledge thereof. If the facts in this case had showed such to be the case, the court should have instructed the jury in the language of the instruction asked. But the same witness, who afforded the basis of the instruction, by testifying that she had raised the cover on the morning of the accident, also testified that she had done the same thing every day for six weeks to two months before the date of the accident. Under such a state of facts the court would have been fully justified in refusing instruction No. 8 entirely; and, this being true, the modification of that instruction made by the court did not injuriously affect the defendant at all.

4. The defendant next contends that the verdict was the result of passion and prejudice. The gist of this contention is that the evidence is so overwhelmingly in favor of the defendant that the court must necessarily find that the jury were guilty of passion or prejudice. The argument is that the plaintiff is the only witness who testified that the cover was lying flat in its place over the coal hole at the time he stepped on it, and that his testimony is contradicted by that of Mrs. Miller, who says she propped it up on the morning of the accident; by that of Mrs. Keebaugh, who says she saw it so propped up; by that of Mrs. Cohn and Mrs. Samuels, who said that the plaintiff was looking across the street at some houses in process of construction when he stepped on the cover; and by that of Albert Stedman, a witness for the plaintiff, who testified that he saw the cover about five minutes before the accident, and that it was slightly out of position. If it be conceded that the testimony was just as stated, nevertheless it would not be sufficient to establish the charge that the verdict was the result of passion and prejudice; for it was the province of the jury to believe or disbelieve any of the witnesses who testified in the case, and it was the privilege of the jury to believe the testimony of the plaintiff, if the jury were satisfied that his version of the case was the correct one. Aside from all this, however, there is no necessary and irreconcilable conflict between the testimony of the plaintiff and the other witnesses. It may be true that Mrs. Miller had propped up the cover over the coal hole, and that Mrs. Keebaugh had seen it so propped up on the morning of the accident; but neither of them

testified that it was so propped up at the time of the accident, and Mrs. Miller testified that she was not at home when the accident occurred. Likewise it may be true, as stated by Mrs. Cohn and Mrs. Samuels, that the plaintiff was looking across the street at the moment he stepped on the cover, yet this would not establish that the cover was lying flat, or was propped up, or was slightly out of position. It may be true, as stated by Mr. Stedman, that five minutes before the accident the cover was slightly out of position, and yet it may likewise be true that the cover was lying flat, and, so far as the plaintiff could see from the position he was in before he stepped on it, that it was apparently in place. This analysis, however, is not intended as a comment upon the weight of the evidence, but simply to show that there is nothing in the testimony to induce a fair conclusion or belief that the verdict of the jury was the result of passion or prejudice.

A careful examination of the testimony, and of the instructions given and refused, compels the conviction that the case was fairly presented to the jury; that there is substantial evidence to support the verdict; that, in view of the serious and painful and permanent character of the injuries inflicted upon the plaintiff, the damages assessed cannot fairly be said to be excessive; and therefore there is no legal ground upon which this court can interfere with the finding of the jury and the judgment of the circuit court.

The judgment is affirmed. All concur.

DAUSMAN v. RANKIN.

(Supreme Court of Missouri, Division No. 2, June 6, 1905.)

1. WILLS—UNDUE INFLUENCE.

Undue influence, to invalidate a will, must be such as amounts to overpersuasion, coercion, or force, destroying testator's free agency and will power, and not mere influence of affection or attachment, or the result of testator's desire to gratify the wishes of another, whom she loved, respected, and trusted.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 375-387.]

2. SAME—EVIDENCE.

In a will contest, evidence held sufficient to sustain a verdict finding that a will was the result of undue influence.

Appeal from Circuit Court, Jefferson County; Frank R. Dearing, Judge.

Will contest by Maggie R. Dausman against Eugene O. Rankin and another. From a judgment for contestant, defendant above named appeals. Affirmed.

Joseph G. Williams, R. A. Frazier, and James F. Green, for appellant. Sam Byrns and E. J. Bean, for respondent.

GANTT, J. This in an action instituted in the circuit court of Jefferson county, Mo., at the January term, 1902, for the purpose of contesting the last will of Cecilia A. Rankin, deceased.

The petition is as follows: "Plaintiff states that she is a child and heir at law of Cecilia A. Rankin, deceased, and as such is interested in her estate; that deceased was a single woman, and departed this life in Jefferson county, Missouri, on the — day of April, 1901, possessed of a large estate of real and personal property; that her heirs at law are Charles T. and Eugene O. Rankin, defendants herein, and this plaintiff; that thereafter, to wit, on the 17th day of May, 1901, there was admitted to probate by the probate court of Jefferson county, Missouri, and within five years from this date, a certain instrument in writing as and for the last will and testament of Cecilia A. Rankin, deceased, and bearing date August 17, 1899, and that letters testamentary thereon were on the — day of —, 1901, granted by said probate court to said Eugene O. Rankin as executor named in said supposed will; that by the supposed will plaintiff and defendants herein were made legatees. Plaintiff further states that at the time the said supposed will was subscribed by the said Cecilia A. Rankin, in her lifetime, and also at the time the same was published and declared as and for her last will and testament, said Cecilia A. Rankin was not of sound mind and disposing memory, but, on the contrary, was wholly incapable of making a testamentary distribution of her affairs. Plaintiff further says that, at the time said supposed will was executed by Cecilia A. Rankin, she was under the control of the defendant Eugene O. Rankin; that he possessed and exercised undue influence over her, and that the will and the mind of the said Cecilia A. Rankin was controlled and dominated by said Eugene O. Rankin, and that he caused his will to be substituted and his intention carried out in said will for that of Cecilia A. Rankin, deceased. Plaintiff says that by fraud and artifice, resorted to and practiced by the said Eugene O. Rankin on Cecilia A. Rankin, he induced her to attempt to make a will; that the supposed will was the result of the weak and unsound mind of the said Cecilia A. Rankin, unduly controlled by the undue influence and fraud of the said Eugene O. Rankin; and that said will is not her own free act and deed, and said writing is not the last will and testament of the said Cecilia A. Rankin, deceased. Plaintiff therefore prays that an issue be made up whether said writing, produced and admitted to probate as aforesaid, be the last will and testament of Cecilia A. Rankin, deceased, or not, and that the same be set aside and for naught held, and that plaintiff recover her costs in this behalf expended."

Defendant Eugene O. Rankin filed his answer as follows: "Now at this day comes defendant Eugene O. Rankin, and for his answer to plaintiff's petition denies that the said Cecilia A. Rankin, testatrix, was not of sound mind and disposing memory at the time of executing the last will and testament in plaintiff's petition described, and which is

contested herein; and, further answering, denies that at the time said will was executed by Cecilia A. Rankin she was under the control of the said defendant Eugene C. Rankin, and denies that he possessed and exercised undue influence over her, and denies that the will and mind of the said Cecilia A. Rankin was controlled and dominated by him, the said Eugene C. Rankin, and denies that he caused his will to be substituted and his intentions carried out in said will for that of Cecilia A. Rankin, and denies that the said will was not her own free act and deed, and denies that the said defendant Eugene C. Rankin resorted to any fraud or artifice of any kind whatever, and denies that he induced her to make a will, and denies that the said will was the result of the weak and unsound mind of the said Cecilia A. Rankin, unduly controlled by the undue influence and fraud of the said Eugene C. Rankin, and denies that the said writing is not the last will and testament of said Cecilia A. Rankin, deceased, and denies that she was incapable of making a testamentary disposition of her affairs. Defendant Eugene C. Rankin states the fact to be that the said Cecilia A. Rankin was at the time of the execution of the said last will and testament by her of sound mind and disposing memory. Defendant further states that the said Cecilia A. Rankin departed this life on or about the 17th day of April, 1901, and that on the 7th day of May, A. D. 1901, the said will was duly admitted to probate by the probate court of Jefferson county, Missouri; and that the last will and testament was the free act and deed of the said Cecilia A. Rankin, and the untrammelled disposition of her property to the therein mentioned objects of her bounty. Wherefore the defendant prays the court that the last will and testament of the said Cecilia A. Rankin be declared and established as her last will and testament."

The action was dismissed as to the executor of the will, and defendant Charles T. Rankin filed his answer as follows: "Now at this day comes Charles T. Rankin, one of the defendants in the above-entitled cause, and for answer to plaintiff's petition filed herein admits each and every allegation in said petition contained."

The cause was tried before the court and a jury. The jury returned a verdict that the paper writing propounded was not the last will and testament of said Cecilia A. Rankin. Motions for a new trial and in arrest of judgment were duly filed, heard, and overruled, and the defendant Eugene C. Rankin appealed to this court.

On the trial the defendant Eugene C. Rankin offered evidence of the due execution of the will.

Perry Bartholow testified that he had lived in the city of St. Louis since 1873, and was at the time of testifying assistant superintendent of supplies of the Louisiana

Purchase Exposition Company, and prior to that time had been United States consul to Germany; that he had known Mrs. Rankin since 1878, having married her niece in that year. He identified his signature as a witness to the will, and stated that he signed the same at her request; that Mrs. Rankin read the will and signed it, and the witness asked her if it was her last will, and if she wanted him to sign it as a witness, and she said, "Yes," and he did so; that at the time there were present in the room Ed Fletcher, Eugene Rankin, the testatrix, Mrs. Rankin, and Max Seeman; that the will was executed on the 17th of August, 1899; that Mrs. Rankin at that time was in good health, but was an old woman; that he had often seen her since the death of her husband, and prior to the signing of the will; that at the time of the execution of the will she was a very strong-minded woman, of fine education and refinement; that at that time Mr. Ed Fletcher, the other witness, who was her nephew, boarded in the same house with her. On cross-examination he stated it was about 11 o'clock in the day when the will was executed; that Gene Rankin had written him that he would come up and wanted to see him; that they had a typewritten copy of the will; that they went out to the house, where Mrs. Rankin was staying in the city, and that he went upstairs and called her to come down and get through with the will, so that they could go down town; that Mrs. Rankin read the will, and said that was what she wanted; that Mrs. Rankin lived in De Soto, or boarded there, and that she had been in St. Louis about six weeks or two months, and came up there about the 4th of July; that he went out to the house for the purpose of witnessing the will; that the will was typewritten by a Mr. Jenkins in the Laclede Building; that Jenkins was the witness' stenographer; that he (Bartholow) told Eugene Rankin to get a stenographer to write the will; that Rankin had a rough draft of it when he came into the office; that he had had it typewritten, and then they went out to the house, and Ed Fletcher was there; that Mrs. Rankin wrote her name to the will in the parlor in the presence of them all, and that witness asked her if that was her last will and if that was what she wanted, and she said it was; that the notary asked her about the same question that he did, viz., if that was her last will; that Mrs. Rankin had told witness that she was going to have a will made, and had told him that she was going to leave her property to Eugene, her son; that if she did not do that it would be thrown away and squandered; that if she gave it to Mrs. Dausman (her daughter) it would be given to Dausman, and that he would throw it away, and that she was not going to give Charley (her son) any more to squander; that if she gave it to Charley he would not have a dollar in three months; that Mrs. Rankin at that time was 73 years

old, was not very strong physically, and could not stand much exercise, but her mind was very clear; that Eugene Rankin's treatment toward his mother at the time his father died was such as a son's should be toward his mother. In regard to drinking, he said he had seen Eugene C. Rankin full pretty often before and since his father's death; that he was sober about as long as he was drunk during the past 30 years. He had reformed about a year before this will was written.

Ed Fletcher testified he signed the will as a witness for Mrs. Rankin; that he was boarding with his aunt there at the time, and she asked him to sign the will as a witness, and said it was her last will, and she wanted to leave her property that way; that he asked her, when she signed it, if she knew what she was signing, and she said she did, and that she had left her property as she wanted to; that the condition of her mind was all right, and she knew what she was doing. On cross-examination he stated that he had been down to the butcher shop, and when he came back Eugene Rankin and Perry Bartholow were there, and he went in and witnessed Mrs. Rankin's signature; that the execution of the will occurred between 10 and 11 o'clock in that day; that a notary public had the will when witness first saw it, and that the notary laid the will on the table; that at that time Mrs. Rankin was sitting in the room, and the notary asked her if she knew what was in the will, and if she had read it, and whether it was all right, and she told the notary that she knew everything there was in there, and that it was all satisfactory; that he did not remember what was done with the will after it was signed, and he did not see it any more until he made the affidavit as a witness after Mrs. Rankin's death; that he signed the will in the presence of Bartholow, and was there when Bartholow signed it as a witness; that Mrs. Rankin was over 21 years of age and of sound mind when she signed it.

Having made this formal proof of the execution of the will, the defendant offered and read in evidence the said will, which is in words and figures as follows:

"I, Cecilia A. Rankin, being of sound and disposing memory, do make and declare and publish this my last will and testament, hereby revoking and annulling all former wills by me made, as follows:

"First. I order and direct that all of my just debts be paid with convenient speed out of my personal estate, if possible.

"Second. I give, bequeath, and devise unto my son, Eugene C. Rankin, all of lots eight (8), nine (9), ten (10), eleven (11), and twelve (12), in block three (3), known as the 'Rankin House,' in De Soto, Missouri, being the same left me by my husband, L. J. Rankin, deceased; also the silverware and all the books and pictures, of every description and kind, wherever located; and also one-half interest

in all my personal property and real estate, of whatever nature, in my possession at the time of my death.

"Third. I give and bequeath unto my son, Charles T. Rankin, one-fourth ($\frac{1}{4}$) of my estate, both real and personal, provided that he shall be frugal and saving from this date on; otherwise, he shall receive one thousand dollars (\$1,000.00) and no more, and should he be dead at or before my death, the above to go to my other children, excepting one (1) dollar each to Mattie and L. J. Rankin, Jr., children of the above-named Charles T. Rankin.

"Fourth. I give and bequeath unto my daughter, Maggie C. Dausman, one thousand five hundred dollars (\$1,500.00) worth of real estate, or in cash, at the option of the other heirs; she to have and to hold the same as her separate property, and her husband, W. H. Dausman, is not to have any right, title, or interest or curtesy therein, but this to be hers, separate and distinct, as though she was single and unmarried, and at her death the same to go to her children, with the same restriction as above set forth.

"Fifth. The remainder of my estate, if there be any, I give and bequeath to my son, Eugene C. Rankin.

"Sixth. I hereby appoint my son, Eugene C. Rankin, my executor, without bond, of this my last will and testament.

"Dated this 17th day of August, 1899.

"[Signed] Cecilia A. Rankin.

"Signed and published and declared by the above Cecilia A. Rankin to be her last will and testament, in the presence of us, who, at her request, and in the presence of each other, and in her presence, have subscribed our names.

"[Signed] Ed L. Fletcher.

"Perry Bartholow.

"State of Missouri, City of St. Louis—ss:—

"On this 17th day of August, 1899, before me personally appeared Cecilia A. Rankin, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed. And the said Cecilia A. Rankin further declares to be a widow and unmarried. In testimony thereof, I have hereunto set my hand and affixed my seal at my office in the city of St. Louis, the day and year first above written.

"My term of office expires September 11th, 1900.

"[Signed] M. J. Seeman,
Notary Public."

Thereupon the defendants rested their prima facie case.

The plaintiff then offered in evidence the inventory of Mrs. Rankin's estate made by her son, Eugene C. Rankin, from which it appears that she had real estate valued at about \$18,000 and personal property of the value of \$315.

Mrs. Maggie Dausman testified she was a

daughter of L. J. Rankin and Mrs. Cecilla A. Rankin, and was living in Moberly, Mo., and the wife of W. H. Dausman; that in 1899, in August, she was living in De Soto, Mo.; that her father had been dead about five years, and her mother died in April, 1901; that her mother kept house until witness married, and after that boarded; that at the time of her mother's death witness was living in Webster Groves, was present with her mother in her last sickness, was telegraphed for, and came and stayed with her during her last sickness, which lasted about three weeks; that her mother was 78 years old at the time of her death, and had been in poor health for years; that she took the death of her husband very hard, and her health was much worse after his death; that her mother had no business capacity, and she never knew her to transact any; that she had no idea of her estate and had never had any estate until the death of her husband; that she did not know the value of or the number of houses she owned; that she was incapable of giving the list of her property to the assessor; that she did not know who her tenants were; that she knew that she owned the Acme Hotel, the Grove, and the old homestead property, but some of the little houses she did not remember at all; that the relation of Gene and her mother was very intimate; that he controlled her business, and she never did anything without consulting him; that her mother visited her and was very kind to her up to her father's death, except the first two or three weeks after her marriage; that she was invited home by her mother, that she and her husband went, and that deceased seemed satisfied, and all the family treated her well, except Eugene, and he did not speak to her for eight years; that right after her father's death she noticed a change come over her mother towards herself, her visits were not so frequent, and she finally ceased visiting her entirely, until she moved to De Soto; that there was never any trouble between them to cause this, but her mother gradually grew cold towards witness; that during this time Eugene was her confidant; that for 19 months before her mother's death she lived in Webster Groves, 14 miles out from St. Louis, and that her mother never visited her there, though she was in her usual health and visited St. Louis a month or so at a time; that she visited her mother at De Soto for three days the week before she was taken down with her fatal sickness; that her mother called Eugene to come in and see her, but he refused, and did not see witness while she was there; that she went home on Monday, and her mother was taken sick Friday; that Eugene then sent for her, and she came, and remained until her death and funeral; that immediately after the funeral, and while at the station, Eugene did not speak to her or tell her good-bye; that she told Eugene that

she would like to give her Aunt Clara some of her mother's clothes, but he said, "Put them in the trunk and give me the key." "My mother's watch and some silverware were in the trunk." The clothes and wearing apparel were her mother's, and witness was the only daughter. After her father's death she had a talk with her mother about a will she had made; that she told witness the contents, and "she said she had left my daughter a house and had left another daughter a house, and that she left my daughter Cecilla her watch"; that while they were taking the goods Mrs. Dedrick told Gene that he had his father's watch and that Mrs. Rankin intended her watch to go to Maggie's daughter Cecilla, but he said, "No, put it in the trunk;" that the witness had a family of five daughters; that when she moved to De Soto she moved into the old home place; that her mother, Gene, and Charley had a talk with her, and all said they wanted her to have that place; that Charley said she was welcome to his interest, and they were to let her have the house without rent; that Gene charged her \$16 per month, and deducted it out of her share of her father's estate; that just before Gene went to St. Louis witness and her mother were in his room at the Acme Hotel in De Soto, and he produced a will which purported to have been made by him, and handed it to the witness, and said, "Read this," and she was reading it to herself, and he said, "Read it aloud." It was admitted that the attorneys had notice to produce this will, but they did not have it. This will, as witness remembered it, stated that "I, Eugene C. Rankin, being of sound mind, do will and bequeath to my mother, Cecilla A. Rankin, all of my possessions, knowing that she will make a proper disposition of them." Her mother was then 76 years old, and Gene about 45, and in good health; that he had always lived at home, except a short time when he had positions in St. Louis; that for the last 15 years he had not done anything that she could learn. She stated that the time that Gene showed her this will of his was in the spring of 1899, and there were no witnesses to it.

Mrs. Lattie J. Pratt testified that she heard Mrs. Rankin say: "There was one thing sure—that, when she died, Maggie's children would be well provided for." She said that two or three times just before she was taken sick. She said she did not want Will Dausman to get her money, and that what she did for Maggie she did not want Eugene to know. She was very forgetful, and always had some one with her in going about the streets of De Soto. Her business capacity was very poor. Her objection to Mr. Dausman was not on account of his drinking, but Maggie's children increased too often. That was her objection to him.

Otto Hermann testified that he knew Mrs. Rankin, and that he never knew her to do

any business; that Gene managed her business; that she had valuable property on Main and Boyd streets in De Soto—stores, hotel, and residence property; that he never heard of her transacting any business in regard to them.

Mr. Blackman testified, on part of plaintiff, that he lived in De Soto and had a piece of property belonging to Mrs. Rankin for sale in 1899, and sold it to Mr. Shuman for \$650; had an office with Charles Rankin, and he placed it in his hands for sale; that the deal was closed, but Mrs. Rankin did not make this deed; that Gene objected to it being sold, and Mrs. Rankin asked him to see Gene and ask him to allow her to sign the deed; that he asked Gene why he did not allow his mother to sign the deed, and Gene said he was going to sell it himself, and thought he could sell it for more money, but witness said, "You had better let your mother sign the deed," and Gene said he would. Gene generally made out the tax list for her property and had charge of her papers.

Dr. James Deadrick testified, for the plaintiff, that he married a niece of Mrs. Rankin, knew her quite intimately, and did not think she had business capacity. She was a woman of strong prejudices. She did not like Will Dausman, the husband of her daughter.

Charles T. Rankin testified that he did not learn of the contents of the present will until the day the petition was served on him in this case; that he knew of another will besides this, one which had previously been made by his mother; that that will was in his mother's possession. He was asked to state the provisions of that will, to which defendant objected. E. C. Rankin was then called for the plaintiff, and asked if he had in his possession a will purporting to have been executed by Cecilia A. Rankin prior to the will in controversy, and he said that he had not; that it had been destroyed; that that will was prepared in 1897. Thereupon Charles T. Rankin was recalled, and testified that under the provisions of that former will his mother made all the children equal; that she gave to his sister's oldest daughter a watch and house and lot, and to Nettie, the second daughter, some property; that when he heard of this will being contested he thought it was the will that his mother had told him she had made, and was surprised at his sister contesting it; that Mr. Williams, the attorney, wrote him a letter, and told him about the suit having been brought against himself and Eugene, and of his having employed Mr. Frazier to represent him, and wrote Frazier, and told him to file an answer; that at that time he had given his brother Gene a deed for part of the property; that his mother did not attend to business after his father's death; that witness attended to it, and filed all the papers in her statement of his father's estate; that she did not do anything in con-

trolling the property; "she gave brother Gene the power of an attorney to attend to her business, she would do nothing without consulting Gene, and would not sign papers without consulting him." He also related the circumstances about Capt. Blackman selling the lot, and stated that his mother did finally sign a second deed, and that witness got some money from the German-American Bank. 'He had a lawsuit at Hillsboro, and it took nearly all of his money, and his mother indorsed the note for him at the bank, but said she did not want Gene to know about it, for he would raise a row. She did business with the People's Bank of De Soto, and the money was borrowed from the German-American Bank. Mrs. Rankin's property consisted of some 12 houses, most of which were rented, the rental amounting to about \$175 or \$200 per month. Gene rented the property and collected the rents. Witness did not think that his mother knew the value or extent of her property. Part of the time witness attended to the property, and afterwards his brother did. On one occasion, when Gene, his mother, and the witness were present, and his sister was thinking of moving to De Soto, witness told her he would give her his interest in the homestead property, and his mother said she would give her hers, and his mother insisted on Maggie moving down to De Soto; that Gene said, "We will see about it." Witness owned one-fourth interest in the property. Maggie came down and lived there awhile, but the deed was not made to her; that he was present at the last sickness of his mother, and his sister, Mrs. Dausman, was there attending to his mother for several weeks before she died, and whenever she was out of the room her mother wanted her back again. On cross-examination he was examined as follows: "Q. You stated a while ago that your mother had made a prior will? A. Yes, sir. Q. Who drew it? A. I think Mr. Williams. Q. Who were the witnesses to that will? A. I cannot remember. Q. What was the date of it? A. I do not know as to the date. Q. What was the manner of the disposition of the property under the will? A. She left it as I said. We were to share and share alike. Q. Did you ever talk with your mother about the execution of that will? A. Yes, sir; at different places, and she has talked to me about it at my office. Q. Is not it a fact that Gene was to get the Rankin house? A. No, sir. Q. Have you not heard your mother say a number of times that she wanted Gene to have that hotel property? A. No, sir; she said she wanted to do as my father had done—make us all equal."

At the close of the plaintiff's evidence in chief the defendants asked an instruction in the nature of a demurrer to the testimony, which was by the court overruled. The defendants then called Dr. W. H. Farrar, a physician who had lived in De Soto since

1878, and was the family physician of Mrs. Rankin in her lifetime. He testified that she was a very strong-minded woman, and very intelligent; that during the year 1899, up to her death, he considered her mind active and strong. On cross-examination he stated that he did not know of her transacting business; that she was a feeble woman physically, and a woman of strong prejudices; that she would not be easy to turn against any one, but, if she made up her mind that way, it would be hard to change her. "She was very feeble before her husband's death, and when the body fails the mind usually fails with it." Witness saw Mrs. Dausman waiting on her mother during her last illness. Her mother seemed to have every confidence in her. Mrs. Dausman waited on her day and night.

Dr. Auerswald testified that he had known Mrs. Rankin since 1880, and saw her a short time before her death. She was a strong-minded woman, and in his opinion capable of disposing of her property. He stated that he had been at Mrs. Rankin's house a number of times when her husband was sick, and as a rule a person 70 years old, feeble in body and of strong prejudices, was susceptible to the influence of others.

Mr. Manheimer and his wife testified also that Mrs. Rankin was a woman of strong mind and very decided.

Mr. Crow testified that he had known her intimately for about 11 years, and in 1898 had a conversation with her. She came into witness' office and asked where Gene was. Witness said, "I suppose he has gone out to get a drink," and she said, "No, he had not," and said, as long as Gene stayed there and took care of her, he should have charge of her property, and that if he would get married she would will it all to him. He thought she was a woman of sound mind and very intelligent. On cross-examination he stated that he was a friend of Gene's. They had hunted together many times, and had an office in the same building. Gene Rankin had the management of Mrs. Rankin's property, so far as he knew, and she had utmost confidence in him.

Dr. Bryan testified he had known Mrs. Rankin for 20 years and she visited his family. She was a woman of over average intelligence. She told him in 1898 that she was going to leave her property to Gene, because he would take care of it and would not drink it up, and, as he was taking care of her, he was entitled to it; that Charley had had enough—had had his share and drank it up. On cross-examination he stated this conversation was in consequence of Gene's ceasing to drink, and occurred at his store; that he had treated Gene for pneumonia and for the liquor habit at the request of his mother.

Mr. Park also testified that she was a bright woman of excellent character. Witness on one occasion made a remark that he

believed in people holding onto their property as long as they lived, and not letting their children have it; but she said, "It will be all right if you give it to a party that would take care of it."

L. J. Deering had known Mrs. Rankin for several years. She had boarded with him about two months in 1899. She said in his presence on one occasion, if Gene outlived her, he would have all she had; that Charley had sold his interest in the real estate, and her daughter's husband had lived off her estate long enough; that she would leave all she had to Gene.

Mrs. Hunter testified to about the same effect, as did Mrs. Deering and Mrs. Fletcher.

The defendants then called Eugene C. Rankin as witness for himself. He testified his father died in 1897, and his estate was settled in 1899; that he and his mother bought the interest of his brother Charles in the real estate; that they also wanted to buy Mrs. Dausman's interest in partnership, but that on July 31, 1900, Mrs. Dausman sold her interest to Geo. Mahn; that Mr. Joseph G. Williams, one of the attorneys in and present at the trial of this case, drew the will which his mother made in June, 1899; that the will was changed at his mother's special request; that under that will he was to receive the Rankin hotel property and one-fourth of the estate, and his brother one-fourth, provided he would live a frugal life and stop drinking, and his sister was to receive \$1,000 in money and a piece of property valued at \$400 or \$500, free from the control of her husband; that that is the only difference between the old and the new will; that after the new will was made she remained in St. Louis, and had been there some two months before, at 2848 Lafayette avenue, at Mrs. Honey's boarding house; that he saw her about every two weeks while she was there; that when she returned to De Soto she went to Mrs. Hunter's to board. On cross-examination he said he did not know the day of the month on which the June will was made; that it was destroyed at his mother's request after she had made her last will; that he destroyed it as soon as he got home from St. Louis; that he thought the last will was written on the 15th of August, 1899.

The following questions and answers were then propounded to him by plaintiff's counsel: "Q. Did she write to you? A. Yes, sir. Q. If she wrote to you have you those letters? A. I think I have them at home. Q. Did she indicate to you how she wanted that will changed in those letters? A. She told me to come up and she would explain it. Q. When did you go up? A. The day the will was signed. Q. On what train? A. The Arcadia. Q. Did you have a draft of the will with you? A. Yes, sir; I made a copy of the old will. Q. That is the will? A. Yes, sir. Q. Now this will reads: 'I give and bequeath to my son, Eugene C.

Rankin, all of lots 8, 9, 10, 11, and 12, in block 3, known as the Rankin house, in De Soto, Mo., being left me by my husband, L. J. Rankin? A. Yes, sir. Q. 'Also all the silverware, books, and furniture, and also one-half interest in all my personal property at the time of my death'? A. Yes, sir; that is a correct copy of the June will. Q. And the third clause is: 'I give and bequeath to my son, Charles T. Rankin, one-fourth of my estate, both personal and real, provided he shall be frugal and saving from this day on; otherwise, he shall receive \$1,000, and no more, and should he be dead at or before my death the above to go to my other children, excepting \$1 each to Mattie and L. J. Rankin, Jr., children of the above Charles T. Rankin.' Is that the same? A. Yes, sir. Q. The fourth clause reads this way: 'I give and bequeath unto my daughter, Maggie Dausman, \$1,500 worth of real estate, or in cash, at the option of the other heirs. She to have and to hold the same as her separate property, and her husband, W. H. Dausman, is not to have any right, title, interest, or curtesy therein; but this is to be hers separate and distinct as though she were single and unmarried, and at her death the same to go to her children, with the same restrictions as above set forth.' What is the difference between this clause and the June will? A. She was to get \$1,000 and a house and lot up on the hill, I think well worth \$450; and in order to avoid controversy she was to have \$1,500 or that amount of property." The fifth clause of this will and the June will are just the same. He never talked to his mother about making a will. He and his mother were buying this property together. He represented himself and his mother in the transaction.

Defendant also offered in evidence a deed from Charles Rankin to Mrs. Rankin and Eugene Rankin for his one-fourth interest in his father's estate, and another, executed April 23, 1901, by which Charles Rankin conveyed to Eugene Rankin all his interest under the will of Cecilia Rankin to certain property therein described. Defendant also offered in evidence the last will of Louis J. Rankin, by which he gave to his widow, Cecilia Rankin, certain lots in De Soto, and divided the balance of his estate in four equal parts between his widow and his three children. It was admitted that if Joseph A. Hammond were present he would testify that he copied the will executed in June by Cecilia A. Rankin on a typewriter; that the will was written by Joseph G. Williams, and contained the exact words of the will now in contest, with the exception that it gave Mrs. Dausman \$1,000 in cash and a house and lot in the city of De Soto.

At the close of the evidence the court gave the following instructions for the plaintiff:

"Instruction No. 1. The court instructs you that the question you are to determine in

this case is whether or not the paper writing offered in evidence, dated August 17, 1899, as the last will and testament of Cecilia A. Rankin, was the result of undue influence used upon said Cecilia A. Rankin by Eugene Rankin in procuring the execution of said paper writing; and if you find from the evidence that said paper writing was the result of undue influence exercised by Eugene C. Rankin over Cecilia A. Rankin, then you will find your verdict against the will and in favor of the plaintiff, although you may believe from the evidence that she signed it as such and the witnesses attested it as such.

"Instruction No. 2. By the term 'undue influence,' as used in these instructions, is meant the exercise of such power and influence by one person over the mind of another as would result in the subjugation of the mind of the one to that of the other, and the complete subjugation of the will of the one for the will of the other in the matter in which they were engaged; and if the jury believe from the evidence in the case that by reason of the weak and feeble mind of said Cecilia A. Rankin said Eugene C. Rankin was enabled to and did exert such an influence over the mind of said Cecilia A. Rankin as to substitute his will and wishes for that of Cecilia A. Rankin in the disposition of her property by will, and if the signing of said paper by said Cecilia A. Rankin was induced and brought about by the exercise of the influence, then the jury will find that said paper is not the will of said deceased, Cecilia A. Rankin, notwithstanding that said Cecilia A. was, at the time said paper was signed and attested, of sound mind and disposing memory.

"Instruction No. 3. The court instructs the jury that it is not necessary that undue influence should be proved by direct and positive testimony, but the same may be proven by facts and circumstances; and, in passing on the question as to whether the signing of the paper in question by Cecilia A. Rankin was induced by influence on the part of Eugene C. Rankin, it is proper for the jury to take into consideration the terms of the will itself, the relation of Cecilia A. Rankin to the plaintiff as shown by the evidence, her age and mental and physical condition as shown by the evidence, her relation to and feeling toward the defendants Charles T. Rankin and Eugene C. Rankin as shown by the evidence, as well as other facts and circumstances disclosed by the evidence in the case; and if from all the facts and circumstances the jury believe that the signing of the paper in controversy by said Cecilia A. Rankin was induced and brought about by an undue influence on the part of said Eugene C. Rankin, as undue influence has been defined in these instructions, then it is the duty of the jury to find that the said paper is not the will of the said Cecilia A. Rankin."

To the giving of such instructions the defendant excepted at the time.

The court, at the instance of defendants, gave to the jury the following instructions:

"Instruction No. 2. The court instructs the jury that there is no evidence that Cecilia A. Rankin was, at the time she made the will, of unsound mind and incapable of making said will, and you cannot find against the will produced on that issue.

"Instruction No. 3. The court instructs the jury that there is no evidence as to the charge of fraud on the part of Eugene C. Rankin, and you cannot find against the will produced on that issue.

"Instruction No. 4. The court instructs the jury that Cecilia A. Rankin had the right to will the property to any one she desired to, and even had a right to make an unreasonable, unjust, and injudicious will; and you have no right to alter the disposition of her property simply because you may think that Cecilia A. Rankin did not do justice to her family.

"Instruction No. 5. The court instructs the jury that by undue influence is meant such influence as amounts to force, coercion, or overpersuasion, which destroys the free agency and will power of the testator.

"Instruction No. 6. The court instructs the jury that Cecilia A. Rankin had the right to dispose of her property by will in such manner and to such persons as she deemed proper, and the beneficiaries in such will are not required to account for or explain such disposition; and if you find that said Cecilia A. Rankin did execute the instrument of the 17th day of August, 1899, then the plaintiff can only avoid such will by showing to your satisfaction by a preponderance or greater weight of evidence that said will was procured by undue influence on the part of Eugene C. Rankin.

"Instruction No. 7. The court instructs the jury that any degree of influence over another acquired by kindness and attention can never constitute undue influence within the meaning of the law; and although the jury may believe from the evidence that the deceased, Cecilia A. Rankin, in making her will, was influenced by any person or persons, still if the jury further believe from the evidence that the influence which was exerted was only such as was gained over the deceased, Cecilia A. Rankin, by kindness and friendly attention to her, and not such as to destroy her free agency and make the will not hers, but that of such person, then such influence cannot be regarded in law as undue influence, and a verdict on this ground should be in favor of the will.

"Instruction No. 8. The court instructs the jury that undue influence as defined in these instructions, sufficient to set aside the will in question, must be an influence exerted and used over the mind of the said Cecilia A. Rankin prior to the execution of said will, and at the time of its execution; and unless you find that such undue influence was wielded over her at the time of the execution of

said instrument, the will in question will be the last will of the said Cecilia A. Rankin."

1. The instructions of the court reduced the issues in this case to one, to wit, whether the paper writing propounded as the will of Mrs. Rankin was the result of undue influence exerted upon her by her son, Eugene C. Rankin. The court by a peremptory instruction told the jury there was no evidence that Cecilia A. Rankin was at the time she made the will of unsound mind and incapable of making said will, and therefore could not find against the will on that issue. This instruction renders it wholly unnecessary on this appeal to discuss whether Mrs. Rankin had sufficient testamentary capacity to make a valid will. The one question, then, which we are called upon at this time to determine, is whether there is sufficient evidence to sustain the verdict of the jury, which declared that the paper writing propounded as such was not the last will and testament of Mrs. Rankin. While counsel for appellant assigns as error the refusal of the circuit court to give instructions numbered 13 and 9, as prayed by the defendant, which were as follows: Instruction No. 9: "The court instructs the jury that there is no evidence as to the charge of undue influence on the part of Eugene C. Rankin, and that you cannot find against the will produced on that issue." Instruction No. 13: "The court instructs the jury that if you believe and find from the evidence that Cecilia A. Rankin signed the will in the manner testified by the subscribing witnesses, and that at the time of such signing she had sufficient understanding and intelligence to understand what disposition she was making of her property, the nature and extent of her property, and to whom she was giving it, then the jury will find that she had sufficient capacity to make a will, and that said will is the last will and testament of said Cecilia A. Rankin, unless you further find from the testimony that the making and signing of said will was procured by defendant Eugene C. Rankin by undue influence which amounted to a moral force or coercion, destroying the free agency of Cecilia A. Rankin; and in such cases the burden is on the plaintiff to show by preponderance of the evidence the existence of such undue influence"—it is apparent that the court did not err in refusing instruction No. 9, if in fact there was evidence which justified the court in submitting the issue to the jury at all; and instruction No. 13 was devoted mainly to the question of testamentary capacity, which was taken from the jury by a peremptory instruction, and so much of it as referred to undue influence was fully covered and included in instructions 5, 6, 7, and 8 given at the request of defendant, so that, as already said, the only duty devolving upon us at this time is to determine whether there was sufficient evidence to take the case to the jury.

There is nothing novel in a will contest.

It is a class of litigation with which this court is very familiar. There is no conflict in opinion as to what constitutes undue influence such as will vitiate a will, or rather a paper writing propounded as such. Again and again it has been adjudged by this court that influence, in order to be undue, within the meaning of the law, which would make it sufficient to vitiate a will, must be such as amounts to overpersuasion and coercion or force, destroying the free agency and will power of the testator. It must not be merely the influence of affection or attachment, nor the result of a desire on the part of the testator of gratifying the wishes of one beloved, respected, and trusted by the testator. *Boyse v. Rossborough*, 6 H. L. 6; *Jackson v. Hardin*, 83 Mo. 185; *Carl v. Gabel*, 120 Mo. 283, 25 S. W. 214; *McFadin v. Catron*, 138 Mo., loc. cit. 218 et seq., 38 S. W. 932, 39 S. W. 771. The burden of proof is on the party alleging it; but, like every other question of fraud or bad faith, it is a question of fact, and can rarely be proved by direct or positive evidence, but may be established by facts and circumstances and upon the ground of public policy. The doctrine of courts of equity has been adopted by the courts of law in these contests, and where a devise or legacy has been given by a testator to one occupying a fiduciary relation to him, "proof of the existence of such a relation raises the presumption of undue influence, which will be fatal to the bequest, unless rebutted by proof of free deliberation and spontaneity on the part of the testator and good faith on the part of the devisee or legatee." 1 *Woerner's Am. Law of Adm'n*, § 32; *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314; *Carl v. Gabel*, 120 Mo., loc. cit. 297, 25 S. W. 214. In *Gay v. Gillilan*, 92 Mo. 251, 5 S. W. 7, 1 Am. St. Rep. 712, this last-named doctrine was extended to embrace the case of a son who by his conduct had placed the mind of his aged father in complete subjection to his demands. An examination of the instructions will show that the trial court applied the foregoing tests to the facts of this case, and the only ground upon which its judgment can be reversed is that the facts in evidence did not justify its submission to the jury, because, as defendant insists, there was no evidence of undue influence.

Proceeding, then, to an examination of the facts in evidence, we must respond to this insistence. Mrs. Cecilia A. Rankin, the testatrix, at the time of the execution of the will in contest, was about 77 years of age. She had been frail and in feeble physical health for a number of years. She had three children, two sons and a daughter. The sons were both unmarried at the time. Her permanent home for many years had been at De Soto, in this state. The will in contest was made August 17, 1899. She died in April, 1901. The evidence quite conclusively shows that in her husband's lifetime Mrs. Rankin had nothing to do with business af-

fairs. L. J. Rankin, her husband, died in 1897, and his estate was finally settled in 1899. After the death of her husband the business affairs of the testatrix, such as the renting and collecting of rents, the payment of taxes, and the sale of property, were attended to by her two sons, Charles and Eugene; for awhile by Charles, but for some time prior to the execution of the will almost wholly, if not entirely so, by her son Eugene. Some time after her husband's death, in the year 1897, 1898, or 1899 (and there is a conflict as to the date), Mrs. Rankin made her will. It was drawn by Joseph G. Williams, a member of the Jefferson county bar. What the provisions of that will were was one of the disputed facts in the case. Charles Rankin testified that by that will the three children were given equal shares, but there were some special legacies to Mrs. Dausman's two oldest daughters. That will was destroyed by Eugene Rankin, as he asserts, by the direction of his mother, after the will in contest was made or executed. Eugene Rankin testified that this former will was exactly like the one contested, save and except it gave Mrs. Dausman \$1,500 in money or land, at the option of the other heirs, instead of \$1,000 in money and a lot worth \$400 or \$500. He testified that his mother wrote him to come to St. Louis, where she was visiting at the time, in regard to changing her first will, which he said was executed in June, 1899; that when he came up she would explain the changes to him; that he went up to St. Louis from De Soto the day the will in contest was made. He was asked if he had a draft of the will with him, and he answered: "Yes, sir; I made a copy of the old will." He is corroborated on this point by Bartholow, who attested the will in contest, who says that Eugene wrote him that he would be in St. Louis and wanted to see him; that prior to going out to Mrs. Rankin's boarding house, Eugene came to see him (Bartholow) and had a rough draft of the will his mother was to execute, and at Bartholow's suggestion had Mr. Jenkins, a stenographer in the Laclede Building, copy it on a typewriter; that Jenkins was Bartholow's typewriter. It is made entirely clear from the evidence of both Eugene Rankin and Bartholow that there was no conference or explanation of any kind by Mrs. Rankin with Eugene Rankin of the changes she desired made in her will prior to the time the will in contest was prepared for her signature; but it was written by Eugene Rankin himself before he came to St. Louis, and was copied by Jenkins. It is true he says the will in contest corresponded with what she told him she wanted to give Mrs. Dausman; but when she told him this he does not say, and, though he claims to have had letters from his mother making a request for a change in her will, and still had them, he did not produce them.

His explanation of his mother's desire for

a change in the will was that it "was to avoid complications with Mrs. Dausman," but by the new will Mrs. Dausman got exactly the same amount of property, \$1,500, that she would have received under the June will, according to his testimony; the only difference being that under the June will she got a little house worth \$400 or \$500, instead of \$500 in money. What complication was avoided by this slight and immaterial change is hard to imagine. If the jury believed Charles Rankin, there was a much stronger motive for this change in his mother's will. By her first will she had made her three children equal, but by this change Eugene got the lion's share of this valuable estate, and his sister only \$1,500 worth of property. At this time Eugene held a power of attorney from his mother to control all of her business affairs. He was estranged from his sister. That he exercised a strong influence over his mother is evidenced by the fact that when, in 1899, her agent had made what he thought was an advantageous sale of unproductive property, and Charles, her other son, had advised the sale, and the deed was prepared for her to execute, she declined to do so unless Eugene would consent, and he refused to let her sign it, and she appealed to Mr. Blackman to persuade Eugene to let her make the deed, and it was only after Blackman had induced Eugene to consent to it that she did sell the property. We think the evidence tended strongly to prove that Eugene Rankin, before and at the time the will in contest was written, had acquired the control of his mother's business and bore a fiduciary relation to her; that he had obtained a strong control of her mind as to the disposition of her property, and there was evidence that when she desired to aid the other two children she sought to keep Eugene from knowing it, lest he should raise a disturbance about it. There was evidence that Mrs. Rankin had become possessed of the notion that Dausman, her son-in-law, was living off of her estate, when in fact there was not a word of evidence that such was a fact. On the contrary, Mrs. Dausman had received from her father's estate one-fourth of the personal estate and real estate, which she sold in 1901 for \$4,200 to George Mahn. When it is considered that Eugene was so embittered toward his only sister that for eight years he would not speak to her, and exhibited this unnatural disposition at the time his mother died, and the close personal and financial relation which he bore to his mother, and the known influence he was exerting in her affairs, and her feeble health and the old age, it cannot be said that the triors of the facts could not properly have attributed Mrs. Rankin's perverted idea as to Dausman living off her estate to the suggestion of her son Eugene. Under these circumstances a will drawn by Mr. Williams was destroyed by Eugene, and the will in

contest drawn by him, by which he received the bulk of an estate amounting to over \$18,000, and his sister, who had faithfully fulfilled all the obligations of a dutiful daughter, was cut off with \$1,500. That it was a most unnatural division of her estate by Mrs. Rankin goes without saying. When we look for a reason for this unnatural preference, it cannot be found in any particular service rendered by Eugene, or any personal superiority over his brother and sister. His intimate friend, Bartholow, testified that Gene had been drunk as often as sober for 30 years past, and it appears elsewhere in the record that his mother had had him treated for the liquor habit. It does, indeed, seem that Mrs. Rankin was displeased at first with her daughter's marriage, but soon forgave her, and their relations were affectionate and natural until Eugene obtained control of his mother's affairs. While, in absence of evidence of undue influence, discrimination in favor of one child over another is no evidence of undue influence, when as in this case that influence does appear, and the favored child prepares a will by which he obtains the bulk of a parent's estate, to the detriment of his brothers and sisters, the burden is on him to show that the will was the result of deliberation and spontaneity on the part of the testator, and absolute good faith on the part of the devisee or legatee, and we think the perfunctory part played by Mrs. Rankin in the execution of the will in contest, and the dominating influence and the activity of Eugene Rankin in preparing the will in his mother's absence, the selection of the witnesses, and the great disproportion which he takes under such will over his sister and brother, fell far short of that disinterested good faith and fairness, which one in his position and bearing the relation which he did to his aged and feeble mother is required to show before he can profit by an instrument prepared by himself.

We have read this record carefully, and while we adhere to the conservative rulings of this court, which scrupulously guard the right of the citizen to dispose of his property by will as he sees fit, we have never said that a will obtained by undue influence was a valid disposition of one's property, nor have we relaxed the wholesome doctrine that one occupying a fiduciary relation to a testator has the burden of rebutting the presumption that a legacy in his behalf was the result of undue influence and was the free act of the testator.

Our conclusion is that there was no error in the instruction, that the cause was fairly submitted to the jury, that there was sufficient evidence upon which to base their verdict that the paper writing propounded as the will of Mrs. Cecilia A. Rankin was not in fact her last will and testament, and that the judgment must be and is affirmed.

BURGESS, P. J., and FOX, J., concur.

STATE v. CUMMINGS.

(Supreme Court of Missouri, Division No. 2.
June 6, 1905.)

1. CRIMINAL LAW — CONTINUANCE — REQUISITES OF APPLICATION.

An application for a continuance in a criminal case must show the materiality of the evidence of the absent witnesses, and the exercise of due diligence. It must substantially state the facts expected to be proved, that the applicant believes the facts to be true, and should give the names of the witnesses and their residence, if known. It should indicate the probability of procuring the attendance of the witnesses, state the applicant's inability to prove the facts any other way, and allege that the witnesses are not absent by the connivance of the applicant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1353-1359.]

2. SAME—SUFFICIENCY OF SHOWING.

On an application for a continuance in a criminal case, it appeared that the witnesses sought by defendant were residents of the city where the trial was taking place, but whether their residence was temporary or otherwise did not appear. The case was set for hearing on July 7th, and process was not procured until July 1st. There was no statement in the application explaining the delay, nor did it appear when knowledge came to defendant that the witnesses would testify to the facts alleged. The residence of one of witnesses, or where he could be probably found, was not stated; nor did the probability of securing the testimony of the absent witnesses, or in what time said testimony could be procured, appear. *Held*, that there was no abuse of discretion in denying the continuance.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1353-1359.]

3. SAME—DISCRETION OF TRIAL COURT.

The granting of a continuance in a criminal case rests largely in the discretion of the trial court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1311-1314, 1322.]

4. WITNESSES — CONFIDENTIAL COMMUNICATIONS.

On a prosecution for the murder of defendant's husband, there was no error in admitting testimony of an attorney as to a conversation occurring between the husband and wife in his office; he at the time acting as attorney for the husband on a charge of larceny.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 749-761.]

5. HOMICIDE—MATERIALITY OF EVIDENCE.

On a prosecution for the murder of defendant's husband, testimony of a police officer as to the business in which deceased was engaged at the time witness first knew him, and the character and nature of the business, though immaterial, was not reversible error.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3137.]

6. SAME—THREATS BY DEFENDANT.

On a prosecution for the murder of defendant's husband, it was proper to admit evidence of a conversation by a witness with defendant, a short time before the homicide, which indicated the unpleasant relations existing between defendant and deceased, and in which defendant had threatened to make deceased suffer for certain things he had done.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 293-295.]

7. APPEAL — REVIEW—TESTIMONY OF WITNESSES.

Objection cannot be made to the testimony of witnesses for the first time on appeal.

8. CRIMINAL LAW — TRIAL — ARGUMENT OF COUNSEL—OBJECTIONS.

Argument of counsel for the state in a criminal case, in reference to testimony which was not objected to and which was not made the subject of a motion to strike, was not error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1651, 1670.]

9. HOMICIDE—EVIDENCE—DIAGRAM SHOWING SCENE OF CRIME.

On a prosecution for murder, it was proper to admit in evidence a diagram of the room where the killing was done; the room at the time the diagram was made, together with its furnishings, being in about the same condition as when the killing occurred.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1024.]

10. CRIMINAL LAW — NEW TRIAL—AFFIDAVITS—TIME FOR FILING.

Where the trial court gave a reasonable time in which to prepare affidavits for a new trial, which time was then extended two weeks, the affidavits not being then filed, the court was warranted in refusing to consider them.

11. SAME—CONTINUANCE—REVIEW.

In determining on appeal in a criminal case the propriety of denying a continuance, affidavits filed subsequent to the trial cannot be looked to.

12. HOMICIDE—INDICTMENT—INSTRUCTION.

Where an indictment only charged murder in the second degree, the court was not called on to charge on murder in the first degree.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 639-641.]

13. SAME—SUFFICIENCY OF EVIDENCE.

On a prosecution for murder, evidence considered, and *held* sufficient to warrant a conviction of that crime in the second degree.

14. CRIMINAL LAW—APPEAL—REVIEW.

The Supreme Court, on appeal in a criminal case, will review only such errors as were timely and properly preserved by the record.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Minnie Cummings was convicted of murder in the second degree, and she appeals. Affirmed.

This prosecution is based upon an indictment filed in the circuit court of the city of St. Louis, Mo., on the 21st day of May, 1903. The indictment charges this defendant, Minnie Cummings, with murder in the second degree—that of willfully, premeditatedly, and with malice aforethought killing one Dennis Cummings, on the 18th day of April, 1903, in said city. Upon arraignment the defendant entered a plea of not guilty, and was placed upon trial on the 9th day of July, 1903, before a jury duly impaneled. The facts developed upon the trial on the part of the state were substantially as follows:

The shooting occurred at 2814 Locust street in the city of St. Louis, in the back room of the third story. The defendant and the deceased were husband and wife. They were married in July, 1902, and lived together, boarding at first one place and then another, until about four weeks prior to the difficulty, during which time they had been seeing and visiting each other frequently. After the separation the deceased boarded on Channing avenue, in said city. About three weeks before the difficulty the deceased

ed was arrested, charged by defendant with stealing her jewelry, and placed in jail, and remained there about a week. During his confinement an officer visited his room, having a written order from the deceased to search it. The defendant appeared, shortly after his arrest, at his boarding house, and inquired for her husband. The door to his room being locked, the landlady thought he had left, and so informed the defendant. Defendant appeared one evening, and was very angry with the landlady for deceiving her. She again visited his boarding house one Sunday, and, being refused admission to the deceased's room, told the proprietress her troubles, and that Cummings had treated her very badly and stolen her jewelry, and requested the landlady to try to bring about a reconciliation, and, if necessary, send for her, but to try to get him to visit her at her place. The deceased at that time was out of jail, and she promised the defendant that she would deliver her message to the deceased, which she did the next morning. On one of the visits of the defendant to the room of her husband, she borrowed scissors and opened his trunk, looking for her jewelry, and while in the room, seeing some lady's wearing apparel, hair pins, etc., she said that another woman had been in his room. The landlady informed her that she had formerly occupied the room, and that the hair pins were her property. On Friday week before the homicide, the defendant secured a room at 2814 Locust street. During that week the defendant told the landlady that her husband was going with another woman, saying that she had seen him with another woman, and referring to him as "Cummings," or "the Irishman." On Sunday night before the homicide she left her room, saying that she was going to the deceased's boarding house and wait until he came in, if it was 5 o'clock in the morning. She visited the deceased at his room one night, arriving there between 2 and 3 o'clock in the morning, and the next morning had breakfast with him. The deceased and defendant had a conversation at the breakfast table in which a woman's name was mentioned. The defendant spoke very kindly of her, and then asked the deceased why he did not come and stay at home with her, and do what was right, to which he replied: "I am not going there. You want to get the drop on me. You want to kill me. You want to take advantage of me." The defendant said: "No such thing," that she wanted him to behave, and that she did not want to harm him at all. The deceased was drinking, and insisted that she wanted to kill him. He mentioned her former husband, and said, "You want to get the drop on me, like you did Harris," and finally he said he would not go home with her, and never would go; that he did not intend to go back; that he was afraid to. In a few days, and on the day of the killing, the deceased

removed his trunk from his boarding house at the request of the landlady, who said she did not want to be bothered with their troubles. The defendant appeared on Channing avenue at the boarding house of the deceased about 2 o'clock in the afternoon, and about a half hour after the deceased had removed his trunk and was seen talking to some one in front of the house. The deceased removed his trunk to his wife's room on Locust street, reaching there about 5 o'clock that afternoon. The defendant was seen about half past 4 that afternoon at her boarding house, and asked the landlady if her husband had been there, and then went up stairs, returning shortly, telling the landlady that he had been there and left a note. She handed the note to the lady and asked her to read it. The note read: "I will see you later." The defendant was seen again about 6 o'clock that afternoon. She went into the kitchen, closed the doors between the hall and dining room, and told the landlady that she had killed her husband. She stated that when she went upstairs he drew a knife on her, and she shot him. The lady remarked that perhaps he was not dead, to which she replied: "Yes, he is dead; come upstairs and see him." The lady then asked her why she did it in her house, and she replied: "It was my life or his, and I had to do it. I found a pawn ticket on him for my jewelry, pawned for \$90"—and, calling the lady by her name, said: "Mrs. Duff, you are a woman like myself; stand by me." The defendant further stated that there was a blood stain on the carpet, but that it would wash out, and added: "It came out of my carpet on Evans avenue."

Dr. Rule testified that he was called to the scene of the shooting, and arrived there about 6 o'clock; that he found the deceased lying on his back with his head on a rug; that his feet were to the south window, with one limb entirely extended and the other slightly contracted; that he found blood in the southeast corner of the room, about four or five feet from where the deceased was lying; also blood on the curtain, on the window, and on the rug on which his head was lying; on the floor near the window he found a bullet; that there was an indenture in the wall, showing where the bullet struck; that the deceased had on his overcoat, which was thrown back, but that it was about straightened out under him; that from his examination of the body the deceased had been dead a half hour or longer when he arrived; that the blood had changed in color, and had congealed about the wound; that the defendant stated to him that she was expecting trouble, and had bought a revolver; that he then left the house to notify the police, and when they arrived he returned to the house and found a knife in the deceased's right hand, under his body, with the large blade opened. The testimony further shows that about 3 o'clock

on the afternoon of the homicide the defendant visited the barber shop of W. T. Camberton, on Leffingwell avenue, and asked to borrow a revolver, saying that she had been robbed about two weeks before. The witness told her that he did not have one, and she then asked if he knew where she could find one. About 4 o'clock that afternoon the defendant visited Dunn's Loan Company and borrowed a 38-caliber revolver, for which she paid \$7, agreeing to return it in a week or ten days, on the returning of which she was to be refunded a certain sum.

Dr. Hochdoffer testified that he was connected with the coroner's office, and that on the afternoon of the shooting he performed a postmortem examination on the body of the deceased, and found two gunshot wounds, one on the right side and the other on the left side of the face, just over the right temple and the left temple; that the one on the left side was a scalp wound, and showed marks of powder burn; that the right eye was discolored; that the wound over the right temple caused practically immediate death, as it penetrated the brain; that the muscular system relaxed; and that the deceased must have fallen in a heap when he was shot.

Frank Nally testified that he was a police officer, and that he visited the scene of the shooting, arriving there about 6:30; that he found the deceased's body on the floor; that he searched his pockets, and among other things found a knife in one pocket in a case. Assistant Chief of Detectives Kelley testified that on the evening of the homicide the defendant came into his office with an officer, and that he remarked, "Well, what is the trouble?" to which she replied, "Well, me and my husband had trouble, and I shot him." She said he came there drunk and started to abuse her, and he picked up a pair of scissors and threw them to the corner of the room, and then partly turned around, and put his hand in his pocket, and she supposed he was going to get his knife, and that she was standing near the foot of the bed, and reached down and took up the revolver and shot him, and that he fell with the knife open in his hand.

Charles Krone testified: That he was an attorney at law, that the defendant and the deceased came into his office, that he was then representing the deceased on a charge of stealing his wife's jewelry, and that he was not at any time employed as an attorney for the defendant. That the defendant and deceased had a conversation in his office, after the dismissal of the charge against the deceased. That the defendant asked the deceased what he had been doing in the chief's office, to which her husband made no reply. The defendant then called her husband a dirty, low-down scoundrel, and said he ran after lewd women. She said, "You insulted my dear aunt," to which the deceased replied: "Your dear aunt nothing; not so.

She was a prostitute. A party in jail told me, and he knew her." The deceased said the defendant was no better, and she called him a liar, and a damn liar, repeatedly. That the defendant then remarked: "To think that you would take the jewelry that my former dear husband gave me, an honorable man; to think that you, dirty, low-down scoundrel, would steal my jewelry." The witness then turned to the defendant and said: "You are alluding to your former husband, or to some other husband you may have had," to which the defendant replied, "I will give you to understand that I have had only one husband before Mr. Cummings." That the deceased called his wife a bigamist and a liar, and the defendant called him a damn liar. The witness then said, "Well, you are alluding to Mr. Harris, the man found dead in his bed with a bullet through his head," to which she replied in the affirmative. That the deceased then remarked, "You killed him, and you know you did, and you confessed to me you killed him." The defendant then called him a liar, and said: "You are my husband. You think you are a smart young fellow, you dirty, low-down scoundrel. I will teach you a lesson."

Archie T. Edmonston testified: That he was a reporter for the St. Louis Star, located at the Four Courts. That he saw the defendant the day after she caused the arrest of her husband for stealing her jewelry. That she came to the press room that morning, and asked for a Star reporter, and asked the witness if he had written the article that appeared in the Star. He told her that he had, and she demanded to know where he got it. The witness told her that he had gotten it from her husband, but that he could not publish all that the deceased had told him. That he told her that the deceased had told him that she had confessed to him that she had killed her first husband. Harris—had shot him. That the defendant said: "It is not true. He shot himself." That the defendant then said she would make him suffer for what he had said, and for what had been published. The witness then told the defendant that he would publish her side of the story. On the day the case against Cummings, charged with stealing his wife's jewelry, was set for trial, he saw her in the sheriff's office with Cummings; that they were having words, but he did not understand what was said; that they were both angry. The witness testified that he saw the defendant in the office of the chief detective the night of the shooting, and heard a conversation between the defendant and the assistant chief detective; that she stated she came in that night and found Cummings in her room; that he had been drunk; that he started to talk to her, picked up a pair of scissors lying on the dresser, half way opened them, and then threw them to one side; then turned half way around and made a move towards his pocket, as if

to draw his knife which she knew he had; that she rushed to the foot of the bed, where she said she had a revolver, grabbed it up, and shot him; that she said the ball must have struck him in the side of the head, as he was scarcely half way turned. She said she knew he had a knife, and knew he had no revolver, because he had pawned his revolver several days before that, and that she knew he had no money to redeem it, because she had loaned him her meal ticket the morning or night before; that she had to kill him; that it was a question of which should die; that she was afraid he was going to attack her with a knife, and therefore she shot him; and that she then rushed downstairs, ran out of the house, and went to the Four Courts and surrendered.

The defendant introduced evidence showing that the deceased was of a wild and turbulent disposition and in the habit of becoming intoxicated, and when in that condition was very quarrelsome. The defendant testified in her own behalf substantially as follows: "On the 18th day of April, 1903, I lived at 2814 Locust street, with Mrs. Dunn. I lived in the back room of the third story. The deceased and I were married on the 13th of July, 1902. We first lived at 836 Lucas avenue, and then went to 8400 Lucas avenue; stayed there about four weeks. One night he came home about half past 11 very drunk, and I did not know what was the matter with him. I got up and asked him what was the matter. He knocked me down and called me names, and said I did not care for him. He pulled his trunk out in the hall, and said he would not live with a woman that did not love him. I pulled the trunk back in the room. He had a revolver in his hand. He went down in front and shot his revolver; came in again, and commenced to swear and beat me, and threw me on the bed. I screamed for help. He said: 'I will kill you. I don't care who comes in.' He left the room, and returned and beat me again, and I begged him not to kill me. He said he would kill me anyway. I paid the board for both of us; paid the board all the time out of my own pocket. I was working at the dressmaking business, and made \$10 a week. We then moved to 2904 Morgan street. A lady came there to see him one night. We did not stay there very long, because the landlady told me that she could not have us around the house. We then moved to 2934 Lucas avenue. I was out for a week. When I came back he accused me of being out with men. He knocked me down on the floor near the table, pulled a revolver from his pocket, and was going to smash me with it. I got scared, heard some one in the hall, and pushed his revolver under the wardrobe. He then struck me and called me names. Another time he came home drunk, broke the door open, and struck me. I ran downstairs, and asked Mrs. Harris if I could not stay with her all night; that I was afraid

he would kill me. I stayed that night with Mrs. Harris in the back parlor, and he kept going up and down stairs every five minutes, saying: 'If I could get her, I would kill her, the God damn bitch. She will not run away from me.' Then I went upstairs in the room the next morning, and he was there and commenced quarreling with me—accused me of being out all night. I had not been out that night, nor the night before. After that I was working at Nugent's, and he came down there, right in at the door at the Washington avenue entrance, and came up to me, and says: 'I have got to have some money. I will have money, or there will be trouble. You know what Callaway did to his wife across the street here. If you don't get me some money, I will do the same thing.' And so I gave him \$10. The next trouble we had was on Washington avenue. He got in my room that night with a skeleton key, and took \$29 and all of my jewelry out of my trunk. I was going upstairs, and I met him running down, and I went upstairs and wondered how he got into the house and asked the landlady. I followed him to Washington and Garrison, screaming at the top of my voice, and caught up with him. I told him to give back my money. He said he would not do it. I went back home. I went down the next morning to the insane asylum to see him; had a talk with him; said he had my jewelry and money, but would not give it to me. I then went back near the asylum, and saw Mrs. Leissmeister, and asked her if I could get board there. I did not get board at first, but went back the second time, and she took me in; got a room and board. My husband lived there with me. I went there Saturday, and he came on the following Monday. I got the jewelry back in three weeks, but never got any money back. I had trouble with him at that place. One night he came home very drunk, and commenced to quarrel, and pointed his revolver at me; said he would kill me. I ran up to the third story, and the landlord got up and told him he must put away that revolver. He then went back to 2914 Locust street. I did not see him until the following Monday. He stole my jewelry again and \$30 in money. I wrote him on the 11th of April. I did not write him a letter on Saturday, April 18th. Friday, April 17th, we got up late and had breakfast at 3100 Olive street. I paid for the breakfast. I walked to Thirty-Fourth and Channing and got his laundry; paid \$1.50 for it. I brought it back to his room on Channing avenue. Saw my husband that night again. He came home to my room. We stayed together that night. The next morning we got up, and I gave him my meal ticket, and he got his breakfast at the boarding house. He came back and says, 'I have got to have some money,' and I told him I did not have any. He says, 'I will be back this afternoon, and you have got to have the money,

or something will be done.' I went to his room in the afternoon to look for him to help him pack his trunk as he requested, but he was not there. I went then and secured a revolver, as I knew there would be trouble. My life was in danger, and I wanted something to protect myself. He had always carried a revolver, and told me this revolver had a record of two marks, and the third mark will be your mark. His revolver was then in the pawnshop. After I got the revolver I came back home. I went upstairs, and was not upstairs more than a few minutes when Cummings came in. He came in cursing and calling me all kinds of names. I asked him for my keys. He took a bunch of keys out of his pocket, and threw them on the bed, and said, 'Here is your God damn keys.' He went around the room cursing, and to the corner right in front of the dresser, picked up a pair of scissors on the stand, and he had the scissors like this, and was trying to get them open, and slung them over in the corner. I was standing at the foot of the bed, and the revolver was there on the bed. He said, 'You are a God damn bitch, and I am going to finish you right now,' and he put his hand in his pocket and got his knife open, and I grabbed the revolver and shot him. I saw the knife in his hand. He said, 'You God damn bitch, I am going to kill you right now.' I was standing at the foot of the bed, and he turned around and pulled that open knife from his pocket, and I grabbed the revolver and shot him. He was very close to me. I held the revolver right up against his face. I was almost paralyzed for a few minutes, and when I recovered I walked downstairs and called Mrs. Duff, and told her what happened. I said: 'Mrs. Duff, I shot my husband. It was my life or his, and I had to. I swear I had to save my own life.' Mrs. Duff sent for the doctor right away, and I walked upstairs to the second floor, and waited for the doctor to come, and I says: 'Here is the man. Here is the revolver. Here is the scissors.' And I asked him what I should do. He says: 'Will tell you what to do. Go downstairs and give yourself up.' And I came right down to the Four Courts and gave myself up. I stopped at my boarding house and got a cup of tea. When I left the boarding house I walked to Twenty-Eighth and Olive, and took a street car right to Olive street and Eighteenth, and transferred to Eighteenth, and came here to the Four Courts, and I walked to the Four Courts. I walked in there, and went up to the railing, and asked for the sergeant or captain. I told him my name was Mrs. Cummings, and that I had shot my husband in self-defense. He took down my name, and called Mr. Harrington, who was standing near the railing, and he took me upstairs to the matron on the third story."

At the close of the evidence the court fully and fairly instructed the jury upon murder

of the second degree, self-defense, and reasonable doubt, and the cause was submitted to the jury; and they returned a verdict of guilty, assessing defendant's punishment at 10 years' imprisonment in the penitentiary. From a judgment rendered in accordance with this verdict, defendant in due time and form appealed, and the record is now before us for consideration.

John I. Martin, C. E. L. Thomas, and James H. Lay, for appellant. E. O. Crow, Atty. Gen., Sam B. Jeffries, H. S. Hadley, Atty. Gen., and John Kennish, for the State.

FOX, J. (after stating the facts). Numerous errors are assigned and urged by counsel for appellant as reasons for the reversal of the judgment in this cause. We will treat the assignment of errors in the order as stated in the brief, and give them such consideration as their importance merit and demand.

Appellant complains at the action of the court in its denial of her application for a continuance. The consideration of the action of the trial court upon the application for continuance leads us to the inquiry as to what are the essential requisites of such application in a criminal case. In order to conform to the requirements of the statute upon this subject, it is necessary that the application should show the materiality of the evidence of the absent witness, and that due diligence has been used to procure the attendance of such witness. It should substantially state the facts that the applicant expects to prove by such absent witness, and that the applicant believes such facts to be true. It should give the names of the witnesses, and, if known, where they reside or may be found. It should indicate in some way the probability of procuring the attendance of such absent witness, or his deposition, in the event of the granting of the continuance. It should state that the applicant is unable to prove the facts that are alleged can be proven by the absent witness by any other witness whose testimony can be as readily procured. Finally, it should state that the witness is not absent by the consent, connivance, or procurement of the applicant, and that the application is not made for vexation or delay, but to obtain substantial justice. The sufficiency of this application must be measured by the essential, necessary requisites above indicated.

A defendant, being confronted with a serious criminal charge, must exercise reasonable diligence in preparation for trial, and ordinarily, where he or she in good faith is preparing for trial, and in fact wants the case tried on the day it is set for trial, the application for process for witnesses who are material to the defendant is made within a reasonable time before the case is set down for hearing, and is not delayed to a very few days before such hearing. Appli-

cation for process for witnesses must be timely, and, if otherwise, upon request for a continuance on the ground of the absence of such witnesses, the trial court will expect and has the right to require a showing of substantial and valid reasons for such failure and delay in making application for the process. As applicable to the diligence disclosed in the application for continuance now under consideration, we find the witnesses sought by the defendant to be residents of the city of St. Louis. Whether their residence was only temporary or permanent is not disclosed in the application. The case was set for hearing on the 7th of July. Process was not procured until the 1st of July. There is no statement in the application assigning any reasons why the securing of process for these witnesses was delayed until five or six days before the case was to be called for trial. It is nowhere made to appear by the application when knowledge came to the defendant that the absent witnesses would testify to the facts alleged, to the end that the court might take that fact into consideration in the exercise of its discretion in granting a continuance. If the defendant knew that these witnesses would testify to the facts indicated, and they were located in St. Louis, we see no good reason for waiting to procure process for them until a few days before the case is set for trial, and thereby take the risk of their being absent from the city. Added to this it will also be noticed that the residence of witness Miller, or where he could probably be found, is not stated, and the application makes no indication as to the probability of securing the testimony of the absent witnesses, or in what time such testimony could be procured, in the event of granting her request for a continuance. The application failed in important particulars to conform to the requirements of the statute. Granting continuances must rest largely in the discretion of the trial courts, who are in a much better position to judge of their merits than this court can possibly be. Hence the well-settled rule, uniformly adhered to by this court, that, unless it is clearly obvious that this discretion has been abused, this court will not disturb the action of the trial court upon such applications. *State v. Ranks*, 118 Mo. 117, 23 S. W. 1079; *State v. Riney*, 137 Mo. 102, 38 S. W. 718.

Numerous complaints are urged upon the action of the trial court in the admission of testimony at the trial. It is insisted that the court erred in the admission of the testimony of witness Charles F. Krone, for the reason, it is argued, that his testimony disclosed confidential communications between attorney and client. An examination of the record before us discloses that no such relation existed between the witness and defendant. Krone was the attorney for her husband upon a charge of larceny, in which case the defendant was the prosecuting witness,

and the conversations testified to by the attorney as occurring in his office were by no means confidential. In fact, he in no way was the representative of defendant in a professional capacity. We have carefully considered the examination of this witness, and the testimony detailed by him, and find no error in the admission of his testimony.

There were some objections urged to the testimony of Dr. Runge, who was connected with the asylum in which deceased had been employed. The only objections disclosed by the record to Dr. Runge's testimony were directed to his statements that "he had heard of the defendant, and that he had requested the deceased to resign his position at the asylum." While it may be said that these statements by the doctor had little or nothing to do with the case, we are unable to see how they could have possibly operated to the prejudice of the defendant in the trial of this cause. There being no other objections to the doctor's testimony, this error complained of must be ruled adversely to the appellant.

Again, it is insisted that the trial court committed error in the admission of certain testimony by witness E. D. Lingo, who was a police officer. We have patiently and carefully examined the record upon this assignment of error, and can only find two or three objections urged to the testimony of this witness, and they were without merit. First, objection was simply as to a preliminary inquiry as to the business in which deceased was engaged at the time the witness first knew him, and the character and nature of the stand or place of business. It may be conceded that this was immaterial; but it must be remembered that under the well-settled law of this state it is not every immaterial and irrelevant matter which may happen to be injected into a case during the progress of a long and tedious trial that will constitute reversible error. It must be at least of such a character as would tend to endanger a fair and impartial trial before this court would be warranted in reversing the judgment on that ground.

The other objections were in relation to the examination of this witness as to the identity of a letter addressed to the deceased, and the objections were properly overruled. The witness did not undertake to relate any conversation between the deceased and himself in respect to this letter; but the witness saw the letter, and how it was addressed, and the questions propounded were simply those tending to obtain from the witness his knowledge as to whether or not the letter shown to the witness in court was the same letter he saw in possession of the deceased prior to his being killed.

It is earnestly insisted that the testimony of A. F. Edmonston, who was a reporter on the *St. Louis Star*, was improperly admitted. In the statement of this case we have briefly stated the testimony of this witness.

There is no necessity for its repetition here. It is sufficient to say that we have read in detail the testimony of this witness, as disclosed in the record, and have reached the conclusion that there was no error in its admission. It was simply the reception in evidence of a conversation by a witness with the defendant, a short time before the homicide, which indicated the relations existing between the defendant and the deceased, and, in addition, declarations of the defendant in the nature of a threat to make the deceased suffer for what had been published in the paper by the reporter, and for what he had told the reporter in respect to the defendant killing her first husband. This testimony was competent, and there was no error in admitting it.

Complaint is also made in the brief of counsel in respect to the testimony of witness Tony Leismester, notwithstanding the record discloses that not a single objection was made to his testimony. It is too late now for the first time in the appellate court to urge objections to testimony of witnesses offered upon the trial. We are not exercising original jurisdiction of this cause, but simply reviewing the action of the trial court upon errors assigned which have been properly preserved in the record before us.

It is earnestly complained that references to defendant's former husband by witnesses Krone and Morgan were incompetent, erroneously admitted, and prejudicial to the rights of the defendant. An examination of the record again discloses that no proper objections or exceptions at the time were preserved to such alleged error.

Again, it is insisted that certain statements made by the circuit attorney in his closing remarks were improper, and constitute error. The testimony referred to by the prosecuting officer in his closing address was given by Krone and other witnesses without any objection or protest on the part of counsel for appellant during the progress of the trial; nor was there any subsequent effort to have it stricken out. Hence we feel a reference to any part of the testimony by the prosecuting attorney, which was admitted without objection, does not constitute error. The only objections disclosed by the record to the testimony of Krone, upon whose testimony the state's counsel based the remarks to which counsel for appellant now urge objections, was that the conversation between defendant and witness Krone was incompetent on the ground that the witness was acting as counsel for the defendant and could not divulge the communications, and that the questions were leading and suggestive.

There was one other objection to the testimony of witness Krone, directed to any conversation not in the presence of the defendant. This, however, need not be considered; for it is apparent that the entire conversation detailed was between witness and

defendant, and the defendant and deceased, when all of them were present. We are simply confronted with this proposition: Can appellant, during the progress of the trial, permit testimony to be introduced without objection, and then complain that the prosecuting attorney improperly based remarks upon it? The proper and only time to make the test as to the admissibility of testimony is at the time it is offered. We are unwilling to sanction the practice, conceding that incompetent evidence was introduced, of allowing the testimony to go to the jury, and wait until counsel in his closing argument proceeds to comment upon it, before interposing objections to it. This is practically this question; for the reference in the conversations to the killing of her former husband, to which the prosecuting attorney referred in his closing address, went to the jury without objection and exception.

There is no merit in the complaint urged by counsel as to the use of the diagrams of the premises and room where the killing occurred. At the time the diagram was made, the room, together with its furnishings, were in about the same condition as when the homicide occurred, and it is but common practice to use such diagrams in trials of this character, to the end that the triors of the facts may be put in full possession of the full surroundings at the time of the tragedy.

As to the affidavits in support of the motion for new trial, the record discloses that the court gave a reasonable time in which to prepare and file the affidavits, and afterwards extended the time for such filing. Still we find that they were not filed for at least two weeks after the expiration of such extended time. The trial court was warranted in refusing to consider them; but, aside from that, they absolutely failed in many particulars to comply with the essential requisites of application for new trials upon the ground of newly discovered evidence. That was the only ground for which they could be legally considered, for the application for a continuance had previously been adjudged insufficient, and the correctness or incorrectness of the action of the trial court upon that application can only be determined from the application at the time it is presented, and its allegations cannot be reinforced by affidavits filed subsequent to the trial of the cause.

Finally, it is insisted that the trial court committed error in its failure to instruct the jury upon murder of the first degree. This would not constitute error, even if there was a charge of that nature upon which to base it; but the record settles this question. The indictment in this cause, as shown by the record, only charges defendant with murder of the second degree. The former Attorney General, who briefed this case, as well as the counsel for appellant, doubtless failed to observe the omission in the indictment of

the charge of deliberation, which is an essential element in murder of the first degree.

As to the testimony in this case, it is sufficient to say that there was no eyewitness to this homicide, except the defendant. Of course, if her version of what occurred at the time of the killing was true, and the jury believed her testimony, then she should have been acquitted; but under the law of this state the jury are the sole and exclusive judges of the credibility of the witnesses and the weight to be attached to their testimony. It was for them to pass upon her testimony, in connection with the other facts and circumstances in evidence. They heard her testify, and doubtless observed her conduct and demeanor on the stand. They could believe or disbelieve any of her statements. That Dennis Cummings was killed and that defendant killed him there is no dispute. The jury heard all of the testimony, it was specially their province to consider it and weigh it, they returned a verdict of guilty as herein indicated, and we are unwilling to say that there was not substantial support in the evidence for such verdict.

We have thus reviewed the record in this cause, as it is presented. There are no objections to any of the instructions of the court given at the trial. In fact, this record indicates a trial with a view that no objections or exceptions were necessary. That may be true, if the rulings of the lower court upon questions are concededly correct; but it must not be forgotten that such concession cannot, subsequent to the trial, and for the first time in the appellate court, be withdrawn. This court will only review such errors of the trial court as were timely and properly preserved by the record before us.

We find no errors, upon the record presented, which warrant the disturbance of this judgment. It is ordered affirmed. All concur.

HARRISON v. POUNDS.

(Supreme Court of Missouri, Division No. 2
July 3, 1905.)

1. APPEAL—REVIEW—EVIDENCE.

The ruling of the trial court on a demurrer to the evidence will not be reviewed unless all the evidence is before the Supreme Court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2911-2915.]

2. SAME—CONFLICTING EVIDENCE.

It is not the province of the Supreme Court to settle the weight of conflicting evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

Appeal from Circuit Court, Jefferson County; Frank R. Dearing, Judge.

Action by Judson Pounds against Josiah R. Harrison. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Byrns & Bean, for appellant. Kleinschmidt & Reppy, for respondent.

GANTT, J. This is an action of ejectment, originally brought to recover 18 acres of land in the north part of United States survey No. 872 in Jefferson county of this state, and was a tract of land between where Big river now runs and where it formerly ran according to the field notes of the United States government survey made by Philip Relly, county surveyor, whose testimony discloses that he never found an original corner. After the evidence had been heard, plaintiff filed an amended petition, to conform, as he states, to the evidence, in which he sues for one acre, a part of United States survey No. 872, and lying on the north side of said survey, and bounded on the north by the old bed of Big river, on the west by a fence on the east side of a tract owned by plaintiff and occupied by William May. Ouster was laid as of July 2, 1893. The answer was and is a general denial. The cause was tried to the court without a jury, and the finding and judgment was for defendant, to reverse which defendant prosecutes this appeal.

The court gave three declarations of law prayed by plaintiff, and gave none for defendant. The sole ground of error alleged is that the circuit court erred in not rendering judgment for plaintiff upon the undisputed and uncontradicted evidence. This insistence places the burden on this court of investigating the evidence. This controversy is between adjoining proprietors. Plaintiff owns land in survey No. 872 on the south side of the Big river as it originally ran, and defendant's lands lie in survey No. 3,195 on the north side of said river; that is to say, the plaintiff and defendant are opposite riparian owners. The evidence tends to establish that about 12 or 13 years ago there was a sudden change in the course of the river, caused by the falling of large trees in it, and cutting off what the witnesses called "Harrison's Island," which is north of the present bed of the river. Various if not all the material witnesses appear to have testified with reference to certain plats which were in evidence but which are not set forth in or attached to the abstracts of the record before us. As far as we can glean from the evidence, one of the controlling facts necessary to determine this controversy was the location of the old line of the river. That there was a conflict as to this we think there can be no two opinions. The plats are not before us, and it is the settled rule of law in this court that where we are asked to pass upon a demurrer to the evidence, or as to whether there is any evidence to establish a fact, that the appealing party must bring all the evidence before this court, otherwise we will not disturb the finding of the trial court. The assumption of plaintiff that, because counsel for defendant stated on the trial that defendant did not claim anything south of where the river used to run, and that plaintiff had established that the

river formerly ran north of this acre in dispute, all controversy ended, is not supported by the record. The case hinged on that question of fact as to where the river ran with reference to this land, and the circuit court found against plaintiff on that point. To justify us in reversing that finding, clearly the plat should be before us to enable us to say, in connection with the other evidence, whether what the witnesses call "May's Island" was any part of "Harrison's Island." Butz testified that he had known the river 44 years before the trial, and prior to plaintiff's deed from Harrison in 1864, and that at that time the river ran south of May's Island, and continued to do so up to 1878, and is now running, with reference to May's Island, just as it was then, and that at that time the river ran north of Harrison's Island, and that the old slough which is now there was the channel of the river at that time. The trouble appears to be that plaintiff insisted on treating the meander line as surveyed by Reilly as the old bed of the river. Plaintiff's deed calls for Big river as the northern boundary of his tract. Reilly was a witness, and in answer to questions by the court said that what he called the meander line was the old river bed, and not the line as run through there now, and that the land which he spoke of as south of the old river bed is the land lying south of the line he run, and yet north of the old slough; and the other witnesses made the old slough the old river bed. Mr. G. W. Harrison said the land the defendant has in possession and which plaintiff claims is north of the old river bed. Jas. S. Wilson testified to like effect. In view of this conflict with the claim of plaintiff, it is clear that the circuit court was in a much better position, with the plats before him and the witnesses, to pass upon this question than we possibly can be. It is not our province to settle the weight of conflicting evidence, even if we had all the testimony and evidence before us, and, as already said, this we have not, and we are not to put the trial court in error on a pure question of fact in the circumstances.

The judgment of the circuit court must be and is affirmed. All concur.

HAXTON v. KANSAS CITY.

(Supreme Court of Missouri, Division No. 2.
June 6, 1905.)

1. MUNICIPAL CORPORATIONS — ACTION FOR INJURIES—QUESTIONS FOR JURY.

In an action against a city for injuries, evidence examined, and held that whether plaintiff was injured in a public street, or attempted to cross the street at an irregular place, which the city had not put in use for pedestrians, or was guilty of contributory negligence, were questions for the jury.

2. DAMAGES—FUTURE PAIN AND SUFFERING.

Where injuries are such that they are necessarily certain to continue to cause pain and anguish, the fact that they are not shown to

be permanent does not preclude the consideration of future pain and anguish as elements of damages therefor.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 236.]

3. MUNICIPAL CORPORATIONS—DUTY TO KEEP SIDEWALKS IN REPAIR.

It is the duty of a city to exercise ordinary care to keep its sidewalks and crossings in a reasonably safe condition for public travel.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1587-1594.]

4. SAME—PRESUMPTION.

A traveler on a public street has a right to presume, in the absence of knowledge to the contrary, that the city has performed its duty to exercise ordinary care to keep its sidewalks and crossings in a reasonably safe condition for public travel.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1673, 1678.]

5. APPEAL—HARMLESS ERROR.

A party cannot predicate error on the giving of an erroneous instruction which was given at his request.

6. TRIAL — INSTRUCTION — CONFORMITY TO PROOF.

A charge requested which is not justified by the evidence is properly refused.

7. SAME—REQUEST TO CHARGE—INSTRUCTION ALREADY GIVEN.

A charge requested which is covered by the instructions given is properly refused.

8. DAMAGES — PERSONAL INJURIES—VERDICT—EXCESSIVENESS.

Plaintiff, who lived apart from her husband, made her living by taking in washing prior to the time of the accident. The injury received was a sprain of the left ankle, two ligaments being ruptured. A physician testified that plaintiff's ankle would never be as good again as it was before the hurt, and that ankylosis was in progress at the date of the trial. The evidence also tended to show that plaintiff's backbone struck a protruding gas pipe when she fell, and that she constantly suffered with pains in her back on that account; and her physician testified that such an injury would affect the nervous system, and produce the pains of which plaintiff complained, and that, considering plaintiff's age, her condition was not likely to get any better. Because of her injuries, plaintiff was compelled to give up washing, and tried various ways of making a living, and had been compelled to abandon them or work only half time. Held, that a verdict for \$5,000 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 357, 353, 363.]

9. VENUE—WAIVER OF OBJECTION—STATUTE.

Where no exception was taken to the action of the circuit court of Jackson county in granting, on plaintiff's application, a change of venue to the circuit court of a county other than one in the same or next adjoining circuit, and no motion was made to strike the cause from the docket of the court to which the venue was changed, but the defendant voluntarily entered its appearance, and submitted to the jurisdiction of the court without objection of any kind, any objection the defendant might have under Rev. St. 1899, § 822, providing that changes of venue from Jackson county shall be granted to some county in the same or next adjoining circuit, was waived.

10. APPEAL—HARMLESS ERROR.

Any error in the action of the court to which a cause was taken on change of venue in permitting the correction of a clerical mistake made by the clerk of the court from which the cause was transferred, in certifying the

transcript by changing the word "right" to "left," in describing the injury to plaintiff's leg, was not prejudicial to the defendant, especially as defendant was not surprised thereby.

Appeal from Circuit Court, Benton County; W. W. Graves, Judge.

Action by Jane Haxton against Kansas City. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

R. J. Ingraham, J. G. L. Harvey, and L. E. Durham, for appellant. Henry J. Latschaw, Jr., for respondent.

GANTT, J. This is an action against Kansas City for damages resulting from personal injuries received by the plaintiff June 19, 1900, by falling into a hole at the northwest corner of Ninth and Jefferson streets, in Kansas City, Mo., and striking the small of her back against the end of an iron gas pipe extending up from the bottom of said hole, and by a severe sprain of her left ankle by reason of the turning of a stepping-stone, and the rolling of the same upon her said ankle. The petition charges that the city negligently maintained this hole in said street; that it neglectfully maintained said stepping-stones near said hole; that it negligently permitted weeds to grow about that hole and these stones, which obscured both; and that it negligently failed to maintain barriers around the hole and stones. There was a prayer for judgment for \$5,000 for said damages. The answer of the defendant is a general denial and a plea of contributory negligence. The reply denies all new matter. On the application of the plaintiff a change of venue was granted, on the ground of the undue influence of the defendant over the minds of the judges of the Jackson county circuit court, to Benton county, Mo. The cause was tried on the 13th of December, 1902, in the Benton county circuit court, and a verdict of \$5,000 rendered in favor of plaintiff. Motions for new trial and in arrest of judgment were filed and overruled, and time given to file a bill of exceptions; and, in accordance with the leave granted, a bill of exceptions was filed on the 6th of May, 1902.

The evidence tends to show that the plaintiff is a lady of Welsh descent. She had been married, and had a young son, about 10 years old, but she was divorced from her husband for his fault previous to the receiving of the injuries for which she sues. She supported herself by taking in washing and kept a few boarders. About 7 o'clock in the afternoon of July 19, 1900, plaintiff was sitting on the front porch of her home, 903 Jefferson street, when she saw her young son going north on the west side of Jefferson, near Ninth, carrying a basket of clothes, which appeared to be too heavy for him, and she started to his assistance. She went north on the east side of Jefferson street (her home being on that side) to the north side of Ninth street, and crossed west over Jefferson street. As plaintiff went to the

assistance of her son, she stepped over the curbing onto a space between the sidewalk and the curb on the west side of Jefferson street, just north of Ninth street; that is, near the northwest corner of Ninth and Jefferson streets. Jefferson street runs north and south, and Ninth street runs east and west, crossing Jefferson street. In this space there had been some stones, which the evidence tends to show had been arranged for stepping-stones, to allow pedestrians to pass over the curbing to the sidewalk. The plaintiff stepped on one of these stones, which turned with her and threw her on her back, which struck upon a projecting gas pipe which had been left there when the gas post was moved. This space on the sides of these stepping stones and at this projecting gas pipe was covered at that time with weeds. The evidence shows that these stones had been arranged for ten months to a year prior to the time plaintiff fell. About five or six months before plaintiff fell, the lamp-post had been moved from the place where this gas pipe stuck up, to the position it occupied at the time plaintiff fell. At the time plaintiff fell it appears that Jefferson street was being paved by the city with asphaltum, and the crossing had been removed for that purpose. The testimony on behalf of the plaintiff tended to show also that these stepping-stones were on a direct line with the end of the sidewalk on the north side of Ninth street and the west side of Jefferson street. The curbing around the hole into which plaintiff fell had been put in by the defendant city through its superintendent of curbing and sidewalks, Thomas F. Callahan, in the year 1892, and was the "regular shoulder four-feet corner." At the time plaintiff was injured both Ninth and Jefferson streets were public, and among the principal thoroughfares of the city, and had been for at least 20 years. Both streets at this point were side-walked on both sides, and had gas and sewers on them. The principal cable road of Kansas City ran over the hill on Ninth street to the Union Station, and crossed Jefferson street at this corner within a short distance from where plaintiff fell. Jefferson street is the first street on the top of the hill over the incline from the Union Station. When the stepping-stone turned with the plaintiff, she fell, and the stone rolled over on her foot and ankle, and her little son was not strong enough to remove it; but a gentleman who ran to her assistance removed the stone from her foot, and several men then picked her up and carried her in their arms to her home, at Jefferson street. Dr. Branaman, who lived near by, was summoned, and testified that he did not remember whether he examined her back or not, but he found her suffering from a dislocated ankle and ruptured ligaments of the left ankle joint. In a few days he brought Dr. Beattie with him, and they together put her foot in a plaster-paris cast. Plaintiff was

confined to her house for about four weeks, and was compelled to keep the plaster-paris cast on her ankle for three weeks. She testified that she could not go about very much for a couple of months; walked with crutches at first. Dr. Branaman attended her for about a month. Then she called in Dr. Jones, and he treated both her ankle and her back. Dr. Jones testified: That when he first examined plaintiff's left limb he found it swollen near the ankle, and the ankle was sore on pressure, and one bone in the leg diseased, and the bone was inflamed, with two angry-looking red scars about the size of a silver dollar over the bone. He also found pus gathered in several places at or near this point, and abnormally large veins in the same region. That the ankle joint was involved in an inflammatory process. That ankylosis was in progress at the time of the trial. On her back he found an enlargement of the sacrum, and pain and tenderness at the sacrum and surrounding parts, to wit, the lower part of the spine. He testified that an injury or fall would be the natural cause of these conditions, and that these injuries would affect the nervous system, and would naturally produce pains in the back such as plaintiff complained of, and that in a woman of plaintiff's age this condition was not likely to get any better. Dr. Burnett, who was appointed (on the motion of the city) by the court to make an examination of plaintiff, did so on December 9th, a few days before the trial. He made a specialty of nervous and mental diseases, and was a professor of the University Medical College of Kansas City. He testified he found Mrs. Haxton in only fair physical condition for a woman of her age; that she complained of pain over what is known as the "sacrum" (that is, the lower end of the spinal column, between the two hips). This pain incapacitated her to such an extent that she was unable to stoop or rise or follow her work. She is not able to do the work she once was. But he found no abnormal condition in this area, except on the left side of the sacrum, and there it appeared there was some thickness—a little unnatural roughness as compared with the other side. He testified he was unable to find any affection of the nerves at the base of the spinal column. The plaintiff herself testified that the projecting gas pipe struck her right on the backbone; that the pain in her back and foot was so intense she could not move; that her ankle still bothers her, and pains her so she cannot use it like she could before her injury; that her back is so weak and pains her so much that she cannot wash and do her work like she could before she was hurt; that she has tried numerous jobs to make her living since her injury, and has been obliged, on account of her back, to give them up; and that while she held different jobs she was able to work only half of the time. On the part of the defense

there was evidence that plaintiff's health was not good prior to her injury, but there was nothing in this evidence to indicate that her spine or ankle had given her any trouble before that time. Numerous errors are assigned, for which a reversal of the judgment is asked. The instructions will be noted further on in the opinion.

1. Three grounds are urged why a demurrer to the evidence should have been sustained: First, that there was no proof that the place at which plaintiff was injured was in a public street or thoroughfare of the city; second, that, even if it was a public street, the evidence shows there was a perfectly safe sidewalk and crossing at the proper and ordinary place, and within a few feet of the place where the plaintiff desired to cross, and, instead of using that, plaintiff voluntarily chose to cross at an irregular place, which the city had not put in use for pedestrians; and, third, that plaintiff was guilty of contributory negligence which would bar her recovery. As to the first of these propositions, we think there was ample evidence to show that Jefferson street was a public street, and the place at which plaintiff fell was within the lines of that street, and it was the duty of the city to make it reasonably safe for pedestrians' use. We have already noted in the statement that Mr. Callahan, the superintendent of curbing and sidewalks, had placed this curbing on the west side of Jefferson street, from Eighth to Ninth streets, in the fall of 1892, and at the time this accident or injury occurred to Mrs. Haxton the street was being paved with concrete, preparatory to laying asphaltum thereon. The facts concerning this case distinguish it from *Downend v. Kansas City*, 158 Mo. 60, 58 S. W. 902, 51 L. R. A. 170, and *Ely v. City* (Mo. Sup.) 81 S. W. 168. In this case, unlike those, the testimony of Policeman Kirk shows that Ninth street, where it crosses Jefferson street, was one of the principal thoroughfares of the city, and the same could be said of Jefferson street. We do not deem it necessary to set forth the evidence at length to show that both of these streets were clearly public highways, which it was the duty of the city to keep in reasonably safe condition for those traveling over them for business or pleasure. The next contention is that the demurrer should have been sustained because appellant says there was a perfect sidewalk and crossing at the ordinary place, and plaintiff voluntarily chose to cross at an irregular place. This seems to be based upon a question put to the plaintiff, and her answer to it, as follows: "Q. You could have walked around and stepped upon the sidewalk from the east side there, where people cross the street? Ans. I could, but I did not do it." Clearly counsel meant "north side," instead of "east side," as there was no possible way of getting to this sidewalk from the east side of any place. "Q. And you could have stepped upon the side-

walk from Ninth street? Ans. Yes; I could have gone that way. Q. But you did not? Ans. No." We think it is plain the demurrer should not have been sustained on this ground, because there was much evidence to show that plaintiff was crossing at the usual and ordinary place, and over the crossing that had been used for a long time on the north side of Ninth street, crossing Jefferson; and, according to plaintiff's testimony, her use of the stepping-stones was not negligence, in the circumstances, as they had no appearance of danger, and seemed to have been used by the public generally in passing that way, and the testimony tended to show that these stones had been laid there as stepping-stones for public use for at least a year; and this leads to the next contention—that she was guilty of contributory negligence, as a matter of law, in attempting to cross on these stepping-stones. Whether or not she was guilty of contributory negligence was, under the testimony, clearly a question for the jury, and they were instructed upon that issue. That the place where plaintiff was crossing when she fell was the usual and ordinary place for people to cross at that point was supported by the evidence of Policeman Kirk, who testified that the stepping-stones were right at the crossing, and were in direct line with the crossing. He said: "Coming west on Ninth street, a person walking along here would strike these stones going across here between the curbing and this space. These stones look as though they had been put in there as stepping-stones to the crossing. That there was a space of about four feet between the sidewalk and the curbing, going west that way, and that there were weeds growing up around these stones. That is the regular way where the people would travel in going from the east side of Jefferson street to the west side of Jefferson street." These facts, taken in connection with the testimony tending to show that the point where she fell was not so dangerous as to deter a person of ordinary prudence, and that the hole in which she fell, and the gas pipe sticking up from the bottom of said hole, were hidden from view by the weeds, authorized the jury to find that plaintiff was not guilty of contributory negligence in walking upon these stepping-stones to reach the sidewalk, and tended to show at least that plaintiff, in the exercise of ordinary care, would not have discovered that the hole was there, or that the stepping-stones were insecure, or that the gas pipe was sticking up from the bottom of the hole. We think there was no error in overruling the demurrer to the evidence for either of the reasons urged in its support.

2. Instruction No. 1 given on behalf of the plaintiff is assailed for the reason that the jury were permitted to take into consideration future pain and suffering, without requiring them to find that plaintiff's injuries were permanent. This instruction was based

upon the medical testimony that the injuries to plaintiff would extend into the future for years, and would probably be permanent; and, on the question as to what injuries the jury would consider in making up their verdict, the court, in instruction No. 3, directed them "that if you believe that all or any part of the physical ailments and the consequent pain and suffering which plaintiff alleges she now has existed in plaintiff before her alleged fall, then for all such pre-existing ailments you can award plaintiff no damages." None of the cases cited by the learned counsel for the city go to the length which they claim. Those authorities hold that the jury may allow for future pain and suffering if the injuries are permanent, but none of them hold that the jury cannot allow for future pain and suffering unless such injuries are permanent. On the contrary, it is well-recognized law that, where the injuries are such that they are reasonably certain to continue to cause future pain and anguish, they are proper elements of damages.

3. Instruction No. 2 for the plaintiff is challenged. It tells the jury that "it is the duty of defendant city to exercise ordinary care to keep its sidewalks and crossings in a reasonably safe condition for public travel, and you are further instructed that plaintiff had a right to presume, in the absence of knowledge to the contrary, that defendant had performed said duty." The criticism is that plaintiff was not injured upon the sidewalk or crossing, and this reference to the duty to keep the sidewalk and crossing in repair was calculated to impress the jury with the view that the court, as a matter of law, meant to declare the place where she fell was within the terms "sidewalk and crossing," and was misleading, and that the knowledge which plaintiff confessed she had of the surroundings made all reference to her right to presume that it was safe improper. The city having assumed, according to the evidence of the plaintiff, to construct this crossing of stepping-stones, or permitted them to be so laid with its acquiescence, and invited the public to use the same as a crossing, it was entirely proper for the court to give this instruction, and we think there is no merit in the objection to the instruction as far as it told the jury plaintiff had a right to presume it was safe. There was no such knowledge on the part of the plaintiff of any danger in stepping on those stones shown that would deprive her of the right to this instruction—an instruction that has often been approved by this court under similar facts.

4. Among other instructions for the defendant, the court gave one numbered 10, in words following: "The court instructs the jury that the defendant city has the right to place obstructions at or within the curb line which marks the boundary between the roadway and the sidewalk, while engaged in improving a street, provided enough side-

walk space is left unobstructed, sufficient to accommodate public travel; and if the jury believe from the evidence that the plank sidewalk opposite the point where plaintiff alleges she fell was of sufficient width to accommodate public travel at that point, and was unobstructed at the time she fell, and that the sidewalk from the east to the west side of Jefferson street was unobstructed, then your verdict must be for the defendant city." Counsel for the city insist that as this was the announcement of correct legal principles, and as the jury found for plaintiff, they must necessarily have disregarded it, and therefore their verdict should be set aside. A further contention is that the court, having held this was a proper instruction, ought to have sustained a demurrer to the evidence. In a proper case the instruction was well enough, but was somewhat inconsistent with the insistence of counsel for the city in this court, to wit, that Jefferson street was not a street. We are of opinion, however, it has no application to the facts developed in this case. There is no evidence that the stepping-stones on which plaintiff was injured were temporary obstructions caused by the improvements of the streets. For a year they had, with the knowledge of the city, been so arranged as to invite the public to use them as a walk, and were not within the line of the improvement then being made, to pave the street with asphaltum, but were between the curb and the sidewalk. Moreover, the jury evidently found that the cross-walk from the east side of Jefferson street was not "unobstructed," and that the stepping-stones were unsafe and negligently maintained as a walk. As to the other proposition—that the court should have sustained a demurrer to the evidence—we have already expressed a contrary opinion. Is defendant in a position to complain of the giving of this instruction? We hold not. If it properly construes instruction No. 10, then it obtained from the circuit court a ruling too favorable to it. Clearly the jury did not understand that this was a peremptory instruction to find for defendant, and the defendant cannot complain of an error invited by it and in its favor. *Erickson v. Railway*, 171 Mo. 647, 71 S. W. 1022.

5. Complaint is made that the court erred in refusing instruction No. 15 prayed by defendant, as follows: "The court instructs the jury that there is no evidence in this case of actual notice to any such city official of the alleged defect." Policeman Kirk not only saw and knew of the dangerous condition of this place, but, 19 days before the injury occurred, notified his superiors in the usual way. Obviously it would have been error to have given it. *Franke v. St. Louis*, 110 Mo. 524, 19 S. W. 938.

6. No error was committed in denying instruction No. 16 asked by defendant, on the credibility of witnesses. The court fully

covered this point in its thirteenth instruction. That instruction goes as far as the courts are justified in going, without invading the province of the jury to weigh and consider the evidence.

7. Error is also assigned in refusing instruction No. 17 prayed by the defendant. It was as follows: "The court instructs the jury that if you believe from the evidence that the place where plaintiff alleges she fell was not in the line of the cross-walk from the east side to the west side of Jefferson street, and that a person exercising ordinary care and prudence would have avoided the place where plaintiff alleges she fell, then plaintiff cannot recover, and your verdict must be for the defendant city." The court had already given instruction No. 9, in the following form: "The court instructs the jury that it is the duty of persons traveling over the streets and sidewalks of the city to use their eyes and other senses to see where they are going, and to avoid defects which are obvious or could be discovered by the exercise of ordinary care on their part; and if the jury believe from the evidence that plaintiff did not exercise ordinary care in stepping on the stone which she alleges caused her fall, but by the exercise of ordinary care could have avoided it or passed over it in safety, then your verdict should be for the defendant city." It is apparent, we think, that instruction No. 9 embodied the proposition for which defendant contends, to wit, "that if plaintiff had used her eyes, and by the exercise of ordinary care could have avoided going upon the stepping-stones, she was not entitled to recover." But this instruction was not properly modified. It assumes, and does not require the jury to find, that the place into which plaintiff fell and the stepping-stones had the appearance of being dangerous, and therefore plaintiff was bound, in the exercise of ordinary care, to avoid going upon them. The facts in evidence, without contradiction, disclose that at the time the hole was covered with weeds, and the stepping-stones bordered by them, and there was nothing to indicate to one not accustomed to use this path that it was dangerous. Even if the court had not given instruction No. 9, which fully guarded the defendant's rights, the evidence did not justify this instruction. Nor was there error in refusing to advise the jury that, "if the place where plaintiff alleges she fell was not in a direct line of the cross-walk from the east side of Jefferson street to the west side thereof," she could not recover. The whole testimony showed that at the time Jefferson street was being improved, and there was no cross-walk from the east side to the west side of it; and hence the walk on which plaintiff fell could not have been in a direct line with such cross-walk, which had been removed pending the paving of the street at the time. On the other hand, the only evidence on the sub-

ject was that the stepping-stones were in the direct line of the sidewalk on the north side of Ninth street at the west side of Jefferson street. Moreover, if, as the testimony all tends to prove, the city had caused these stepping-stones to be placed there for a crossing, and invited the public to use them in passing from the street across the curb to the sidewalk, the mere fact that they were not laid in an exactly direct line with what had previously been a crossing would not exculpate the city for their negligent setting. This instruction was properly refused.

8. The city complains of the amount of the verdict as excessive. Various witnesses did testify that Mrs. Haxton had poor health before she suffered this fall. It appears she had been afflicted with hemorrhoids and had fainting spells, but it also appears that she was an industrious woman; making her living, with the aid of her little boy, by taking in washing, prior to the time of her fall. There is no question that by the fall she received an exceedingly painful sprain of the left ankle, and that the ligaments thereof were ruptured, and that two physicians (Drs. Beattie and Branaman) found it necessary to put the ankle in a plaster of paris cast for three or four weeks; and Dr. Jones and Dr. Burnett afterwards found this ankle in a deplorable condition, particularly for one whose condition in life required her to stand over a washtub to make her living, and to do other work requiring her to stand on her feet. All the physicians agree with our common experience that such a sprain and rupture is more painful and serious than the breaking of a bone, as a fractured bone will unite more readily than a ruptured ligament, especially in the region of the ankle. The physician testified that plaintiff's ankle would never be as good again as it was before the hurt, and that the presence of ankylosis was in progress at the date of the trial. In addition to this the evidence tends to prove that plaintiff's backbone struck the protruding gas pipe when she fell, and the evidence tended to establish that she constantly suffered with pains in her back from this cause; and her physician testified that such an injury from such a cause would affect the nervous system, and produce the pains of which plaintiff complained, and, considering her age, this condition was not likely to get any better. By reason of her injuries, plaintiff was compelled to give up washing, and tried various ways of making a living, and had been compelled to abandon them, or work only half time. The verdict in this case received the approval of the trial judge and the jury. In view of all the evidence, we are not authorized to hold that it was so unreasonable and disproportionate to her injuries as to shock the conscience of the court, or to appear to be the result of passion, prejudice, or mistake, and hence it must stand.

9. The sole remaining contention is that

the circuit court of Benton county had no jurisdiction to try this cause, because the law governing changes of venue from Jackson county requires that they shall be granted to some county in the "same or next adjoining circuit." Rev. St. 1899, § 822 (Laws 1879, p. 82, § 11). When the change of venue was granted, no exception was taken to the action of the circuit court of Jackson county in granting it, and no motion to strike it from the Benton docket was entered. Defendant voluntarily entered its appearance in the Benton court, and submitted to its jurisdiction, without objection of any kind. The circuit court of Benton county was and is a court of general jurisdiction, and had jurisdiction of this class of cases, and the parties voluntarily submitted themselves to its jurisdiction. By so doing they waived any objection they might have had by reason of the statute governing changes of venue from Jackson county. This is too well settled to be longer questioned in this state. *State v. Lynn*, 169 Mo. 670, 671, 70 S. W. 127; *State ex rel. v. McKee*, 150 Mo. 238, 51 S. W. 421; *Wright v. Kansas City* (Mo. Sup.) 86 S. W. 452.

One other matter need be mentioned. The circuit court of Benton county permitted a correction of a clerical mistake made by the clerk of Jackson county in certifying the transcript to Benton, by changing the word "right" to "left," in describing the injury to her leg. It is apparent the defendant was neither surprised nor injured by its correction or amendment.

We find no reversible error, and the judgment is affirmed. All concur.

STATE v. HUNT.

(Supreme Court of Missouri, Division No. 2
July 8, 1905.)

1. CRIMINAL LAW—INFORMATION—STATUTES—VENUE.

Rev. St. 1899, § 2527, provides that it shall not be necessary to state any venue in the body of an information, but that the county or other jurisdiction named in the margin shall be taken to be the venue for all the facts stated in the body of the same. *Held*, that an indictment for arson which stated that the prosecuting attorney for a certain county in the state of Missouri informed the court that defendant did then and there, etc., was sufficient, without again repeating "in the state of Missouri."

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 119, 239, 240, 243.]

2. SAME—LOCATION OF BUILDING.

Rev. St. 1899, § 1875, in relation to arson, divides the buildings named therein into different classes. Following the first classification are the words "of another," but the clause referring to houses of public worship, etc., is not followed by words of any such import. *Held*, that an information charging arson, consisting of the burning of a house of public worship, the property of the General Baptist Church, was sufficient to advise defendant of what particular church he was charged with burning.

3. CRIMINAL LAW — LIMITATIONS — INSTRUCTIONS.

On a prosecution for arson, an instruction that the jury should convict if the crime was committed within three years prior to the date when the amended information was filed was not prejudicially erroneous.

Appeal from Circuit Court, Douglas County; Jno. T. Moore, Judge.

J. W. Hunt was convicted of arson, and he appeals. Affirmed.

Burkhead & Clarke, for appellant. H. S. Hadley, Atty. Gen., and Frank Blake, for the State.

BURGESS, P. J. On the 8th day of September, 1904, the prosecuting attorney of Douglas county, Mo., filed an information in the circuit court of said county charging the defendant with the crime of arson, in setting fire to and burning a church building in said county on or about the 16th day of June, 1904. Thereafter, on September 26, 1904, he filed an amended information, by leave of court, charging the defendant with the same offense. Upon trial had, the defendant was convicted of the crime charged, and his punishment fixed at five years' imprisonment in the State Penitentiary. After unsuccessful motions for new trial and in arrest, the defendant saved his exceptions and appeals.

On Thursday, the 16th day of June, 1904, a country Baptist church was destroyed by fire in the said county of Douglas, state of Missouri. It appears from the evidence that the defendant owned and had in his possession a horse, the right hind foot of which had some peculiarity, in that it seemed to turn in, or rather to one side, and when the horse walked or ran it made a "winding track." The day before the building was burned there had been a rain, and witnesses for the state testified that the horse's tracks were found leading from the direction of the town of Arnold up to the hitching place near the church, and back again towards Arnold. The defendant lived about 3½ miles northwest from the church, and west of the town of Arnold, which was 2½ miles from the church. A witness for the state, by the name of G. P. Everhart, measured the foot of the defendant's horse on one occasion when it was ridden to his house by a son of defendant, and he testified that the tracks leading up to and away from the church corresponded to and fitted the measurements of the horse's foot. It seems that some time before the building was burned the defendant's son had been arrested for disturbing religious worship at this church, and defendant made various threats about its destruction in the event the prosecution was not stopped. About two weeks before the fire he stated to witnesses who testified in behalf of the state that if this was not done the churchhouse would be burned to ashes, and said: "I will stop the Sunday school and prayer meeting, both." The prosecution was

not dismissed, and about two weeks thereafter the church was destroyed by fire. There was other evidence as to the measurements of the horse's foot, and the correspondence thereof with the measurement of the tracks seen near the church, and also as to the threats made by defendant that the church would be burned down if the suit against his son was not dismissed. The evidence also showed that the shoes of the horse had been removed before the burning of the building. The defense was an alibi, and several members of the defendant's family testified that he was at home on the night of the burning of the building, but the testimony was not exactly in accord as to the hour he went to bed.

The information upon which defendant was convicted was in substance as follows: "In the Circuit Court of Douglas County, Missouri, September Term, 1904. Fred. Stewart, prosecuting attorney within and for the county of Douglas, in the state of Missouri, informs the court that J. W. Hunt on or about the 16th day of June, 1904, in the said county of Douglas, did then and there unlawfully, willfully, and feloniously set fire to and burn a certain house of public worship there situate, of the property of the General Baptist Church, in said county, and erected for public use, to wit, for the public worship of God, against the peace and dignity of the state." The information is assailed upon various grounds, but only such of them as seem to be worthy of consideration will be noticed. One of these is that the information does not charge that the alleged burning was done in the state of Missouri, and does not, therefore, show that the situs of the offense was within the jurisdiction of the court. After stating in the information that "Fred. Stewart, prosecuting attorney within and for the county of Douglas, in the state of Missouri, informs the court that J. W. Hunt on or about the 16th day of June, 1904, in the said county of Douglas, did then and there," etc., it was wholly unnecessary to again repeat "in the state of Missouri." By section 2527, Rev. St. 1899, it is provided: "It shall not be necessary to state any venue in the body of any indictment or information; but the county or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the same." The words "then and there," together with the words "there situate," clearly mean that the offense was committed in the county of Douglas, state of Missouri, as the caption to the information shows that the information was filed and the prosecution had in Douglas county, Mo., and practically the same allegations appear in the first part of the information itself. Indictments similar in form have frequently been held valid by this court. *State v. Ames*, 10 Mo. 743; *State v. Goode*, 24 Mo. 361; *State v. Simon*, 50 Mo. 370; *State v. Dawson*, 90 Mo. 149, 1 S. W. 827.

Nor was it necessary that the particular location of the building alleged in the information to have been burned be set forth therein. The allegation that it was a house of public worship situate in said county, the property of the General Baptist Church, and erected for the public worship of God, was all that was necessary in order to advise defendant of the particular church which he was charged with burning. The information alleges that the building was owned by the General Baptist Church, and it is contended by defendant that, as that church is not an individual or a corporation, the building is not identified by charging or averring ownership. This case, however, does not come within the range of defendant's argument, in that the building referred to in the information does not belong to that class of buildings in respect of which it is necessary to allege ownership. The information in this case is drawn under section 1875, Rev. St. 1899, which divides the buildings named therein into different classes. Following the first classification are the words "of another," while the clause which refers to houses of public worship, colleges, schools, and other public buildings is not followed by such words or words of similar import. It was not necessary, therefore, to the validity of the information that ownership should have been alleged, and the allegation that the church was "the property of the General Baptist Church" is immaterial and should be disregarded. In *State v. Moore*, 61 Mo. 276, this court said: "All that the ends of justice required was that the building should be sufficiently identified by the allegation of the indictment, and that those allegations should find support in the testimony adduced, and this was done. It would be as absurd as it would be impossible to require grand jurors in finding, and prosecuting attorneys in preparing, indictments, or courts during the progress of a criminal trial, to go into nice and critical examinations as to the ownership of real property. Were this allowed, offenders would frequently 'go unwhipped of justice' in consequence of the tangled intricacies of the title to a piece of land." *State v. Roe*, 12 Vt. 93, is very much in point upon this feature of the case. The defendant in that case was indicted and convicted for burning a certain meeting house belonging to the First Calvinistic Congregational Society in Burlington, erected for public use, to wit, for the public worship of Almighty God, under a statute making it a felony to set fire or burn such a building with a felonious intent. It was held to be unnecessary to allege in the indictment that such building was of, or belonged to, any particular person or persons or corporation, and that all that allegation was surplusage in the indictment.

To authorize a conviction, the offense must have been committed within three years next preceding the finding of the information; and as the first information in the

case was filed on the 8th day of September, 1904, and the court instructed the jury to convict the defendant if they found that he had committed the offense within three years prior to the 26th day of September, 1904, the day upon which the amended information was filed, it is contended that the court committed reversible error in giving such instruction. We are unable to appreciate the force of this contention, because, if an error at all, it was in favor of the defendant, in that it gave him the benefit of 16 days in time that he would not have gotten if the instruction had told the jury that in order to convict the defendant it devolved upon the state to show that the offense had been committed within three years prior to the time of the filing of the information on the 8th day of September, 1904, and the defendant cannot be heard to complain of such error, if such it was.

The instruction upon reasonable doubt is in the form often approved by this court, and the objection urged against same is without merit. *State v. Duncan*, 142 Mo. 456, 44 S. W. 263; *State v. Garrison*, 147 Mo. 548, 49 S. W. 508; *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737; *State v. Smith*, 164 Mo. 569, 65 S. W. 270.

Finding no reversible error in the record, we affirm the judgment. All concur.

BRADFORD et al. v. BLOSSOM et al.

(Supreme Court of Missouri. June 23, 1905.)

1. WILLS—UNDUE INFLUENCE—EVIDENCE.

Undue influence may be inferred from facts and circumstances—from the relation of the parties and testator's mental condition.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 383-402.]

2. SAME.

On an issue as to whether a will was brought about by fraud and undue influence, *held*, that the question was one for the jury.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 769.]

Brace, C. J., and Marshall, J., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Contest of the will of Emma V. Bradford by Frank E. Bradford and another. From a judgment in favor of proponents, contestants appeal. Reversed.

M. F. Hanley and R. P. & C. B. Williams, for appellants. Thos. B. Harvey, for minor respondents. Boyle, Priest & Lehmann, for other respondents.

BURGESS, J. This is a statutory contest of the will of Emma V. Bradford, who died July 23, 1898. The will was admitted to probate August 8, 1898, and the contest proceedings were begun on October 10, 1899. The contestants are Frank E. Bradford and Caroline B. Ryan, son and daughter and only children of the testatrix.

The will purports to have been executed

on the 21st day of July, 1893. It reads as follows:

"I, Emma Virginia Burns Bradford, widow of the late William E. Bradford, of the City of St. Louis, State of Missouri, being of sound mind and memory and mindful of the uncertainty of life, do by these presents make, publish and declare the following instrument to be my last will and testament, hereby expressly revoking all other wills made and published by me.

"I. I declare that I have now living two children: My son, Frank E. Bradford, and my daughter, Carrie Bradford Ryan, wife of Alfred Ryan; that I have no debts or obligations of any character to be allowed against my estate, except such as may accrue for my last sickness and funeral, and except such as may be secured on real estate purchased by me, for the deferred payments of the purchase price, for which I have hereinafter made special provision. And as to other debts and obligations, I direct my executor named to contest the validity of any claim against my estate which in his opinion is of long standing and supported by doubtful or uncertain evidence.

"II. It is my will that all of my estate, real, personal and mixed, wherever situate, and to which I am entitled either at law or in equity, vested in me in fee simple, or otherwise, by virtue of any gift, grant, devise, inheritance, or by virtue of any conveyance made to any trustee or trustees for my use and benefit, or under any power mentioned in such conveyance, which authorizes me to appoint, dispose or devise by last will and testament, or any other conveyance in the nature of a last will and testament, any of such property, real, personal or mixed, I do hereby will, devise and bequeath to my friend Howard A. Blossom.

"To have and to hold the same unto him, the said Howard A. Blossom, and to his heirs and assigns forever.

"In trust, however, for the following purposes, to wit: To deliver to my daughter, Carrie Bradford Ryan, wife of Alfred Ryan, and to my son, Frank E. Bradford, out of my residence such statuary, pictures, laces, jewels, clothing and household goods, of equal value to each of said persons, as they may select; and if my said son and daughter cannot agree upon the articles to be selected by them then said trustee shall decide in all cases of disagreement and shall deliver such property as herein devised and bequeathed to him to said persons, as he may determine.

"And in further trust, as to all other property owned and possessed by me, or to which I am entitled either at law or in equity, to collect and receive all the rents, issues and profits thereof, and to pay all the taxes, assessments, insurance and repairs, and all other expenses which in the discretion of the said trustee may be deemed proper and expedient to be incurred in holding, managing, controlling and disposing of said property;

and to pay out of said income (or the principal, if necessary), so held by said trustee, any sum or sums of money that may be recovered by any action at law or suit in equity against said trustee, by any person or persons whomsoever, for any damages or injuries sustained by any person or persons by reason of any act done, or omission of any act, by the said trustee, by which any cause of action for any injury or damage shall result, and for which any person or persons may be entitled to recover against said trustee for such injuries or damages. And from the net income thereof, after the payment of all such sums required herein to be paid by said trustee, to divide the said income into two equal parts; to suffer and permit my son Frank to use and enjoy so much of the one part of the said net income for and during his natural life as my said trustee may deem proper to pay him, such payment to be made to him in such sum or sums and at such time or times as said trustee may determine, paying the same into his own hands and taking his receipt therefor. And from the other part of said income to suffer and permit my daughter Carrie to use and enjoy so much of said part of said net income, for and during her natural life, as my trustee may deem proper to pay her, such payment or payments to be made to her in such sum or sums and at such time or times as said trustee may determine, paying the same into her own hands and taking her receipt therefor.

"III. And in further trust, after the death of the said son Frank, in the event of his marriage and his wife should survive him, to suffer and permit his widow to use and enjoy so much of one-fourth of said net income (i. e. one-half of his share), for and during the period of her natural life, if she shall remain the widow of my son Frank, as my trustee may deem proper to pay her, in such sum and at such times as said trustee may determine, paying the same into her own hands and taking her receipt therefor; and in case of her death or marriage all the share of my said son Frank in such income shall be paid to his child or children as hereinafter mentioned, in the manner hereinafter stated.

"And in further trust, that in case my said son Frank shall marry and any child or children shall be born of his body, who shall survive him, to suffer and permit such child or children to use and enjoy so much of one-fourth of said net income (i. e. one-half of his share), for and during the period of the minority of such child or children, as my trustee may deem proper to pay to the lawful guardian of such child or children, in such sums and at such times as said trustee may determine; said payment to be made into the hands of the said guardian or legal custodian of such child or children, or directly to such child or children, if my said trustee may deem such payment proper and expedient,

and taking the receipt of such child or children therefor.

"And in further trust, that in case my said son Frank shall die without issue born of his body, leaving a widow, then one-fourth of the net income is to be added to the principal and held by the said trustee as herein provided for the disposal of the said principal.

"And in further trust, that in case of the death of my said son Frank, unmarried, and without issue born of his body, and prior to the death of my daughter Carrie, then I direct my trustee to suffer and permit my daughter Carrie to use and enjoy as much of the said net income for and during her natural life as my said trustee may deem proper to pay her, in such sums and at such times as said trustee may determine, paying the same into her own hands and taking her receipt therefor.

"IV. And in further trust, in case of the death of my said daughter Carrie, leaving a child or children born of her body, to suffer and permit such child or children to use and enjoy so much of said net income as she would be entitled to, if living, for and during their minority, as my trustee may deem proper to pay them, or the guardian or custodian of such children, in such sums and at such times as said trustee may determine; said payments to be paid in the hands of said guardian or legal custodian, or directly to said child or children, if my said trustee may deem such payment proper and expedient, and taking the receipt of such child or children therefor.

"And in further trust, that if my said daughter Carrie shall die leaving no children or their descendants, or in case of her death any of her children shall not attain the age of twenty-one years and shall die leaving no descendants, and my son Frank shall survive the said daughter Carrie and her said children and their descendants, or my said son Frank shall marry and leave any child or children born of his body surviving him, and after the death of my said daughter Carrie and her descendants and any of her children shall not attain the age of twenty-one years and shall die leaving no descendants, then my said trustee shall suffer and permit my said son Frank, or his child or children, to use and enjoy so much of the entire income of said estate, for and during their natural lives, as my trustee may deem proper to pay them, in such sums and at such times as said trustee may determine, and paying the same into their own hands and taking their receipt therefor.

"And in further trust, that in case my said son Frank shall die leaving no children or their descendants, or in case of his death any of his children shall not attain the age of twenty-one years and shall die leaving no descendants, and my daughter Carrie shall survive my said son Frank and his said children and their descendants, or my said daughter Carrie shall leave any child

or children born of her body surviving her, and after the death of my said son Frank and his descendants and any of his children shall not attain the age of twenty-one years and shall die leaving no descendants, then my said trustee shall suffer and permit my daughter Carrie, or her child or children, to use and enjoy so much of the entire net income of said estate, for and during their natural lives, as my said trustee may deem proper to pay them, in such sums and at such times as said trustee may determine, and paying the same into their own hands and taking their receipt therefor.

"V. And in further trust, that if my said daughter Carrie shall die leaving a child or children who shall not attain their majority or leave descendants, and in case of the death of my son Frank, unmarried, or if married without children born of his body, or shall die leaving a child or children who shall not attain their majority or leave descendants, then I do will, devise and bequeath to Alfred Bradford and Charles H. Bradford, if they shall then be living, for and during their natural lives, and after the death of Alfred Bradford and Charles H. Bradford to the heirs of Alfred Bradford, a certain lot or parcel of land situate in the City of St. Louis, State of Missouri, being a lot of ground having a front of forty feet on the north line of Washington Avenue by a depth of one hundred and twenty-five feet; said lot commencing at a point on the north line of Washington Avenue ninety feet east of the east line of Sixth Street, running thence north and parallel with Sixth Street, one hundred and twenty-five feet, thence east and parallel with Washington Avenue forty feet, thence south and parallel with Sixth Street one hundred and twenty-five feet, thence west along the north line of Washington Avenue forty feet to the point of beginning. To have and to hold the above described premises to the heirs of the said Alfred Bradford, and their assigns forever.

"VI. And in further trust, that if my said daughter Carrie shall die leaving a child or children who shall not attain their majority or leave descendants, and in case of the death of my son Frank, unmarried, or if married without children born of his body, or shall die leaving a child or children who shall not attain their majority or leave descendants, then in trust to convey all the rest, residue and remainder of my estate, real, personal and mixed, including both principal and income thereof, to the legal heirs of my two sisters, Mrs. Margaret Burns Mygatt, deceased, late of Vicksburg, Mississippi, and Mrs. Caroline A. Burns Wood, deceased, late of Richmond, Virginia.

"To have and to hold the same unto them, and their heirs and assigns forever.

"VII. And in further trust, that if my said daughter Carrie shall die leaving a child or children, and when the youngest of such children shall attain the age of twenty-one

years, after the death of their said mother, and in case of the death of my said son Frank, leaving a child or children born of his body, and when the youngest of whom shall attain the age of twenty-one years, after the death of their said father, then I direct my said trustee to divide the principal of said estate into two moieties; one of which I direct he shall convey in fee simple to the child or children, or the descendants thereof, of my daughter Carrie, discharged of said trust, and the other moiety I direct said trustee to convey in fee simple to the child or children, or the descendants thereof, of my son Frank, discharged of said trust.

"VIII. It is my will, and the said trustee is further authorized and empowered that at any time during the life of my son Frank and my daughter Carrie, or at any time after the death of either of them and during the existence of the trusts hereinbefore mentioned and set forth, to sell and convey in fee simple, or lease for a term of years, or mortgage, or convey by deed of trust, or otherwise encumber any or all of the real estate held and owned by me, or in municipal, state or county bonds, for the same uses and trusts and to pay over the income therefrom in the same manner as the rents and income of the real estate and other property are to be paid under the provisions hereof.

"And the said trustee is further authorized and empowered to pledge, hypothecate, mortgage or otherwise encumber any of the real estate herein devised, for the purpose of paying off any mortgage or other encumbrance existing upon any of the real estate herein devised, or to sell any of the real estate for the purpose of paying off any encumbrances.

"And the said trustee is hereby authorized to lease, sell and convey in fee simple, or otherwise dispose of any part or portion of any of the property so held by him in trust under the provisions herein, as he may deem expedient, it being left entirely to his discretion when such leases, sales, hypothecations and dispositions of said property shall be made.

"IX. All of the property herein conveyed to the said trustee, including all rents, income and profits thereof, and which is held by him in trust for the use and benefit of the beneficiaries herein named, shall be disposed of and held by said trustee in the manner herein provided and in no other manner whatsoever, and neither my son Frank nor my daughter Carrie, nor their descendants, nor any beneficiaries herein named, shall have any right or power to sell, convey, mortgage, hypothecate or dispose of any interest or right in and to any of the trust property herein held by said trustee or his successor; such disposition is hereby prohibited by any beneficiary in this will.

"X. And in further trust, that whenever the said Howard A. Blossom, trustee named herein of the trusts created by this will,

shall become a nonresident of the State of Missouri, or shall desire to resign the said trusts herein created, he shall have full power and authority, at any time he may so desire, to appoint a new trustee in his place and stead, by an instrument in writing duly signed, sealed and acknowledged by him and recorded in the office of the Recorder of Deeds of the City of St. Louis. And the said Howard A. Blossom shall also have power in his last will and testament to appoint a new trustee in his place and stead, to execute the trusts herein created, in case of his death.

"And in further trust, that if the said Howard A. Blossom shall resign or shall die without appointing any trustee as his successor herein, then the Mississippi Valley Trust Company of the City of St. Louis shall become his successor of the trusts herein created.

"XI. In conclusion I do hereby nominate and appoint my friend Howard A. Blossom executor of my will, and I do especially direct that he be authorized and empowered to qualify and perform all the duties required by the laws of the State of Missouri, as such executor, without giving bond to any person or to the State for such duties in said office. And it is my further will that said Howard A. Blossom, as trustee under the trusts herein created, shall perform the duties and obligations of said trusts without being required to give bond to the State of Missouri, or to any beneficiary, or any person for the faithful discharge of his duties as such trustee.

"It is my further will, and I request and direct my executor to finally settle my estate and make distribution thereof as soon as the laws of the State will permit.

"In witness whereof, I have hereunto set my hand and seal this 21st day of July, A. D., 1893. Emma V. Bradford. [Seal.]"

The will is contested on the ground that it was procured by fraud and undue influence by the defendant Howard A. Blossom. The petition alleges that the said alleged will was procured to be drawn and prepared by said Blossom, who was made executor therein, and to whom, and to his heirs and assigns forever, the property mentioned in said will, valued at \$350,000, was devised and bequeathed in trust for the certain alleged purposes set forth in said will, and that the said Blossom, in fraud of the rights of the plaintiffs, and by his fraud and undue influence practiced upon Emma V. Bradford, procured the execution of said will; that the probate of said will was also procured by the fraud and deception of said Blossom, all for the fraudulent purpose of securing the benefit of said estate to himself and his wife, one of the contingent devisees in the said alleged will. It is further alleged that at the time the said will is claimed to have been executed, for several years prior thereto, and until

the time of her death, the testatrix was physically delicate, weak, and infirm, and that during all of that time she was suffering from extreme nervousness and other derangements, that made her incapable of attending to her ordinary affairs; that during all of said time she was almost totally deaf, and, by reason of her afflictions and condition, she was wholly dependent upon others in the management of her household and business affairs. None of the defendants filed answers to said petition, except Howard A. Blossom and Ada E. Blossom and the two minor defendants, by their guardian ad litem. The answers of Howard A. Blossom and Ada E. Blossom, though filed separately, are in substance the same. In said answers it is alleged that the instrument in contest was executed by Emma V. Bradford on the 21st day of July, 1893, and was duly attested and admitted to probate; that Howard A. Blossom was duly qualified as executor thereof and thereunder, and that letters testamentary were duly issued to him in the probate court, and that at the time of the execution of said will said Emma V. Bradford was of sound and disposing mind and memory; and that the same was and is her last will and testament. All other allegations in plaintiff's petition not expressly admitted are denied. The minor defendants, who are the children of Caroline B. Ryan, by their guardian ad litem, Thomas B. Harvey, neither join, answer, admit, nor deny the allegations of plaintiff's petition as to fraud and undue influence, but submit their interests to and for the protection of the court.

The cause was submitted to the jury upon the following issue or instruction: "The jury are instructed that the issue to be tried in this case is the paper writing dated the 21st day of July, 1893, propounded as the last will and testament of Mrs. Emma V. Bradford, deceased, and witnessed by W. B. Thompson and Sophia C. Loessler, in truth and in fact the last will and testament of said Emma V. Bradford or not; and upon this issue the court instructs the jury that, under the pleadings and the law and the evidence, the jury must find that the paper writing propounded as the last will and testament of Emma V. Bradford, which bears date of July 21, 1893, and attested by W. B. Thompson and Sophia C. Loessler, is in truth and in fact the last will and testament of said Emma V. Bradford." To the action of the court in giving this instruction the contestants objected and excepted at the time. Under the instructions of the court, the jury found the following verdict: "We, the jury in the above-entitled cause, do find that the paper writing dated the 21st day of July, 1893, propounded as the last will and testament of Emma V. Bradford, deceased, is the last will and testament of said Emma V. Bradford, deceased." In due time the contestants filed their motion for a new trial, which being overruled they saved their ex-

ceptions, and bring the case to this court by appeal for review.

The facts disclosed by the record are substantially as follows:

Upon the issues presented the defendants adduced evidence which tended to show the due and proper execution and probate of the will in question. The evidence on the part of the contestants showed that the will was drawn upon the request of the defendant Howard A. Blossom; that W. B. Thompson, the attorney who drew said will, was and had been the acting attorney for said Blossom. Thompson testified that Blossom called at his office several times to see him about the preparation of the will; that he never saw Mrs. Bradford but one time, and that was when she came to his office to sign the will, and that the data upon which the will was prepared and executed was furnished by Blossom; that Blossom made the memoranda with respect to the terms of the will, and carried the same to Thompson. The memoranda on the paper delivered to Thompson were in the handwriting of Blossom. It included two sheets of paper. The first draft of the will was prepared from the memoranda contained in these two sheets of paper, the said memoranda being as follows:

"The income—

"To Carrie and Frank during their lives, equal parts.

"If Frank marries and has children, and dies, one-half of his share to wife, while a widow.

"To children

"If Frank marries, and has no children, and dies, one-half of his share

"To wife, while a widow

"To be added to principal and invested.

"If Frank's widow dies add the share to principal.

"If Frank does not marry, one-half of his share may be added to Carrie's allowance, at trustee's option.

"If Carrie dies, her income to her children as they may need, at trustee's discretion, and through her husband, or may direct payment of bills at trustee's discretion.

"If Carrie's children die, after Carrie and before their 21st year, their share to

"Frank if surviving, or his children, if any, or added to principal.

"As trustee may deem expedient at the time.

"The principal to the children of Frank and Carrie, per stirpes, at the age of twenty-one, or after the parents demise.

"If Frank die, unmarried, his share to Carrie's children, if they survive to inherit as above, but if he leaves children, to them at the age of twenty-one, or after his death.

"If Carrie die, after her children, her share to Frank or his children.

"And if Frank or Carrie leave no lineal descendants, heirs of their bodies, then the estate shall not be turned over to the grandchildren, until they reach the age of twenty-

one, respectively, or after the parents' death, and shall not be liable for debts made prior to actual possession.

"The income shall not be assignable for any purpose by C. Q. T., not liable for their debts either before or after testator's death.

"Be payable in such sums as trustee deems sufficient to keep them in comfort, and not wastefully, and any excess be divested and added to principal.

"The trustee has power to sell any or all for purposes of reinvestment, to regulate in a reasonable degree the expenditure of C. Q. T. and to prevent extravagance, speculation or wastefulness.

"To invest principal or accumulations in real estate or other approved securities,

"To deduct from income, expenses and taxes for caring for estate,

"To advance temporarily a portion of income to either C. Q. T. if justified by his judgment.

"To relinquish the trust and transfer same to a trust company to be selected by him."

The will was first dictated by the attorney, Thompson, to his stenographer, who transcribed the same on yellow paper. Some corrections were made on this draft of the will by Blossom, and some by the attorney, and from this the last draft was prepared. Thompson testified that he prepared the first draft of the will and gave it to Blossom, and did not know what he did with it; that he never saw Mrs. Bradford until she came to execute the will; and that he had no conversation with her about the preparation of the same, but that all the negotiations were had with, and all the data gotten from, Blossom. The objections made by Blossom to the first draft of the will were made on the margin of the paper, and by interlineations on the will. These objections and suggestions by Blossom, for the guidance of the attorney in making the last draft of the will, were made to suit Blossom's views, and the will prepared in accordance with his wishes. The objections by Mr. Blossom to the first draft of the will, and the alterations suggested therein by him, were very material, and charged it in several respects. Mr. Thompson testified: That Blossom gave him all the information that he had in regard to the manner in which the trust in the will should be created, and explained the purpose of the trusts. That Blossom came to his office and stated that he wanted him to draw the will of Mrs. Bradford. That he (Blossom) stated that Mrs. Bradford had two children, a son and a daughter, and that he wanted a spendthrift trust as to both of them; that she had no confidence in her son or daughter; and that she wanted the will drawn in the way that it was drawn. That Blossom at the time made very uncomplimentary remarks about Mrs. Bradford's son and her son-in-law. Thompson also testified that Blossom stated that in case Frank Bradford died without children, when he was

single, he (Blossom) wanted the property to go to his (Blossom's) wife, as she was the next nearest heir. He further testified that this was marked out or told to him by Blossom, and that he pursued his directions in the preparation of the will; that he endeavored to so draw it as to make it impossible for Frank Bradford or his sister to touch the property during their lives, except to have the income from it, and the remainder was to go to their children; that his recollection was that, in the event of both son and daughter dying without issue attaining to the age of 21 years, or it may be further removed than 21 years, it was Blossom's desire that the property go to his (Blossom's) wife. Witness also stated that Mrs. Bradford brought the will with her when she came to sign the same; that this was the first time he had ever seen her, and that he noticed that she was a very small, elderly woman; that a great many of the clauses of the will, and the legal effect of them, were discussed between him and Blossom; that Blossom brought him quite an elaborate memoranda in his (Blossom's) handwriting; that he took up the memoranda and discussed them with Blossom, and what the rule of law was against perpetuities, and how far these limitations could be over; that they discussed the nature of the powers that were to be given the trustee under the will, and that he told Blossom what these powers were, and that they were to be wholly discretionary on the part of the trustee; and that he (Thompson) tried to form them in such a way that the trustee should have absolute discretion. Witness further testified that the length of time the property in the will should remain in the hands of the trustee, or would probably remain in his hands, was discussed between him and Blossom; that it was understood that there would be life estates first carved, then contingent remainders, etc.; that Blossom at the time expressed to him the desire of tying up the estate in the hands of the trustee for an indefinite length of time, and that that was the purpose of drawing up the will; that he (Thompson) did not discuss the provisions of the will with Mrs. Bradford when she came to his office to execute it or at any other time; that he did not read the will to Mrs. Bradford before she signed it, nor could he remember that she read the same in his presence.

Contestants then introduced in evidence a will purporting to have been executed by Mrs. Emma V. Bradford, dated the 21st day of June, 1886. This will was shown to have been prepared for Mrs. Bradford, at her request, by one Thomas Metcalfe, an attorney then residing in the city of St. Louis. The will gives to Frank Bradford, absolutely and in fee simple, one-half of all the property the testatrix might die seised and possessed of, to be used and disposed of as he might see fit, and in the event of his death said

property to go to his children, and if he should be dead at the time of the death of said testatrix, leaving no children surviving him, then the property was to go to Alfred Bradford and Howard Blossom as trustees for Caroline W. Ryan, to hold said property in trust for her sole and separate use and benefit during her natural life, and upon the death of her the said Caroline W. Ryan the property to go and vest in her children, and, if she should leave no child surviving her, then the property to vest in the nephews and nieces of the testatrix; that is, to the children of Carrie A. Wood and Margaret Mygatt, sisters of the testatrix. The remaining one-half of the property of the testatrix, so given to Alfred Bradford and Howard A. Blossom, as trustees, to hold in trust for the sole and separate use and benefit of Caroline W. Ryan for and during her natural life, free from the claim or control of her husband, Alfred Ryan, or any other husband she might have, should he die, and she marry again. The property was to be free from the debts of her husband, and was to be used by her trustees for her own maintenance and support, and the maintenance and support of her children. The trustees, as to the bequest of Caroline W. Ryan, are vested with the power to dispose of any of the real estate and reinvest the proceeds. If she should die, leaving children, then the property was to vest absolutely in fee simple in said children or their guardian, and the said trustees were directed to transfer and convey said property to them. In the event the said Caroline should die, leaving no children, then such property was to go to and vest in Frank E. Bradford; and if he should die, leaving children surviving him, then it was to go and vest in his children. In case of the death of Frank Bradford at the time of the decease of the testatrix, leaving no children surviving him, and if Caroline at the time of her death leave no children surviving her, then and in that event the property described and known as Nos. 515 and 517 Washington avenue, in the city of St. Louis, was to go to Alfred Bradford and Dr. Charles Bradford; and if either should be dead, and leave no children surviving him, then his survivor or his children to have the whole of said property. Then it provided that all of the remainder of the property of the testatrix in this contingency (that is, in the event of the death of Frank E. Bradford and Caroline Ryan without children surviving them) was to go to the nephews and nieces of the said testatrix (that is, to the children of her two sisters), or, if either of them should die, leaving children, the part of such decedent was to go to and vest in his or her children, and if either should be dead, without children surviving him or her, then his or her part to go to the survivors or their children. Alfred Bradford and Howard A. Blossom were made executors in this will. Mr. Metcalfe, the attorney who prepared this will,

testified that he had acted as attorney for Mrs. Bradford in the administration of her husband's estate, and that he had known her since 1886; that he prepared this will from information received from Mrs. Bradford—that is, she directed him as to the manner in which the will was to be drawn, and the terms thereof. At the time of the preparation of this will Metcalfe says that Mrs. Bradford was somewhat deaf.

Dr. Goodman testified that he was a practicing physician; that he attended Mrs. Bradford in 1892, and that at the time she was in a very nervous condition; that she had been ailing for some time before he visited her; and that she was then a very delicate woman.

Mrs. Ryan, the daughter of Mrs. Bradford, testified that her mother had always been a very delicate woman as long as she could remember, since 1875 or 1876; that her average weight was about 75 or 80 pounds, and that her mother always suffered from nervousness, caused from first one thing and then another; and that a trifling thing would upset her. She stated that her mother's hearing commenced to get bad in 1875, and gradually grew worse; that in the years 1892-93 she had to use an ear trumpet almost all the time. This witness testified that her mother died at Paul Smith's, in the Adirondacks, July 28, 1898, and that her remains were brought back to St. Louis, where she was buried; that she was buried on Saturday, the 30th day of July; that when her remains reached the city Mr. Blossom was at the station, and that he made arrangements for the funeral; that she saw Mr. Blossom after the funeral, and that he spoke to her before they left the burial grounds; that he came out to the carriage in which she was sitting at the burial grounds, and asked her if she was going to her mother's house, to which she replied that she was, and that he seemed very much confused, and did not seem to like the idea of her returning to her mother's house; that she went from the burial grounds to her mother's house; and that Mr. Blossom came to the house immediately after her. Counsel for the proponents objected to this line of testimony, the objection was sustained by the court, and contestants excepted. The witness also testified that on the next day, the 31st day of July, Mr. Blossom told them to meet him down town and open the will; that on Monday, the 1st day of August, they met at the office of the Missouri Safe Deposit Company, and Mr. Blossom took the will out of the box of the safe deposit company; that they had no key to the box, and the same was broken open; that the will was in the box, sealed up, and that on the back of the envelope was written, "Last will and testament of Mrs. Emma V. Bradford;" that after they got the will they all went to the probate court; that while they were in the probate court room Mr. Blossom retired for a few minutes,

taking the will with him, and that when he returned the envelope was broken, and the will was out of the same; and that the envelope was not opened in their presence. She was asked if she had any conversation with Mr. Blossom after the probate of the will as to what she might expect in case a suit was instituted to contest the will, to which question counsel for the proponents objected, which objection was sustained by the court, and contestants excepted. Witness testified that her mother had great affection for her children and grandchildren; that she frequently visited her grandchildren, and gave them presents at Christmas and on their birthdays.

Miss Julia Schofield, witness for contestants, testified that she had known Mrs. Emma V. Bradford ever since she could remember; that during the last nine years of her life (from the 1st of January, 1890) she was a member of Mrs. Bradford's household until her death; that she was her confidential friend and her assistant; that she went with her upon all occasions (very nearly always), and assisted her about the house in every way, to save her physical strength; she always accompanied her whenever she left the city; that Mrs. Bradford always left the city in the summer; that she was always with Mrs. Bradford during the time mentioned, excepting a few weeks of the year when she would go to her home, in the country; that she was in the nature of a member of her family. "Q. I will ask you to state what was Mrs. Bradford's physical condition? A. Well, there was a great change. When I first went there she was in a very different condition than the last years of her life. I could notice a very appreciable change each year. She would become less able to follow her inclinations. She could never have been called a strong woman, and, as I remember her, there were two very opposite sides to her life. There were days when she was ill, when she was suffering from nervous exhaustion, and days when she was very bright and well. That was the condition when I first went there." Witness testified further that these periods of depression would come one day out of each week; that when these spells of exhaustion were not on her she was quite bright and sociable, though she could never be called strong; that Mrs. Bradford was a very small woman; that when witness first went to live with her she perhaps weighed 85 pounds. That was in 1890. Witness says that as the time passed on from 1890 these periods of depression would become more frequent, and longer in duration; that they seemed to undermine her physical strength as the years advanced; that her strength decreased from year to year. "Q. Have you any particular recollection of her condition in the year 1893? A. Yes; she still had those days when she had spells of exhaustion; when she felt badly and was not able to go about in her accustomed duties. Q. I will ask you to state

if you noticed any appreciable change in her condition in 1890 and 1893? A. Yes; I think there was always a slight difference each year. Q. What do you mean by 'a slight difference each year'? A. That she would become a little weaker each year; that those spells of exhaustion undermined her physical strength." Witness says that when Mrs. Bradford recovered from those spells of exhaustion she might become, in a few hours, bright and active; that she had a very sociable, lively disposition when she felt well; that she would recover in a remarkably quick time. Witness says that Mrs. Bradford was always faithful and affectionate to her children, Mrs. Ryan and Mr. Bradford, and was very fond of her grandchildren; that she would exhibit her affection for her grandchildren by bringing them presents when she went away, and would remember them at Christmas and at their birthdays. Witness says that she has known Howard A. Blossom since her entry into the Bradford family; that she had heard Mrs. Bradford speak of Mr. Blossom many times; that she always spoke of him with confidence and respect; that Mrs. Bradford would talk over and consult with Mr. Blossom about her business affairs; that when Mrs. Bradford had any business of extreme importance she would advise with Mr. Blossom. Witness says that she remembers two occasions when Mr. Blossom came to the house; that the first time he came was among the earlier few years of her being there; that on the occasion when Mr. Blossom came to the house the conversation between him and Mrs. Bradford was always a private one; that she did not hear it. Witness remembers that the first time Mr. Blossom came to the house that he did not remain longer than 15 minutes, but the last time he might have remained a half an hour. "Q. Did you see on the occasion he came there— Did he remain long enough to write out any paper? A. Not any paper of any great length or importance, I should judge; but he might have written— He had time to write something if he chose. Q. Look at these two papers, Exhibits A1 and A2, and state whether or not on any of these occasions when Mr. Blossom came there he remained long enough to write out that paper? A. Well, as I said, I don't know. Is that a matter of great importance, great thought? If it would take very much thought and was a matter of great consideration, I do not think that he could have; but, if it could have been written easily and quickly, yes." Witness says that she could not say whether either of these visits was in the month of June, 1893. She could not exactly locate the date. Witness says that Mrs. Bradford talked with her freely about her business; that she was not, however, her adviser, but she usually made a confidant of witness of whatever was upon her mind; that she never spoke to witness about having made

Mr. Blossom executor in her will; that she never spoke to her at all about having made a will. Upon cross-examination by proponents, witness said that she knew Mrs. Bradford nearly all her life; that she lived in her home since 1890 as a companion; that she went abroad with Mrs. Bradford in 1890; that as Mrs. Bradford grew older she grew physically weaker; that mentally she was bright always; that Mrs. Bradford was considered a very bright, intelligent woman; that, as her physical strength declined, her mental capacity was taken with her physical strength; that she was very weak during the last two years of her life; that Mrs. Bradford died in the year 1898; that in the years 1893-94-95 she was a woman of intelligence, and knew her own will; that she was a woman of very strong will; that she was a very forceful, purposeful woman—eminently so; that she attended to her business with the assistance of her business agent, Mr. Rutledge, who collected her rents, leased her property, and did things of that kind; that Mrs. Bradford could handle her own finances at her house. Witness says that she did Mrs. Bradford's shopping and errands, and paid a great many bills for her; that Mrs. Bradford was a sociable woman when she felt well; that there were times when she was perfectly prostrate; that she was a woman of strong natural affections, fond of her children and fond of her grandchildren; that in the later years of her life, from what she told witness, she would say that she contributed largely to the support of her son and daughter; that her son did not depend upon her so much as her daughter, though he lived at home; that the daughter depended more. Witness says that William E. Bradford was dead at the time she went into the household; that Alfred Bradford did not die until 1890; that Alfred Bradford and Emma Bradford were on friendly terms. She had the greatest respect for him. Witness says that Mr. Blossom was at the house of Mrs. Bradford once to a dinner party; that he may have been there once or twice. Of course, she was not at home always, but she remembers these two times absolutely. Witness says that she could not say that Mr. Blossom called at the house occasionally, unless it was when she was away, and, so far as she knows and remembers, the occasions when he came there were when he was sent for. Says that she cannot say that Mrs. Bradford went to see Mr. Blossom repeatedly, but she can say that she has heard Mrs. Bradford say that she would go and ask Mr. Blossom about so and so. She did not say it to her very often. She had Mr. Rutledge always to do it. Upon redirect examination witness said that Mrs. Bradford spoke to her on a number of occasions about consulting Mr. Blossom about her business; that these were the occasions other than the ones when he came to her house. Witness says that Mrs. Bradford

was very hard of hearing; that even when she went there first she was very hard of hearing; that Mrs. Bradford never went out without her ear trumpet after about the first year witness went there. She became accustomed to using it more and more; that the trumpet always went with her when she left the house; that they got three trumpets abroad; that these trumpets were gotten in Europe, and they were her constant companions; that Mrs. Bradford could be made to hear without the trumpet, provided people understood how to talk to her and could talk loud enough, sitting close to her, if their voices were distinct.

Miss Sophy Loessler, the stenographer in Mr. Thompson's office, who copied the will, and was one of the attesting witnesses thereto, testified that, when Mrs. Bradford came to the office of Mr. William B. Thompson for the purpose of executing the will, she was of the impression that she did not come alone, but that Mr. Blossom was with her; that he did not remain during the execution of the will, but introduced Mrs. Bradford and left, but afterwards came back, and he and Mrs. Bradford left together.

The inventories, supplemental inventories, and appraisement of the personal property of the estate of Mrs. Bradford were introduced by the contestants to show the value of the property devised and bequeathed in the will.

Proponents offered no evidence other than as to the formal execution of the will, and the record of its admission to probate.

Since the cause has been pending in this court, Mrs. Ryan has dismissed her appeal, and the cause is now pending on the appeal of Frank Bradford.

The court, by its instruction, in effect told the jury that there was no substantial evidence before them which tended to show that the will in question was procured to be made through fraud practiced upon the testatrix, or undue influence exerted over her by the defendant Howard A. Blossom; and the question is, was there any evidence tending to show either one of these averments? If there was such evidence, the judgment must be reversed; otherwise affirmed.

It is conceded that there was no direct evidence of either fraud or undue influence, but it is contended that contestants were not required to produce direct evidence of either in order to entitle them to go to the jury, and that, if there was substantial evidence tending to show fraud or undue influence in the procurement of the will, this was all that was necessary in order to entitle the contestants to have their case submitted to a jury. Undue influence need not be shown by direct proof, but may be inferred from facts and circumstances. *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127. It may be shown by the relation of the parties, the mental condition of the person whose act is in question, and the character of the trans-

action. *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087. At the time the will was drawn, Mrs. Bradford was a weak, delicate woman, and had much confidence in the business capacity and judgment of defendant Blossom. While Mr. Rutledge was her regular adviser, she would talk and consult with Blossom about her business affairs, and when she had any business of extreme importance she would advise with him. It is true, the evidence only shows the presence of Mr. Blossom at the home of Mrs. Bradford upon two particular occasions, one of which was several years before the execution of the will, at which time he did not remain longer than 15 minutes. The last time, he remained about half an hour. When there the conversations between him and Mrs. Bradford were always private. Mrs. Bradford's physical condition during the last nine years of her life grew much worse than theretofore. The change was very appreciable each successive year. She became less able to follow her inclinations, and, of course, more susceptible to the influence of others.

It is contended by contestants that the motive for the practice of fraud by Blossom in the procurement of the will is shown by the unlimited power and authority conferred upon him by the will with respect to the property disposed of by it, as well as the unreasonably long time that he might hold the property and draw commissions for handling it; that in certain contingencies mentioned in the will there is almost no limit to the time the property might remain in the hands of Mr. Blossom, and furnish, in the way of commissions, a fruitful and perpetual source of revenue for him. If the contingency mentioned in the seventh clause of the will should arise, the executor might hold the property and dispose of the income from it as he might see fit during the lives of Frank and Carrie, children of the testatrix, and after their deaths, if both of them should leave children, until the youngest of their children should have reached the age of 21 years. In the event of this contingency, after the death of the trustee, his representative or assigns would be drawing commissions upon the property mentioned in the will; and all of the grandchildren of the testatrix, after the death of Carrie and Frank, who have reached the age of 21 years, would be deprived of the enjoyment of the property until the youngest child of each arrive at the age of 21 years. In the event of the contingency mentioned in the third paragraph of the fourth clause of the will, the trustee would be entitled to hold the property and draw the commissions for handling the income of the same during the lives of Frank and Carrie, and if both should die, and Frank leave no children or descendants of children, and Carrie should leave children, then during the natural lives of all the children of Carrie, until they become extinct. By this paragraph of the will the

trustee is given the power to hold the property during the lives in being (Frank and Carrie), and during the lives not in being (of children which might be born of Carrie after the death of the testatrix). Mrs. Bradford always had great affection for her children and grandchildren, and by will of July 21, 1886, she gave to her son, Frank, absolutely and unconditionally, one-half of all her property, real, personal, and mixed. This will was drawn at the request of Mrs. Bradford and Alfred Bradford, her brother-in-law, who were both present at the time, talked to the attorney who drew the will, and told him what they wanted. She was then a small, delicate woman, but aside from her deafness there was no evidence of physical illness. When the will in contest was prepared she was not present, but the memoranda from which it was drawn were in the handwriting of and furnished by the defendant Blossom, and the material changes which were subsequently made in the original draft of the will were made at his suggestion, and from memoranda furnished by him. They were, of course, material; otherwise they would not have been suggested by him, and the will prepared in accordance therewith. So far as this record shows, there is not a scintilla of evidence which tends to show that Mrs. Bradford ever knew anything about the contents of this will, or the changes that were made in the original draft thereof; and all that the record discloses, so far as relates to her connection with the will, is the simple fact that she signed it, and requested the attesting witnesses to sign it as witnesses to her will. She was at the time not so strong, either mentally or physically, as she was when she executed her will in 1886. The provisions of the two wills are in great contrast, much to the disadvantage of her heirs and their descendants, and without any cause or reason for it, so far as disclosed by the record, except such as might be inferred from the uncomplimentary remarks of Mr. Blossom at the time he applied to Mr. Thompson to prepare the will, to the effect that Mrs. Bradford had no confidence in either her son or her son-in-law. At the same time he told Mr. Thompson that in case Frank Bradford dies without children, when he was single, he (Blossom) wanted the property to go to his (Blossom's) wife: that she was the nearest heir he thought of. He did not say that Mrs. Bradford wanted the property to go to his wife, but that he did. He manifested a marked degree of interest in the matter of the will and the property of the estate. When Mrs. Bradford went to execute the will he took her to Mr. Thompson's office, introduced her to him, and then withdrew until the will was executed by her, when he returned, and he and Mrs. Bradford left together. It seems somewhat strange that, after Mr. Blossom took Mrs. Bradford to Mr. Thompson's office

to execute the will, he should have retired therefrom while she was executing it, and, after she had done so, return for her, unless it was to avoid any suspicion that might be occasioned by his presence when she signed the will that she was executing the same by reason of his undue influence over her. At the burial of Mrs. Bradford he wanted to know of Mrs. Ryan which house she was going to live in, and when she stated that she was going to her mother's house he replied, "You are, are you?" and, as the witness says, "seemed very much confused, and did not seem to like the idea of my returning to my mother's house." All of these facts and circumstances must, under the instruction of the court, which was in the nature of a demurrer to the evidence, be taken as true; and when such facts and circumstances are considered in connection with the great confidence that the testatrix seemed to have had in Mr. Blossom, to the extent that when she had any business of great importance she would advise with him; the interest, both direct and indirect, that he had in the property described in the will; its remarkable provisions in many respects, especially in that it not only makes the defendant trustee for her children, but also for their children, or any grandchildren that might be born to them during their natural lives; with full power upon his part to appoint his successor as trustee by instrument in writing, or, in case of the trustee's death, then by will; without bond as executor or as trustee of so large an estate, thus showing unbounded confidence in him—tend strongly to show that the instrument of writing is not the will of the testatrix, and that it was procured by undue influence on the part of Mr. Blossom, and, at the least, calls for an explanation from him. In *Gay v. Gillilan*, 92 Mo. 263, 5 S. W. 11, 1 Am. St. Rep. 712, it is said: "And while it is true that undue influence will not be presumed, yet, when such facts are proved as will authorize a jury to find the existence of undue influence, then the burden shifts, and it then devolves upon the party charged to exonerate himself from such charge in like manner as in the case of fiduciary or confidential relations." *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734. In passing upon the question as to whether or not a will is the result of undue influence, the question should be determined in the light of all the circumstances connected with and bearing upon its execution, and the provisions of the will itself. *Myers v. Hauger*, 98 Mo. 483, 11 S. W. 974. And "undue influence may be shown by the relation of the parties, the mental condition of the person whose act is in question, and the character of the transaction." That the testatrix had the power to dispose of her property as she saw proper cannot be questioned, provided she was not unduly influenced in so doing, which we think, under

the facts and circumstances disclosed by the record, was for the consideration of the jury.

Our conclusion is that the judgment should be reversed, and the cause remanded for further trial. It is so ordered.

GANTT, VALLIANT, FOX, and LAMM, JJ., concur. BRACE, C. J., and MARSHALL, J., dissent.

MAHONEY v. NEVINS et al.

(Supreme Court of Missouri, Division No. 2.
July 3, 1905.)

1. TENANTS IN COMMON—PURCHASE OF INCUMBRANCE—CONTRIBUTION.

Where a co-tenant buys in an incumbrance without any express agreement, the other co-tenants are bound in equity to contribute their respective proportions of the consideration paid.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, § 59.]

2. SAME—EFFECT OF PURCHASE.

A co-tenant cannot, by buying in an outstanding incumbrance, acquire title as against his co-tenants.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 55-59.]

3. HUSBAND AND WIFE—DEATH OF HUSBAND—PERSONAL ESTATE—WIDOW'S TITLE.

Where the personal estate left by a deceased husband and in the possession of his widow did not exceed the amount to which she was absolutely entitled under Rev. St. 1899, §§ 107, 108, though there was no administration, the widow would, in equity, be regarded as having title.

4. SAME — WIDOW'S RIGHTS IN GROWING CROPS.

A widow with no minor children was entitled to the crops growing on the homestead at the time of the husband's death.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 267.]

Appeal from Circuit Court, Carroll County; John P. Butler, Judge.

Suit by Henry Mahoney against Mollie Nevins and others, and from the decree granting insufficient relief plaintiff appeals. Affirmed.

Lozier & Morris and S. J. Jones, for appellant. Conkling & Rea, for respondents.

GANTT, J. This is an appeal from a decree in equity by the circuit court of Carroll county setting aside a trustee deed to the homestead of Patrick Mahoney, deceased, and adjudging contribution by the plaintiff and the other heirs of Patrick Mahoney to defendant Catherine Mahoney on the ground that the said deed of trust and note secured thereby was acquired by said Mollie Nevins as a tenant in common with plaintiff and the other heirs of Patrick Mahoney to the exclusion of plaintiff and said heirs. Patrick Mahoney and defendant Catherine Mahoney, his wife, on the 15th of December, 1890, executed to Gus Siegel a deed of trust to secure payment of a note for \$360, bearing interest at 8 per cent. per annum, on 45.96 acres off the south half of the southwest

quarter of section 18, township 55, range 21, Carroll county, Mo., which land was worth about \$1,300, and at that time was the homestead of said Patrick Mahoney. On the — day of February, 1891, while the deed of trust was still a lien on the land, Patrick Mahoney died intestate, leaving no other debts, still owning and residing on this land as his homestead. He left surviving him his widow, Catherine Mahoney, who was entitled to a homestead in the land; Henry Mahoney, a son, the plaintiff; Mollie Nevins, a daughter; and Cora, Mary, William, and Jessie Rinehart, grandchildren, being the children and sole heirs in law of a deceased daughter, named Kate Rinehart. Catherine Mahoney, the widow, was entitled to use and occupy all the premises, upon the death of her husband, as her homestead, and she was also entitled, by reason thereof, to all rents, issues, and profits arising therefrom. Catherine Mahoney was the mother of Henry Mahoney and Mollie Nevins, and the grandmother of the Rinehart children, and continually resided on the homestead until shortly before the suit. Patrick Mahoney at his death owned personal property consisting of a team of horses, five cows, twelve hogs, some grain and hay, and farm machinery, worth less than \$300. The twelve hogs were soon sold by the widow, and delivered by Henry Mahoney, the son, and all the money arising therefrom used to pay the funeral expenses. At the time of Patrick Mahoney's death there was also growing on this homestead property a crop of wheat, which was afterwards harvested, and sold by his widow for \$238 gross. Henry Mahoney hauled this wheat to market at the request of his mother, and she paid him for his work. No letters of administration were ever granted on the estate of Patrick Mahoney by the probate court of Carroll county, nor was there any order or judgment of said court refusing to grant letters of administration upon the ground that the personal assets of the estate were less in quantity and value than allowed the widow by law; but the evidence conclusively shows that in reality the value of the personal property would not exceed the amount allowed the widow by law. This is a suit in equity growing out of the deed of trust and note executed by Patrick Mahoney to said Gus Siegel. In December, 1891, Catherine Mahoney furnished Mollie Nevins with \$295 with which to buy said note, which at that time amounted to \$388; Mollie Nevins furnishing the balance of the money to buy the note. The portion of the money paid of Catherine Mahoney for the note was derived by her from the sale of the wheat and personal property left by her husband. The note was assigned to Mollie Nevins, who, on the 13th of November, 1900, had the deed of trust securing the same foreclosed in accordance with the terms and conditions thereof. At such foreclosure a life estate

was conveyed to Catherine Mahoney and the remainder in fee to Mollie Nevins, whereupon the plaintiff instituted this suit to cancel the deed of trust, in which suit Mollie Nevins, Catherine Mahoney, and the Rinehart children were all made defendants. The amended answer of defendants Mollie Nevins and Catherine Mahoney states that the purchase of said note "was made with the full knowledge and consent of plaintiff, and not in fraud or prejudice of his rights; and that for a period of almost ten years, although knowing said facts, he failed and neglected to make any objection thereto, or to make any contribution on his part on account of the purchase of said incumbrance"; and, "if the court should find that plaintiff and the other defendants herein are yet entitled to make contribution on account of the amount paid by these defendants for said incumbrance, then these defendants pray that judgment may be rendered in their favor or in favor of defendant Catherine Mahoney against the other parties herein for the amount which may be found due from them in contribution on account of the purchase of said incumbrance, and for all other and further relief that may be just and equitable." The trial court found that the purchase by Mollie Nevins was not in fact a purchase, but a payment of the Siegel note, and that Henry Mahoney, the Rinehart children, and Mollie Nevins should contribute to Catherine Mahoney their respective proportions of the consideration paid for the note. The court found that the personal property which Patrick Mahoney left at the time of his death did not amount to more than that allowed the widow by law, and that in equity she was entitled to all of it. The note at the time of the suit amounted to \$465.45, and the court found that Henry Mahoney should pay his mother \$155.15, that the Rinehart children should pay the same amount, and that Mollie Nevins should pay \$12; from which judgment the plaintiff has appealed.

1. There is practically but one question left in this appeal. The circuit court found, and the evidence abundantly supports its decree, that the purchase of the Patrick Mahoney note by Mrs. Nevins was a payment thereof by two of the co-tenants, and that one tenant could not buy in an outstanding incumbrance on the joint property, and thereby acquire title against her co-tenants. Respondents concede this statement of the law, but assert that, if one co-tenant does buy in an outstanding title or incumbrance without any express agreement, then the other co-tenants are bound in equity to contribute their respective proportions of the consideration paid for such outstanding incumbrance or title; and of this there can be no question. *Cockrill v. Hutchinson*, 135 Mo. 67, 38 S. W. 375, 58 Am. St. Rep. 564; *Dillinger v. Kelley*, 84 Mo. 561; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. 494, 1049. So that the contention is narrowed down to the

question whether Mrs. Mahoney's contribution to the payment of the deed of trust was with her own means or with moneys belonging to the heirs of her deceased husband. There is no dispute as to the facts. At his death Patrick Mahoney left less than \$300 worth of personal property and the homestead on which he resided. No administration was had in his estate, and he owed no debts except the one secured by the deed of trust on his homestead. Mrs. Mahoney sold a portion of the personal property, and out of the proceeds paid the funeral expenses. The contention now is that because there was no administration Mrs. Mahoney had no title to the personal estate left by her husband, though it was in her possession as his widow, and was less than the amount to which she was absolutely entitled at the time. Sections 107, 108, Rev. St. 1889. That the widow was, in view of the amount of personal property left by her husband, absolutely entitled to all of it, there can be no doubt whatever. This provision of our administration law was construed in *Hastings v. Myers' Adm'r*, 21 Mo. 519. In that case Jacob Myers died leaving a widow, Margaret Myers, who died leaving children before she had received from her husband's estate the sum of \$200 in property as a part of her dower allowed by the administration law. The administrator on a settlement showed he had \$195.08 in his hands. The creditors claimed this sum, but her children demanded it. The county court adjudged it should be applied to the debts, and the children appealed. Judge Scott, for this court, held the widow was entitled to the fund to the exclusion of creditors, but that it should be paid to her administrator. In *McFarland v. Baze's Adm'r*, 24 Mo. 158, Judge Leonard held that the \$200 of personal property allowed as a part of her dower vested in the widow immediately upon her husband's death, discharged of the lien of the debts, and would pass by her assignment of dower. In *Cummings v. Cummings*, 51 Mo. 261, it was held the \$400 to which the widow is entitled is hers absolutely, is a part of her dower, and does not depend on her election. *Comerford v. Coulter*, 82 Mo. App. 362. Conceding that regularly the legal title to this personal property left by Patrick Mahoney, and less than \$400 in value, would have been in his administrator had one been appointed, it is clear that the equitable title thereto was in his widow, and a court of equity would not go through the formula of enforcing an administrator's mere naked legal right that he might uselessly distribute it to her. *Richardson v. Cole*, 160 Mo. 372, 61 S. W. 182. She had this property in possession, and of her own accord devoted a portion of it to the funeral expenses, and we have no hesitancy in this equitable proceeding by the heirs in holding she had the equitable title thereto as against them, and when she devoted it to the relief of their

homestead she was entitled to exoneration and contribution from them before they could share in the estate which her payment relieved from the incumbrance thereon. The decision in *Adey v. Adey*, 58 Mo. App. 408, and *McMillan v. Wacker*, 57 Mo. App. 220, were both replevin suits, in which the legal title only was involved, and in no manner conflict with the conclusion we have reached in this case, which is a suit in equity, and the equitable title to the absolute property in possession of the widow is involved.

2. The next inquiry is as to the widow's right to the growing wheat crop on the homestead at the time of her husband's death. It is conceded it was growing on the homestead at the time of her husband's death, and was afterwards harvested by her, and sold for \$238. There were no minor children of the deceased, Patrick Mahoney, at the date of his death. Consequently the widow was entitled to the exclusive possession of the homestead. It is obvious that the homestead was the superior right, and the assignment of dower has no place in the determination of the question as to the ownership of the growing wheat. As the owner of the homestead, Mrs. Catherine Mahoney was entitled to all the rents, issues, and products during the existence of her homestead estate, and consequently to the wheat growing thereon. *Alley v. Burnett*, 134 Mo. 321, 33 S. W. 1122, 35 S. W. 1137; *Gentry v. Gentry*, 122 Mo. 202, 26 S. W. 1090. By the purchase of the mortgage debt Mrs. Mahoney was subrogated to the rights of the mortgagee, and the purchase inured to her benefit so far as to keep the incumbrance alive against the plaintiff and the other heirs in remainder.

The foregoing were the grounds upon which the circuit court based its decree, and we concur in the view taken by our learned Brother on the circuit, and accordingly the decree is in all things affirmed. All concur.

STATE v. BAILEY.

(Supreme Court of Missouri, Division No. 2.
June 6, 1905.)

1. HOMICIDE — INFORMATION — INFLICTION OF WOUND — SUFFICIENCY OF ALLEGATION.

An information alleging that defendants, having in their hands a pistol loaded with gunpowder and leaden bullets, did feloniously, etc., discharge and shoot off the same at, upon, and against deceased, and him, the said deceased, with the leaden bullets aforesaid, out of the pistol aforesaid, by the force of the gunpowder aforesaid, by the said defendant shot off and discharged as aforesaid, then and there feloniously, etc., on purpose, etc., did strike, penetrate, and wound the said deceased in and upon the body of him, the said deceased, thereby giving to him, the said deceased, with the leaden bullets aforesaid, so as aforesaid discharged and shot off out of the pistol aforesaid by the said defendants, one mortal wound, sufficiently charges defendants with having inflicted the wound upon deceased from which he died.

2. INFORMATION — VERIFICATION — REPETITION OF VENUE.

Where an information and verification are upon the same sheet of paper, and the venue is laid in the caption of the information, and the affidavit is taken and certified by the clerk of the criminal court of the county stated in the caption, it is unnecessary for the venue to be repeated in the verification.

3. CRIMINAL LAW—TRIAL — EXCEPTIONS TO TESTIMONY—NECESSITY OF SAVING.

Objections and exceptions to rulings made during the trial must be made when the rulings are made, and the grounds of objection must be stated, in both civil and criminal cases; and while the circuit court of a county may, if it wishes, dispense with the rule, yet the fact that it does so imposes no necessity on the criminal court of that county to do likewise, so as to put it in error in denying a motion to permit exceptions to be saved without announcing the same to the court at the time.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2022, 2024.]

4. SAME—WITNESSES — INDORSEMENT ON INFORMATION.

Under Rev. St. 1899, § 2517, requiring the names of all material witnesses to be indorsed on the indictment, but providing that other witnesses may be subpoenaed and sworn by the state, it was not error to permit the state to call and examine witnesses whose names were not indorsed on the information, where the prosecuting attorney served defendant's counsel with a list of names of the additional witnesses before the examination of witnesses had begun, and the additional witnesses were well-known parties and easily accessible to defendant, and yet defendant neither asked for a continuance, nor for time in which to investigate concerning such witnesses.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1409-1419.]

5. SAME—EVIDENCE—RELATED OFFENSES.

In homicide, where the crime grew out of a hack drivers' strike, defendant being a union and deceased a nonunion man, and the state's evidence showed that defendant procured deceased to drive defendant and his companions to a remote part of the city for the purpose of beating deceased and killing him if he resisted, whereas defendant's testimony was that he was merely enjoying a hack ride and going to get some drinks when he was set upon by deceased, testimony that earlier in the evening of the homicide defendant and his associates had procured another nonunion hack driver to take them to another remote portion of the city, and had there forcibly assailed him and taken from him the pistol with which they afterwards killed deceased, was competent.

6. SAME—STATEMENTS OF DEFENDANT—COMPETENCY TO SHOW MOTIVE.

In homicide, where the crime grew out of a strike, a statement of defendant, one of the strikers, made on the day of the homicide and subsequent thereto, that the only way to win was by shooting people, and that all nonunion men, to which class deceased belonged, should be killed, was competent to show motive and intent.

7. SAME—HARMLESS ERROR.

In homicide, the admission in evidence of a vile epithet applied by defendant, after the killing, to nonunion hack drivers, to which class deceased belonged, was not ground for reversal.

8. HOMICIDE — INSTRUCTIONS — PROVOKING DIFFICULTY.

In homicide, a charge that if defendant voluntarily brought on the difficulty with deceased or voluntarily entered into a difficulty with deceased "with the intention of killing or inflicting upon him some great bodily injury," then the danger in which he found himself would

not extenuate or mitigate his offense or raise the issue of self-defense, was a correct statement of the law of provoking the difficulty, and was not subject to the objection that the quoted clause applied only to its immediate antecedent and not to both the antecedent hypotheses.

9. SAME—CONDITIONAL FELONIOUS INTENT.

In homicide, a charge that, if defendant voluntarily brought on the difficulty with the intention of killing deceased or inflicting upon him some great bodily injury "if he should resist," the danger in which he found himself would not mitigate his offense or raise the issue of self-defense, was not subject to the objection of predicating a "felonious intent upon condition."

10. SAME—CONFLICTING INSTRUCTIONS.

In homicide, where the state's evidence showed that defendant went to a remote part of the city with deceased for the purpose of doing him great bodily harm and killing him if he resisted, while defendant's testimony was that the killing was done purely in self-defense, a charge that, if defendant voluntarily brought on the difficulty with the intention of killing deceased, the issue of self-defense was not raised, was not in conflict with instructions on self-defense predicating that right on an absence of original intention on defendant's part of killing or seriously injuring deceased, and an assault committed by deceased on defendant with a revolver.

11. SAME—WITHDRAWAL FROM DIFFICULTY—INSTRUCTIONS.

In homicide, where the state's evidence was that defendant brought on the difficulty with the felonious intention of beating deceased in order that he might have an excuse for killing him, and defendant's testimony was that deceased assaulted defendant entirely without provocation and defendant killed deceased in self-defense, and there was no evidence whatever of the beginning of a contest by defendant and withdrawal therefrom prior to the killing, a charge that if defendant provoked the difficulty with deceased without felonious intent, intending merely an ordinary battery or disturbance of the peace, whereupon deceased attacked defendant and compelled the latter, in order to save his own life, to take that of deceased, defendant would be guilty of manslaughter merely, was properly refused.

12. SAME—INSTRUCTIONS—ACCOMPLICE'S TESTIMONY.

In homicide, a charge specially singling out a prostitute who had accompanied defendant on the occasion of the killing, and who testified as a witness, and telling the jury to take into consideration what weight ought to be given to her testimony, was properly refused, where the only evidence tending to show that the witness was an accomplice was her own, and according to that, she did not join in defendant's purpose, but was protesting against it.

13. SAME—SELF-DEFENSE — PROVOCATION OF DIFFICULTY—NECESSITY OF DEFINING.

The terms "self-defense" and "bring on the difficulty," as used in the law of homicide, are self-explanatory, and need not be specifically defined in instructions.

Appeal from Criminal Court, Jackson County; John W. Wofford, Judge.

Edgar G. Bailey was convicted of murder, and appeals. Affirmed.

Williamson & Brooker, W. F. Riggs, and I. B. Kimbrell, for appellant. H. S. Hadley Atty. Gen., and N. T. Gentry, for the State.

GANTT, J. On the 19th of April, 1904, there was filed in the criminal court of Jack

son county, by the prosecuting attorney of said county, an information charging the defendant, Edgar G. Bailey, James Forsha, and William Moon, jointly, with the murder in the first degree of Albert Ferguson, by shooting him with a pistol on the 19th day of March, 1904, in said Jackson county. Upon the application of the defendants a severance was granted, and the state elected to try Edgar G. Bailey first. The trial began on the 27th of June, and ended on the 21st of July, 1904, and resulted in a conviction of defendant Bailey of murder in the first degree. From that conviction he has appealed to this court.

The information is as follows:

"State of Missouri, County of Jackson—ss.: In the Criminal Court of Jackson County, Missouri, at Kansas City, Missouri, April Term, A. D. 1904. Now comes Roland Hughes, Prosecuting Attorney for the State of Jackson, in and for the body of the County of Jackson, and upon his official oath informs the court, that Edgar G. Bailey, James Forsha and William Moon, late of the county aforesaid, on the 19th day of March, 1904, at the County of Jackson, State of Missouri, in and upon one Albert Ferguson then and there being feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought did make an assault; and a certain revolving pistol, which was then and there loaded with gunpowder and leaden bullets, and by them the said Edgar G. Bailey, James Forsha and William Moon in their hands then and there had and held, they, the said Edgar G. Bailey, James Forsha and William Moon, did then and there feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, discharge and shoot off at, upon and against him the said Albert Ferguson; and him the said Albert Ferguson, with the leaden bullets aforesaid out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Edgar G. Bailey, James Forsha and William Moon shot off and discharged as aforesaid, then and there feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, did strike, penetrate and wound the said Albert Ferguson in and upon the body of him, the said Albert Ferguson, thus and thereby, then and there feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, giving to him, the said Albert Ferguson, with the leaden bullets aforesaid, so, as aforesaid discharged and shot off out of the pistol aforesaid, by the said Edgar G. Bailey, James Forsha and William Moon, one mortal wound, of which said mortal wound the said Albert Ferguson from the said 19th day of March in the year aforesaid until the 20th day of March in the year aforesaid, did languish and languishing did live, and on which said 20th day of March in the year aforesaid, the said Albert Ferguson at the County of Jackson and State

of Missouri, of the mortal wound aforesaid died; and so the Prosecuting Attorney aforesaid upon his official oath aforesaid, doth say, that the said Edgar G. Bailey, James Forsha, and William Moon, him, the said Albert Ferguson, at the county and State aforesaid, in the manner and by the means aforesaid, feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, did kill and murder; against the peace and dignity of the State.

"Roland Hughes, Prosecuting Attorney.

"Roland Hughes, Prosecuting Attorney of Jackson County, Missouri, makes oath, and says, that the facts stated in the above and foregoing information are true, according to his best information and belief.

"Roland Hughes.

"Subscribed and sworn to before me this 19th day of April, 1904.

"John R. Ranson,

"Clerk of the Criminal Court of Jackson Co., Missouri.

"By Wm. L. McClanahan, Deputy Clerk."

The evidence in the case tended to establish the following facts: In the month of March, 1904, there was a strike in Kansas City on the part of the Hack Drivers' Union against the transfer and cab companies, in an effort to compel the companies to employ only union men. The defendant, Bailey, although the owner of a hack himself, was a member of the union, and he, Forsha, and Moon, both of whom were also members of the union, were taking an active part in the strike. The headquarters of the Hack Drivers' Union was located on Central, a little to the north of Ninth, street, in Kansas City, and for two weeks prior to the date of the homicide the defendant had been living with a woman by the name of Gertrude Biggs at the Thelma Hotel, at the corner of Ninth and Central streets, and this hotel, the saloon that was located therein, and the room occupied by Bailey and Mrs. Biggs, seems to have been a place of rendezvous for Bailey and his two associates, Moon and Forsha. For several days prior to the 19th of March the feeling engendered by the strike had become so pronounced that the defendant and his associates had apparently determined upon a course of violence to accomplish the purpose of the strike. Albert Ferguson, the deceased, was employed as a driver by the Landis Company, and did not belong to the union. During the two weeks preceding the homicide, the defendant, Forsha, and Moon were frequently together at the headquarters of the Hack Drivers' Union, at the Thelma Hotel, and the saloon therein. On the night of the 18th of March, 1904, the defendant, Forsha, Moon, and Gertrude Biggs were together at these headquarters. From there they went in a hack to a saloon on South Main street kept by a man named O'Flaherty. After drinking a while at this saloon, the Biggs woman ordered a hack, by telephone, of one of the companies employing nonunion hack

drivers, to come to 1625 Main street, which was a house of ill repute. This party of four then went to this latter place, and when the hack driven by Andrew Meyers, a non-union hack driver, called for them, they got into the hack and ordered the driver to take them to a roadhouse at Twenty-Ninth and Southwest Boulevard. They stopped, however, on the way at Broadway and Southwest Boulevard, at a saloon, where they had a round of drinks. After they arrived at the roadhouse at Twenty-Ninth and Southwest Boulevard, they took Meyers' revolver and cartridge belt, which he was wearing by virtue of the fact that he was a special officer, away from him by violence. The evidence shows that Bailey, the defendant, took the revolver, and Forsha took the belt. Leaving the driver lying on the ground in the yard of the roadhouse where he had hitched his horses, the defendant and his associates above named returned to the Thelma Hotel, taking the revolver and the cartridge belt with them. Bailey and Gertrude Biggs went to their room, and the pistol that Bailey had taken by violence from Meyers, the nonunion hack driver, together with one that he himself carried, was secreted behind the radiator in their room. The party arrived at the Thelma Hotel about 2:30 in the morning of the 19th of March. After secreting the revolver, Bailey and the Biggs woman went downstairs to the saloon, where they met Forsha and Moon, from which place the Biggs woman, at the request of defendant, Bailey, went upstairs and got the pistol that had been taken from the nonunion hack driver, gave it to Bailey, who in turn handed it over to the bartender. After having had a round of drinks, the Biggs woman went upstairs to bed, but at the request of Bailey she dressed and came downstairs again, and the four then went to labor headquarters, where Bailey, Moon, and Forsha discussed the question from what carriage company they would be most likely to get a driver whom they could beat up with impunity. In the presence of all parties, Moon telephoned to the Landis Company to send a hack to the Coates House, and be sure to have it there at a certain time, as otherwise the parties desiring it might miss the train. When the Biggs woman discovered the purpose of sending for another hack, she protested to Bailey against going out again, but he replied that he was going out, and directed her to go up to their room and get his revolver. This she refused to do, and then Forsha told Bailey to get the revolver that he, Bailey, had taken from Meyers at the roadhouse and had left with the bartender at the Thelma Hotel. The Biggs woman again protested against Bailey going with the party, telling him that he was drinking and ought not to go, and asked what he wanted his pistol for; and he answered that he was going to have the back driver whom they had called take them

to Fifteenth and Central, and he wanted his revolver because, if the hack driver "started anything," he would kill him, and also made the statement that he proposed to "get another scab before morning." The woman then consented to accompany the party, and Bailey got the revolver that he had left with the bartender, and the four went up in front of the Coates House at Tenth and Broadway, and waited the arrival of the hack, which was driven by Albert Ferguson, the deceased. They got in the hack, and directed Ferguson to take them to Fifteenth and Central. On the way the defendant, Moon, and Forsha discussed the plan of action they would take when they arrived at their destination. It was agreed that Forsha and Moon should get out of the hack first and grab the hack driver, that Bailey was then to take his revolver from him and beat him up as they had Meyers earlier in the night, and Bailey said that if the hack driver started anything he would kill him. When the hack arrived at Fifteenth and Central it stopped at the corner, the hack driver alighted and opened the door of the hack, and Forsha and Moon got out in the order named, and immediately grappled with the driver. Bailey followed immediately. It seems from some of the evidence that the hack driver knocked Forsha down when the latter assaulted him, and as soon as Bailey got out of the hack Forsha said, "Shoot him, shoot him, shoot the son of a bitch!" The Biggs woman followed Bailey out of the hack, and started to run east on Fifteenth street, Forsha and Moon having preceded her down the street. This left Bailey and Ferguson alone in the rear of the hack. Before the Biggs woman had gone half a block she heard Ferguson begging for mercy and calling for help, followed immediately by one shot, and then in a short interval another shot, then a number of shots were fired in quick succession. The cries for help both preceded and followed the first shot. When the Biggs woman got to the first corner east of Fifteenth street and Central she was overtaken by Bailey, who said he thought he had killed "the son of a bitch," and, catching hold of the Biggs woman's arm, told her she must run "like hell" or they would get arrested. The party of four separated at this place, Forsha and Moon going in one direction, and Bailey and the Biggs woman in another, agreeing to meet in Bailey's room at the Thelma Hotel. On the way to the hotel, Bailey told the Biggs woman again that he thought he had killed the driver Ferguson, applying to him a vile epithet. Bailey and the Biggs woman arrived at the hotel first, but were soon joined by the other two, and they then proceeded to coolly discuss what had happened. Forsha related that he had hit the deceased with a pair of brass knucks, but that it did not seem to "daze him." Moon spoke also of having hit him, and Bailey said that the deceased had "put up a hell of a

fight," but he thought he had killed him, and Moon said, "if he had not, he ought to." Next morning the Biggs woman went to see her sister, and Bailey, the defendant, went to serve as a judge of registration. That night, however, they returned to their room. On Sunday morning they learned from the newspaper that Ferguson was dead, and Bailey remarked to the Biggs woman, "My God! that man that was shot at Fifteenth and Central, that scab hack driver, is dead. I know what that means for me." That night the two went to a theater, but the next day Bailey remained in concealment until late in the evening, when they removed to a room in Hasbrook Place upon West Twelfth street, because, as Bailey said, he learned that the police were watching the Thelma Hotel. They sent for their clothes at the Thelma Hotel, and remained in their new hiding place for some time, until Bailey sent the Biggs woman out of the city to a sister who lived in Wetmore, Kan., telling her to stay there until he sent for her, remarking that if she ever told what she knew they would both go to the penitentiary, and he might be hung.

At the time of the killing, two messenger boys, Bailey Boone and Ed Eckert, were at the corner of Thirteenth and Broadway, which is about three blocks from Fifteenth and Central. Their attention was attracted by the shots, and they rode at once to the place of the homicide, where they found Ferguson leaning on a post. Ferguson said to them: "Come help me, I am shot; hurry up, turn my hack around, I am dying!" "We turned his hack around, and he told us if his gun had exploded more than three times he would have killed one of the fellows. He wanted us to hurry up and get him to the police headquarters." Well, Eckert helped him into the hack, and he got upon the hack and drove on down Central towards Twelfth street, and Boone took the two wheels, rode one, and led the other. Ferguson, the deceased, was taken to the hospital, where he made the following dying declarations, one to Dr. Sulzbacker, before an operation was performed, and one to Assistant Prosecuting Attorney A. S. Lyman, after an operation was performed:

"Kansas City, Mo., March 19, 1904.

"I, Albert Ferguson, being wounded, and realizing my serious condition, being conscious and knowing that I stand in the presence of death, make this statement and declaration:

"Went to make a call for the Landis Carriage Co.; went to Coates House on a call; there were four men there. One was disguised as a woman. Drove them to 15th and Central. Got down to open the door, and they drew pistols on me. I hit one of them and knocked him down. He said, 'Shoot the son of a bitch,' and they shot. They started to run, and I shot at them three times, and they shot at me four times as I

lay on the ground. Don't know if I could identify them or not.

"Al Ferguson.

"Witnesses:

"Elmer Riley.

"W. C. Warde.

"Wm. Christopher."

"March 19, 1904.

"I, Al Ferguson, now at German Hospital, believing that I am about to die, and having no hope of recovery, do make the following statement of facts, leading up to my being shot and wounded this morning at about three o'clock:

"I have been driving for Landis. This morning shortly before 3 a. m. we got a call from the Coates House. Went there and took three men, and a man dressed in woman's clothes, into my hack. They wanted me to drive them to 15th and Central Street. I drove there and got down to let them out. I opened the hack door. I found that the man had removed his woman's clothes, and there were four men there. As they got out they began to attack me. I defended myself as best I could. The third man who got out of the hack shot me in the abdomen. He was a medium-sized man, with black hair. The first who got out of the hack said to me: 'We have got you, you son of a bitch; what are you going to do now?' After the third man shot me, they all ran away. I did not know any of them. I am twenty-five years old, and am unmarried. I do not belong to the Hack Drivers' Union. No threats were made against me last night, and I had no trouble until I met them.

his
Al X Ferguson.
mark

"Witnesses:

"A. S. Lyman.

"Dr. E. L. Stewart."

The next day he died. The fatal wound received by Ferguson was from a bullet which entered the abdomen three inches below and two inches to the right of the navel, taking a downward, backward, and outward course, perforating the bowels and lodging under the spine at a point about 2½ inches below the brim of the hip bone and 3 inches in front of the spinal column.

A number of people who resided near Fifteenth and Central, that being a residence neighborhood, testified they were awakened by the shots and cries of the deceased. Their testimony agrees upon the proposition that there were two series of shots, between which there was a slight interval, and that the cries that they heard immediately followed the first shot. William A. Satterlee, assistant general manager of the Metropolitan Street Railway Company, who resided at 221 West Fifteenth street, testified that he was awakened by the first shot, went to his window, and saw a man stand at the northeast corner of Fifteenth and Central and fire two or three shots in a westerly di-

rection, and then turn and run east on Fifteenth street. Before these shots were fired, during the firing, and afterwards, he heard the cries for help. As already stated, Bailey, the defendant, served as a judge of registration on Saturday, March 19th, after his night of dissipation and participation in the occurrence above stated. During that day the subject of the shooting of Ferguson, the non-union hack driver, was discussed by the judges and clerks of election. One of the judges made the remark that the hack drivers could never expect to win the strike by shooting people. Bailey said that "that was the only way to win; they all ought to be killed." When Bailey was arrested and taken to the police station, the chief of police charged him with having killed Ferguson. He denied it, and denied having anything to do with it or any knowledge of it.

The foregoing is in substance the principal facts shown in behalf of the state.

Defendant, Bailey, testified in his own behalf. He stated that about 3 o'clock in the morning of the 19th of March, 1904, he was at the union headquarters of the hack drivers of Kansas City; was there possibly a half hour or longer; that, besides the three parties who went there with him, he thought there were possibly a dozen other people around the headquarters; that when he came out of the labor headquarters he went to the Coates House, because there was a carriage call, as he was told, and he went up there to take a carriage ride; he met this carriage, and took a carriage ride. Asked who invited him to go on that ride, he answered that it was either Moon or Forsha, possibly both. "When they got to the Coates House, the carriage had not yet arrived, but they only had to wait a little while—just a moment. Their party consisted of Forsha, Moon, Mrs. Biggs, and himself. One of the party, I think it was Forsha, directed the driver to go to 'Eighteenth and Grand.' Ferguson, the driver, asked him where to go, and something was said about Eighteenth and Grand, and Moon spoke up and said, 'Fifteenth and Central.' Ferguson, the driver, went on Broadway to Fourteenth, then on 14th street east. Q. Did he pass 14th and Central? Ans. He got off Central when Mr. Forsha says, 'Where are you going? Don't you know the way to Fifteenth and Central—You have scabbed long enough?' and Ferguson replied that he did not care to hear any remarks from union bastards like we were." He testified he took no part in this conversation. When they reached Fifteenth and Central, Ferguson got down off of the hack and opened the door, and said, "Get out of here, you union bastards," and as Forsha went to step out he said to Ferguson, "What is that you got there in your hand?" and, in reply to this, Ferguson knocked Forsha down with his fist. Moon followed immediately, and Ferguson struck at him, and thereupon Moon and Forsha got up and ran away. The defendant

testified that he was the third to get out of the hack, but the woman followed immediately and disappeared, and they all three ran off and left him there with Ferguson. "Ferguson was standing close to the hack with a gun in his right hand. He shot, and I felt a bullet pass the right side of my head close enough so that I felt a little wind or something of that kind. I jumped towards him, and grabbed him by the wrist and wrestled around with him. I threw his hand away from me the best I could; turned it away from my face. The hack was standing kind of in a southwesterly, northwesterly direction, at the corner of Fifteenth and Central, about from five to nine feet from the street lamp. We wrestled, and in the scuffle we got over here behind the hack. During the scuffle or struggle, as I threw his revolver away from my face the best I could, he fired, and the bullet went through my coat. This is not the coat I was wearing at that time. The bullet went through the lapel of my trousers and through the outside shirt. It numbed my stomach to such an extent I thought he had shot me; I thought he had shot me through the stomach. I still had hold of his hand, and shoved it away from me as best I could; he stumbled and kind o' fell or partially fell, and was kind of in a kneeling position, and drew his gun right across the wheel of the hack, and at that I jerked out my gun out of my pocket and commenced to fire. When we were scuffling I told him, 'For God's sake not to shoot, I would pay him for the hack.' I addressed him in that manner—I would not be positive those were the very words—a number of times. Four or five times I asked him not to shoot. I started back and commenced to shoot; I guess I was possibly eight feet from him." Asked what the deceased said when defendant told him to stop or he would shoot him, he said deceased said "by hell" or something of that kind. "He was trying to get in a position so as to shoot me. I was in a easterly direction from him; he was kind of behind the hack; he was west from me." Asked why he shot deceased, he answered; "It was either me shoot him or he shoot me, because there was no chance for me to run. If I ran from him, he had that gun in such a position that I would be gone; that is all." On cross-examination he stated that he lived in Kansas City about seven years; was well acquainted with the town. Year before that he had driven an ice wagon up to Hasbrook Place. He had been driving a hack in Kansas City which he purchased about a week or ten days before the Carnival. He stated, further, that they were just going out to get some more drinks and take a ride; did not have any other purpose on his part when they started from the Coates House that night. He stated that there were nothing but residences in the neighborhood of Fifteenth and Central; no public house there to his knowledge, and no saloon to drink at

there. He did not know where they were going until he got into the hack and this order was given. "I cannot say that there was any definite statement that anything was to be done or would be done at Fifteenth and Central; I was not in a very good condition." He stated that his gun was in his overcoat pocket on the right-hand side; it was a common affair for him to carry it in his overcoat pocket. Other facts and the instructions will be noted and discussed as occasion may require in the course of the opinion.

1. The information, which has already been set forth in full in the statement of this case, is challenged as insufficient, on the ground that the defendants are not charged with having inflicted upon the deceased, Albert Ferguson, the wound of which he died. This criticism is leveled at the clause in the information which reads as follows: "And a certain revolving pistol, which was then and there loaded with gunpowder and leaden bullets, and by them the said Edgar G. Bailey, James Forsha and William Moon in their hands then and there had and held, they, the said Edgar G. Bailey, James Forsha and William Moon, did then and there feloniously, wilfully, premeditatedly, on purpose and of their malice aforethought discharge and shoot off at, upon and against him the said Albert Ferguson; and him the said Albert Ferguson with the leaden bullets aforesaid out of the pistol aforesaid then and there, by the force of the gunpowder aforesaid, by the said Edgar G. Bailey, James Forsha and William Moon shot off and discharge as aforesaid, then and there feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought did strike, penetrate and wound the said Albert Ferguson in and upon the body of him, the said Albert Ferguson, thus and thereby, then and there feloniously, etc., giving to him, the said Albert Ferguson, with the leaden bullets aforesaid, so, as aforesaid discharged and shot off out of the pistol aforesaid, by the said Edgar G. Bailey, James Forsha and William Moon, one mortal wound."

Learned counsel for the defendant has indulged in an extensive criticism of the foregoing words as ungrammatical, but, after a careful review of the elementary principles, we find ourselves unable to agree with him that the information does not charge the defendants with having inflicted the wound upon the deceased, Albert Ferguson, from which he died. The objection urged against this information was made by the same learned counsel to the information in *State v. Nelson*, 181 Mo. 340, 80 S. W. 947, and we held there that the indictment sufficiently charged the defendant with the infliction of the wounds upon the deceased, and called attention to the fact that it was clearly distinguishable from *State v. Edwards*, 70 Mo. 480, and *State v. Manning*, 168 Mo. 418, 68 S. W. 341. In the last-mentioned cases the

indictments charge the deceased with inflicting the wounds upon himself, but in this information it is distinctly averred that the defendants, with the leaden bullets shot out of the pistol which was held in their hands, inflicted the mortal wound of which the deceased, Ferguson, died. The information is sufficient, and not subject to the objection made.

It is further objected that the information is insufficient in that the verification contains no venue. We think there is no merit in this contention; the information and verification are upon the same sheet of paper, and the venue is laid in the beginning in the county of Jackson, state of Missouri, and the affidavit was taken and certified by the clerk of the criminal court of Jackson county, Mo. It was entirely unnecessary for the clerk to repeat the venue under these circumstances. Every presumption of law is that the clerk took and certified this affidavit within the territorial bounds in which he was authorized to administer oaths.

2. At the beginning of the trial, counsel for defendant filed and presented to the court a motion to permit and allow exceptions to all adverse rulings on objections interposed by the defendant on the trial, without announcing such exceptions to the court at the time, on the ground that the saving of such exceptions would create in the minds of the jurors a prejudice against the defendant. This motion the court overruled. The practice in this state has long been settled that objections to the admission of testimony to improper remarks of court or counsel during the trial must be made at the time and the grounds of objections stated, and, if the decision be against the objector, he should have his objections at the time, and the practice in this regard is the same in criminal cases as in civil. And, unless exceptions are thus saved, it is uniformly held by this court that the rulings of the trial court will not be reviewed by us. *State v. Hope*, 100 Mo. 352, 354, 13 S. W. 490, 8 L. R. A. 608; *Hickman v. Green*, 123 Mo. 172, 173, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; *State v. Scullin* (Mo. Sup.) 84 S. W. 862; *State v. Williams* (Mo. Sup.) 84 S. W. 924.

Learned counsel, however, call our attention to the fact that in the circuit court for the trial of civil cases in Jackson county the judges invariably allow such exceptions to appear in the record and bill of exceptions, by common consent, without the exception having been called to the attention of the court at the time. The conduct of a trial is oftentimes a matter within the discretion of a trial court. The rule above noted is for the protection of trial courts, that they may not be adjudged guilty of error, in a matter which was not called to their attention, and an opportunity given them to correct any oversight or error they may have committed, without putting the injured party to the expense of an appeal to this court; but if

the circuit courts see fit to consider the exceptions saved to every ruling which they make, and certify to this court that the exceptions were duly saved, we can see no objection to the practice; but because one trial court sees fit to allow this course to be pursued is no reason why another court should decline to do so, and elect to be governed by the universally accepted practice in such matters. It is too plain for discussion that the criminal court did not err in overruling this motion, and requiring counsel to save their exceptions in the due and orderly course of practice long approved by this court.

3. The next assignment of error is that the criminal court erroneously permitted the state to call and examine several witnesses, among others, Mrs. Stevens, Miss Johnson, Miss Hudson, Mr. Satterlee and his wife, and two others, although their names had not been indorsed upon the information when it was filed. It should be stated in this connection that the trial began on the 27th of June, 1904, and the examination of witnesses began on the 30th of June. On the 29th of June the prosecuting attorney served Mr. Riggs, one of the counsel for the defendant, with a list of names of additional witnesses which had not been indorsed upon the information, and upon that list the names of the witnesses above mentioned appeared. This objection is predicated upon section 2517, Rev. St. 1899, which provides "that when an indictment is found the names of all the material witnesses must be endorsed on the indictment; other witnesses may be subpoenaed or sworn by the state." This section has been before this court for consideration on various occasions, and, as said in *State v. Shreve*, 137 Mo., loc. cit. 5, 38 S. W. 549, "while this court has invariably held that the spirit and letter of our law both concurred in requiring the names of the witnesses to be indorsed in order to enable a defendant to know by whom the charge against him is to be established, still it must often occur that new evidence is discovered, and no good reason appears why the state must be denied the right to use it." Certainly the objection in this case has little merit, since the supplementary list of witnesses whose names were not indorsed on the information was furnished counsel for the defendant before any witness was sworn in the case, and after the defendant had received this supplementary list he neither asked for a continuance or time in which to investigate concerning these additional witnesses, and those to which this objection was made were persons easily accessible to the defendant, and so well known in the city where the trial was held that no unfairness or injustice can reasonably be charged because they were not indorsed on the information. Thus Clara Stevens and Mabel Hudson were employes at the Thelma Hotel, Dr. Boarman was assistant coroner of Jackson county, Mr.

Lyman was assistant prosecuting attorney, and Mr. Satterlee assistant general manager of the Metropolitan Railway Company, and three of the other witnesses were election officers who were at the election booth with defendant on the day of the homicide, and doubtless well known to him. Mr. Hayes was chief of police of Kansas City. The conduct of the prosecuting attorney, instead of displaying any disposition to take an advantage of the defendant, was eminently just and fair. No case in this court on this statute gives any countenance to the contention of the defendant on this point. *State v. Henderson* (Mo. Sup.) 85 S. W. 576.

4. In the several able and exhaustive briefs by counsel for the defense it is earnestly insisted that the criminal court committed prejudicial error in permitting the state to prove that on the same night, and prior to the killing of Ferguson, these same four parties, Bailey, the defendant, Moon and Forsha, and the woman Biggs, had called up another nonunion hack and driver and had directed him to take them to a roadhouse on Southwest Boulevard, and, while they were at this roadhouse, forcibly and feloniously took from Meyers, the said nonunion hack driver, a revolver, with which the defendant afterwards killed Ferguson. It is urged that this evidence was utterly incompetent and irrelevant, and tended to prove a crime not alleged either as a foundation for a separate punishment, or as aiding the proofs that the defendant was guilty of the one charged, and does not fall within the exceptions to the general rule which excludes evidence of other crimes than that for which the defendant is on trial; and *State v. Spray*, 174 Mo. 569, 74 S. W. 846, is relied upon to sustain this exception and assignment of error. In this last-mentioned case both the rule and the exceptions received the most careful consideration and distinction, and with the conclusion reached therein we are entirely satisfied.

The question presented now is whether the evidence falls within either of the exceptions recognized by this court, in the *Spray* Case, and so lucidly stated in *People v. Molineaux*, 163 N. Y. 264, 61 N. E. 286, 62 L. B. A. 193, wherein it is stated: "Generally speaking, evidence as to other crimes is competent to prove the specific crime when it tends to establish: First, motive; second, intent; third, the absence of mistake or accident; fourth, the common scheme or plan embracing the commission of two or more crimes, so related to each other that proof of one tends to establish the others; fifth, the identity of the person charged with the commission of the crime on trial." As an argument against the admissibility of this evidence of the assault upon and of the forcible taking of the revolver from Meyers, the nonunion hackman, at the roadhouse on Southwest Boulevard a few hours prior to the homicide under investigation, counsel for

the defendant, in his brief, says: "When defendant was arrested, he admitted the killing and claimed self-defense; when Moon and Forsha were arrested, they stated Bailey did the killing—which facts were in possession of the state before the commencement of the trial." This statement of counsel is not borne out by the record, in which it appears that Bailey denied the killing, and all knowledge of it, when charged with having committed it by the chief of police; and nowhere in the record does it appear that Moon and Forsha stated that Bailey did the killing. Neither does it appear that the criminal court admitted this evidence for the purpose of showing that the defendant and his said associates had committed a murderous assault on the other nonunion hack driver, but limited the evidence as to what occurred at the roadhouse to the fact that Bailey, the defendant, Moon, and Forsha took from Andrew Meyers, the nonunion hackman, the pistol with which Bailey, the defendant, afterwards killed Ferguson. Keeping in view the distinct theories of the state and the defendant as to the purpose and intent of the defendant and his associates in making the call for Ferguson, the deceased hackman, and in causing him to meet them at the Coates House several blocks distant from the Thelma Hotel, from which place they sent the order by telephone to the Landis stables, the state contends that this evidence demonstrated that the defendant and his associates had Ferguson, the deceased, meet them at the Coates House and drive them to Fifteenth and Central, a lonely resident portion of the city, for the purpose of committing upon him a felonious assault, and, if he resisted, kill him. On the other hand, it was the theory of the defense that the defendant and his associates had the deceased drive them to this lonely part of the city for the sole purpose that they might enjoy a hack ride and perhaps get some drinks. It was the contention of the state that evidence that the defendant and his associates had not only been active in the hack drivers' strike then going on in Kansas City, but had determined upon a course of violence in order to accomplish the purpose of the strike, and that, as tending to show the intent with which they lured Ferguson, the deceased, to drive them out to Fifteenth and Central; and to show a common scheme embracing the commission of two or more crimes so closely related to each other that proof of one tends to establish the others, it was pertinent and competent to show that on this same night, and but a few hours previous to the homicide, they had another nonunion hack driver, one who bore the same relation to the strike that Ferguson, the deceased, did, take them to the roadhouse on Southwest Boulevard, another remote and lonely place, and had there by violence taken the pistol from him with which the defendant afterwards killed

the deceased, Ferguson. That it was entirely competent for the state to prove that the pistol with which defendant killed Ferguson was the property of the other nonunion hack driver, Meyers, and the circumstances under which the defendant obtained it from Meyers a few hours before he killed Ferguson, and that it tended to prove that defendant was the person who did the killing, or, in other words, the identity of the person charged with the commission of the crime, we think there can be no sort of doubt; but we go further in this case: The defendant is charged with willful, deliberate, and intentional murder, and it devolved upon the state to show the intent and the circumstances tending to prove deliberation, and the motive, if possible; and we think it was entirely competent to show the felonious assault by the defendant and his associates upon the other nonunion hackman, Meyers, as a part of a common scheme to insure the success of the hack drivers' strike by resorting to acts of violence and felonious assault upon nonunion hackmen, and thereby intimidate and so terrorize them that they would not dare to drive a hack or work for transfer companies and liverymen who insisted on employing nonunion hack drivers. In a word, this evidence tended strongly to show that the calling of the nonunion hackman, Meyers, and causing him to drive them to a remote part of the city, and then and there by violence and force taking his revolver from him, was a part of the same composite crime or plan which the defendant and his associates were pursuing with reference to other nonunion hack drivers, and shed light upon the purpose which they had in view when a few hours afterwards they succeeded by false representations to have Ferguson, the deceased, meet them at the Coates House and drive them to Fifteenth and Central, and that purpose was to commit upon him a felonious assault, and, if he resisted, kill him. This evidence was calculated to disprove the claim of the defendant that their only purpose was to enjoy a hack ride at 3 o'clock in the morning, or to get drinks, when they were driving away from the place where the saloons were kept into a remote neighborhood of private residences only. The case is clearly distinguishable in all its facts from *State v. Spray*, supra, in which no question of motive or intent was involved, but in which the robberies in each case were separate and distinct transactions, and the facts of each furnished its own motive and intent. It has long been decided in this state that evidence of this character, illustrative of the principal act in the tragedy, and a part of a system of criminal acts so connected together that each tends to establish the guilty intent, design, and purpose of the other, is competent. Underhill, in his work on Criminal Evidence, § 88, thus states the doctrine: "No separate and isolated crime can be given in evidence. In order

that one crime may be relevant as evidence of another, the two must be connected as parts of a general and composite scheme or plan. Thus the movements of the accused prior to the incident of the crime are always relevant to show that he was making preparations to commit it. Hence on a trial for homicide it is permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial; and generally, when several similar crimes occur near each other, whether in time or locality, as, for example, several burglaries or incendiary fires upon the same night, it is relevant to show that the accused, being present at one of them, was present at the other, if the crimes seem to be connected." This connection was made to appear in this case, not only by the relation which the defendant and his associates as union hackmen on a strike bore to the deceased and other nonunion hackmen, but also from the statements of the defendant of his intention to kill "another scab before morning," and the similarity of the plan with which he and his associates had treated both Meyers and the deceased, *Ferguson*, State v. Dettmer, 124 Mo. 433, 27 S. W. 1117; State v. Mathews, 98 Mo. 129, 10 S. W. 144, 11 S. W. 1135; State v. Jones, 171 Mo., loc. cit. 407, 71 S. W. 680, 94 Am. St. Rep. 786; State v. Rudolph (Mo. Sup.) 85 S. W. 584; State v. Greenwade, 72 Mo. 300. Hence, as already said, we think this evidence was competent to establish the identity of the defendant as the person who committed the crime, to show that it was intentional and willful, and to show that he was one of a band organized together to commit crimes of the kind charged, and to connect the offense with which he is charged in this case as a part of a common, unlawful, and felonious scheme. The statement of the defendant on the same day of the homicide and subsequent thereto, in the presence of the witness Cooper, when one of the judges had stated that the hack drivers could never expect to win a strike by shooting people, to the effect that "that was the only way to win, and they all ought to be killed," was not improperly admitted; it was a voluntary statement of the defendant, and, taken in connection with the other facts already noted, tended to establish the motive and intent which actuated him at the time of the homicide. There is nothing in the case of *State v. Evans*, 65 Mo. 574, which militates in the least against this conclusion. In the *Evans* Case the defendant, and not the state, offered to prove his own declarations, which were no part of the *res gestæ*—a very different thing from the state proving statements or admissions made by the defendant, whether before or after the commission of the offense.

Now, as to the sixth assignment, which relates to the state's witness Lee as to a statement as to the vile epithet applied by

the defendant to nonunion hack drivers the morning after the killing, it is to be observed that the counsel for the defendant did not object to the question until after the witness had partially answered it. The witness never finished the sentence, but, as far as he did go, his answer showed a bitter feeling on the part of the defendant towards the nonunion hack drivers, but it is clear that the simple fragment of evidence that they thus elicited furnishes no ground for reversal of the judgment.

5. Among other instructions, the court gave the following instruction, No. 13: "The court instructs the jury that if you find from the evidence that the defendant, Edgar G. Bailey, shot and killed the deceased, and, at the time he shot him, the deceased was about to kill defendant or to do him some great bodily injury, he had the right to shoot and kill in his own defense; but to justify such shooting and killing, you must find from the evidence that the defendant did believe, and had reasonable cause to believe from all appearances, that such injury was about to be done him, and that he shot deceased to prevent such injury. It is not necessary that the danger should have been actual and about to fall on him, but it is necessary for him to have believed it from all appearances, and that there should have been at the time he shot reasonable cause for such belief. It is for you to say from the evidence in the case whether the defendant did believe, and had reasonable cause to believe from all appearances, that such impending harm at the time he shot was about to fall upon him. If, as a fact, he did not have reasonable cause to believe from all appearances that such danger was impending at the time he shot, then it is not justifiable. His believing himself in danger is not sufficient; he must have had reasonable cause to believe it from all appearances, and of that you are to determine from all the facts and circumstances in the case." And instruction No. 4: "The court instructs the jury that if the defendant voluntarily brought on the difficulty with deceased, or voluntarily entered into a difficulty with deceased, with the intention of killing or inflicting upon him some great bodily injury if he should resist, then the danger in which he found himself during such difficulty, no matter how great it might be, would not extenuate or mitigate the offense or reduce its grade at all, and there can be no self-defense in the case." The criticism made on this instruction is that the phrase, "with the intention of killing or inflicting upon him some great bodily injury," does not modify or qualify the antecedent phrase, "that if the defendant voluntarily brought on the difficulty with deceased," but that said phrase "with the intention of killing," etc., applies only to the second clause, that of "voluntarily entering into the difficulty with the deceased," and, when thus divided, the first clause of the instruction

would clearly be erroneous, and in conflict with the rule announced in *State v. Partlow*, 90 Mo. 603, 4 S. W. 14, 59 Am. Rep. 31. It is further objected to this instruction that it tells the jury that the defendant is guilty if he had a felonious intent upon condition. Now, as to the first objection to the instruction above noted, we think there is no merit in the criticism. The phrase, "with the intention of killing or inflicting upon him some great bodily injury," clearly refers to and modifies both of the preceding clauses in the instruction, and, when thus read and understood, in no manner conflicts with the rule announced in *State v. Partlow*, or *State v. Herrell*, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289, but simply announces the sound and wholesome law that, if one brings on a difficulty with the purpose of wreaking his malice by slaying his adversary or doing him some great bodily harm, and, actuated by such a felonious purpose, does the homicidal act, then there is no self-defense in the case, and he is guilty of murder in the first degree, and nothing less. *State v. Sharp*, 183 Mo. 715, 82 S. W. 134; *State v. Pennington*, 146 Mo., loc. cit. 35, 47 S. W. 799.

As to the second ground of objection to this instruction, to wit, that it charges the jury that the defendant is guilty if he had a felonious intent upon condition, we think it is clearly groundless. One may intend to waylay another and kill him "if" that other comes that way, or he may arm himself and go in search of another intending to kill him "if" he can find him, or "if" any one interferes; in either of which cases, if he does encounter his victim, and, under such circumstances and with such intention, slay him, he will be guilty of murder in the first degree. The evidence in this case on the part of the state tended to show that the defendant and his companions, Moon and Forsha, went out to Fifteenth and Central streets with the intention to assault and beat up the deceased, Ferguson, in order to create an opportunity to kill him. The alleged condition expressed in these circumstances was no condition at all, for the defendant and his companions well knew or were bound to know that no man of any spirit whatever would stand still and submissively permit another to beat him up without resisting. The fact that the defendant took two confederates with him, and went armed with the deadly weapon on what his counsel are pleased to call "an innocent hack drive," shows that he was expecting resistance, and was actually seeking and trying to bring on a difficulty for the purpose of killing Ferguson, whom he had denominated "a scab hack driver"; in a word, intended to present to Ferguson the alternative of quietly submitting to a brutal assault or being killed. The so-called "condition" upon which Ferguson might have escaped death was in fact no condition, as far as the intention of the defendant and his associates was concerned,

and under the deliberate plan of action agreed upon by the defendant and his associates. In 1 Wharton's Cr. Law (10th Ed.) § 315, the learned author says: "Independently of the statutes, it had been said that though A., in anger, from preconceived malice, intended only to severely beat B., and happened to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was malum in se, and he must be answerable for its consequences. He beat B. with an intention of doing him great bodily harm, and is therefore answerable for all the harm he did." And in section 108 of the same volume the learned author says: "No plan of wrong, therefore, can be framed by even the most capable and cautious of conspirators which they must not regard as dependent upon contingencies for its consummation. An assailant, therefore, in meditating an attack on another, must contemplate the possibility of miscarriage. This possibility may be greater or less. A good marksman may be almost sure of hitting his intended victim; a man who sends an explosive compound to an enemy may estimate that the probability of injuring his enemy is slight. If the means adopted are such as cannot possibly succeed, then there is no such connection between the instrumental intent and the final intent as is essential to constitute guilt. But if there be no such impossibility, and if the means adopted, improbable as it would seem, have a fatal result, then the end is to be regarded as having been intended." The Supreme Court of Illinois in *Mayes v. People*, 106 Ill. 303, 46 Am. Rep. 698, said: "Where an act, unlawful in itself, is done with deliberation, and with intent of mischief or great bodily harm to some particular person, or of mischief indiscriminately, fall where it may, and death ensues from such act, against or beside the original intention of the party, it will be murder." "The plea of provocation will not avail in any case where it appears that provocation was sought for and induced by the act of the party in order to afford him a pretense for wreaking his malice." Wharton on Homicide, 197; 2 Bishop on Cr. Law, § 702; *State v. Pennington*, 146 Mo. 36, 47 S. W. 799.

In this connection it is earnestly insisted that instruction No. 4 completely eliminated the question of self-defense; but the court in instruction No. 11 told the jury "that if they found and believed from the evidence that the defendant, at the time he entered the hack which took him and the others to Fifteenth and Central streets, had no intention of killing Albert Ferguson or to do him great bodily harm, and had no intention at any time previous to the time the said Albert Ferguson drew a revolver and shot at the defendant, if you find from the evidence that he did so shoot at him, then the right of self-defense on the part of the defendant exists in law, and the jury are instructed

that the defendant has the legal right to invoke the law of self-defense in his favor"; and in instruction No. 13 gave the usual and full instruction on the right of self-defense. There is no conflict between these instructions. The question of the intention of Bailey, the defendant, as to inflicting great bodily harm upon Ferguson or of killing him, or the absence of such intention, determines the application of either instruction No. 4 or instruction No. 11 to the facts of the case. Under the testimony of the defendant, he shot in self-defense, and, according to the state's evidence, he had Ferguson, the deceased, bring him to Fifteenth and Central in order that he, the defendant, might kill, or do Ferguson great bodily harm, and hence there was no consistent middle ground upon which to base instruction No. 14, requested by the defendant, to the effect that if Bailey, the defendant, provoked the difficulty with the deceased, or produced the occasion without any felonious intent, intending, for instance, an ordinary battery merely, or disturbance of the peace, or an annoyance of Ferguson by calling him to Fifteenth and Central streets for the purpose of taking away from him, in order to annoy him, his revolver, or other insignia of authority, and thereupon the deceased, Ferguson, attacked Bailey, and compelled Bailey, in order to save his own life, to take that of deceased, still the law, while it would not entirely justify the homicide on the ground of self-defense, would hold the defendant guilty of no higher crime than that of manslaughter in the fourth degree. There was absolutely no evidence upon which to base this instruction No. 14. The evidence before us presents two theories alone: That by the state, that the defendant and his companions brought on the difficulty with a felonious intent of beating up the deceased in order that they might have an excuse for killing him; and that of the defendant, unreasonable as it appears, of an innocent hack drive at 3 o'clock in the morning, in a lonely resident portion of the city, and of an entirely unprovoked and uncalled-for assault by the deceased, a nonunion hack driver, upon the defendant and his companions, and the killing by the defendant of the hack driver as a last resort in self-defense. In neither was there the slightest evidence upon which to base an instruction of withdrawing from the contest after the difficulty had been brought on. Instructions in all cases, civil and criminal, must be based upon the evidence in the cause. Instructions Nos. 11 and 13 fully presented the law from the defendant's standpoint. If the facts were as he testified, he acted in self-defense, and was not guilty of any grade of homicide, and the court should not have invited the jury to compromise him into the penitentiary by finding him guilty of manslaughter. On the other hand, there was evidence from which the jury, under the instructions of the court,

might have found him guilty of murder in the first or second degree, and the court fully instructed upon both of those degrees. We think the court properly refused to instruct upon manslaughter and either degree, in the light of the evidence developed in this record. *State v. Gartrell*, 171 Mo. 489, 71 S. W. 1045; *State v. Lewis*, 118 Mo. 79, loc. cit. 83, 23 S. W. 1082. The court carefully instructed the jury as to what constituted a just cause of provocation to passion as to reduce the grade of the homicide from murder in the first degree to murder in the second degree.

6. There was no error in refusing the instruction No. 5, asked by the defendant, to the effect that the jury should take into consideration specially what weight ought to be given the witness Catharine Biggs. Leaving out of view that the Biggs woman was named Gertrude, and not Catharine, there was no reason why the court should single out her testimony and comment on it separately. The only evidence tending to show that she was an accomplice, and therefore the court should have given a cautionary instruction as to her testimony, was her own, and according to that she did not join in the common purpose of her three male companions, but was protesting against it all the time, and only accompanied the defendant upon the hack ride in response to the demands of Bailey.

7. The court did not err in failing to define, other than it did, the terms "self-defense" and "bring on the difficulty." The term "self-defense" was fully and carefully defined to the jury in instruction No. 13, and the attempt to have defined the words "bring on a difficulty" would have simply resulted in either confusing the jury, or have added nothing to their plain ordinary significance. Both of these terms are self-explanatory. We think, though, this question is not before us properly, because no exception was saved to the failure of the court to instruct thereon.

8. So far we have endeavored to meet and discuss the various propositions announced by counsel for defendant in two of the briefs filed by them, but there is still another brief by another of the counsel for the defendant, in which it is earnestly insisted that the criminal court erred in refusing instruction No. 14 asked by the defendant. Counsel urges that there was sufficient evidence upon which to base this instruction, and to leave it to the jury to say whether or not the defendant brought on the difficulty with the intention of committing a mere common assault upon, or to take away from, Ferguson, the deceased, his revolver, and we are again cited to what was said in *State v. Partlow*, 90 Mo. 622, 4 S. W. 14, 69 Am. Rep. 81, which has often been approved and reasserted by this court, as follows: "Indeed, the assertion of the doctrine that one who begins a quarrel or brings on a difficulty with the felonious purpose to kill the person assaulted, and, accomplishing such purpose, is guilty of mur-

der, and cannot avail himself of the doctrine of self-defense, carries with it in its very bosom the inevitable corollary that, if the quarrel be begun without a felonious purpose, then the homicidal act will not be murder." The law of this state is that if the original wrong or assault would have been a mere misdemeanor, and such was the purpose of the accused when he committed or engaged in it, then the homicide growing out of or occasioned by it, though in self-defense from any assault made upon him, would be manslaughter. As already said, the criminal court instructed upon the defendant's own evidence on the law of perfect self-defense in its instruction No. 13, and in the instruction numbered 4 and instruction No. 11 the court instructed the jury "that, if the defendant voluntarily brought on the difficulty with deceased with the intention of killing or inflicting upon him some great bodily injury, then the danger in which he found himself during such difficulty would not extenuate or mitigate the offense, or reduce its grade at all, and there was no self-defense in the case." And in its instruction No. 11 the court further told the jury, however, "that if they should find and believe from the evidence that the defendant, at the time he entered the hack to ride to Fifteenth and Central streets, had no intention of killing Ferguson, or of doing him any great bodily harm, and had no intention of doing so at any time previous to the time the deceased drew his revolver and shot at the defendant, if in fact they found that he did shoot at him, then the defendant had a perfect right of self-defense and to slay Ferguson." We have already said that in our opinion there was no evidence of a withdrawal from a combat brought on by the defendant, or of an intent to commit a mere common assault upon the deceased. No witness for the defendant, nor he himself, testified to any intention to go to Fifteenth and Central streets for the mere purpose of committing a common assault on the deceased or to take from him his revolver. We have searched the record carefully, and on the part of the defendant he testifies that his purpose in going to Fifteenth and Central that night was only "to take a ride," and, he supposed, "to have some drinks." We are not left to speculation so far as his testimony is concerned as to what his intention in taking this ride and in going to the place of homicide was. There is not a scintilla of evidence falling from his lips that his intention was to commit a mere common assault or to annoy the deceased by taking his revolver from him, and therefore there was nothing in his testimony which would have justified the giving of the fourteenth instruction prayed for by him. But leaving his testimony for a moment out of view, and turning to the evidence in behalf of the state, we have the case of a defendant, with two other accomplices, armed with a deadly weapon, resorting to a scheme by which they induced

the deceased to take them to a lonely part of the city at 3 o'clock in the morning with the deliberately expressed intention of "beating him up," and, as a part of this scheme, Forsha, one of his accomplices, was to grab him and disarm him. When the woman Biggs protested against the defendant going with this party, and asked him what he wanted his pistol for, he replied that he was going to have a hack driver take them to Fifteenth and Central, and he wanted his revolver, and if the hack driver "started anything" he would kill him, and that he would "get another scab before morning"; and the evidence further shows that, as the defendant got out of the hack, Forsha, one of the accomplices, immediately said, "Shoot him, shoot him, shoot the son of a bitch!" And the evidence further discloses that, before any shot was fired, the deceased was heard begging for mercy and crying for help. To say that this evidence affords any foundation for an instruction that the defendant and his accomplices intended to commit a mere common assault would be to disregard all human experience, and to attribute a purpose wholly at variance with the expressed intention of the defendant and his accomplices when they started upon that extraordinary ride that night. If the evidence of the state is to be credited at all, and it evidently was believed by the jury, it was fairly susceptible of one construction only, and that was a deliberately formed design on the part of the defendant and his associates, Moon and Forsha, to beat up Ferguson, the deceased, for the purpose of causing him to resist, in order to have an ostensible excuse for killing him. To say that the defendant, in the circumstances following fast after his declaration that he proposed "to get another scab before morning," and armed with a deadly weapon, only intended to commit a common assault, is contrary to human intelligence and opposed to all human experiences, and, in our opinion, furnishes no basis whatever for the hypothesis announced in instruction No. 14. And it follows, therefore, that neither the defendant's own evidence, nor that on the part of the state, furnishes any ground for the fourteenth instruction asked for by the defendant, and left the case just as the instructions given by the court presented it to the jury, to wit, on the theory of the defendant, of a perfectly innocent hack drive, and an uncalled for and murderous assault upon him by the deceased, and the killing of the deceased in self-defense as his only resort; and, on the part of the state, of a preconcerted plan and formed design to kill the deceased by the defendant and his associates bringing on a difficulty with the intent to kill the deceased or do him some great bodily harm, and, if so, there was no self-defense in the case, however great the exigencies in which defendant found himself by reason of his own illegal acts.

We have thus examined all the assign-

ments of error and the record in this case, with a view to ascertain whether the criminal court afforded the defendant a fair and impartial trial, or was guilty of prejudicial error in the trial of the defendant. We have reached a conclusion that there is no reversible error in the record, and that the evidence is sufficient to justify the verdict of the jury. The result is that the judgment of the criminal court must be, and is, affirmed, and the sentence which the law pronounces must be carried into execution, and it is so ordered.

FOX, J., concurs. BURGESS, P. J., absent.

STATE v. FORSHA.

(Supreme Court of Missouri, Division No. 2.
June 20, 1905.)

1. INFORMATION — VERIFICATION — JURAT — OMISSION TO ATTACH SEAL.

The omission of the seal of the court to the jurat of the clerk does not invalidate the verification of an information.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 165.]

2. JURY — CHALLENGES — SUFFICIENCY OF FORM.

An objection after the close of the examination of a juror, "Challenged for cause," is insufficient to preserve for appellate review any error in overruling the challenge.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 559.]

3. SAME—DISQUALIFICATION — FORMATION OF OPINION.

The fact that jurors have formed and expressed opinions as to the guilt of defendant from rumor or newspaper accounts does not disqualify them, where they state that they can give defendant a fair and impartial trial on the testimony as it may be introduced before them.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 449-457.]

4. WITNESSES — IMPEACHMENT—CONTRADICTION.

In homicide, where the principal actor in the crime was called as a witness for defendant, and denied upon cross-examination that he had stated that using violence and shooting people was the only way to win the strike in which defendant and his companions were engaged and out of which the homicide arose, it was competent for the state to contradict such testimony by showing that such statement, which was material as tending to refute the theory of self-defense relied upon by defendant, was made by the witness.

5. HOMICIDE — EVIDENCE — PARTICIPANCY OF DEFENDANT—CONCLUSIONS OF WITNESS.

In homicide, where the principal actor in the crime was called as a witness for defendant, and had testified that defendant had said nothing about killing deceased, and that there was no agreement or understanding that any violence was to be inflicted upon him, but defendant and witness were going with him for a purely innocent purpose, it was not error to exclude testimony as to whether, in shooting deceased, witness was actuated by anything that defendant had said or done.

6. WITNESSES — CREDIBILITY — CONVICTION OF CRIME.

Where a witness admitted that he had pleaded guilty to a common assault, it was proper to show, as affecting his credibility, that he

had pleaded guilty of a charge of assault with intent to kill.

7. TRIAL—EXAMINATION OF WITNESS—PRESERVATION OF ERRORS.

Objections and exceptions to testimony must be made and saved at the time the testimony is given in order that any error therein may be available on appeal, and such error cannot be preserved by a mere motion to strike, made after the testimony has been submitted to the jury.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2639, 2674.]

8. CRIMINAL LAW—TESTIMONY OF DEFENDANT—FAILURE TO TESTIFY IN CHIEF—CONFINEMENT TO REBUTTAL.

Where defendant rested his case in chief without being introduced as a witness, it was proper for the court to confine testimony afterwards given by him to a rebuttal of the rebuttal testimony introduced by the state, and to decline to reopen the case and permit defendant to testify as a witness in chief.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1618, 1620.]

9. HOMICIDE — ACCOMPLICES—FLIGHT FROM CRIME—EFFECT.

One who aids, abets, or encourages another in the commission of a homicide, telling the latter to "shoot him, shoot him," etc., is not relieved from criminal responsibility by fleeing from the scene of the difficulty before the fatal shot is fired.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 48.]

Appeal from Criminal Court, Jackson County; John W. Wofford, Judge.

James Forsha was convicted of murder in the second degree, and appeals. Affirmed.

On the 19th day of April, 1904, there was filed in the criminal court of Jackson county, Mo., by the prosecuting attorney thereof, an information against Edgar G. Bailey, James Forsha, and William Moon, jointly charging them with the crime of murder in the first degree, it being alleged in the information that the parties named killed Albert Ferguson upon the 19th day of March, 1904, in Jackson county, by shooting him with a pistol. Upon application of the defendant, the court granted a severance, and the state elected to try Edgar G. Bailey first. His trial began on the 27th day of June, and ended the 2d day of July, and his conviction of murder of the first degree was affirmed by this court (not yet reported). The state elected to try James Forsha next, and his trial began upon the 18th day of July, at the April term of the criminal court of Jackson county, and ended upon the 23d day of July, 1904, resulting in a conviction of murder in the second degree, and a sentence of 18 years in the State Penitentiary. The evidence in the case offered by the state and the defendant was substantially as follows:

In the month of March, 1904, there was a strike in Kansas City, Mo., on the part of the hack drivers' union against the hack companies, in an effort to compel them to employ only union men. The defendant Forsha was a member of the union, and he, Bailey, and Moon (both of whom are also mem-

bers of the union) were taking an active part in the strike. The headquarters of the Hack Drivers' Union was located on Central street, a little to the north of Ninth street, and for two weeks prior to the date of the homicide, Bailey had been living with a woman by the name of Gertrude Biggs at the Thelma Hotel, at the corner of Ninth and Central, and the room in this hotel occupied by Bailey and Mrs. Biggs, and the saloon that was located therein, seem to have been a place of rendezvous for Bailey, Forsha, and Moon, and from which upon the night of the homicide they started out. By the 18th of March the feeling engendered by the strike had become so pronounced that the defendant and his associates seemed to have determined upon a course of violence in order to accomplish the purpose of the strike, and this determination appeared in evidence from the statements shown to have been made by the defendant and his associates, in which nonunion hack drivers were referred to as "scabs," such designation being further emphasized by the use of vile epithets, accompanied by threats of death or bodily harm. On the night of the 18th of March, 1904, the defendant Bailey, Moon, and Mrs. Biggs were together at labor headquarters, just north of the Thelma Hotel. From there they went in a hack driven by one W. E. Ferguson, who was a union hack driver, to a saloon kept by one O'Flaherty upon South Main street. After drinking a while at this saloon, the Biggs woman ordered a hack, by telephone, of the Walnut Street Livery Company, a hack company employing nonunion hack drivers, to come to 1625 Main street, which was a house of prostitution. After ordering this hack, it being directed to come to the house of prostitution so as not to excite suspicion as to the purpose of the call, the defendant, Bailey, Moon, and Mrs. Biggs went to the house of ill repute, and when the hack arrived they entered it and ordered the driver, whose name was Andrew Meyers, to take them to a roadhouse at Twenty-ninth and Southwest Boulevard. They stopped, however, on the way at Broadway and Southwest Boulevard at a saloon, at which place they had the hack driver bring them out a round of drinks. When they arrived at the roadhouse at Twenty-ninth and Southwest Boulevard, Meyers, the hack driver, was invited to go into the roadhouse by Moon, who helped him hitch his team. After they entered the roadhouse, Meyers was invited to take a drink with the party, who were standing in front of the bar. While they were standing there, Bailey asked Meyers what it was that he had on his coat, and if he had a pistol. Meyers told them that he had a star as a special officer, and that he had a pistol in order to protect himself and his passengers. At that Bailey jerked the star from Meyers' coat, passed it to Moon, who handed it to Forsha. As Meyers

was starting to take the star from Forsha, who was pretending to return it, Bailey drew his pistol upon Meyers, threatening to kill him if he took the star or put it on again, and at that Meyers received two blows on the head, delivered from behind. Moon grabbed him around the neck, while Bailey took his pistol, and Forsha took from him his cartridge belt. Forsha began beating Meyers over the head with the cartridge belt, and he fell to the floor unconscious. When the hack driver regained consciousness, he tried to run from the room, but Forsha struck at him again with the cartridge belt, which was filled with cartridges, and Meyers dodged to avoid the blow, and Moon then struck him, knocking him to his knees upon the floor. At that Bailey fired at Meyers, failing, however, to hit him, and Meyers regained his feet and ran from the roadhouse. Bailey followed him from the roadhouse, and, while he was partially dazed from his previous blows and partially blinded by blood flowing from his wounds, Bailey struck him twice over the head with a pistol, felling him again to the ground and rendering him again unconscious. While Meyers was being disarmed and beaten up in the roadhouse saloon, he kept begging for mercy, saying to his assailants: "Please don't shoot me; please don't hurt me; I will go away, and you won't have to pay me for your hack fare." The answer these three men gave to these supplications for mercy were the assaults that have been described, accompanied by vile epithets which they applied to the hack driver. Leaving Meyers unconscious and covered with blood in the roadhouse yard, the party of four separated, Bailey and the Biggs woman leaving together, and Moon and Forsha together. They met, however, about a block from the roadhouse, where, in discussion of the assault, they expressed the opinion that they had killed Meyers. Fearing that they might be arrested, they again separated, but were soon together again at the Thelma Hotel. Bailey and Mrs. Biggs arrived there first and went up to their room. Bailey, after wiping the blood from the nonunion hack driver's pistol, secreted it, and one which he himself carried, behind the radiator in their room. They then went downstairs to the saloon, where, with Forsha and Moon, as usual, a round of drinks was ordered. While in the saloon, at the request of Bailey, Mrs. Biggs went upstairs and got the pistol which had been taken from Meyers, and gave it to Bailey, who in turn handed it to the bartender. The circumstances of the assault were then gone over in the presence and hearing of the bartender, each one telling his part in the assault. Bailey stated that he believed that he had killed the hack driver, to which remark Forsha made reply by saying that if he did not "kill him he ought to have done so." After having remained in the saloon

for some time, Mrs. Biggs went upstairs to go to bed, but at the request of Bailey she dressed herself and came back downstairs, and the four then went to labor headquarters, where the three men discussed the question as to what carriage company they would be most likely to get a driver from whom they could beat up with impunity. Bailey suggested the Depot Carriage & Baggage Company, but Forsha objected to this company, as the men that they employed would not, he contended, be as easy to beat up as the man that they had at the roadhouse. At Moon's suggestion, a hack driver was called from the Landis Livery Company and notified to be at the Coates House in half an hour. This occurred in the neighborhood of half past 2 o'clock. When the party left labor headquarters, Bailey told Mrs. Biggs to go upstairs in their room in the Thelma Hotel and get his revolver. To this Mrs. Biggs objected, telling Bailey that he should not have his pistol; that she had the key to the room, and would not give it up; that he, Bailey, was drinking too much, and that they had gotten into enough trouble for one evening. Bailey replied that he wanted a pistol, as he was going to get another son of a bitch before morning. Forsha then told Bailey to go in the saloon and get the revolver he had given to the bartender. Bailey went into the saloon and secured the revolver from the bartender. The party went up to the Coates House, and, when the hack arrived, Forsha directed the driver, who was Albert Ferguson, the deceased, to drive them to Fifteenth and Central, this place having been agreed upon on the way to the Coates House at the suggestion of Forsha that it was a dark place, suitable for beating up nonunion hack drivers. As they were riding from the Coates House to Fifteenth and Central, a plan of action was agreed upon when they should arrive at the point of destination. It was agreed that Forsha and Moon should get out of the hack and grab Ferguson, the hack driver, and then he was to be beaten up, as Meyers had been served earlier in the night. Bailey added prophetically that if the hack driver "started anything" he would kill him. Bailey was carrying his pistol in his hand. The plan of action decided upon seemed to be that if Ferguson, when seized and disarmed, quietly submitted to being "beat up" by these three men at this lonely place at this hour of the morning, then they would be satisfied; but if he should attempt to "start anything"—that is, to defend himself—then he was to be killed. When the hack driver arrived at Fifteenth and Central, it stopped near the northeast corner. Ferguson, the driver, opened the door, and Forsha stepped out, quickly followed by Moon, and the two grappled with the driver. As soon as Bailey got out of the hack, Forsha, standing on the corner, said, "Shoot him; shoot him; kill the son of a bitch;"

and then he and Moon ran east on Fifteenth street. Mrs. Biggs had immediately followed Bailey out of the hack, and started to run east on Fifteenth street, preceded by Forsha and Moon. Bailey and Ferguson were at that time in the rear of the hack. When the Biggs woman had gone about a half block she heard a shot, followed by the cry from Ferguson, "Help! help! oh my God! I'm shot." This cry was immediately followed by another shot, and then in a short interval a number of shots were fired. Bailey, leaving the scene of the murderous assault, ran in the direction of his associates, overtaking them at the first corner east on Fifteenth street, where he said that he thought that he had killed the son of a bitch, and that they must "run like hell," or they would get caught. It was agreed that they should scatter; Moon and Forsha going in one direction, and Bailey and the woman in another. The party of four, however, went to the Thelma Hotel according to agreement, where they met at Bailey's room. There they proceeded to coolly discuss the incidents of the homicide, Forsha relating how he had hit the deceased with a pair of brass knucks, and that it "didn't seem to daze him." Moon told how he hit him, and Bailey said deceased had put up "a hell of a fight," but that he "thought he had killed him," and Moon added that "if he did not he ought to." Forsha exhibited a bruise on the jaw he had received in the fight, and told how he had left the cartridge belt, a knife, and a pair of brass knucks at a saloon up on Ninth street. Forsha and Moon soon left the hotel after having another round of drinks at the saloon.

Ferguson was taken from the place of the homicide to the police station, from which place he was taken to the German Hospital, where he made a dying declaration to the assistant prosecuting attorney, A. S. Lyman, which is as follows:

"Mch. 19, 1904.

"I, Al. Ferguson, now at the German Hospital, believing that I am about to die, and having no hope of recovery, do make the following statement of the facts leading up to my being shot and wounded this morning at about three o'clock:

"This morning, shortly before 3 a. m., we got a call from the Coates House. Went there, and took three men and a man dressed in woman's clothes into my hack. They wanted me to drive them to Fifteenth and Central street. I drove there, and got down to let them out. I opened the hack door. I found that the man had removed his woman's clothes, and there were four men there. As they got out they began to attack me. I defended myself as best as I could. The third man who got out of the hack shot me in the abdomen. He was a medium-sized man, with black hair. The first man who got out of the hack said to me, 'We have got you, you son of a bitch; what are you going

to do now? After the third man shot me, they all ran way. I did not know any of them.

his
"Al. X Ferguson.
mark.

"Witnesses:

"A. S. Lyman.

"Dr. E. L. Stewart."

At the hospital, Ferguson was operated on by a physician in the vain hope of saving his life, but the next day he died. The fatal wound received by Ferguson was from a bullet which entered the abdomen three inches below and two inches to the right of the navel, taking a downward, backward, and outward course, perforating the bowels and lodging under the spine at a point about 2½ inches below the brim of the hip and one to three inches in front of the spinal column.

A number of people who resided near Fifteenth and Central, that neighborhood being a residence and not a business section of the town, testified to being awakened by the shots and cries of the deceased. Their testimony agrees upon the proposition that there were two series of shots, between which there was a slight interval, and that the cries for help which they heard immediately followed the first shot. The testimony of the witness which was of most importance was that of William A. Satterlee, assistant general manager of the Metropolitan Street Railway Company, who resided at 221 West Fifteenth street, and who testified that he was awakened by the first shot, went to his window, and saw a man stand at the northeast corner of Fifteenth and Central and fire two or three shots in a westerly direction, and then turn and run east on Fifteenth street. Before these shots were fired, during the firing, and afterwards, he heard the cries for help.

The evidence in behalf of the defendant consisted of the testimony of Bailey and Moon, and that given by three painters who were working in the county jail on the date before the trial, and claimed to have heard Mrs. Biggs say that a representative of the state had told her father, her lawyer, and herself that if she testified against Forsha she would get out of jail, but if she didn't she would get 10 years in the penitentiary, and that she had also said if the sons of bitches didn't treat her right they would not get any evidence out of her.

Bailey, testifying in behalf of his associate, Forsha, stated that they, Forsha, Moon, Mrs. Biggs, and himself, had been at labor headquarters some 15 or 20 minutes before Moon had called the hack from the Landis Company, and that Forsha had not said anything in regard to a hack prior to that time; that, on the way from the Coates House to Fifteenth and Central, Forsha had called to the driver when he was going in the wrong direction, asking if he didn't know the way to Fifteenth and Central, saying that he ought to know, as he had

"scabbed long enough"; that to this remark Ferguson made reply by some muttered curses; that, when the hack arrived at Fifteenth and Central, Ferguson, with a revolver in his hand, opened the door and said, "Get out of here, you union bastards;" that Forsha then got out of the door, and was promptly knocked down by Ferguson; that Moon, following, dodged a blow; and that, as he himself got out of the hack, Ferguson shot at him, the bullet passing by his head; that he was in such position that he could not run, and so he grappled with the hack driver, who fired again, the bullet passing through his clothing and grazing his stomach, making him think that he was shot; that then he threw Ferguson from him, and the latter thereupon drew his gun over the wheel of the hack, and at that "I jerked my gun and commenced to shoot, and he done the same." He denied that Forsha said anything to him as he got out of the hack, and claimed that, at the time the shooting had begun, Forsha and Moon were running away. He also testified that there was nothing said at headquarters, or on the way to Fifteenth and Central, about shooting anybody; that he and the balance of the party were all under the influence of liquor, and while in the hack were "jollyng back and forth" and singing "Bedelia." On cross-examination he admitted that he did get the revolver which he had given to Robinson, the bartender, before he left the saloon, but was not positive whether Forsha was present at the time or not. He denied having sent Mrs. Biggs up to the room to get the revolver which he afterwards gave to the bartender, claiming that he had given it to him "in a drunken way." He stated that Fifteenth and Central had been selected as the destination of their hack ride on the impulse of the moment, and that their intention in having a nonunion hack driver drive them there was "to give him a bogus call, then get out and walk away, because they (nonunion hack drivers) had been in the habit of sending us on bogus calls"; that he knew the driver of this hack was a nonunion man, and to give him a "bogus call" was the sole purpose of the ride. Witness further testified that he was not a member of the "wrecking crew" of the Hack Drivers' Union. He admitted that upon Monday after the homicide he moved from the Thelma Hotel to Hasbrook Place, and did not give his name at his new location, but claimed that he did not remain there in hiding; that he stayed close to his room because he felt bad over the "difficulty." He declined to answer as to what statements he made to the officers when arrested, but admitted that he had given Mrs. Biggs money to leave town on, but denied that it was at his suggestion that she left. Bailey stated that he had hold of Ferguson's hand in which the latter had his revolver when the second shot was fired, but could

point out no powder burns upon the clothing which he claimed to have had on at the time and which he exhibited in court. He further stated that the deceased did not begin to cry for help until he, Bailey, had started to run away from the scene of the homicide. He declined to state what he did with the pistol with which he had shot Ferguson, and declined to answer as to where it then was.

Moon, called as a witness by the defendant, was instructed by the court that, as he had not yet been tried, it was his right and privilege to refuse to answer any question that he might think would tend to incriminate him. Under that admonition he testified, in substance, as follows: That he was 24 years old, and a native of Missouri; a hack driver by profession; that he was at Fifteenth and Central on the morning of the 19th of March, in a hack, in company with the defendant, Bailey, and Gertrude Biggs; that when the hack came to a stop the hack driver got down with a pistol in his hand, and said, "Get out of here, you union bastards, as I am ready for you," that thereupon Forsha got out of the hack, and that the driver with his left hand knocked Forsha to his knees; that witness, following Forsha out of the hack, was struck at by the driver, and thereupon he and Forsha both ran away; that they said nothing to the hack driver or to Bailey; that when they reached the corner of Fifteenth and Wyandotte they heard some shots fired; witness stated that he himself had called the hack without any suggestion from Forsha; that on the way to Fifteenth and Central the driver had gotten off his course; that Forsha had said to him that he had been "scabbing" long enough to know the way to Fifteenth and Central, to which the driver replied by saying, "I am next to you, you union bastard," and continued mumbling up to Fifteenth street, and was angry when he opened the door; that Forsha made no threats against Ferguson. On cross-examination he stated that their only purpose in going to Fifteenth and Central was to give the driver a "bogus call"; that there was no talk between Forsha, Bailey, and himself as to what they were going to do to the hackman. He stated that when he and Forsha were arrested they had denied to the chief of police being connected in any way with the homicide.

This constituted the testimony in behalf of the defendant.

Upon rebuttal, John Hayes, chief of police of Kansas City, testified that, upon the 16th of April, Bailey, Moon, and Forsha were arrested and brought to police headquarters; that Moon and Forsha there made a written statement in reference to the homicide, which was signed by each; that at first Forsha had denied any knowledge of the affair, but that afterwards, on Bailey telling him (Forsha) that he (Bailey) had "told everything," Forsha then said: "I will admit I was out there.

We took him out there from a damn good licking—to slug him."

A portion of the written statement of Moon, to which his attention was called, and in which he said, "I had not got over 20 feet when I heard a shot, then three or four shots fired afterwards," was then admitted without objection.

The written statement of Forsha was then offered in evidence, over the objection and exception of the defendant on the ground that the same was not rebuttal, and incompetent, irrelevant, and immaterial. The written statement is as follows:

"Kansas City, Mo., April 16th, 1904.

"My name is James Forsha. I room at 212 West 7th street. On the morning of the 19th day of March, 1904, Moon, Bailey, Miss Biggs and I got into a hack at the Coates House and drove to 15th and Central street. I don't remember who it was that told the driver to go to that place. When we got there the driver got down off the hack; he had a pistol in his hand, and opened the door. I was the first one to get out, and as I was getting out the driver struck me on the chin with a pair of brass knucks; he knocked me to the ground. When I got up the shooting was going on; after he knocked me down there was a shot fired. After I got up I started away, and when I got near 14th and Central I heard four or five shots fired. Bailey told me he had shot the driver; I did not see the shooting. We had the driver go to 15th and Central because it was our intention to beat him up; we did not intend to do him great harm. I made this statement because it is the truth, without fear or promise of reward.

James Forsha."

Moon, recalled to the witness stand, denied, after stating again that the purpose of the hack ride was entirely an innocent one, that the linings of Ferguson's hack were torn and cut by him and his associates. On examination by the defendant's counsel, he testified that he had pleaded guilty in the criminal court of Jackson county to a charge of common assault, served a sentence in jail, and had been paroled by Judge Wofford. In rebuttal of this last statement of Moon's the state offered in evidence an information filed in the criminal court of Jackson county, Mo., at the January term, 1902, by the then prosecuting attorney of Jackson county, charging William Moon with felonious assault, and to which he had pleaded guilty.

El. Landis testified that he was the owner of the hack that Ferguson was driving at the time of the homicide; that he had seen it about 12 o'clock midnight March 18th, and a few minutes after the killing, and that the lining was then all cut and was torn, but that there were no bullet holes in the hack, the only damage being to the inside. He further testified that Ferguson was a man about five feet seven inches tall, weighing about 140 pounds, and that he had a crippled hand; that he, the witness, had given Ferguson a

loaded pistol in order to defend himself from the assaults that might be made upon him by union hack drivers.

Mrs. Biggs, called again to the stand, described how Forsha, Moon, and Bailey had torn and cut the lining of the hacks in which they had ridden to the roadhouse on South-west Boulevard and to Fifteenth and Central.

Bailey, recalled for further examination, denied that on March 19th, at the registration booth, where he was serving as judge of registration, he replied to a remark made by one L. R. Cooper, "The strikers can never expect to win as long as they are using violence and shooting people," by saying, "That is the only way to win."

L. R. Cooper, called to the stand, testified that on the 19th of March he had said, in Bailey's presence, "The strikers could never expect to win as long as they are using violence and shooting people; they will get public sentiment down on them;" and that Bailey made reply, "That is the only way to win."

The witness Cooper, David Buck, an ice dealer in Kansas City, and John L. Huntsman, a member of the police force, testified that they were acquainted with the general reputation for moral character of Edgar Bailey in the community in which he lived, and that it was bad.

Matt S. Kinney, a detective, testified that after the defendant Forsha was arrested he told him, the witness, that he had given to a bartender on Ninth street the cartridge belt that he had taken from Meyers, and also his knife.

After the close of the testimony in rebuttal by the state, the defendant was sworn as a witness. As numerous complaints are made at the action of the court in respect to the examination of this witness, his testimony will be fully stated and considered during the course of the opinion.

At the close of the evidence the court fully and fairly instructed the jury as follows:

"No. 1. The information in this case was filed by the prosecuting attorney on the 19th day of April, 1904, and charges the defendant with murder in the first degree. Murder in the first degree is the willful, felonious, deliberate, and premeditated killing of a human being with malice aforethought. Murder in the second degree has all the elements of murder in the first degree except that of deliberation. As used in these instructions, the word 'willful' means intentional, not accidental. 'Felonious' means wickedly, and against the admonition of the law—unlawfully. 'Deliberately' means in a cool state of the blood. It does not mean brooded over, considered, reflected upon for a week, a day, or an hour, but it means an intent to kill, executed by a party not under the influence of a violent passion suddenly aroused by some just or lawful cause of provocation to passion, but in the furtherance of a formed design to gratify a feeling of revenge or to

accomplish some other unlawful act; and the passion here referred to is that only which is produced by what the law recognizes as a just or lawful cause of provocation to passion. 'Premeditated' means thought of beforehand for any length of time, no matter how short the time. 'Malice,' as used in these instructions, signifies a condition of the mind void of social duty and fatally bent on mischief, or an unlawful intention to kill or do some great bodily harm to another without just cause or excuse. 'Aforethought' means thought of beforehand. In defining the words 'just or lawful cause of provocation,' as used in these instructions, the court instructs the jury that opprobrious epithets or insulting gestures when applied to a person constitute a just cause of provocation to passion; and if the person to whom they are applied is thereby aroused to a sudden heat of passion, and before such passion has had time to cool, with a deadly weapon kills the person who applies such opprobrious epithets or gestures to him, then such killing is done without deliberation, and a homicide committed under such circumstances is murder in the second degree. The court instructs the jury that an assault made upon the defendant constitutes a lawful cause of provocation to passion, and where a homicide is committed with a deadly weapon in a heat of passion suddenly aroused by an assault, and before such heat of passion has had time to cool the defendant kills the person making such assault with a deadly weapon, such killing is manslaughter in the fourth degree. The words 'heat of passion' as used in these instructions means a heated state of the blood, caused by a lawful or just provocation, which deprives the defendant of the power of self control.

"No. 2. The court instructs the jury that if you find and believe from the evidence that at the county of Jackson and state of Missouri, at any time before the 19th day of April, 1904, the defendant, James Forsha, either alone or acting in concert with another or others, willfully, deliberately, premeditatedly, and of his malice aforethought, did with a certain revolving pistol, and that the same was a dangerous and deadly weapon, shoot one Albert Ferguson, inflicting upon him a mortal wound, from which said mortal wound the said Albert Ferguson within one year thereafter, at the county of Jackson and state of Missouri, died, then you will find the defendant guilty of murder in the first degree, and so say in your verdict. In that event you have nothing to do with the punishment; that is fixed by law.

"No. 3. The court instructs the jury that if you fail to find a verdict according to the law as declared in instruction No. 2, but shall find and believe from the evidence that at the county of Jackson and state of Missouri, at any time before the 19th day of April, 1904, the defendant James Forsha, either alone or acting in concert with an-

other or others, willfully, premeditatedly, and of his malice aforethought, did with a certain revolving pistol, and that the same was a dangerous and deadly weapon, shoot one Albert Ferguson, inflicting upon him a mortal wound, from which mortal wound the said Albert Ferguson within one year thereafter, at the county of Jackson and state of Missouri, died, then you will find the defendant guilty of murder in the second degree, and assess his punishment at imprisonment in the State Penitentiary for any term not less than 10 years.

"No. 4. The court instructs the jury that, if they find and believe from the evidence that James Forsha was present aiding and abetting Edgar G. Bailey in the act of homicide in evidence in this case, he is in law equally guilty with him who fired the shot. When two or more persons are engaged in the same illegal purpose, any act done by one of the party in pursuance of that purpose, and with reference to it, is, in contemplation of law, the act of all; and proof of such act is evidence against any or either of the others who were engaged in the combination.

"No. 5. The court instructs the jury that if you find and believe from the evidence that defendant, James Forsha, conspired and agreed with William Moon and Edgar G. Bailey to assault and beat Albert Ferguson, but not to the extent to doing him great bodily harm, and absolutely without any intention in Forsha's mind of shooting said Ferguson, and that, in pursuance of said agreement, any one or all of the parties thereto assaulted said Albert Ferguson with the intention aforesaid, and that thereafter or thereupon Edgar G. Bailey, without the consent, aid, or encouragement of defendant, James Forsha, shot and killed Albert Ferguson, then in that case you will find the defendant guilty of manslaughter in the fourth degree.

"No. 6. The court instructs the jury that, if you shall believe and find from the evidence that at the time it is charged that Albert Ferguson was killed, the defendant, James Forsha, William Moon, and Edgar G. Bailey were acting together, and that Albert Ferguson was about to kill Edgar G. Bailey or do him great bodily harm, that then he had the right to kill Albert Ferguson under such circumstances; but to justify such killing you must find from the evidence that he did believe, and had reasonable cause to believe, that such injury was about to be done, and that deceased was killed to prevent such injury. It is not necessary that the danger should have been actual and about to fall on him, but it is necessary for him to have believed it, and that there should have been at the time of such killing reasonable grounds for such belief. It is for you to say from the evidence in the case whether Edgar G. Bailey did believe, and had reasonable cause to believe, that such impending

harm at the time the deceased was shot was about to fall on him. If, as a fact, he did not have reasonable cause to believe that such danger was impending at the time the deceased was shot, then such killing is not justifiable. His believing himself in danger is not sufficient; he must have had reasonable cause to believe it, and of that you are to determine from all the facts and circumstances in the case. If you find that Bailey shot in self-defense as defined, then you should find defendant guilty.

"No. 7. If the jury believe and find from the evidence that Bailey, Forsha, and Moon confederated together and engaged in a common design to take deceased out on the night in question and beat him up, and that it was part of their common design and purpose, if deceased made resistance, to kill him or to do him some great bodily injury, then whatever Bailey did in carrying out the common purpose was in law the act of Forsha, the defendant, and they are equally liable for such act; and if the defendant and Bailey and Moon, in pursuance to such common design, brought on the difficulty in which Albert Ferguson was killed, and entered into it with the intention of killing or inflicting great personal injury upon Ferguson, if he should resist them, then the danger in which they, or any of them, found themselves or himself, would not extenuate the offense or reduce its grade, and there could be no self-defense in the case.

"No. 8. The court instructs the jury that if you find from the evidence that James Forsha, William Moon, and Edgar G. Bailey conspired and agreed to entice Albert Ferguson to Fifteenth and Central streets, and there assault him, but not to the extent of killing him or doing him great bodily harm, and that upon arriving at said place James Forsha struck at or struck Albert Ferguson, but did not inflict upon him any injury sufficient to endanger his life, and that immediately thereafter the defendant James Forsha ran away, and endeavored in good faith to withdraw from said difficulty, and Edgar Bailey then killed Ferguson, but not under circumstances to constitute complete self-defense, as elsewhere in these instructions defined, then you will find defendant guilty of manslaughter in the fourth degree. But if defendant, at the time or immediately before he ran away, incited or encouraged Bailey to kill Ferguson or to do him great bodily harm, and intended that he should kill or inflict upon him great bodily harm, then his running away would not avail the defendant anything.

"No. 9. The court instructs the jury that if defendant and Bailey and Moon voluntarily entered into the difficulty, or brought it on, but without any intention of killing or inflicting upon Ferguson any great personal injury, and without intending to kill him or to do him great bodily harm if he resisted, and during such difficulty Ferguson,

before he was assaulted, with a deadly weapon attempted to kill Bailey or Moon or Forsha, and it became necessary for Bailey to kill said Ferguson to save himself or to save Moon or Forsha from being killed or receiving great personal injury, then the defendant cannot be entirely excused on the ground that Bailey killed Ferguson in self-defense, but in that case you should find the defendant guilty of manslaughter in the fourth degree.

"No. 10. The court instructs the jury that, if they find the defendant guilty of manslaughter in the fourth degree, they will assess his punishment at imprisonment in the State Penitentiary for a term of two years, or by imprisonment in the county jail not less than six months nor more than twelve months, or by a fine not less than five hundred dollars, or by both a fine of not less than one hundred dollars and imprisonment in the county jail not less than three months, nor more than twelve months.

"No. 11. The court instructs the jury that any statements which the proof shows Edgar Bailey made after the homicide was committed, and not in the presence of the defendant Forsha, are not binding upon the defendant, but can only be considered so far as it may throw light upon the acts or testimony of Bailey.

"No. 12. If verbal or written statements of the defendant have been proven in this case, you may take them into consideration, with all the other facts and circumstances proven. What the proof may show you, if anything, that the defendant has said against himself, is presumed to be true, because against himself; but anything you may believe from the evidence the defendant said in his own behalf you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when considered with a view to all the other facts and circumstances in the case.

"No. 13. The court instructs the jury that the law presumes the innocence and not the guilt of the defendant, and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence in the case, when taken as a whole, satisfies you of the defendant's guilt beyond a reasonable doubt as defined in these instructions.

"No. 14. The court instructs the jury that the burden of proof in this case rests upon the state.

"No. 15. The court instructs the jury that before they can convict the defendant they must be satisfied of his guilt beyond a reasonable doubt. Such doubt, to authorize an acquittal upon reasonable doubt, must be a substantial doubt of the defendant's guilt, with a view to all the evidence in the case, and not a mere possibility of the defendant's innocence.

"No. 16. The jury are the sole judges of the credibility of the witnesses, and of the

weight and value to be given to their testimony. In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, the motives actuating the witness in testifying, the witness' relation to or feeling for or against the defendant or the alleged injured party, the probability or improbability of the witness' statements, the opportunity the witness had to observe and to be informed as to the matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight, as you deem proper. If, upon a consideration of all the evidence, you conclude that any witness has sworn willfully false as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony.

"No. 17. The court instructs the jury that the defendant is a competent witness in this case, and you must consider his testimony in arriving at your verdict; but in determining what weight and credibility you will give to his testimony in making up your verdict, you may take into consideration, as affecting his credibility, his interest in the result of the case, and that he is the accused party on trial, testifying in his own behalf.

"No. 18. The court instructs the jury that the statement read to you as the dying declaration of Albert Ferguson should be received by you as such declaration, but because it is a dying declaration you are not necessarily bound to believe it, but you will give it that weight which you think it ought to have when considered in connection with all the other facts and circumstances in evidence.

"No. 19. The court instructs the jury that the defendant is not charged in this case with making an assault upon Albert Meyers, and you will not consider the testimony before you upon that subject, except in so far as it may tend to throw light upon the motives or intentions of Bailey, Moon, and this defendant; whether or not it does throw light on the motives and intentions of defendant and Moon and Bailey, you will be the judges, when it is viewed in connection with all the other facts and circumstances in the case."

The cause was submitted to the jury upon the testimony and the instructions of the court as herein indicated, and they returned a verdict of guilty of murder of the second degree, and assessed defendant's punishment

at imprisonment in the penitentiary for 18 years. Sentence and judgment was rendered in accordance with the verdict, and from this judgment defendant prosecutes this appeal, and the cause is now before us for consideration.

W. F. Riggs, for appellant. H. S. Hadley, Atty. Gen., and North T. Gentry, for the State.

FOX, J. (after stating the facts). Numerous complaints are urged by learned counsel for appellant as grounds for the reversal of the judgment in this cause. This is a companion case of *State v. Bailey* (not yet reported) 88 S. W. 733, and the testimony as to the main facts upon which this judgment rests, with a few exceptions, are substantially the same as in that case.

At the very inception of the consideration of this cause, it is well to see what legal propositions were disposed of in the *Bailey* Case, for, as to questions involved in that case, we see no reason to depart from the conclusions announced, and they must be treated as being settled.

The defendant *Bailey*, *Forsha*, and *Moon* were jointly charged with murder in the information now under consideration, and its sufficiency is challenged in this cause upon the same ground as urged in *State v. Bailey*, *supra*. It is unnecessary to repeat the reasons assigned in the *Bailey* Case, for, holding the charge as made in the information sufficient, that proposition must be treated as settled. *State v. Bailey*, *supra*; *State v. Nelson*, 181 Mo. 340, 80 S. W. 947. It will be sufficient to say, as to the additional ground urged in the motion to quash the information, "that the seal of the court was not affixed to the jurat of the clerk, and that the oath was administered by the deputy clerk," that there is no merit in such contention. The court to whom this motion was addressed is presumed to know its officers and their signatures, and the omission of the seal of the court to the jurat does not invalidate the verification. The purpose of affixing the seal of the court to the jurat of the clerk is in the nature of an attestation of the genuineness of his signature, but the affixing of the seal is not an indispensable requisite to such jurat, as was very appropriately said by the Court of Appeals in *State v. Pfenninger*, 76 Mo. App. 313: "The judge of a court having a clerk will take judicial notice of the signature of the clerk, and an attestation of such signature by a seal is not indispensable to satisfy the judge of the genuineness of his signature; and, when the attention of the judge was called to the signature of the clerk by the motion to quash in this case, it will be presumed, in the absence of any evidence to the contrary, that he inspected the signature of the jurat and saw that it was genuine."

The assignment of error upon the admis-

sion of testimony in respect to the difficulty with *Meyers* on the night of the homicide was fully and exhaustively treated by Judge Gantt in *State v. Bailey*, and it is only necessary to say that we are fully satisfied with the conclusions reached upon that proposition, and see no reason for a reconsideration of that question, or departing from the rules of evidence announced in that case.

It is insisted by appellant that the court erred in retaining jurors *Shaw*, *Duncan*, *Bell*, and *Ryan* on the panel from which the jury of 12 was to be selected to try this cause. We have carefully considered the record disclosing the examination of the jurors upon their *voir dire*. The record discloses, after the close of the examination of each juror, that counsel for appellant contented themselves with a simple objection, "challenged for cause." This was insufficient to preserve the error complained of for review. It has been uniformly held by this court that the grounds of challenge must be specifically stated. *State v. Taylor*, 134 Mo. 100, 35 S. W. 92, and cases cited; *State v. Evans*, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669; *State v. McGinnis*, 158 Mo. 105, 59 S. W. 83. We may also add, in addition to the failure to preserve the question of disqualification of the jurors for review in this court, that their examination did not disclose their disqualification. While they had formed and expressed opinions as to the guilt of the defendant from rumor or newspaper accounts of the killing of *Ferguson*, they finally state that they could give the defendant a fair and impartial trial upon the testimony as it may be introduced before them. In *State v. Reed*, 137 Mo., loc. cit. 132, 38 S. W. 574, the rule upon this subject was clearly and tersely stated. It was there said: "It is well settled in this state that a person otherwise qualified to sit as a juror in a criminal case is not disqualified by reason of having formed an opinion as to the guilt or innocence of the accused from reading partial newspaper accounts of the homicide, or from rumor, when he states on his *voir dire* that he can give the defendant a fair and impartial trial;" and, "moreover, a general objection did really not amount to an objection."

Numerous complaints are made upon the admission and exclusion of evidence during the progress of this trial. Some of them are doubtless not seriously made; however, we have fully considered all of them, but must be content with the expression of our views upon those which are of sufficient merit to demand serious consideration. It is insisted by appellant that the testimony of *L. R. Cooper*, in which the witness stated that on the 19th of March he had said in the presence of *Bailey* that "the strikers could not expect to win as long as they are using violence and shooting people; they will get public sentiment down on them;" and that *Bailey* replied, "that is the only way to

win"—was incompetent, and its admission constituted reversible error. The objection to this testimony is predicated upon two theories: First, that the statement was made in the absence of this defendant, and cannot be binding upon him; and, secondly, that it was in the nature of a confession or admission of a co-conspirator after the commission of the act and termination of the conspiracy. Appellant clearly misconceives the purpose of the testimony of Cooper. Bailey was called as a witness for defendant in this cause, and the state was, beyond question, privileged to introduce any testimony which tended to contradict him, and, Bailey having denied upon cross-examination that he had made any such statement as testified by Cooper, it was clearly competent for the state to contradict him in that respect. The statements of Bailey were relevant in this controversy, for he was the principal actor in the commission of the homicide, and his statement to Cooper tended to refute the theory of self-defense, and was therefore material, and, being so, the state had the right to contradict the witness in respect to such testimony.

There was no error in the exclusion of the answer of Bailey to a question propounded, that, in shooting Ferguson, he (Bailey) was not actuated by anything that this defendant said or did. He had fully testified on that subject, had denied that this defendant had said anything to him about killing Ferguson, or that there was any agreement or understanding that any violence was to be inflicted upon any one, and stated that the mission in taking the drive with Ferguson was purely an innocent one. We are unable to see what force the answer to the question could have added to what he had already testified. His answer was nothing more than a conclusion of the witness from the facts to which he had given testimony, and it was the province of the jury to frame their conclusions from such facts, and the testimony was properly excluded.

The record discloses complaint upon the cross-examination of witness Moon, for defendant. A careful consideration of that entire examination fails to disclose any error. The state, as affecting the credibility of the witness, could legitimately inquire of the witness if he had been previously convicted of a criminal offense. After the witness admitted that he had pleaded guilty to a common assault, there was nothing improper in permitting the state to show by the record that the witness had pleaded guilty to a charge of an assault with intent to kill. This testimony was admissible as affecting the credibility of the witness. *State v. Howard*, 102 Mo. 142, 14 S. W. 937; *State v. Blitz*, 171 Mo. 530, 71 S. W. 1027.

Again, it is urged that the testimony of witnesses W. E. Ferguson and Mrs. Clara Stevens was incompetent, and should have been excluded. An examination of the record

as to the testimony of the witnesses above noted discloses that the examination of these witnesses was complete before any effort was made to exclude this testimony, and, while the questions and answers in the examination cover a number of pages, there is an entire absence of a single objection or exception to the testimony given. After the testimony was all submitted to the jury, then counsel for appellant moved that it be stricken out. This method of preserving complaints to the action of the trial court has not met with the approval of this court. It was ruled in *State v. Marks*, 140 Mo., loc. cit. 668, 669, 41 S. W. 973, 43 S. W. 1095, that, where timely objections and exceptions were not made to testimony at the time of its introduction, it was not error to refuse to exclude it afterwards; and, in the discussion of the proposition, Gantt, J., in speaking for this court, said: "A party cannot speculate upon the effect of evidence which is objectionable upon its face when offered, as this clearly was, if ever, and then complain of a refusal to reject it later in the trial. *Maxwell v. Railroad*, 85 Mo. 95; *State v. Hope*, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608; *People v. Chacon*, 102 N. Y. 669, 6 N. E. 303; *Miller v. Montgomery*, 78 N. Y. 282; *Quin v. Lloyd*, 41 N. Y. 349; *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1; 1 Rice, Ev. §§ 258, 259; *Hickman v. Green*, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39." This rule of practice as announced in the case last cited was approved in *Roe v. Bank*, 167 Mo. 426, 67 S. W. 303.

This leads us to the complaint urged in respect to the examination of defendant in this cause as a witness in his own behalf. The record before us discloses that the defendant rested his case in chief without being introduced as a witness in the cause, and the court properly ruled that his testimony should be confined to rebuttal of the rebuttal testimony introduced by the state. The record discloses numerous questions propounded to the defendant, and his answers excluded without any objection or exception on the part of the appellant; hence the action of the court as to those questions and answers were not properly preserved, and are not subject to be reviewed by this court. Counsel for appellant, with commendable frankness, concede that no proper objections or exceptions were made in respect to these matters. The defendant was permitted to testify fully as to all matters which were in rebuttal of the testimony introduced in rebuttal by the state. It is apparent from the record that the main purpose of introducing defendant as a witness was to explain the statement in writing made by him, introduced by the state. There is no pretense that he did not make the statement offered in evidence, or that it is ambiguous or uncertain in any of its terms, and, so far as any explanation of this statement at the time it was made, and what was said at the time

he signed it, and any other statements which he made at the time which were not correctly reduced to writing, the state, by her counsel, expressly announced that they had no objection to such showing; but the record discloses that notwithstanding such announcement by the state's counsel, no examination was made along that line. That we may fully appreciate just what was done in respect to the examination of the defendant, touching the statement he had made, which was introduced by the state, we quote from the record upon that subject: "Q. I will ask this question, Mr. Forsha: Tell the jury what you said at police station at the time this signed statement was made by you; tell the jury all that you said about the shooting of Ferguson, and what part you said, if anything, was not included in the statement; and tell the jury all of the facts leading up to and including the shooting of Ferguson by Bailey, and all that you said and did in that connection. Mr. Reed: The state does not object to that part of the question which asks the witness, Forsha, to tell the jury what he said at the police station at the time he signed the statement, nor to the witness telling any other statement which he made at the time of the signing of the statement which he claims wasn't correctly taken down in the statement, but the state does object to the latter part of the question which is, 'State all of the facts and circumstances leading up to and including the shooting of Ferguson by Bailey, and all that you said and did in that connection,' for the reason that it isn't surrebuttal, and should have been introduced, if at all, in the defense in chief. The Court: Sustained. To which ruling of the court the defendant did then and there at the time duly except." This clearly indicates an express waiver of any objection by the state to the testimony of defendant as to all proper explanations of the statement made by him in writing. The defendant, at the close of the state's case in chief, had every opportunity to go on the stand and testify fully as to the entire difficulty, but, failing to do so, we are of the opinion that it was not error for the court to limit his examination in the manner it did. There was offered appellant an opportunity to explain fully what he said at the time he made the statement at the police station, but his counsel declined to avail themselves of such opportunity, and moved the court to reopen this cause and permit them to introduce defendant as a witness in chief. This the court declined to do, and, we think, properly so. Courts, in the administration of justice, are fully justified in adhering to the well-recognized and uniform rules of procedure in the trial of causes. To grant the request of appellant in this cause and adopt a rule suggested by such request could not help but result in endless trials and a weak and feeble administration of the law.

We have read with care and interest the

instructions given by the court in this cause, and have herein fully reproduced them. They are a full and fair presentation of the law as applicable to the facts developed at the trial. They fully meet every phase of this case, and are extremely favorable to the defendant.

We have fully considered the refused instructions requested by appellant, and it is sufficient to say that a number of them did not declare the law and were properly refused, and those correctly announcing legal principles were fully covered by those given by the court. In oral argument it was earnestly insisted that instructions Nos. 10 and 12, requested by defendant, should have been given. They are as follows:

"No. 10. The court instructs the jury that even if you find from the evidence that defendant, James Forsha, conspired and agreed with Edgar G. Bailey to kill or inflict great bodily harm upon Albert Ferguson, and that during the difficulty, if any, with said Albert Ferguson, defendant told, advised, or encouraged Edgar G. Bailey to shoot said Albert Ferguson, still if you further find and believe from the evidence that, before Bailey fired the fatal shot, Forsha in good faith withdrew from said difficulty, and abandoned the design to kill or inflict great bodily harm upon said Ferguson, and that Bailey, knowing that Forsha had withdrawn from and abandoned said difficulty and design, thereafter, from and on account of motives, intentions, and purposes actuating his, the said Bailey's, mind alone, shot and killed Albert Ferguson, then in that case you should find the defendant, James Forsha, not guilty; and statements made by Bailey, and not in the presence of the defendant, wherein Bailey states his views as to the way strikes should be conducted, should not be considered by the jury as prejudicial to the defendant, nor binding upon him."

"No. 12. The court instructs the jury that even if you find and believe from the evidence that James Forsha agreed with Edgar G. Bailey and others to kill or inflict great bodily harm upon Ferguson, still if you further find from the evidence that before Edgar Bailey shot and killed Albert Ferguson, defendant, James Forsha, attempted in good faith to withdraw from and abandon said assault upon or difficulty with Ferguson, and succeeding in so doing, and that said Edgar Bailey knew and believed, and had reasonable cause to believe from all the facts and circumstances, that said James Forsha had so withdrawn from said assault and difficulty, and that thereafter said Edgar G. Bailey, from and on account of motives, purposes, or incentives actuating his own mind and heart, and without the consent, aid, or encouragement of Forsha, shot and killed said Albert Ferguson, then in that case you should find the defendant not guilty."

It will be observed that instruction No. 4 given by the court fully covered the law as

applicable to the question of defendant's aiding and abetting in the commission of the homicide. Instruction No. 8 given by the court was the only instruction to which the defendant was entitled upon the subject of withdrawing from the difficulty. We are unable to assent to the legal principles announced in the refused instructions as quoted. If the defendant aided, abetted, or encouraged Bailey in the commission of this homicide, as some of the witnesses put it, at the time the difficulty was in progress, commanding Bailey to "shoot him; shoot him; kill the son of a bitch"—the mere fact that he undertook to flee from the scene of the difficulty before the fatal shot was fired by no means can relieve him of responsibility for his participation in the commission of the act. We are unwilling to sanction as the law of this state that a defendant can first, by words and actions, put in operation a difficulty, or aid and abet in the commencement of it, and, after having by his course of conduct brought the principal actors into a deadly contest, that he can then flee from the scene of the struggle and thereby relieve himself absolutely from the results of such fatal difficulty. Such is not the law of this state, and the court very properly refused the instructions requested upon that subject.

Many other objections to the admission of testimony are presented by the record. Upon a careful consideration of them, we think they are without merit.

We have fully considered the questions involved in this case as presented by the record before us, and, if the jury believed the testimony as introduced by the state, we are deeply impressed with the exceedingly great tenderness manifested by the jury in fixing the punishment of the defendant. In view of the results of the finding of the jury in the companion case of *State v. Bailey*, which was fully supported by the evidence, we confess that upon the showing as developed in this cause, which, as to the essential elements of the crime charged, was equally damaging, that there is little ground for complaint on the part of the appellant at the conclusions reached by the jury.

Finding no error in the record prejudicial to the rights of the defendant, the judgment should be affirmed, and it is so ordered. All concur, except BURGESS, P. J., not sitting.

LOEVENHART v. LINDELL RY. CO.

(Supreme Court of Missouri, Division No. 2.
July 3, 1905.)

1. APPEAL—REVIEW—GRANT OF NEW TRIAL.

The action of a trial court in granting a new trial because he believes injustice has been done through the rendition of an inadequate verdict in an action for damages will only be interfered with by the appellate court when the exercise of unwise discretion in such action is clearly shown.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 3873.]

2. NEW TRIAL—PERSONAL INJURIES — INADEQUATE VERDICT.

Where, in an action against a street railway for injuries inflicted on plaintiff, a passenger on one of defendant's cars, by its employes, the evidence tended to show that plaintiff was struck on the head by defendant's motorman with an iron controller, and struck on the face by the conductor of the car, and thrown therefrom into the street, receiving a scalp wound four inches long on the head, and severe bruises on the side of his body, there was nothing to indicate an unwise discretion on the part of the trial court in setting aside as inadequate a verdict for plaintiff for one dollar.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 151, 152.]

Appeal from St. Louis Circuit Court; Horatio D. Wood, Judge.

Action by Jacob Homer Loevenhart against the Lindell Railway Company. Judgment for plaintiff, and, from an order granting plaintiff a new trial, defendant appeals. Affirmed.

Boyle, Priest & Lehmann and Geo. W. Easley, for appellant. Nathan Frank, Richard A. Jones, and Max W. Oliver, for respondent.

GANTT, J. This is an appeal from the order of the circuit court of the city of St. Louis granting a new trial to the plaintiff.

The action was begun September 16, 1897, and on January 6, 1898, plaintiff filed an amended petition, wherein he states, in substance, that on the 23d day of July, 1897, he entered one of the defendant's cars for the purpose of being transported as a passenger from Seventh and Washington avenue to his home, and defendant agreed, and it became its duty, as a common carrier, to well and safely carry and transport plaintiff from said Seventh and Washington avenue to his place of destination on said line of cars; but that the defendant, in violation of its contract aforesaid, and unmindful of its duty, failed to safely carry the plaintiff, but, on the contrary, while upon said car as such passenger, plaintiff was wickedly, brutally, and unlawfully assaulted by the conductor and motorman of said car, and forcibly ejected therefrom, and by said assault plaintiff was bruised and marked for life; that he has suffered great pain in mind and body, and laid out and expended considerable sums of money for physicians, surgeons, and medicine, to his damage to the sum of \$5,000, wherefore he prays judgment for said sum of \$5,000, his actual damages, and \$5,000 punitive damages, and costs. Defendant in its amended answer denies each and every allegation in the amended petition; and for another defense stated that at the time of the commission of the alleged grievance plaintiff entered the car in a drunken condition, and, with two companions, took seats in the car, and the plaintiff then and there began to vomit upon the side, seats, and floor of said car, and the conductor, thereof, quietly and without unnecessary force, removed plaintiff to the rear platform

of said car, so that he could vomit over the side of the car, and not befoul the same to the disgust and inconvenience of the passengers then upon or thereafter to come upon said car. When plaintiff had been removed to the rear platform, his two companions followed, and, after using loud, profane, and threatening language toward the conductor, plaintiff and his two companions began to assault, strike, and beat said conductor, and, except for his acts in self-defense, and with the assistance of the motorman, said conductor would have suffered great bodily harm, and that defendant's said servants only acted in necessary self-defense against the assault of said plaintiff and his two companions, and in putting said plaintiff off of the car for his said misconduct they used no more force than was necessary. The reply was a general denial. The cause was tried before a jury on the 4th of May, 1902, and resulted in a verdict for plaintiff, assessing his actual damages at one dollar. No punitive damages were given. A motion for a new trial was filed in due time, assigning, among other reasons, that the verdict was against all instructions of the court, and on this ground the court set aside the verdict of the jury and granted a new trial. It is from this order that the appeal is now here, and the only question is the propriety of the action of the court in granting plaintiff a new trial.

The evidence tended to prove that on July 23, 1897, about 9:30 o'clock in the evening, the plaintiff with two companions boarded a street car operated by the appellant company in St. Louis. They took their seats, they paid their fare to the conductor in charge, but soon thereafter the plaintiff was taken sick and began to vomit. The testimony of appellant witness was to the effect that the plaintiff vomited on the sides and floor of the car, and refused to retire to the rear platform at the request of the conductor, who thereupon with the use of force removed the plaintiff to the rear platform; that thereupon the plaintiff attacked the conductor, and was assisted by his two companions; that the conductor, with the assistance of the motorman, defended himself, and ejected plaintiff and his two companions from the car. On the other hand, plaintiff's witnesses testified that plaintiff was at no time the aggressor, but was given no opportunity to retire to the rear platform, but was dragged thereto by the conductor, mistreated, and struck in the face by the conductor, and on the head with an iron car controller in the hands of the motorman; that he was struck in the face by the conductor, and thrown from the car into the street, and received a scalp wound four inches long on the head, and severe bruises on the side of his body. His injuries were dressed by Dr. Heine Marks.

1. It is insisted by the defendant that the circuit court, in setting aside the verdict of

the jury in favor of the respondent and assessing his damages at one dollar, sought to exercise a discretion which it did not possess. It is urged by counsel for the defendant that, inasmuch as instruction No. 4 for the plaintiff authorized the jury to take into account the extent of the injury inflicted by the servants of the defendant, the physical pain and humiliation, if any, endured by the plaintiff, and by their verdict award him such sum as would compensate him therefor, not to exceed the sum of \$5,000, any sum returned by the jury from one cent up to \$5,000 could not be otherwise than in conformity with the instruction, and therefore their verdict could not have been against their instruction from the court, and cases of this court are cited wherein this court has refused to interfere with the verdict on the ground of its inadequacy when the circuit court has refused to grant a new trial on that account. The question presented to this court on this appeal is whether the action of a trial court, which has heard the testimony and observed the conduct of the jury, in granting a new trial because he believes that injustice has been done, should be interfered with by this court. In *Lockwood v. Insurance Company*, 47 Mo. 50, it was said by this court: "Trial courts in reviewing verdicts are not subject to the same rules that govern appellate courts. They may weigh the evidence, and, if they think injustice has been done, grant a new trial, in cases where they would not be justified in taking an issue from the jury, and where appellate courts should not interfere." In *Reid v. Piedmont Insurance Co.*, 58 Mo. 429, the respective functions of a trial and an appellate court in the granting of a new trial was pointed out by Judge Wagner. He said: "The trial courts have opportunities which we have not. In witnessing a proceeding of a trial, they are put in possession of facts which we cannot possibly obtain. They see the witnesses, can form an opinion respecting their veracity, can observe whether they are biased or prejudiced, can notice their willingness or unwillingness, and a great many other circumstances which it is impossible to transfer to paper. They can also form a correct conclusion as to whether any improper influences bear on the jury in producing the verdict. All these considerations render it peculiarly proper that the question of granting new trials on account of the verdict being against the weight of the testimony should be exclusively exercised by the court trying the cause, and, where the trial court is of the opinion that the verdict is not supported by the evidence or is against the weight of evidence, it should never hesitate in exercising the power in granting the aggrieved party a new trial." In *Chouquette v. Electric Ry. Co.*, 152 Mo. 257, 53 S. W. 897, there was a verdict for one cent, and on motion of the plaintiff the verdict was set aside, and from that order the defendant

appealed to this court. The contention there was by the defendant that a verdict for one cent ought to be regarded as a verdict for the defendant, and that there was nothing in the record to support the reason given for granting the motion for new trial; but this court said: "It is the peculiar and special duty of trial courts to grant new trials where the verdict is arbitrary or manifestly and clearly wrong, or where it appears that the verdict was the result of passion, prejudice, or misconduct on the part of the jury." Citing numerous cases of this court, it further said: "The jury having found by their verdict that plaintiff's injuries were occasioned by the negligence of the defendant, it clearly devolved upon them, under the instructions of the court, to award her reasonable compensation therefor, yet, in this record of the court's instructions and the evidence touching the natural character and extent of plaintiff's injuries, assessed her damages at one cent, after finding that she was entitled to damages on account of defendant's negligence;" the court saying: "This precise question underwent adjudication in this court in *Lee v. Publishers, Geo. Knapp & Co.*, 137 Mo. 385, 38 S. W. 1107, and it was there held, in circumstances like the present, that this court will not interfere with the discretion of the trial court in setting aside the verdict of the jury, unless it satisfactorily appears that such discretion had been arbitrarily and unreasonably exercised." In *Haven v. R. R. Co.*, 155 Mo. 216, 55 S. W. 1035, the conclusion was reached that the acts of 1891 and 1895 only bring the ruling of the trial court on the motion for new trial to this court for review before a final judgment, instead of afterwards, as was formerly the case; that no other change in the procedure was contemplated by those acts. "The case is here on appeal, and the usual and immemorial appellate practice must obtain. It is here for review on matters of law, not on the weight of the evidence, nor for this court to substitute its discretion for the discretion of the trial court." The same conclusion practically was reached in *McCloskey v. Pulitzer Publishing Co.*, 163 Mo. 22, 63 S. W. 99, in which last-named case the statement made in *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076, was quoted with approval, "that there is no more important power for the promotion of justice than that intrusted to the trial court in the matter of granting a new trial. It is a power to be exercised with great care, and no one is so well informed as to how the discretion is to be used as the trial judge. It is only when it very clearly appears that a wise discretion has not guided his action that an appellate court should interfere." These cases indicate sufficiently the rule which has always governed this court when called upon to interfere with the discretion of the trial court in granting a new trial. It is not our province in this case to weigh

the evidence and determine which of the respective parties should have recovered on the trial, but we are clear that there is nothing to indicate an unwise discretion on the part of the circuit court in setting aside a verdict for one dollar, where the evidence tended to show such substantial injuries.

The judgment of the circuit court in granting a new trial is affirmed. All concur.

ISENHOUR v. BARTON COUNTY.

(Supreme Court of Missouri. June 28, 1905.)

1. COUNTIES — WARRANTS — WHEN INTEREST COMMENCES TO RUN.

Under Rev. St. 1899, § 3705, providing that creditors shall be allowed to receive interest at the rate of 6 per cent., when no other rate is agreed on, for all moneys, after they become due and payable, on any written contract, a county warrant providing for no rate of interest bears interest at 6 per cent. after presentation to the treasurer of the county and failure to pay because of there being no money in the treasury.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, § 253.]

2. SAME — ASSIGNMENT OF WARRANT — ASSIGNMENT IN BLANK—RIGHTS OF ASSIGNEE—INTEREST.

Rev. St. 1899, § 6798, provides that no county treasurer shall pay a warrant drawn on him unless it be presented for payment by the person in whose favor it is drawn, or by his assignee, and that, when presented for payment, if there be no money, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same. Section 6799 prescribes a form for an assignment of such warrant. "For value received, I assign the within warrant to A. B. this _____ day of _____, 19—. Signed"—and declares that no blank indorsement shall transfer any right to a warrant, nor authorize the holder to fill up the same. Section 6808 makes it a misdemeanor for a county treasurer to violate any of such provisions, and section 6771 declares that a county treasurer shall keep a book in which he shall enter all warrants presented: stating the date, amount, in whose favor drawn, by whom presented, and the date when presented. Section 3705 provides that, when no rate of interest is provided for, written contracts shall bear interest at the rate of 6 per cent. after they become due and payable. *Held*, that where a county warrant was assigned in blank, and delivered to an assignee for value, and he presented it in person for payment, which was refused, as shown by the indorsement of the county treasurer on the back of the warrant and on his warrant register, interest did not commence to run on the warrant from the time of its presentation, owing to the fact that there was no proper assignment.

3. SAME—ACTION ON WARRANT—BURDEN OF PROOF.

In an action on a county warrant by the assignee thereof, in order to entitle him to recover interest from the time of presentation of the warrant and refusal of payment for lack of funds, the burden was on plaintiff to show that he had complied with all the requirements of law.

Brace, C. J., and Marshall and Fox, JJ., dissenting.

In Banc. Appeal from Circuit Court, Barton County; H. C. Timmonds, Judge.

Action by Simeon Isenhour against Bar-

ton county. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Thos. W. Martin and E. L. Moore, for appellant. Thurman, Wray & Timmonds, for respondent.

BURGESS, J. This is an action upon 95 warrants issued by the county of Barton to different persons, and sold and delivered to the plaintiff. The petition was filed on the 5th day of April, 1902, and contained a separate count upon each warrant. In its answer defendant offered to let judgment go for principal and interest upon all counts except the 10th, 12th, 14th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, and 42d. As to these defendant offered to let plaintiff take judgment on each of them for the amount of the principal of the warrants, but denied defendant's liability for any interest thereon. The court, however, rendered judgment upon all the warrants, including interest from the time of their presentation and demand of the county treasurer of payment of the warrants, so that the only question for this court to determine on this appeal, under the facts, is as to whether the trial court erred in rendering judgment against the county for the interest of the warrants sued on in the counts numbered as before stated. As the same questions are involved with respect to all the warrants mentioned in these counts of the petition, any one of them may be taken as an illustration. We will therefore take the warrant sued upon in the twelfth count, which is numbered 1,699. It was issued to Lee Livingston by the county court of said county on February 8, 1898. This warrant was presented to the county treasurer for payment, as shown by his warrant register and his indorsement on the back of the warrant, on the 11th day of February, 1898, by the plaintiff, Simeon Isenhour, and was by the treasurer protested for the want of funds with which to pay it. When this warrant was presented to the treasurer by Isenhour there were two blank printed assignments (so called for convenience) on the back of it, the first of which was signed by Livingston, the payee, as follows: "For value received — assign the within warrant to — this — day of — 1—. Lee Livingston." After the institution of this suit, and after the warrant was presented to the treasurer by Isenhour, on the 11th day of February, 1898, for payment, this blank form was filled out by the payee, Livingston, so as to read at the time of trial as follows: "For value received I assign the within warrant to Simeon Isenhour, this 11th day of February, 1898. Lee Livingston."

Plaintiff's contention is that the warrant drew interest from the date of its presentation and demand of payment, on the 11th day of February, 1898. Defendant contends that under sections 6798 and 6799, Rev. St. 1899, the warrant never commenced to draw

interest, because it was never presented for payment by the payee, or by any other person to whom it had been assigned by him, in accordance with the requirement of the statute; in other words, it had never been presented for payment by any person who had the right to demand and receive payment. No question is raised respecting the pleadings.

The warrant now under consideration, and which was introduced in evidence by plaintiff, is as follows:

"\$172.40. State of Missouri. No. 1,699. The Treasurer of the County of Barton Pay to Lee Livingston One hundred seventy-two and ⁴⁰/₁₀₀ Dollars out of any money in the Treasury belonging to the County Revenue Fund. Given at the courthouse in Lamar, Mo., this 8th day of February, A. D., 1898. By order of the County Court. Wm. P. Scott, President. Attest: Chas. H. Smith, Clerk. By Geo. Rumsey, Deputy."

The indorsements on the back of said warrant at the time of trial were as follows:

"The within warrant presented for payment, and no money in the treasury for that purpose, this 11th day of Feby. 1898. Douglass Inglish, County Treasurer.

"For value received I assign the within warrant to Simeon Isenhour, this 11th day of Feby. 1898. Lee Livingston.

"For value received — assign the within warrant to — this — day of —, 1—."

Upon these facts the court rendered judgment on the twelfth count in the petition (being on warrant numbered 1,699) in favor of plaintiff and against the defendant for the sum of \$216.51, which included interest from the date of presentation at the rate of 6 per cent. per annum. There was embraced in the same judgment, as shown by the record, the same kind of judgment respecting all the other warrants described in the petition; that is, judgment was rendered in favor of the plaintiff for the amount of all the warrants, with interest at 6 per cent. per annum from the time of their presentation for payment up to the time of rendition of the judgment.

The only error complained of is as to the action of the trial court in allowing interest upon said contested warrants, which had been sold and assigned to plaintiff by blank indorsements.

In support of its contention defendant relies on sections 6798, 6799, 6808, Rev. St. 1899, which read as follows:

"Sec. 6798. No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same.

"Sec. 6799. All warrants drawn on the treasurer of any county shall be assignable, and every assignment of any such warrant shall be in the following form: For value received, I assign the within warrant to A. B. this — day of —, 19—. Signed C. D. No blank indorsement shall transfer any right to a warrant, nor shall it authorize any holder to fill up the same."

"Sec. 6808. Any county treasurer violating any provisions of this article shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished," etc.

Plaintiff, in support of the judgment of the court, relies on section 6771, Rev. St. 1899, which is as follows:

"Sec. 6771. He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court * * * stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment."

County warrants are creatures of the statute, and can only be issued in accordance therewith, but, when no rate of interest is prescribed upon their face, they bear interest at the rate of 6 per cent. per annum, as provided by section 3705, Rev. St. 1899, after presentation to the treasurer of the county by which issued, and failure to pay because of there being no money in the treasury for their payment. *Robbins v. Lincoln County Court*, 3 Mo. 57; *Skinner v. Platte County*, 22 Mo. 438; *State ex rel. v. Trustees*, 61 Mo. 155. Such warrants are merely evidences of indebtedness, nonnegotiable, and the Legislature had the power and authority to prescribe their form, and by whom they should be signed and attested, and prohibit their payment by the county treasurer of the county issuing them unless presented for payment by the person in whose favor drawn, or by his assignee, executor, or administrator, as well as also to provide that, when any such warrant shall be presented for payment, if there be no money in the treasury for the purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same. It also had the power and authority to provide that such warrants should be assignable, to prescribe the form thereof, and to provide that "no blank indorsement shall transfer any right to a warrant, nor shall it authorize any holder to fill up the same." All of these things the Legislature did, as is shown by sections 6797, 6798, 6799, Rev. St. 1899; and upon the theory that these statutory provisions are valid, and the act of the Legislature with respect to said warrants exclusive, defendant asked the court, sitting as a jury, to declare the law to be as follows: "The court declares

the law to be that if the court finds from the evidence that the warrants in question were not presented to the treasurer of the county for payment by the original payees therein, but that they were sold, transferred, and delivered by such payees to plaintiff by blank assignment—that is, by writing their names on the back of such warrants, but not filling in the name of the plaintiff or the dates of such transfers—and were then in that condition produced by the plaintiff to the treasurer for payment, then such warrants did not commence to draw interest, and the finding will be for the defendant upon the issue involved." This declaration of law was refused, which defendant insists was error. That a county warrant only draws interest from the time of its presentation to the county treasurer for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator, agent or clerk, and payment refused because of there being no money in the treasury with which to pay it, is too clear for argument; but in the case at bar the plaintiff, Isenhour, presented the warrant and demanded its payment in person, when, although the equitable holder of the warrant, he was not its assignee, as the assignment was in blank, and the legal title to the warrant was still in the payee, Lee Livingston. Under such circumstances, plaintiff had no legal title to the warrant, or authority to even fill the blank by inserting his name therein, because the statute (section 6799) expressly provides that "no blank indorsement shall transfer any right to a warrant, nor shall it authorize any holder to fill up the same."

The indorsement on the back of the warrant by the county treasurer as follows, "The within warrant presented for payment, and no money in the treasury for that purpose, this 11th day of February, 1898," was in express violation of the statute and void, and for which he was guilty of a misdemeanor, and liable on conviction to be punished according to law and to be removed from office. Section 6808, Rev. St. 1899. This could not, therefore, in the remotest degree affect in any way the rights of the parties to this action.

Plaintiff contends that it is apparent that the first clause of section 6798 is intended to avoid payment of warrants to persons who may have become possessed of them without right, in which event the county would be compelled to pay a second time, to which we may be permitted to add, and to prevent county officials from receiving in payment of the revenues due the counties such warrants at their face value, holding them, and thereafter turning them over to the counties upon their settlements therewith of such revenues, with the accumulated interest thereon, which could not well be done in case the warrants be presented by the payee, his legal representative or assignee. We do not see that section 6771, Rev. St.

1899, which provides that the treasurer shall keep a book in which he shall make an entry of all warrants presented to him for payment which shall have been legally drawn, stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented, and that all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment, is in any way out of harmony with what we have said.

With respect to the contention of plaintiff that there was no evidence that he was not authorized by the legal owner of the warrant to present it for payment, and in the absence of such evidence the presumption prevails that he was authorized to present it for such purpose, or the treasurer would not have protested it, as the law presumes the treasurer did his duty, we are unable to agree, for the following reasons: In the first place, the treasurer violated his duty in recognizing the warrant under the circumstances, and indorsing upon it "Presented for payment, and no money in the treasury for that purpose." In the second place, as plaintiff was in possession of the warrant at the time, and in person presented it for payment, it will be presumed that he was its owner, and acting for himself, and not for some other person. Beside, he is prosecuting this suit as owner, which fact would seem to be inconsistent with the idea or presumption that another person was the owner, and he was acting for him.

The statute with respect to the county warrant under consideration is in all of its material provisions as much a part thereof as if it were written or printed upon the face of it, and is as binding upon the payee therein and the plaintiff, as its holder, as if they had expressly agreed to all of its provisions. *State ex rel. Wolff v. Berning*, 74 Mo. 87; *Wanschaff v. Benefit Society*, 41 Mo. App. 206; *Reed v. Painter*, 129 Mo. 674, 31 S. W. 919. And as a condition to plaintiff's recovery of interest upon such warrant and the others in contest, it devolves upon him to show that he had complied with the terms of the statute in regard thereto. This is an action at law, as distinguished from one in equity, and is, of course, governed by the law in such cases.

Our conclusion is that the judgment should be reversed, and the cause remanded, with directions to the trial court to enter up judgment in favor of plaintiff for the amount of the face of the warrants only.

GANTT, VALLIANT, and LAMM, JJ., concur. BRACE, C. J., and MARSHALL and FOX, JJ., dissent.

MARSHALL, J. (dissenting). This is an action to recover on 95 county warrants, jury scrips, etc., issued by the defendant county. The petition contains 95 counts—one for each

of the demands sued for. Demand and protest for nonpayment are alleged on February 11, 1898, and interest at 6 per cent. is asked from that date. An assignment is also alleged of said demands to the plaintiff. The answer consents to judgment for plaintiff as prayed upon all the counts except the 10th, 12th, 14th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, and 42d; and as to these the defendant consents to judgment for the principal of the demands, but denies that it is liable for interest thereon. During the trial the parties admitted that the warrants sued upon in said counts were all presented by the plaintiff to the county treasurer, at the date alleged, for payment; that at said time said warrants were indorsed in blank by the original payees, and had been by the payees previously sold to the plaintiff, but the name of the plaintiff as assignee was not written in the blank assignment, which was in the form prescribed by the statute and printed on the back of the warrant, nor was the date of the assignment filled in the space left therefor; that after the institution of this suit the original payees wrote in the blank spaces in said printed assignments the plaintiff's name, as the assignee, and the 11th of February, 1898, as the date of the assignment. It was also shown by the evidence that such warrants were presented by the plaintiff to the county treasurer on the 11th of February, 1898, and that the treasurer indorsed on each, "Within warrant presented for payment, and no money in treasury for that purpose, this 11th day of February, 1898." The circuit court entered judgment for the plaintiff for the principal of each of said demands, with 6 per cent. interest thereon from the 11th day of February, 1898. From this judgment the defendant appealed.

The only error assigned is the action of the trial court in allowing interest upon the warrants that had been assigned to plaintiff by blank indorsements. In support of its contention defendant invokes sections 6798, 6799, 6808, Rev. St. 1899, which provide, respectively, as follows:

"Sec. 6798. No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same.

"Sec. 6799. All warrants drawn on the treasurer of any county shall be assignable, and every assignment of any such warrant shall be in the following form: For value received, I assign the within warrant to A. B. this — day of — 19—. Signed C. D. No blank indorsement shall transfer any right to a warrant, nor shall it authorize any holder to fill up the same."

"Sec. 6808. Any county treasurer violating

any provisions of this article shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished," etc.

The plaintiff supplements these references by section 6771, Rev. St. 1899, which is as follows: The treasurer shall "keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment * * * stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented, and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment."

It is conceded by the parties that the rule has been, in this state, since 1831, that county warrants bear interest from the date of their presentment for payment, and refusal to pay because of no money applicable thereto. *Robbins v. Co. Court*, 3 Mo. 57; *Skinner v. Platte Co.*, 22 Mo. 438; *State ex rel. v. Trustees*, 61 Mo. 158.

The defendant contends that as a blank indorsement does not transfer any right to a warrant under the statute, and as the indorsement of these warrants was in blank when they were presented for payment, and as they were presented by the plaintiff, and not by the original payees, therefore there was no such presentment as would have authorized the treasurer to pay them, and hence, the transfer and presentation being void, no interest can be recovered on such warrants. Counsel for defendant admit that warrants need not be presented for payment by the original payee in person, but may be presented by a clerk, agent, or attorney of the payee; and this is also clearly contemplated by section 6771, Rev. St. 1899, which requires the treasurer to note "by whom presented." In other words, defendant claims that the presentation of these warrants to the treasurer by the plaintiff did not inure to his benefit, and could not start the running of interest in either his favor or that of the original payee—not in his favor because, the indorsement being in blank, it conferred no right in him to the warrant, or to demand payment thereof in his own favor, and not in favor of the original payee, because no presentation in his favor by the plaintiff was made or authorized to be made. Whatever the purpose of the lawmakers may have been in enacting the provisions of the law quoted, it is clear that they did not have in mind any regulation as to interest upon such warrants. Such warrants are evidences of county indebtedness, and bear interest at the rate of 6 per cent. from demand of payment, under the general statute (section 3705, Rev. St. 1899). Under this statute a demand may be made by the owner of the debt, whether he be the original creditor, or his assignee or legal representative, or the agent of any of them as such owner. And there is no difference as to county warrants. There was concededly a demand made upon the treasurer for the

payment of these warrants on the 11th of February, 1898. That demand was made by the plaintiff. The blank indorsement was insufficient to vest a legal title to the warrants in the plaintiff. Therefore the legal title was then in the original payees. But although the legal title was in the original payees, it was a mere naked legal title, for the plaintiff had paid his money to the original payees for the warrants, and therefore was the owner thereof, in equity, and could have maintained a suit in equity to compel the original payees to transfer the legal title to him. *Craig v. Mason*, 64 Mo. App., loc. cit. 347. In making the demand, therefore, the plaintiff was not a mere volunteer or intermeddler.

It has already been pointed out that the statutes relating to county warrants make no provision whatever for the payment of interest thereon, but that this court has held that they do bear interest, and that the general statute in reference to interest is as applicable to such warrants, or the debts they evidence, as to any other character of debts. The Legislature evidently intended that such should be the case, and the failure to provide specially for interest was not a mere *casus omisus*. For ever since 1865 there has been a provision upon the statutes of this state in reference to city warrants similar to the provisions herein set out as to county warrants, and the protesting of the same when there was no money to pay them, except that it was further provided that such warrants so protested should draw legal interest until funds for the payment thereof should be set apart therefor. Rev. St. 1865, c. 42, § 11; *Wagner's St.* 1872, p. 1825, § 11; Rev. St. 1879, p. 1002, § 5070; Rev. St. 1889, p. 514, § 1929; Rev. St. 1899, p. 1441, § 6155. It is obvious, therefore, that the Legislature intended that the general statute in reference to interest should govern such cases. The statute, in referring to interest (section 3705, Rev. St. 1899), provides that, in the absence of an agreement between the parties, interest shall begin to run after the debt becomes due and demand shall have been made. But the statute contains no provision or regulation as to the demand. Hence the general rules of the common law as to demand apply, for the common law is the law in this state, except so far as it has been modified by statute. Section 4151, Rev. St. 1899. The general rule of the common law is that a demand must be made by the party to be benefited thereby, or by his duly authorized agent. 9 Am. & Eng. Enc. Law (2d Ed.) p. 213; 16 Am. & Eng. Enc. Law (2d Ed.) p. 1022. To this general rule there are well-recognized exceptions. For instance, if the demand is made by a third person, the debtor has a right to require reasonable evidence of the authority to make it, and, if he fails to do so at the time the demand is made, he cannot be heard afterwards to defend on the ground that such person had no

authority to make the demand. *Id.* p. 213. Or if the refusal to pay is based upon some other ground than the right of the person making the demand to do so, he cannot be heard afterwards to defend upon such want of authority. *Spence v. Mitchell*, 9 Ala. 744; *Connah v. Hale*, 23 Wend. 463; *West v. Tupper*, 1 Bailey (S. C.) 193; *Railroad v. Jewett*, 16 Ind. 274; *Robertson v. Crane*, 27 Miss. 362, 61 Am. Dec. 520; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Baxter v. McKinlay*, 16 Cal. 76; *Payne v. Smith*, 12 N. H. 34; *Grafton v. Follansbee*, 16 N. H. 450, 41 Am. Dec. 736. Or if the debtor acknowledges in writing that a demand has been made upon him, he cannot afterwards object that the person making the demand had no authority to do so. *Levistones v. Marigny*, 13 La. Ann. 353; *Barnard v. Bartholomew*, 22 Pick. (Mass.) 291. The main object of a demand is to give the debtor an opportunity to pay the debt, and thereby save the costs of a suit that might be brought against him, or to save the payment of interest. The debtor can refuse to pay to one who is not the original creditor, or who is not authorized by the creditor to make demand therefor, but he must put his refusal upon that ground, because if he does the defective demand could then be remedied at once, or the authority be shown to act for the creditor. These principles of law apply as well to county warrants as to debts due by one citizen to another, for the Legislature have not seen fit to make any other rule, but have left the matter subject to the general law; and it is plain that they so intended, for they expressly changed the law as to the blank assignment of such warrants, and did not change it in any other respect, and hence, upon the principle of, "*Expressio unius est exclusio alterius*," it follows that they did not intend to change the law in any other respect, and therefore the courts have no power to do so by construction.

But aside from this, the demand in this case was good at common law. It was good as to the plaintiff, because he was the equitable owner of the warrants, and therefore had a right to make the demand. When he paid his money to the payees for the warrants, he had a right to use their names both for the purpose of making a demand, and of bringing suit to recover the debt. At common law a suit upon an assigned chose in action ran in the name of the assignor to the use of the assignee. In other words, as choses in action were not assignable at common law, only the person who had the legal right was originally entitled to sue, and the person who had only an equitable right could not do so. *Enc. Pl. & Pr.* col. 15, p. 484. This rule did not obtain in equity, however. Therefore "at an early day courts of law began to recognize the equitable rights of assignees and others, and, to obviate the injustice to them resulting from a rule that only the person having the legal title

can sue, the practice obtained of allowing the person equitably entitled to sue in the name of the person legally entitled. In such cases the person in whose name the suit is brought is called the record, nominal, or legal plaintiff, and the person for whose benefit the action is prosecuted is called the equitable, beneficial, or use plaintiff." 15 *Enc. Pl. & Pr.* p. 487. And this rule obtains in sister states. *Skinner v. Somes*, 14 Mass. 107; *Taylor v. Reese*, 44 Miss. 93; *Page v. Thompson*, 43 N. H. 373; *Caldwell v. Hartupee*, 70 Pa. 74. At common law the court dealt only with the record plaintiff, who was liable for costs, and who alone could appeal, and if he died the suit abated; and the death of the use plaintiff had no effect upon the action, nor was his interest deemed necessary to be shown, it being held sufficient to show a right to recover in the record plaintiff. 15 *Enc. Pl. & Pr.* pp. 488, 489. But the modern doctrine is that the use plaintiff controls the litigation, and the record plaintiff cannot interfere or dismiss the suit or release the cause of action or receive satisfaction of the judgment. *Id.* pp. 491, 492. "Whenever it is necessary to the assertion of the rights of the real party in interest, he may bring suit for his own benefit in the name of the person having the legal title and right to sue. And he may do this even without the latter's authority or against his consent, upon indemnifying him against costs. It is well established that an assignee may sue in the name of the assignor; it being held that the assignor, by the fact of the assignment, authorizes the assignee to use his name in any legal proceedings that may become necessary to give full effect to the assignment." 15 *Enc. Pl. & Pr.* p. 493 et seq., and cases cited. These principles have also received the approval of this court. *Chauvin v. Labarge*, 1 Mo. 557; *Thomas v. Cox*, 6 Mo. 506; *Wooden v. Butler*, 10 Mo. 716; *Alexander v. Schreiber*, 13 Mo. 271.

The inevitable and logical consequence flowing from these rules is that the assignee of an unassignable chose in action, or of an imperfectly executed assignment of a chose in action, has a right to use the assignor's name in any steps that may be necessary to give full effect to the assignment. One of such steps is to demand and receive payment in the name of the assignor. Another step is to make a demand so as to start the running of the interest.

The abstract of the record in this case shows that it was admitted in open court during the progress of the trial that the warrants were presented for payment by the plaintiff, and further shows that they were indorsed by the county treasurer. "Within warrant presented for payment, and no money in treasury for that purpose." It does not appear whether the plaintiff demanded payment in his own name and right, or in the name of the original payee. But

no objection was made at the time to the authority of the plaintiff to make demand. On the contrary, it appears affirmatively that the demand was admitted, and that payment was refused solely on the ground that there was no money in the treasury to pay them. There can be no doubt that, if the defendant was a private citizen, he could not be heard now to say that no sufficient or legal demand had been made. And as hereinbefore shown, the Legislature has left counties to be governed by all the rules of law that apply to private persons, except as to blank assignments of warrants. The provision of the statute in this respect places blank assignments of warrants in exactly the same position that choses in action were at common law; that is, prohibits such assignments. It has been above pointed out that even according to the original, strict common law, an assignee of a chose in action had a right to use the name of the assignor for all the purposes that were necessary to fully carry the assignment into effect. This being true, a county warrant that has been assigned in blank stands upon the same footing, and is governed by the same rules. The result is that the defendant here cannot be heard to now say that no sufficient or legal demand was made upon it, and that the interest began to run from the date the warrants were protested for nonpayment.

For these reasons, I think the judgment of the circuit court should be affirmed, and therefore dissent from the opinion of the majority in this case.

BRACE, C. J., and FOX, J., concur in what is here said.

FINK v. BARTON COUNTY.

(Supreme Court of Missouri. June 28, 1905.)

In Banc. Appeal from Circuit Court, Barton County; H. C. Timmonds, Judge.

Action by O. H. Fink against Barton county. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Thos. W. Martin and E. L. Moore, for appellant. Thurman, Wray & Timmonds, for respondent.

BURGESS, J. This is a companion suit to that of *Isenhour v. Barton County* (just decided) 88 S. W. 759, on scrips issued by defendant county. The petition in this case contains 53 counts, one upon each of the warrants or scrips. The answer consents to judgment for the principal and interest upon all counts, except 1st, 5th, 8th, 14th, 15th, 16th, 17th, 18th, 23d, and 43d, and consents to judgment for the amount of the principal of warrants named in said counts but denies liability for the interest thereon.

There is no substantial difference between this case and the case above referred to, and

for the reasons therein stated the judgment is reversed and the cause remanded, with directions to the court below to enter judgment in favor of the plaintiff for the amount only of the principal of the warrants and scrips mentioned in said contested counts.

GANTT, VALLIANT, and LAMM, JJ., concur. BRACE, C. J., and MARSHALL and FOX, JJ., dissent.

MARSHALL, J. (dissenting). This is a suit to recover on 53 warrants, jury scrips, etc., issued by defendant. The petition contains 53 counts—one on each of said warrants, scrips, etc. The answer consents to judgment for the principal and interest on all the counts except the 1st, 5th, 8th, 14th, 15th, 16th, 17th, 18th, 23d, and 43d, and consents to judgment for the principal of the demands in said counts, but denies liability for interest thereon. There is no substantial difference between this case and the case of *Isenhour v. Barton County* (No. 11,518, just decided) 88 S. W. 759.

For these reasons, I think the judgment of the circuit court should be affirmed, and therefore dissent from the opinion of the majority in this case.

BRACE, C. J., and FOX, J., concur in what is here said.

WADDELL v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri. June 26, 1905.)

1. STREET RAILROADS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

A woman of good eyesight and hearing, who walked across a street car track, in broad daylight, oblivious to her surroundings, and who was struck by a car which she would have seen approaching, had she been on the lookout, was guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 207, 208.]

2. SAME — DISCOVERED PERIL—QUESTIONS OF FACT.

In an action against a street railroad for injuries to a pedestrian, the motorman testified that he had shut off the power, and was standing with his hand on the brake wheel; that he noticed plaintiff, unmindful of the presence of the car, when she was 12 or 15 feet from the track, and the car was 25 feet from the place of collision; that he shouted to plaintiff, and started to apply the brakes with all possible speed, whereupon plaintiff tried to run across ahead of the car. An expert witness testified that, under the conditions described, the car could have been stopped in 15 feet. Held, that an issue of fact was raised, as to whether the motorman could have stopped the car, by the exercise of a reasonable effort, after he observed plaintiff's peril.

3. SAME—PROXIMATE CAUSE.

The negligence of a pedestrian who starts to cross a street car track, heedless of the approach of a car, is superseded, as a proximate cause of the injury which she sustains in being struck by the car, by the negligence of the

motorman, where the latter, knowing of the former's peril in time to prevent the injury, negligently fails to do so.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 219, 220.]

4. SAME — EVIDENCE — INFLAMMATORY STATEMENTS.

In an action against a railroad for injuries to a pedestrian, testimony that it was a good thing that the motorman did not get out of the car after it stopped, as he would have been mobbed, was extraneous to the issues, and highly prejudicial to defendant.

5. TRIAL — OBJECTIONS TO EVIDENCE — IMPROPER ANSWERS—TIME OF TAKING.

Where a question is proper, but the answer is improper and prejudicial, an objection immediately following the answer is timely.

6. SAME—FORM OF OBJECTION.

While the proper course to follow where an improper answer is made to a proper question is to move to strike the improper statements of the answer, yet an objection to the answer on the ground that it is the opinion of the witness and irrelevant, etc., may be regarded as a motion to strike, and may be deemed to have fulfilled the office of such a motion.

7. DAMAGES — PERSONAL INJURIES—FUTURE PAIN AND SUFFERING.

An allowance of damages for future pain and suffering likely to result from personal injuries should be confined to such damages as are reasonably certain to result from the injuries, and should not extend to speculative, contingent, or probable results of the injuries.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 236.]

Appeal from Circuit Court, Jackson County; A. F. Evans, Judge.

Action by Louisa Waddell against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

John H. Lucas, for appellant. Bird & Pope and T. J. Madden, for respondent.

JOHNSON, J. Action for damages resulting from injuries alleged to have been caused by defendant's negligence. The answer contained a general denial and a plea of contributory negligence. Plaintiff recovered judgment in the sum of \$2,000.

It is first insisted by defendant that its request for a peremptory instruction should have been sustained. The facts are as follows: Plaintiff, seventy-five years of age, in attempting to walk across Fourteenth street, in Kansas City, near the intersection of that street with Penn avenue, was struck by a west-bound car on the Observation Park line of defendant's street railway system, and injured. The line ran east and west on Fourteenth street, and consisted of two tracks; the north track being used for west-bound cars, and the other for those going in the opposite direction. Plaintiff, coming from the south, on the west side of Penn avenue, stopped when she reached the curb on the south line of Fourteenth street for an east-bound car to pass, after which she proceeded to walk across at an ordinary gait. She left the sidewalk on the south side of Fourteenth a few feet west of a prolongation of the property line on the west side of Penn, and walked in

a northwesterly direction. In crossing, she did not look to right or left, and was unaware of the approach of the west-bound car. She wore a sunbonnet, which confined her vision to the line of her travel. The testimony introduced by her shows that she was struck when about two feet north of the south rail of the north track; that the motorman in charge of the car was looking towards the north, and did not see her; and that he failed to ring the bell or give any other warning. The time of the occurrence was in broad daylight. There was no obstruction to prevent plaintiff from seeing the car, if she had looked, nor the motorman from observing plaintiff, if he had been attending to his business. The car was going eight or nine miles per hour, up grade, and carried a heavy load of passengers.

That plaintiff was guilty of contributory negligence in thus coming into collision with a moving car cannot be gainsaid. She had no right to be "oblivious to her surroundings" while crossing railroad tracks, but should have been on the lookout for approaching cars. Her eyesight and hearing were not defective. All she had to do was to use her senses, and the accident would have been avoided. Her negligence concurred with that of the motorman in failing to give warning, from which it follows that defendant cannot be held liable without it appears that the motorman could have stopped the car in time to have prevented injuring plaintiff after he became aware, or by the exercise of reasonable care could have known, of her ignorance of the danger which confronted her, and of her purpose to enter into it.

The motorman, introduced as a witness by defendant, testified that when he entered Penn avenue he shut off the power (the car was propelled by electricity) for the purpose of slackening speed in making the crossing; that he was standing with his hand on the brake wheel, was looking ahead, and was ringing the bell; that he first noticed plaintiff intent upon going ahead, unmindful of the presence of the car, when she was 12 or 15 feet from the north track, and the car 25 feet from the place of collision; that he "boiled" at plaintiff, and started to apply the brakes with all possible speed, whereupon plaintiff, instead of stopping, started to run across ahead of the car. An expert witness offered by plaintiff said that under the conditions described the car could have been stopped in 15 feet. If this evidence is to be considered, an issue of fact was presented, under the admission of the motorman that he knew of plaintiff's peril when his car was 25 feet from the place of contact, and the testimony of other witnesses that he made no attempt to stop, and that plaintiff, up to the time the car struck her, had no knowledge of its presence. We do not feel justified in pronouncing plaintiff's expert evidence unworthy of belief, as being in opposition to the law of physics. Under the conditions described.

it does not appear to be an unreasonable conclusion to say that the car could have been stopped, had a reasonable effort been made, in the distance the motorman says intervened between the car and the place of collision when he first observed the danger which threatened plaintiff. The issue was one of fact for the jury unless it can be said that the negligence of plaintiff concurred with that of defendant in producing the injury. In the recent case of *Ross v. Metropolitan Street Railway Company* (decided at this term) 88 S. W. 144, analogous in essential features to the one before us, we held that when a person is not wantonly entering into certain danger, but is negligently ignorant of its presence, his negligence is superseded, as a proximate cause, by that of the driver of the vehicle, who, knowing or being in position to know of his peril in time to prevent injury, negligently runs into him. This rule has the support of the weight of authority, and is prompted by dictates of reason and humanity. *Heinzle v. Ry.*, 182 Mo. 528, 81 S. W. 848; *Bunyan v. Ry.*, 127 Mo. 12, 29 S. W. 842; *Holden v. Ry.*, 177 Mo. 456, 76 S. W. 973; *Sepe-towski v. Transit Co.*, 102 Mo. App. 110, 76 S. W. 693; *Jett v. Ry. Co.*, 178 Mo. 664, 77 S. W. 738; *Meeker v. Ry.*, 178 Mo. 173, 77 S. W. 58; *Cooney v. Ry.*, 80 Mo. App. 226; *Morgan v. Ry.*, 159 Mo. 275, 60 S. W. 195.

The peremptory instruction was properly refused.

The following is from the direct examination of one of plaintiff's witnesses: "Q. Now, after the car stopped, did the motorman get out? A. Well, no. It was a good thing he didn't, too. Q. How is that? A. He didn't stay there any longer than he had to. They would have mobbed him. Counsel for Defendant: I object to that as stating the opinion of the witness; as irrelevant, incompetent, and immaterial." The objection was overruled. The claim of defendant that the matter injected by the witness into his answer was extraneous to the issues and highly prejudicial must be sustained. It is evident the witness purposed to convey to the jury the impression that, in the opinion of those who saw the accident, the conduct of the motorman was so inhuman and reckless that it excited intense and general anger against him. The opinion of the witness relative to the thoughts and feelings of others was barren of probative value, and was gratuitously and offensively thrust into the case. The offense was deliberate, its purpose inflammatory, and the effect intended malevolent to defendant. The objection should have been sustained, and the statement excluded from the consideration of the jury. But plaintiff says that defendant's objection was neither timely nor in proper form, and that the right to complain of the impropriety must therefore be deemed to have been waived. As a rule, the right to object to an improper question must be exercised before the answer is made, as it savors of "sharp practice" for a

party to speculate upon the chance of an answer favorable to him, and then object when it is against him. *Foster v. Ry. Co.*, 115 Mo. 183, 21 S. W. 916. But here the question was unobjectionable, for it will readily be seen that the fact inquired about had some bearing upon the case. The vice in the answer lay in the unresponsive matter volunteered. The objection immediately following the answer was offered at the first opportunity, and therefore was in time. *State v. Foley*, 144 Mo. 619, 46 S. W. 733. As to the form of objection, plaintiff is right in saying that the usual practice in calling the attention of the court to unresponsive and improper statements contained in the answer of the witness is by motion to strike out such matter. An objection goes to the question asked, and frequently does not direct notice to the answer. *Barr v. Kansas City*, 121 Mo. 29, 25 S. W. 562; *State v. Eisenhour*, 132 Mo. 145, 33 S. W. 735; *Hollenbeck v. Ry. Co.*, 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; *State v. Rapp*, 142 Mo. 449, 44 S. W. 270. 1 *Thompson on Trials*, §§ 715, 716. Improper statements of witnesses must be pointed out and objected to, else the right to complain is waived. The fundamental principle controlling the subject is that the trial court must be given a fair opportunity to correct errors as they arise. Parties will not be permitted to take advantage in the appellate court of errors concealed from the trial judge, or to which his attention has not been specifically directed. But where it appears that objectionable statements in the answer of the witness have been made a subject of timely and specific complaint, the function of a motion to strike out is accomplished, and its purpose subverted. Such motion is but a form of objection, and is not devoid of legal equivalents. The objection under consideration was in substance a motion to strike out, and will be so regarded. The error was harmful, and requires that a new trial be ordered.

In plaintiff's third instruction, the direction relating to damages for future pain and suffering is subject to the criticism that it failed to restrict the consideration of the jury to such damages as are reasonably certain to result from the injury. Speculative, contingent, or merely probable results are not a proper element of damages. *Ballard v. Kansas City (Mo. App.)* 86 S. W. 479; *Wilbur v. Ry. Co. (Mo. App.)* 85 S. W. 671.

For these errors, the judgment is reversed, and the cause remanded. All concur.

YOUNG v. MISSOURI PAC. RY. CO.*

(Kansas City Court of Appeals. Missouri.
June 5, 1905.)

1. CARRIERS—INJURY TO PASSENGER—LIABILITY.

Where the passengers on a freight train had received an invitation to get off, and the

*Rehearing denied June 28, 1905.

car had come to a stop, and, as a passenger was moving out, the carrier's servants, without any warning, moved the train with such force and suddenness as to send the car forward with a greater jump or jerk than witnesses in years of experience had ever known, the carrier was liable for whatever injuries resulted to the passenger from the act.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1228-1229.]

2. SAME—CAUSE OF INJURY—EVIDENCE.

In an action against a carrier for injuries, evidence examined, and *held* insufficient to warrant the submission of questions to the jury as to whether plaintiff's injuries were due to the accident, or to an antecedent rupture.

On rehearing. Motion for rehearing denied December 31, 1904. Motion to transfer to Supreme Court denied, and motion to set aside order denying a rehearing set aside, February 6, 1905, and cause set for hearing. Argued and submitted April 11, 1905. Death suggested May 8, 1905, and cause resubmitted. Judgment again reversed.

For former opinion (November 23, 1904) reversing the judgment below, see 84 S. W. 175.

ELLISON, J. Plaintiff shipped cattle over defendant's road, and accompanied them himself; he having been furnished by defendant with what is known as a "stock pass." He was riding in the caboose, and, on arriving at St. Louis, as he was leaving the car a sudden movement of the train threw him to the floor, and caused two other stockmen to fall upon him. He brought this action for the injuries received, and recovered judgment in the trial court. He complains principally of three injuries as the result of his fall—one to his leg, another to his hearing, and another that he was ruptured.

The defendant, for reversal of the judgment, relies, first, on the refusal of its demurrer to the evidence. In considering that point, we find that the evidence in plaintiff's behalf tended to show: That on arriving at St. Louis the conductor passed along the aisle of the car as the train was moving slowly and cried out: "St. Louis. Get out, get out!" That the train then stopped, and plaintiff started out with two men immediately in front of him, when the train "made a heave forward." Plaintiff said that he was never on a train (and he was an old shipper) "that made such a heave as that made." His feet flew from under him, and he fell upon the floor, with the two men on top of him—the heaviest one across his leg. He described his fall, on cross-examination, in this way: That, as he was starting out, "well, just at that time you never seen such a swoop as the old caboose made. It made a jump, and it looked to me like it jumped clear off the track. Well, now, I just come right back. These two men—one would weigh 180 or more pounds, and the other was a 160-pound man. * * * My heels went right out from under. I fell flat on my back. I just seen stars. You talk about

jerks! I have shipped 100 car loads of cattle and hogs. I have shipped to St. Louis time and again, and to Kansas City time and again, and I never was on a train that made such a jerk." The plaintiff's testimony was corroborated by two or more other witnesses. It is quite true that when one rides on a freight train he ought to expect that it will be handled and manipulated in a rougher and more uncomfortable way than would a passenger train, and that it is necessary that he should be more guarded in avoiding injury. But there may be negligence in the movement and handling of such trains, which, resulting in injury, will render the owner liable to a passenger. Here an invitation or direction had been given for passengers to get off the car, and it had come to a stop, when, as plaintiff was moving out, defendant's servants, without any warning, moved the train with such force and suddenness as to send the car forward with a greater jump or jerk than witnesses had ever known in years of experience. There can be no doubt of defendant's liability to plaintiff for whatever injuries resulted from such act, and it is manifest that the court properly refused the demurrer. *Jones v. Ry. Co.*, 31 Mo. App. 614—a case much like the present. See, also, *Duffy v. Ry. Co.*, 104 Mo. App. 235, 78 S. W. 831; *Becker v. Lincoln Bldg. Co.*, 174 Mo. 246, 73 S. W. 581; *Straus v. Ry. Co.*, 75 Mo. 185; *McGee v. Ry. Co.*, 92 Mo. 218, 4 S. W. 739, 1 Am. St. Rep. 706; *Hurt v. Ry. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374.

There was much evidence tending to show that the condition of plaintiff's leg and his rupture were caused by matters prior to his fall in the car. There was evidence tending to show that plaintiff for years had been afflicted with rheumatism, which had affected his leg, and that the injury thereto was solely attributable to that disease. But an examination of the record has convinced us that the state of the evidence was such as to amply justify the trial court in leaving it for the jury to say whether the injury to the leg resulted from the fall in the car. Besides, plaintiff, as to this branch of the case, was cautious enough to have the jury informed in his instruction No. 4 that he was entitled to recover for whatever natural and necessary injuries resulted from the fall, even though he had been afflicted with rheumatism. So, also, we think the court justified in refusing to take from the jury the question as to plaintiff's injured ear, and consequent defective hearing.

But as to the rupture, we are of the opinion that the evidence was such as to leave an answer to the question whether plaintiff's condition in that respect was due to his fall in the car so uncertain and so much a matter of mere conjecture that that branch of the case should have been withdrawn from the jury's consideration, as requested by defendant. The law is that the plaintiff, of course,

must make out his case, and therefore, "if the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and, if the evidence leaves it to conjecture, the plaintiff must fall in his action." *Warner v. Ry. Co.*, 178 Mo. 125, 77 S. W. 67; *Smart v. Kansas City*, 91 Mo. App. 586. In the former case the Supreme Court applied the rule to a railway accident where it could not be said whether the plaintiff was injured by being thrown from his vehicle before the car reached him, or that the car struck the vehicle and threw him out. In the latter, we applied the rule to an alleged injury caused by falling upon one of the streets of Kansas City, where it could not be said that an amputation of the leg was made necessary as a result of the fall, or a former diseased condition. See, also, *Wilbur v. Ry. Co.* (Mo. App.) 85 S. W. 671. The evidence shows that plaintiff was ruptured by lifting at a "log rolling" when he was 16 years old; that it made a protuberance the size of a walnut, or the end of his thumb, on his groin; that he was never cured of it; that on the day before he went with his cattle on defendant's train (July 10th) he, with two others, pitched 40 acres of wheat in a little more than half a day. When asked by defendant's counsel, plaintiff answered "that about the only injury" he complained of, as a result of the accident, was to his right leg and right ear. After a few more questions, plaintiff's counsel reminded him that he had not mentioned his rupture in answering defendant's counsel, and asked: "Now, what about the rupture on your right side—what caused that?" The witness answered: "Well, I couldn't swear—I couldn't swear what done it, but after that man fell on me—" His counsel here interrupted with the question: "It was never there before? Answer. No, sir." His physician, a witness in his behalf, stated that he noticed the two ruptures in or just above the groin—one on each side. When asked by plaintiff's counsel, "What would have produced these ruptures?" he answered that they were "caused from violence or lifting." Again he said, in answer to defendant's counsel, that "a strain or violence" would cause the rupture; that it could come from pitching hay or wheat. Again, in answer to plaintiff's counsel as to "what would be the probable effect of a man pitching wheat—that was used to pitching wheat? Would it produce a rupture?" The doctor answered that "that would depend on whether he pitched one bundle, or two or three. He could pitch enough to make a pretty heavy load. I don't know." It is quite true that at some portions of plaintiff's testimony in his own behalf he made use of language which would indicate that one of his ruptures came from his fall. For instance, he stated that the

man falling on him "burst a striffin"; but it is apparent from his whole evidence that such was merely his opinion at times, in thinking of what caused the additional rupture, for he never thought of a rupture until two or three weeks afterwards.

Since the jury was allowed to consider that branch of the case, we cannot say how much such consideration may have augmented the verdict. It therefore becomes necessary to reverse the judgment and remand the cause. All concur.

HOOVER v. ST. LOUIS & S. F. R. CO.

(Kansas City Court of Appeals. Missouri.
June 26, 1905.)

CARRIERS—CONTRACT WITH SHIPPER—WAIVER OF PRIOR BREACHES.

Where a written agreement, voluntarily signed by a shipper while on the train with his cattle, contained a clause waiving liability on account of delay in shipping the cattle after the delivery of the same to the agent, no action could be maintained by the shipper for a breach of a verbal promise made by the agent to transport the cattle by the first train.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by John Hoover against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

L. F. Parker and Jno. H. Lucas, for appellant. Bremermann & Heidelberger and L. W. Byram, for respondent.

ELLISON, J. Plaintiff was a stock shipper over defendant's road to the market at Kansas City. He engaged cars of defendant, and placed his cattle therein; and they were to be taken out on defendant's first train for Kansas City on the morning of the 11th of December, so as to arrive in that city in time for the early market of that day. Defendant failed to take them on the first train, as its agent verbally agreed with plaintiff that it would, but did take them on a second train, which arrived too late for the best of the market, whereby plaintiff was damaged, etc. The judgment in the trial court was for the plaintiff.

It appears that it was contemplated by the parties that there would be a written contract of shipment, and that while plaintiff was on his way with the cattle the conductor of the train, as he had frequently done on other shipments, presented a written contract of shipment, which plaintiff duly signed. That contract contained the following provision: "For the consideration aforesaid the shipper agrees to waive and release and does hereby release the company from any and all liability for or on account of delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving the same after tender of delivery, and for

breach of any alleged contract to furnish cars at any particular time, and the shipper hereby releases and does waive and bar any and all causes of action for any damage whatsoever, that has accrued to the shipper, by any written or verbal contract prior to the execution hereof concerning said stock or any of them."

After an examination of the authorities presented by the respective counsel, we understand the law, where there is a verbal contract and a subsequent written contract, to be this: If damages have accrued under a verbal contract, and there is no waiver or disclaimer of such breach in the subsequent writing, an action may be maintained on the verbal agreement, notwithstanding there was a subsequent writing. But if the subsequent agreement contains among its stipulations that any breach of the verbal contract relating to the shipments is waived, thereby evincing an intention on the part of the contracting parties to regard the writing as covering the whole shipment, and determining their rights arising by reason of such shipment, no action can be maintained on the verbal agreement. *Harrison v. Ry. Co.*, 74 Mo. 364, 41 Am. Rep. 318; *Railway v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *Miller v. Ry. Co.*, 62 Mo. App. 252, 259.

It should be remarked that there was no evidence of any degree of compulsion on plaintiff's part in signing the contract, nor that he in the least protested. On the contrary, it is admitted by him that he had formerly signed such contracts in the same manner when handed by the conductor while on the way, and that he expected to enter into a written contract when he began considering the present shipment; that he expected it would be presented to him by the conductor, as it was done.

We think the plaintiff shows that he has not a case on the facts, and the judgment will be reversed. All concur.

BURGESS v. DEIERLING.*

(Kansas City Court of Appeals. Missouri.
May 22, 1905.)

1. FRAUD—EVIDENCE—SUFFICIENCY.

In an action wherein defendant was charged with having by fraudulent and wrongful acts defrauded plaintiff in a sale of plaintiff's farm, evidence considered, and *held* insufficient to show any fraud on the part of defendant.

2. SALE OF PARTNERSHIP PROPERTY—PROFITS—RIGHTS OF PARTNER.

Plaintiff sued on the ground that he had been defrauded by defendant in the sale of a farm, and it appeared that plaintiff and defendant had been partners in the ownership of the same, and that defendant had taken a third person over the farm as a prospective buyer. Plaintiff testified that defendant advised him to sell, and defendant testified that plaintiff said he would sell his one-half interest for \$1,000. Defendant thereafter concluded a trade with the third person, and all three persons met, and executed deeds conveying the farm to the

third person, and in the transaction the profit made by defendant amounted to over \$5,000. *Held* that, owing to the partnership relation between the parties and the continuity of the transactions, plaintiff was entitled to one-half the entire profits.

Appeal from Circuit Court, Schuyler County; Nat M. Shelton, Judge.

Suit between John Burgess and Gottlieb Deierling, and from the judgment both parties appeal. Affirmed.

Higbee & Mills and Smoot, Boyd & Smoot, for Burgess. Fogle & Saxbury and Rolston & Frank, for Deierling.

ELLISON, J. The plaintiff instituted this action by filing a bill in equity in the circuit court at Lancaster, Schuyler county, whereby he charged defendant with fraudulent and wrongful acts and practices, whereby the latter cheated and defrauded him in the matter of the sale of his farm, of 355 acres. The trial court found for the plaintiff in the sum of \$2,186.25, and both parties appealed.

It appears from the evidence that plaintiff bought a farm in the southwestern part of Scotland county, consisting of 355 acres, and that he placed mortgages thereon aggregating \$5,365; being some more than the price he paid. He was without ready money, and paid for the farm out of the mortgage money he obtained at time of purchase. He built a house thereon at the cost of \$800, and found himself unable to meet interest on his loan. After trying to get money of various parties, and failing with each, he and the defendant, who resided at Queen City, got together and made an agreement whereby defendant supplied him with live stock for the farm on conditions not necessary to state, and paid him \$400 in cash for one-half interest in the land, subject to the mortgage aforesaid. It clearly appears that they looked upon themselves as sustaining the relation of partners with each other in the transaction thus had. After a time, propositions for sale were made, which need not be gone into, further than to say that finally defendant learned that one Tarr, living in Schuyler county, owned a farm of 120 acres some two or more miles west of Queen City. He took Tarr over into Scotland county to look at the farm there thus owned by plaintiff and himself. He introduced Tarr to plaintiff, and showed him over the farm. Plaintiff was aware that the object was to sell to Tarr, but he and defendant do not agree as to what took place between them at that time and place. Plaintiff testified that defendant advised him to sell or trade with Tarr, and that he thought the best thing to do would be for them to get rid of the farm; that he believed they could make \$1,000 each out of it. Defendant testified that plaintiff refused to entertain any proposition save one exclusively of money, and that he (plaintiff) would sell his undivided one-half interest in the farm, subject to the mortgage, for \$1,000, and give up the "whole

*Rehearing denied June 26, 1905.

thing" within a week. He further testified that he agreed to this, provided that he and Tarr could make a trade. And so they separated, with a promise on defendant's part to notify plaintiff if he and Tarr came to terms. But it seems that plaintiff went to Queen City before he received notice, and, on meeting with defendant, was notified by him that he and Tarr had just concluded upon the terms of a trade. It was then arranged that all three parties, with their wives, should meet at an attorney's office that afternoon and make out deeds. They did so. Plaintiff and defendant made a deed to Tarr for the 355 acres, and Tarr made a deed to defendant for the 120 acres. Tarr also made a deed of trust on the 355 acres to secure a note to defendant for \$2,347.50. The trial court found that the net value of the 120 acres conveyed by Tarr to defendant, after deducting a mortgage with which it was incumbered, was \$3,025, to which was added the sum of \$2,347.50, for which Tarr gave his note, and a deed of trust securing it on the 355 acres, as just stated; making a total profit to defendant on the sale of 355 acres the sum of \$5,372.50. The court then found that plaintiff was entitled to one-half the latter sum, less the \$500 paid by defendant to him, making \$2,186.25, for which judgment was rendered.

A careful examination of the evidence has satisfied us with the result reached by the trial court. We reject in toto the charges of original intention and design on defendant's part to cheat or defraud the plaintiff. There is no evidence of such fraud or fraudulent design. The plaintiff and defendant entered into a fair understanding, with no concealments or wrongful ulterior purposes on defendant's part. Indeed, the evidence shows that defendant could not have known at the time of his original deal with plaintiff, whereby he acquired one-half interest in the farm, that he would make disposal of it to Tarr or any other person. The arrangement between the two was undoubtedly thought by both to be to their mutual advantage. The farm had not cost plaintiff as much as the mortgage he placed upon it, unless, perhaps, the house brought it up to about that sum. He found himself without money to pay interest, and unable to get it. In such situation, this defendant offered him terms of purchase for one-half interest, that, if properly carried out, would have been much to his advantage. This the plaintiff himself practically admitted in one part of his testimony.

But notwithstanding this, the evidence discloses two conditions which render imperative the affirmance of the judgment: It is shown, without substantial dispute, that the two were practically partners in the ownership of the Scotland county farm and its

stock. It is further shown that plaintiff did not know what defendant was getting out of Tarr in their trade. At least, defendant did not make it known to him. It is true, plaintiff had every opportunity for knowing. He was present when the deeds were made. He might at any time that day have inquired of Tarr and found out. We do not discover that there was any effort on the part of defendant or any one else to conceal it from him. But the fact remains that, when defendant took Tarr to the farm as a prospective purchaser, he had in view, of course, the trade that they finally made. Manifestly, he took him to view the partnership property. Plaintiff had a right, as a partner, to his full share of whatever resulted from these prior negotiations. It is true that defendant says that at the time of his arrival at the farm with Tarr he had made no terms with him, and that his offer of \$1,000 for plaintiff's undivided half was conditioned on his being able to make a trade with Tarr. But we cannot separate ourselves from the conviction that defendant should not be allowed to take to himself, without division with plaintiff, the whole of the large profit made in the transaction with Tarr. The transaction between defendant and plaintiff and between defendant and Tarr, and finally between all three of them when they met in Queen City, was really one transaction divided into parts, and out of which defendant made the profit above stated. The delicate relation which partners sustain one to the other—the very nature of that relation—makes it necessary that each may rely upon the other rendering to him his full share of whatever is made out of the partnership property.

We conclude that the judgment should be affirmed. All concur.

BURGESS v. DEIERLING.*

(Kansas City Court of Appeals. Missouri.
May 22, 1905.)

Appeal from Circuit Court, Schuyler County; Nat M. Shelton, Judge.

Suit between John Burgess and Gottlieb Deierling, and from the judgment both parties appeal. Affirmed.

Higbee & Mills and Smoot, Boyd & Smoot, for Burgess. Fogle & Saxbury and Rolston & Frank, for Deierling.

ELLISON, J. This cause is disposed of by opinion in cause 6,975, between same parties, submitted at same time. 88 S. W. 770. The judgment, for the reason therein given, is affirmed. All concur.

*Rehearing denied June 26, 1905.

VILLAGE OF SALEM v. COFFEY.

(Kansas City Court of Appeals. Missouri.
June 26, 1905.)

BREACH OF THE PEACE—OFFICERS.

Where defendant used loud and offensive language in a conversation with a village marshal, as one of a crowd engaged in disturbing the peace, and the marshal neglected to restrain defendant or preserve order, he was not a "person" whose peace could be disturbed within a village ordinance providing that if any person shall willfully disturb the peace of any other person by loud and unusual noise, loud and offensive conversation, etc., he shall be adjudged guilty of a misdemeanor.

Appeal from Circuit Court, Daviess County; J. W. Alexander, Judge.

J. B. Coffey was convicted of disturbing the peace, and he appeals. Reversed.

Harber & Knight and H. L. Eads, for appellant. J. C. Wilson, Boyd Dudley, and J. A. Selby, for respondent.

BROADBODUS, P. J. The defendant was convicted, under an ordinance of the village of Salem, for disturbing the peace of one M. N. Silvey, the village marshal, "by loud and unusual noise, and by loud and offensive and indecent conversation, and by cursing and swearing, quarreling, and by challenging to fight and threatening to fight; and was there and then drunk and in a state of intoxication in the public streets of said village, contrary to said ordinance in such cases made and provided," etc. He was convicted in the village court, and appealed to the circuit court, where the complaint was amended so as to set out the charge of drunkenness more accurately in a second count thereof. He was acquitted on this second count, but convicted on the charge of disturbing the peace of said Silvey, from which he appealed to this court.

On the occasion in question, in the nighttime, a religious revival was being held in a building of the village, during the holding of which a number of persons assembled on the opposite side of the street and about 50 feet distant, where they held mock religious ceremonies. One of their number pretended to preach, and songs and mock prayers and other disorderly conduct were indulged in by the crowd. The persons so engaged, among whom was the defendant, appeared to be under the influence of intoxicants. It does not appear that this disorderly conduct had the effect of disturbing the religious meeting in the building on the opposite side of the street. But after the adjournment of the latter the disorderly conduct of the former was continued. The chairman of the board of trustees, and Silvey (the marshal) requested the crowd to disperse, and expostulated with various members of it on their conduct, whereupon the defendant said to Silvey in a loud tone of voice that, "Silvey, I will bet you \$50 that Perry Godman [one of his associates] can outpreach any G— d— preacher in town." The said chairman and

Silvey, feeling that they were not able to enforce order, left for their respective homes.

The ordinance under which defendant was convicted is substantially a copy of section 2159, art. 7, c. 15, Rev. St. 1899, concerning crimes and misdemeanors. The language used by the defendant was within the meaning of the ordinance and statute, as it was both "loud and offensive." But the question presented is, was the person whose peace was alleged to have been disturbed a "person" within the meaning of the ordinance? We think not. When defendant used the language stated, the complainant, in connection with other peace officers, was endeavoring to disperse the disorderly assembly. He was acting within the scope of his official duties, and as such official was not a person within the meaning of the ordinance. His personality was merged into that of his office of marshal. The ordinary person has the right to invoke the law to insure his peace against the lawless. But it is the duty of a village marshal to deal with disturbers of the peace, and he has the authority to arrest any one who commits a breach of the peace in his presence, and that, too, without a warrant from a magistrate. If he permits a breach of the peace, or suffers the peace of a neighborhood or person to be disturbed in his presence without making every reasonable effort to prevent it, he neglects his duty. He will not be permitted, as in this case, to shirk his duty and to invoke the protection of the law on the ground that his own peace was disturbed. The object of the ordinance was to protect the citizen, and not the peace officer. Whenever the peace of the community or of persons is threatened, the peace officer if present, is always, in law, on duty; and it is not his peace that is threatened or disturbed, but that of the individual or the neighborhood, and, if any one attempts to interfere with him in the performance of his duties, that person becomes liable for resisting an officer. The offense that the individual commits in the presence of the officer is not an offense against the officer, but against society, and, as such, is punishable.

There was error, also, on the trial, in permitting the complainant, over the objections of the defendant, to testify that his peace was disturbed by the language used. It permitted the witness to usurp the function of the jury. Whether or not complainant's peace was disturbed was the ultimate fact to be shown. It was the issue—the words being proved—upon which defendant's guilt or conviction depended. The jury should have been allowed, as in all other cases, to determine the issue, which was one of fact. And the cases cited by respondent to support the action of the court in the admission of such evidence do not do so. In *St. Charles v. Meyer*, 58 Mo. 86, where witnesses for the defense were permitted to testify that the noises made were very slight, and not of a character to disturb the peace of anybody,

and where no witness on either side had testified that he or any one else was disturbed by the demonstration, it was held that, if the object was to show that the persons so testifying were not individually disturbed by the noise complained of, it would be manifestly illegitimate. The court further holding that a disturbance of the peace "was the very gravamen of the charge." The case cited, on the contrary, is authority for our holding on the question. And it is the only case in our Reports that we can find upon the exact question presented. And even if it was not sound in principle—which we think it is—we are bound to follow it. For the reasons already given, neither is it one of those cases in which witnesses are permitted to give their opinions or conclusions. Such, for instance, as in *Taylor v. Jackson*, 83 Mo. App. 641, *Walker v. Davis*, 83 Mo. App. 374, and other cases of like nature.

The cause is reversed. All concur.

STATE ex rel. SAGER v. MULVIHILL.
(St. Louis Court of Appeals. Missouri. June 1, 1905.)

1. CERTIORARI—AMENDMENT OF RECORD.

In certiorari to remove to the St. Louis Court of Appeals the record of the excise commissioner in relation to granting a dramshop license, the court, on suggestion of a diminution of the record, cannot compel the commissioner to make a record of certain alleged findings and certify them as part of the record.

2. DRAMSHOP LICENSE — JURISDICTION OF COMMISSIONER.

Under Rev. St. 1899, § 2093, and section 2997 as amended by Laws 1901, p. 142, providing that a petition for a dramshop license shall remain in the office of the excise commissioner for 10 days before it can be acted on, and directing that the license, if granted, shall be for 6 months, and may be renewed for another term of 6 months on the petition, where a petition was filed May, 1904, and was not acted on until January, 1905, the commissioner was without jurisdiction to grant a license to continue for a term of 6 months from the latter date.

Certiorari by the state, on relation of Arthur N. Sager, against Thomas E. Mulvihill, in relation to the granting of a dramshop license to Carl Anschuetz. License canceled.

J. F. & R. H. Merryman, for relator.

BLAND, P. J. This is a certiorari out of this court to remove to this court the record of the excise commissioner of the city of St. Louis in relation to the granting of a dramshop license to Carl Anschuetz. The petition of the taxpayers on which the license was granted, and which is signed or purports to be signed by a majority of the assessed taxpaying citizens and guardians of minors owning property in the block, is as follows: "To the Excise Commissioner of the City of St. Louis: The undersigned, being a majority of the assessed taxpaying citizens and guardians of minors owning property in block No. 3,765, city of St. Louis, petition you to grant Max

Anschuetz a license to keep a dramshop at No. northeast corner Delmar avenue and Kingshighway street, in said block, for twelve months." The petition was filed in the office of the excise commissioner on May 10, 1904, and was not acted upon until January 28, 1905, when Carl Anschuetz appeared before the excise commissioner and made the following affidavit (indorsed on the back of the petition):

"State of Missouri, City of St. Louis—ss.: Carl Anschuetz, being duly sworn, on his oath says that the foregoing petitioners comprise a majority of the assessed taxpaying citizens and guardians of minors owning property in block No. —, in the city of St. Louis, and that the signatures thereto attached are the personal and genuine signatures of the parties therein mentioned; and affiant further states that he is a lawabiding, assessed taxpaying male citizen, of good moral character, of said city, above twenty-one years of age, and that he has not violated the dramshop laws of the state of Missouri, to the best of his knowledge and belief.

"Sworn to and subscribed before me this tenth day of May, 1904. J. M. Seibert, Excise Commissioner.

"[Signed] Carl Anschuetz, Applicant."

A license was granted Carl Anschuetz for a term of six months, dated January 28, 1905, to expire the 28th of July following. On the request of Carl Anschuetz, this court granted him the privilege of making a defense to the proceeding, and his counsel, in addition to filing a brief in his behalf, has filed written suggestions of what he terms "a diminution of the record." The suggestions are that Max and Carl Anschuetz are one and the same person; that Carl is the true Christian name of Anschuetz, and that Max is a nickname by which he is familiarly known to his friends and acquaintances and to the taxpayers who signed his petition for a dramshop license; and that the excise commissioner found that Carl Anschuetz was the person had in mind by the taxpayers when they signed the petition for the license. The suggestions and allegations are verified by the affidavit of Carl Anschuetz. On this showing we are asked to compel the excise commissioner to make a record of his alleged findings and certify the same as a part of the record in this case and embrace them in his return.

The writ of certiorari brings up the record of the inferior tribunal to which it is directed as that tribunal has made it. It cannot be used to correct that record, or to take the place of a writ of mandamus to compel the making of a record or part of a record which the inferior tribunal should have made but failed or refused to make, nor does it bring up the evidence upon which the record was made, and if such evidence should be included in the return it cannot be considered. In the *Matter of the Saline Co. Subscription*, *Thompson et al., Petitioners*, 45 Mo. 52, 100 Am. Dec. 337; *Hannibal & St. Joseph R. R. Co. v. State Board of Equalization*, 64 Mo. 294;

State ex rel. v. Edwards, 104 Mo. 125, 16 S. W. 117; State ex rel. v. Springer, 134 Mo. 212, 35 S. W. 589; Ward v. Board of Equalization, 135 Mo. 309, 36 S. W. 648; State ex rel. v. Williams, 70 Mo. App. 238; State ex rel. v. Moore, 84 Mo. App. 11; State ex rel. v. Walbridge, 69 Mo. App. 637. The suggestions are dehors any record in the case, and the request for an order on the relator to make a finding of the facts alleged, and to include his finding in the return, cannot be granted in this proceeding. If we had authority under the writ to grant the request, and the commissioner should find the facts to be as alleged, and make a record of his findings and include the same in his return to the writ, it could serve no useful purpose, for the reason the record shows on its face that the excise commissioner exceeded his jurisdiction by granting a license to continue in force beyond the life of the petition for such license. As before stated, the petition was filed May 10, 1904, and the license was not granted until January 28, 1905, and was made to continue in force for six months. Section 2997, Rev. St. 1899, as amended in 1901 (Laws 1901, p. 142), provides that a petition for a dramshop license shall remain on file in the office of the excise commissioner, or in the office of the county clerk where filed, for at least 10 days before it can be acted upon. State ex rel. v. Selbert, 97 Mo. App. 212, 71 S. W. 95. The dramshop act contemplates that after the petition has been on file in the office of the excise commissioner for 10 days it shall be presently acted upon by him, and that a license shall be granted or refused; if granted, it should be for six months. Section 2993, Rev. St. 1899; State ex rel. v. Moore, supra. At the expiration of the first license the applicant may have the license renewed for another term of six months on the petition. At the expiration of the second license the life of the petition expires, and if the licensee would continue his saloon business he must go back to the taxpayers and get a new petition from them. Laws 1901, p. 142. It was never intended that a petition for a dramshop license, after being filed with the excise commissioner or with the clerk of the county court, as the case may be, should lay dormant for months (in this case for 8 months), and then be brought forward as authority for issuing license for a period beyond 12 months and 10 days from the date of its filing, or for more than a year beyond the first term of the county court at which the petition could rightfully have been taken up and passed upon, or beyond the day when the excise commissioner could have lawfully taken the petition up and passed upon it. The petition is good for one year only after the granting of the first license, which first license, we think, the law clearly contemplates should be granted by the excise commissioner immediately after the petition has remained on file in his office for 10 days. The manifest intention of the Legislature, as exhibited by the dramshop act, is that petitions for dramshop license

shall be renewed once in every 12 months. Prior to the amended act of 1893, the statute in terms so provided, and named the day on which petitions should be filed. The only change effected by the amendments of 1893 and 1901 is that a petition filed on any date is good for one year from that date, and the petition must remain on file for inspection at least 10 days before it can be acted upon. Our conclusion is that the excise commissioner was without jurisdiction to issue a license for a period beyond May 31, 1905; that by issuing the license to run to July 28, 1905, he exceeded his jurisdiction, and for this reason the license is void.

Wherefore it is considered by the court that the license of Carl Anschuetz to keep a dramshop at the corner of Kingshighway and Delmar avenue, in block No. 3,765, in the city of St. Louis, be, and the same is, hereby quashed, canceled, and for naught held.

NORTONI, J., concurs. GOODE, J., not sitting.

KNEISLEY LUMBER CO. v. EDWARD B. STODDARD CO. et al.

(St. Louis Court of Appeals. Missouri. June 1, 1905.)

1. MECHANICS' LIENS — PERSONAL JUDGMENT AGAINST PARTNER.

Where, in an action against a firm to enforce a subcontractor's lien, one of the members of such firm was personally served with process, plaintiff was entitled to a personal judgment against him.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Partnership, §§ 431, 437.]

2. SAME—NOTICE TO OWNER.

Though notice of an intention to file a mechanic's lien was not served on all the owners of the property, where it was served on one of such owners the lien can be enforced against his undivided interest.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 608.]

3. SAME—STATEMENT OF MATERIALS FURNISHED—SUFFICIENCY AS TO ITEMS.

A mechanic's lien statement, in which, at the head of the first column on each page, appeared the word "Lumber," underneath which were numerical and abbreviated verbal designations of different kinds of lumber furnished, which abbreviations were understood in trade and employed constantly in making out bills and stating accounts, was sufficiently full and definite as to the items of material furnished.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 236, 256-259.]

4. SAME—ABBREVIATIONS—PAROL EVIDENCE.

Oral testimony is admissible to explain the meaning of figures and abbreviations employed in a mechanic's lien statement.

5. SAME—STATEMENT OF MATERIALS FURNISHED—SUFFICIENCY AS TO DATES.

Rev. St. 1899, § 4207, requires every original contractor within six months, and every journeyman within sixty days, and every other person seeking a lien within four months, after his indebtedness accrued, to file a just and true account of the demand due him, after all just credits have been given; the same to be verified by oath. Chapter 47, art. 4, §§ 4239-4236 (the railroad lien law) requires that dates when materials were furnished should be given. The

other lien statutes exact nothing in regard to time, except that the lien must be filed within a certain period after the indebtedness accrues, which in the case of a subcontractor is four months. *Held* that, where a subcontractor stated in the affidavit attached to his lien account that the demand accrued within four months before the filing of the lien claim, such lien account was sufficient, though there was no showing as to when the first material was furnished, or the extreme dates between which all the material was furnished, or any dates when the different items were furnished.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by the Kneisley Lumber Company against the Edward B. Stoddard Company and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Geo. Hubbert, for appellant. C. H. Montgomery and Frank Farlin, for respondents.

Statement.

GOODE, J. The controversy in this case is over a lien for material used in the construction and building of an improvement constituting an ice factory. The defendants G. F. C. Corl and Charles F. Murray, composing the firm of Corl & Murray, were proprietors of the ground on which the ice plant was erected, and the contractors for the erection of it were Edward B. Stoddard and J. B. Hayward, doing business under the firm name of Edward B. Stoddard Company. The plaintiffs, E. L. Kneisley, Harve Kneisley, and Harry R. Kneisley, were partners doing business under the firm name of the Kneisley Lumber Company, and engaged in the sale of building material. The material for which a lien was filed was sold and delivered by the plaintiffs to the Edward B. Stoddard Company to be used in the construction of the factory which said company was erecting under contract with Corl & Murray. Plaintiffs therefore are subcontractors who furnished material, and are trying to enforce a subcontractors' lien. The material is alleged to have been furnished between March —, 1900, and June 8, 1900. The entire account fell due, according to the petition, on the latter date. A great part of the material, amounting in value to \$1,745.49, was furnished under an original estimate submitted by plaintiffs to the contractors at the inception of the work. Many extras were ordered during the progress of the work, amounting, as we gather, to about \$500. Payments were made at different times aggregating \$778.40, leaving a balance due of \$1,468.98. The petition describes the land on which the improvement was erected; avers that the material was furnished the contractors for use in erecting the plant, and was so used; that on September 25, 1900, plaintiffs gave notice to the landowners of their intention to file a lien, and duly filed the same with the clerk of the Newton county circuit court October 26, 1900. The action to enforce the lien was against the original con-

tractors, the firm of Edward B. Stoddard Company, and Corl & Murray, the landowners. When the contract was let to Edward B. Stoddard Company for the erection of the factory, that firm gave Corl & Murray a bond for the faithful performance of the conditions and covenants of the contract, and, among other things, to keep the premises free from mechanics' liens. Plaintiffs signed the bond as sureties, and Corl & Murray pleaded it in bar of the action of the Kneisley Lumber Company; averring that its condition had been broken by Edward B. Stoddard Company failing to keep the premises free from mechanics' liens, and that as the plaintiffs, under the firm name of Kneisley Lumber Company, were bound on the bond as sureties, they had covenanted that liens should be kept off the premises, and were estopped to assert a lien in their own behalf. The answer avers that the Kneisley Lumber Company, by reason of the breach of the bond by the contractors, became liable to Corl & Murray in the sum of \$553.70 over and above the amount of plaintiffs' lien. Judgment was prayed for that amount by way of counterclaim in addition to the plea of estoppel. The answer also contained a general denial. In reply to the plea of estoppel and the counterclaim, the plaintiffs alleged that Corl & Murray had committed various breaches of the condition of the building contract during the erection of the improvements, which breaches sufficed to exonerate plaintiffs as sureties on the bond given to secure performance of the contract, and deprived Corl & Murray of the right to assert an estoppel against the plaintiffs by reason of the latter's suretyship, or to a judgment on the bond by way of counterclaim.

The case originated in the Newton county circuit court, but went by change of venue to Greene county. The lien claim or account which was filed in the office of the circuit clerk of Newton county was verified by the affidavit of Harry R. Kneisley, and, among other essential statements, says the lien demand accrued within four months prior to the filing of the lien, and that, ten days before filing it, plaintiffs gave notice of their demand to Corl & Murray, and that a lien claim would be filed. In no part of the lien papers—neither in the statement of facts preceding the account proper, nor in the affidavit—was it stated when the account began. That portion of the account which sets out the various items of extras furnished by plaintiffs contains a numerical notation of the dates when the different extras were furnished, but that portion which lists the items furnished under the original estimate gives no dates, either in numbers or words. At the head of the first column of each sheet of the account appears the word "Lumber," and under that word certain abbreviated trade descriptions of the items furnished. The account is too long to set out in full, but we will transcribe part of it:

ALL OUR LUMBER
UNDER SHEDS

KNEISLEY LUMBER COMPANY,

Everything in Building Material.

PLANS AND ESTIMATES FURNISHED

Phone 79

BASH, DOORS
BLINDS
MOULDINGS
LIME, CEMENT
PLASTER, LATH
SHINGLES
PAINTS & OILS
EVERYTHING

IN ACCOUNT WITH *Edw. B. Stoddard Co.* Neosho, Mo., Sept. 22 1900

ARTICLES	PCS	SIZE	LENGTH	FEET	TOTAL FEET	@	\$	AMT.	TOTAL AMT	REMARKS
<i>Lumber</i>				ICE PLANT ACCT ORIGINAL ESTIMATE						
No 1 Rgh	10	8x8	16	853						
"	2	"	14	149						
"	4	8x10	14	373						
"	6	6x8	16	384						
"	1	8x8	7	87	1796	"	28.00	41.81		
S & E	50	2x12	24	2400	2400	"	20.00	48.00		
"	30	2x6	24	1440	1440	"	19.00	27.86		
"	100	2x12	16	3200	3200	"	18.50	59.20		
"	85	2x8	16	1813	1813	"	17.50	31.73		
"	25	"	10	333	333	"	18.00	5.98		
"	350	2x6	16	5600	5600	"	17.50	98.00		
S S	75	1x6	16	600	600	"	18.00	10.80		
S & E	50	2x6	12	600	600	"	17.50	10.50		
"	1000 ft	2x12		1000	1000	"	18.50	18.50		
Com Flg	6000 "		6 "	6000	6000	"	20.00	120.00		
Stardpadg	6000 "		6 "	6000	6000	"	24.00	144.00		
" S 4 S	300 "		1 1/2 x 4	300	300	"	30.00	9.00		
Com Flg	33000 "		4 "	33000	33000	"	20.00	660.00		
No 1 S S	2000 "		8 "	2000	2000	"	19.00	38.00		
S 4 S	100	2x4	16	1067	1067	"	19.00	20.27		
"	300	2x2	16	1600	1600	"	22.00	35.20		
"	300	1x3	16	1200	1200	"	23.00	27.60		
S 4 S	500	1x2	16	1333	1333	"	23.00	30.66		
No 1 S S	500 ft		1x6	500	500	"	18.00	9.00		
Star Flg	600 "		4 "	600	600	"	22.00	13.20		
No 1 P & E	1000 "		2x6	1000	1000	"	17.50	17.50		
"	9	4x6	12	216	216	"	23.00	4.97		
Oak	500 ft		2x12	500	500	"	14.00	7.00		
"	12	6x6	12	432	432	"	15.00	6.48		
Mineral Wool, 4700 lbs				4700	4700	"	35.00	82.25	Price per ton	
P & B Paper, 400 sqs				400	400	"	30	120.00		
Ruberoid Roofing, 50 sqs				50	50	"	2.75	137.50	\$1834.02	
Less about 5 per cent,							-	-	88.53	
Our estimate,							-	-	\$1745.49	
EXTRAS										
4/16 Ch S 2 S	4	1 1/2 x 6	16	40						
"	5	"	14	44						
"	8	"	12	60						
"	1	"	8	5						
"	4	1 1/2 x 8	16	53						
"	2	"	12	20						
"	1	"	6	5						
"	1	"	8	7						
"	1	1 1/2 x 10	14	15						
"	16	1 1/2 x 5	12	100						
"	5	"	14	36	385	"	30.00		11.55	
4/16 No 1 S S	1	1x12	12	12						
"	2	"	14	28	40	"	20.00	.80		
S & E	2	2x4	18	24						
"	2	"	12	16						
"	1	"	14	9	49	"	18.00	.88		
Water cap	78 ft	3 1/2		78		"	2.00	1.56		
Parting stop	160 "			160		"	.60	.96		
O G "	160 "			160		"	.60	.96	5.16	

ARTICLES	PCS	SIZE	LENGTH	FEET	TOTAL FEET	@	\$	AMT.	TOTAL AMT	REMARKS
<i>Lumber</i>										
5/24 No 1 S&E	25	2x4	14	233						
	"	"	"	"	466	"	18.00	8.28		
								.30	8.68	
5/30 Com Flg	275	1x4	14	1233						
	229	"	12	916	2199	"	18.50	40.68		
								.50	41.18	
6/2 Cement	4 bbls	Ft Scot			4	"	.90	3.60		
								.15	3.75	
6/3									.25	
6/8 Com Flg	104 ft		4		104	"	18.50	1.92		
Ch S 2 S	2	1x8	12	16	16	"	27.00	.43		
No 1 S & S	2	2x8	14	37						
	1	"	18	24						
	10	2x4	16	107	168	"	18.60	3.02		
								.35		
								.15	5.77	
										OVER-SHIPMENTS IN CARS.
S 4 S	144 ft	2x2			144	"	22.00	3.17		
"	131 "	1x3			131	"	23.00	3.01		
"	121 "	1x2			121	"	"	2.78		
No 1 S S	576 "	1x6			576	"	19.00	10.94		
S & E	232 "	2x6			232	"	18.00	4.18	24.06	
									2247.38	
CREDITS.										
No 1 S & E	25	2x8	10	333	333	"	18.00	5.99		Shortage
Star Dp Sdg	681 ft		6 ft		618	"	24.00	14.83		"
" S 2 S	39 ft	1 1/2 x 4			39	"	31.07	1.21		"
Ruberoid Rfg	50 Sqs				50	"	2.75	137.50		Rebate
Drop Sdg	104 ft				104	"	24.00	2.50		Returned
Oak	1	2x12	13	36	36	"	14.00	.50		"
S 4 S	77	1x2	16	205						"
	162	1x3	16	648	853	"	23.00	19.62		"
Lime	4 bbls				4	"	.90	3.60	185.00	
Sewer Pipe	160 ft	6 "			160	"	.02	3.20		Rebate
Wool Sks	174 MT's				174	"	.10	17.40		Returned
and	2 1/4 loads	3.25	8 1/2 bbls		50			3.75		"
Com Flg	40 ft		6 "		40	"	20.50	82		"
Oak	1	2x10	12	20						"
	1	2x12	12	24						"
	1	4x6	12	24	68	"	12.50	85	26.02	"
Ruberoid Rfg	50 Sqs				50	"	1.25	62.50		Rebate
S 4 S	9	1x3	16	36						Returned
"	2	"	14	7	43	"	23.00	.99		"
"	1	2x2	16	5						"
"	1	2x2	14	5	10	"	22.00	.22		"
No 1 S & E	3	2x8	14	56	56	"	18.00	1.00		"
Com Flg	26	1x4	12	104	104	"	18.50	1.92		"
6/10			By CASH					\$500.00	778 40	
			BALANCE DUE						\$1468.98	

It will be observed that the account has at its head the date September 22, 1900. But it is agreed that this was the date when the account was made out preparatory to giving notice of the intention to file a lien, and not the date when any of the first material was furnished. Plaintiffs offered the lien claim in evidence at the trial, but the court excluded it. An exception was saved to that ruling. The notice of intention to file a lien was served, according to the return of the sheriff, on the firm of Corl & Murray, by delivering a copy to one member of the firm (G. F. C. Corl). In this action to enforce the lien, personal service of the writ of summons was obtained on J. P. Hayward, who was in Newton county. The defendant Edward B. Stoddard was a resident of Chi-

cago, Ill., when the action was instituted, and an affidavit of his nonresidence in the state of Missouri was filed with the petition. A summons was issued to the sheriff of Cook county, Ill., commanding him to serve Stoddard in his bailiwick, and that writ was executed by personally serving Stoddard in Illinois. The trial court stated that it excluded the lien claim because it was defective on its face in respect of dates and items, and could not be amended. Plaintiffs tendered proof of the other allegations of their petition necessary to make a case on the lien account, but all the evidence tendered was excluded. Thereupon the court gave this declaration of law: "The court declares the law, and instructs the jury that, upon the plaintiff's evidence, which tends to

prove the allegations in their petition, the plaintiffs cannot recover, and the verdict must be against the plaintiffs, in favor of Corl & Murray, because the plaintiffs' lien account is not sufficient in law as to dates or items; in favor of Stoddard & Hayward, because there was no service on them in this state to support a personal judgment." An exception was saved to that declaration, and plaintiffs took a nonsuit, with leave to move to set it aside. A motion to set it aside was filed in due time, containing these grounds: "First. The court erred in excluding the plaintiffs' lien account and statement, and claim and evidence. Second. The court erred in holding that evidence of the plaintiffs offered was insufficient to support a judgment in their favor. Third. The court erred in holding that the court had no jurisdiction for personal judgment against Stoddard & Co. Fourth. The court erred in giving a declaration and instruction peremptorily directing a verdict against plaintiffs, against the law and contrary to the evidence adduced and offered by them. Fifth. The court erroneously compelled plaintiffs to take the said nonsuit by its adverse rulings as to the law of the case, and by excluding evidence." The above motion was overruled, and plaintiffs appealed.

Opinion.

1. It is apparent that the learned circuit judge erred in holding there could be no personal judgment against the defendant Hayward. He was a member of the firm of Edward B. Stoddard Company, and was one of the original debtors for the material in controversy. As he was personally served with process in the case, plaintiffs were entitled to judgment against him. The court below was under the impression that Hayward, as well as Stoddard, had been brought into court by constructive service, and therefore was not amenable to a personal judgment. Counsel for the defendants say the court's attention was not called to this erroneous ruling in the motion for new trial, but, by inspecting the grounds of that motion, it will be seen that it was called to the court's attention in a sufficiently definite way. Besides, the declaration of law given by the court explicitly declared there was no service on Stoddard and Hayward in this state to support a personal judgment. That declaration was erroneous as regards Hayward, and the motion for new trial complained of the declaration.

2. The notice of an intention to file a lien was served only on Corl, one of the owners of the premises, and not on his co-owner, Murray. For this reason the contention is preferred that the lien must fail, as the law requires subcontractors to give notice to all the owners of premises of an intention to file a lien. There may be a question as to whether service on Corl would support a judgment enforcing a lien against Murray's

interest in the premises, although the two were partners, and in some sense agents for each other. This question we waive, as it does not call for present decision. We have no doubt that, notice having been served on Corl, the lien can be enforced against his undivided interest.

3. The important and difficult question is whether the lien statement was sufficiently full and definite to satisfy the law. The lower court held it inadequately stated the items, and the dates when they were furnished. We think the description of the items of material furnished meets the requirement of the law. The heading of the first column of each page showed the different items following were lumber, because the word "Lumber" stood at the head of the column. Underneath were numerical and abbreviated verbal designations of the different kinds of lumber furnished. Such abbreviations are understood in trade, and employed constantly in making out bills and stating accounts. It was competent to explain by oral testimony the meaning of the figures and abbreviations. The figures, abbreviated words and initial letters, such as "S. & B.," "Com. Flg.," "No. 1 Rgh.," "Star dp sdg.," doubtless can be shown to have a well-known meaning, and to be descriptive of the kinds and sizes of the different lots of lumber furnished. Sometimes the material was named—for instance, "Ruberoid Roofing." The question of the sufficiency of such designations of material in a lien account was passed on by our Supreme Court in *Henry v. Plitt*, 84 Mo. 237, 241. The court said the heading of the account showed the figures used to designate the items referred to lumber, and, as figures, instead of words, are in common use in trade to indicate articles sold, the statement was good. The same proposition was passed on in *Schulenburg v. Werner*, 6 Mo. App. 292; *Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737. In those cases the accounts were no more full and definite in describing the different lots of material than is the present account. We therefore deem it not an open question that this one sufficiently describes the kinds of material furnished to be good under the mechanic's lien statutes.

4. The next point to be considered is the effect of the absence of dates. As to the time the extras were furnished, the months and days of the month are indicated by numbers, as is customary in commercial affairs. These numerical designations could have been explained by testimony, and the time they indicated defined. But the difficulty is that no year is given in the bill of extras, and the part of the account containing the lumber furnished under the original estimate has no notation of dates, either in words or figures. The account itself may be assisted by the affidavit attached to it. *Mitchell Planing Mill Co. v. Allison*, 138 Mo. 50, 56, 40 S. W. 118, 60 Am. St. Rep. 544. But the

affidavit contains nothing to throw light on when the material was furnished, except the statement that the demand accrued four months prior to the filing of the lien. Stating the months and days, but not the year, leaves the time when the material was furnished uncertain. Therefore the lien paper shows no more than that the demand accrued within four months prior to the filing of the claim in the office of the circuit court. The last extra was furnished June 8th, as is shown by the notation "6/8." The last credit of \$500 was entered June 10th ("6/10"). The question for decision is as to whether the statement that the demand accrued within four months, without any showing as to when the first material was furnished, or the extreme dates between which all the material was furnished, or any dates when the different items were furnished, makes a good lien account. In answering this question, the first thing to ascertain is what our statutes say on the subject, if anything. The statutes require every original contractor within six months, and every journeyman within sixty days, and every other person seeking a lien within four months, after his indebtedness accrued, to file in the office of the clerk of the circuit court of the proper county a just and true account of the demand due him, after all just credits have been given; the same to be verified by oath. Rev. St. 1899, § 4207. The railroad lien law expressly requires dates to be given. Rev. St. 1899, c. 47, art. 4, §§ 4239-4256. The other lien statutes say nothing about dates, and their language exacts nothing in regard to time, except that the lien must be filed within a certain period after the indebtedness accrues. In the case of a subcontractor this period is four months. Now, as the plaintiffs, who were subcontractors, averred in the lien paper that their demand accrued within four months of the filing, they complied with the language of the statutes. If any more in regard to dates or time is necessary, it is on account of the implication arising from the use of the expression "a just and true account." Are the dates of the different items of an account, or of the first and last items, essential ingredients of a just and true account, according to the meaning of that term in the mechanic's lien law? By "just and true" is meant an account which states truth, and not falsehood, and demands no more than, in right and justice, the claimant ought to have. The question comes down, then, to the legal meaning of the word "account"; and, if we turn to the books, we find that the word has no precise and inflexible meaning in law, but is one of diverse significations. *Morrisette v. Wood*, 128 Ala. 505, 30 South. 630. The primary idea of an account is a statement of debits and credits between parties who have been doing business with each other. *Whitwell v. Willard*, 1 Metc. (Mass.) 216; *Nelson v. Posey Co.*, 105 Ind. 287, 4 N. E. 703; *Purvis v. Kroner*, 18 Or. 414, 23

Pac. 260; *Turgeon v. Cote*, 88 Me. 108, 33 Atl. 787. An account has been defined as a written statement of pecuniary transactions; a detailed statement of demands in the nature of debit and credit between parties, arising out of contract or some fiduciary relation. 1 Am. & Eng. Ency. Law (2d Ed.) p. 434. Another text-book says an account is no more than a list of items, whether debits or credits; an exhibit of charges and credits growing out of mutual dealings, presented in such form as to facilitate the determination of the balance due by simple calculation; that the term has no clearly defined legal meaning, but the primary idea is that of debit and credit. 1 Cyc. 362. The conclusion from these definitions is that giving the dates of various transactions is not indispensable to an account, though dates, we know, are usually affixed in stating a bill of debits and credits. The conclusion is to be derived, also, that the word "account" is not a word of precise technical import, requiring the presumption that the Legislature, in using it, meant to call for a statement of particulars containing essential and well-known parts. There are technical words which convey a meaning not only definite, but full and precise. For instance, if the word "deed" is used, it imports an instrument possessing certain elements or parts, which at once occur to one of legal training. The courts of this state have had occasion to pass on the term "account" as used in the mechanic's lien law. In *McWilliams v. Allan*, 45 Mo. 573, it was said there is a broad distinction between an account and the amount due; the balance due is but the result of the debit and credit sides of an account; it implies mutual dealings, without which there could be no balance; what the Legislature intended was that the lienor should exhibit his demand fully, and thereby show the balance sought to be imposed as a lien, instead of merely stating the balance. But the Supreme Court said in *Mitchell, etc., Co. v. Allison*, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544, that the authority of *McWilliams v. Allan* had been shaken in regard to the necessity of itemizing an account by the later case of *Hilliker v. Francisco*, 65 Mo. 598, which went far toward authorizing a lumping charge under certain circumstances. In *Coe v. Ritter*, 86 Mo. 277, 287, it was said incidentally that the dates of items ought to appear in a lien account; and this ruling was taken in *Curless v. Lewis*, infra, as establishing the rule that dates are indispensable. That remark was made in a case wherein the question for decision was as to whether a lien for material or a deed of trust on the premises should have priority, and the decision depended on when the material was furnished. A lien attaches in favor of any one who furnishes material for an improvement after it is begun, and the lien enjoys priority over a subsequent incumbrance, but not over an incumbrance

earlier in point of time than the inception of the work. It is obvious that the date when an improvement is started and materials furnished for it is vital when the controversy is concerning which has priority—a lien or an incumbrance. In *Coe v. Ritter*, supra, the dates when the several lots of material were supplied were stated in the lien account, and, according to those dates, the deed of trust was entitled to precedence. But the right was asserted to show the dates given in the lien paper were incorrect, and that part of the material was furnished earlier than they indicated. This evidence was rejected on the ground that the statutes called for a just and true account, and the tenure of others interested in the premises, who had relied on the statement filed with the circuit clerk, ought not to be jeopardized by contradicting the statement. That decision did not touch the question in hand. It is difficult to see how dates can be important when the controversy is between a proprietor of premises, who contracts in person for an improvement, and a party who supplies material for the improvement. Of course, if the material was supplied more than five years before the action was instituted, and the earlier items were not kept alive by a running account, those items would be barred by the statute of limitations. That, however, would be matter of defense in a suit to enforce the lien, and the necessity of showing it on the face of the lien claim is far from obvious. *Mitchell, etc., Co. v. Allison*, supra.

As the term "account" has no precise technical meaning, when interpreting a statute in which it is used we should adopt that one of its common meanings which will realize best the main object of the statute. Now, as a statement of debits and credits may either contain dates or not, and still constitute an account, we should not require any fuller showing of dates in a lien account than the language of the lien statutes calls for, or than will aid in accomplishing the purpose of those statutes. To require more would incumber the law with a useless rule. The principal facts to be shown by a lien statement are what material or work the claimant wishes a lien for, and when the indebtedness accrued. Such a showing enables the owner of the premises to ascertain whether the work or material actually went into the improvement, and whether the statement was filed in the time limited. By ascertaining the truth about those matters, the owner will know that his property is or is not liable prima facie for the claim. So much regarding what strikes us as the sound theory of the question. Let us return to the cases.

There has been a diversity of rulings by the appellate courts of this state as to the necessity of dates to a lien account. It may be said that all the decisions hold that a date need not be affixed to every item. The real problem is as to whether the lien paper

must show the extreme dates of the account (that is, the dates of the initial and the final transaction), or whether it suffices to show the demand accrued within four months before the filing of the lien account, or whatever the period may be, depending on the character of the claimant. The decision in *Curless v. Lewis*, 46 Mo. App. 278, was that a "just and true account" meant an itemized account, with dates, and that a lien paper which did not show the beginning of the account, but did show that the demand accrued within six months prior to the filing (the claim was that of an original contractor) was insufficient. The same court (Kansas City Court of Appeals) declared the same doctrine in *Mitchell, etc., Co. v. Allison*, 71 Mo. App. 251. The latter case was certified to the Supreme Court as in conflict with the decision of this court in *Hayden v. Wulfig*, 19 Mo. App. 353. In the following decisions, accounts that gave the initial and the final dates of various transactions, but not the dates of the intermediate items, were held good: *Mesker v. Cutler*, 51 Mo. App. 341; *McDermott v. Claas*, 104 Mo. 14, 23, 15 S. W. 995; *Itner v. Hughes*, 133 Mo. 679, 684, 34 S. W. 1110. The first and last dates appeared, too, in *Mitchell, etc., Co. v. Allison*, for, though there was a long account in that case, consisting of many items to which no dates were affixed, the account closed with these words: "Delivered and used in the building above described between April 20, 1893 and July 19, 1893." The Kansas City Court of Appeals held that those words were not enough, and that the lien claim was void, but the Supreme Court took the other view. It will be perceived that as the account in hand lacks the initial date, and fails to show more as to the final date when material was furnished than that the demand accrued within four months of the filing of the lien, the point in decision in the *Allison* Case is different from the one we are called on to decide. Still the tone of the Supreme Court's decision favors the validity of the present lien. The opinion deals with the meaning of the word "account," and says: "The account which this law contemplates is such a statement of the claim as fairly apprises the owner and the public of the nature and amount of the demand asserted as a lien. The account may consist of one or more items. It may be all on one side, or mutual in its showing. To be valid, however, it must disclose on its face that the demand is of a sort within the terms of the lien law. The affidavit required to verify the account may be considered along with the account itself in ascertaining the sufficiency of the latter." The Supreme Court's opinion pointed out that the decision of the Kansas City Court of Appeals was in conflict with the decisions of this court in several cases besides *Hayden v. Wulfig*. If the opinion had held in terms that *Hayden v. Wulfig* was correctly decided, we would have no difficulty with the

present case. But it made no comment on the decisions of this court. In effect, it overruled the decision in *Curless v. Lewis*, supra, which was discarded as authority by the court which decided it. In *Hayden v. Wulfin*, 19 Mo. App. 353, the account contained no dates except one at the top, which was taken as the time when the account was rendered, and not the time when the material was furnished, just as we take the date at the head of the account in controversy to be. The opinion of Judge Rombauer gave attention to some of the decisions in this state on the subject, and contrasted our statute, which does not require dates in a lien account, with the Pennsylvania statute, which does. After noticing the authorities, the opinion said: "In view of the foregoing, we have come to the conclusion that the account required by the statute is not necessarily invalidated as a lien because it fails to give the dates when the work was done, provided it appears from it or other parts of the lien paper filed that it was completed and the indebtedness accrued within the period required by the statute to entitle the contractor or subcontractor to a lien." In *Cole v. Barron*, 8 Mo. App. 509, the months and days of the months when the material was supplied were given in the lien statement, but not the year. The opinion said that if the items were over four months old the right to a lien was gone, but that the account was a just and true one, within the meaning of the statutes, as every object of the law was fulfilled. The court held the Pennsylvania cases were not in point, on account of the difference between the Pennsylvania and the Missouri statutes. In *Kern v. Pfaff*, 44 Mo. App. 29, the account contained no dates, but the defect was held to be supplied by the averment in the affidavit that the demand accrued within six months prior to the filing of the lien. In *Bambrick v. Ass'n*, 58 Mo. App. 225, the account was practically like the one before us, and without dates. It was adjudged sufficient, on the authority of *Hayden v. Wulfin*, supra, and *Kearney v. Wurde*, 33 Mo. App. 447. The latter case appears not to be in point, because dates were given in the account involved. In *Brockmeier v. Dette*, 58 Mo. App. 607, the account was for 2,409 hours of carpenter work—a lump charge. It was held valid. The foregoing decisions of this court show beyond question that the doctrine it upholds is that a lien account is good, though no dates are given, provided the attached affidavit shows the indebtedness accrued within the requisite period before the filing of the lien claim in the office of the circuit clerk. Decisions of like tenor can be found in other states having statutes similar to our own. *Noll v. Kenneally*, 87 Neb. 879, 56 N. W. 722; *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 47 Am. St. Rep. 779. In *People's Lumber Co. v. Hays*, 75 Mo. App. 516, the Kansas City Court of Appeals dealt with a lien statement

containing a large number of items, many of which had no dates. The court said that, following the decision of the Supreme Court in the *Allison Case*, the lien account must be held sufficient, as the affidavit contained a statement that the demand accrued four months prior to the filing of the lien. In *Sanderson v. Fleming*, 37 Mo. App. 595, the account had no dates, and was not cured by an averment elsewhere in the lien paper that the indebtedness accrued within the time prescribed for filing the lien claim. Therefore the court held that *Hayden v. Wulfin* did not control the decision, and the lien must fail. In the work of a leading text-writer on the subject, the doctrine seems to be maintained that, unless the lien statute requires dates, it is sufficient if the statement of a lien shows it was filed within the requisite time after the indebtedness accrued. *Phillips, Mechanics' Liens* (3d Ed.) § 359, citing *Knauff v. Miller*, 45 Minn. 61, 47 N. W. 313; *Johnson v. Stout*, 42 Minn. 514, 44 N. W. 534. We have no decision by the Supreme Court on the exact point involved, but incline to the view that the *Allison Case* sanctions the previous rulings of this court, which were to the effect that a lien paper is good if the affidavit states that it was filed within the statutory period after the indebtedness accrued, though no dates are given. We must therefore rule that the learned circuit judge erred in excluding the lien account of the present plaintiffs.

The estoppel and counterclaim pleaded in the answer call for no attention at this stage of the case, in view of the above ruling.

The judgment is reversed, and the cause remanded. All concur.

NELSON v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
June 28, 1905.)

1. DAMAGES—PERSONAL INJURIES—OBLIGATIONS INCURRED.

The fact that reasonable obligations, such as medical attention and nurse and servant hire, resulting from personal injuries, have not been paid, does not prevent a recovery therefor.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 99, 251.]

2. SAME—PLEADING.

A petition alleging the payment by plaintiff of sums of money for medicine, medical attendance, and nurse and servant hire, made necessary by personal injuries, does not authorize a recovery of damages for liabilities incurred for such items, but not paid.

3. SAME—PHYSICIAN'S SERVICES—MEASURE OF RECOVERY.

The measure of damages for personal injuries, as dependent on physician's services, is the reasonable value of such services, unless the charge made is less than the reasonable value, in which case the recovery cannot exceed the charge made.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 243.]

4. SAME—EVIDENCE.

Where testimony as to the rendition of physician's services, made necessary by personal injuries, merely shows that liability has been incurred on account of such services, but fails to show either the amount of the charge or the reasonable value of the services, a recovery of damages for the liability so incurred cannot be sustained.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 510.]

5. APPEAL—HARMLESS ERROR.

Where a verdict for injuries to plaintiff's wife greatly exceeded the sum of the actual disbursements made by plaintiff for medical attention and nurse and servant hire, error in the charge in permitting a recovery, under the pleading and proof, for liabilities incurred for such services, but not paid, could not be deemed harmless.

6. HUSBAND AND WIFE—INJURIES TO WIFE—MEASURE OF HUSBAND'S RECOVERY—LOSS OF WIFE'S SERVICES—INDEPENDENT VOCATIONS.

Under Rev. St. 1890, c. 51, relative to the rights of married women, a married woman who runs a boarding house is entitled to the profits thereof; and in case of injuries to her, rendering her unable to pursue her vocation, the right to recover the damages thus sustained, including the consequent expense of servant hire, belongs to the wife, and not to the husband, and the latter's recovery in this respect is measured by the value of his wife's services in the work performed for the family.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 238, 239.]

Appeal from Circuit Court, Jackson County; J. McD. Trimble, Special Judge.

Action by John Nelson against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

John H. Lucas and Chas. A. Loomis, for appellant. Meservey, Pierce & German, for respondent.

JOHNSON, J. Clare Nelson, wife of plaintiff, sustained personal injuries alleged to have been caused by the negligence of defendant. She brought suit to recover her resulting damages, and obtained judgment in the sum of \$1,000, which we affirmed at this term. *Clare Nelson v. Metropolitan Street Railway Company* (not yet reported).¹ In this suit the husband seeks to recover the damages sustained by him in consequence of his wife's injuries. The jury found for him in the sum of \$1,000, and defendant appealed.

All the questions presented upon this appeal are answered in the opinion filed in the wife's case, save those relating to the measure of damages.

The petition alleges that "plaintiff has been compelled to pay out the sum of one hundred dollars for medicine, two hundred dollars for a physician and surgical attention, one hundred dollars for nurse hire, and three hundred dollars for servants to perform the usual work heretofore performed by his said wife, and that he will be compelled to pay

out large sums of money on said account hereafter, and that the injuries received by his wife are permanent; * * * that her services have been entirely lost to this plaintiff, and will be lost to him for a long time hereafter, during which time plaintiff has been, and will be hereafter, deprived of the comfort, society, and assistance of his said wife."

At plaintiff's request the court gave the following instruction: "The jury are instructed that if you find for the plaintiff you will assess his damages at such sum, if any, as you may find and believe from the evidence plaintiff has expended, *or has become liable for*, for medicine for his wife, made necessary on account of the injury to her on March 21, 1903, as detailed in evidence, not exceeding the sum of \$100; also for such sum, if any, as you may find and believe from the evidence plaintiff has expended, *or has become liable for*, for the services of a physician for his wife, made necessary by reason of said injury, not exceeding the sum of \$200; also for such sum, if any, as you may find and believe from the evidence plaintiff has expended, *or become liable for*, for nurse hire for his wife, made necessary by reason of said injury, not exceeding the sum of \$100; also for such sum, if any, as you may find and believe from the evidence plaintiff has expended or become liable for on account of the employment of servants to perform the domestic services for plaintiff's household since said injury, if you find and believe from the evidence that such services were performed prior to said injury by plaintiff's said wife, and that her said injuries prevented her from performing them afterwards, not exceeding the sum of \$300; also such sums, if any, as you may find and believe from the evidence plaintiff will be compelled to expend hereafter as the reasonable result of the injury to his said wife for any of the matters hereinbefore specified; also for such sum, if any, as you may find and believe from the evidence will reasonably compensate plaintiff by reason of his having been deprived of the comfort and society of his said wife, if you find and believe from the evidence that he has been so deprived by reason of said injury; the whole amount of your verdict to be stated in one sum." The directions contained in the italicized words are claimed by defendant to be erroneous, under the averments of the petition and the evidence. It will be observed that liabilities created, but not paid, by plaintiff for medicines bought, and medical attention, nurses, and servants employed, on account of the injuries inflicted, are not included among the damages alleged to have been sustained, but compensation for them is directed in the instruction. The fact that reasonable obligations resulting from such injuries have not been paid does not prevent a recovery for them. *Wilbur v. Ry. Co.* (Mo. App.) 85 S. W. 671; *Mirrielees v. Ry. Co.*, 163

¹ Rehearing pending.

Mo. 402, 63 S. W. 718; Muth v. Ry. Co., 87 Mo. App. 432; Murray v. Ry. Co., 101 Mo. 240, 13 S. W. 817, 20 Am. St. Rep. 601; Morris v. Ry. Co., 144 Mo. 500, 48 S. W. 170. But being in the nature of special damages, the defendant must be advised by the petition of the specific claims he is being called upon to meet. Under allegations of expenses paid in the treatment and care of the injured in negligence cases, evidence of liabilities incurred, but not paid, is not admissible. Without a specific allegation, such damages are not recoverable. Muth v. Ry. Co., supra. We find upon an inspection of the record no evidence upon which to base the allowance of compensation for damages of this character. Plaintiff did not claim that he owed anything for medicines and nurse hire. His only unpaid bills were for medical attention. He said that he paid one doctor \$100 on account of services, and then testified: "Q. Do you owe him anything now? A. Yes, sir. Q. How much? A. I couldn't say how much I do owe him. Q. Haven't you any idea how much it is? A. No, sir." Another doctor attended his wife three or four weeks, for which he had not been paid. Plaintiff said: "Q. You still owe him? A. Yes, sir. Q. How much do you owe him? A. I don't know. Q. Did he ever send you any bill? A. No, sir." The fact alone that physicians treated the patient does not prove or tend to prove either the amount of their charges, or the reasonable value of the services rendered. The latter amount fixes the measure of damages, except when it appears that the charge made is less than the reasonable value, in which case the recovery is limited to the former amount, for the plaintiff is not entitled to receive more on this account than his actual loss. Proof of the liability paid or incurred is some evidence of the value of the services. Abbit v. Transit Co., 104 Mo. App. 534, 79 S. W. 496. But when, as in this case, the evidence fails to show either the amount of the charge or the reasonable value of the services, there is an entire failure of proof, and the jury should not be permitted to speculate in an effort to award full compensation for the actual damages suffered.

Nor can it be said that the error was harmless. The verdict greatly exceeded the sum of the actual disbursements made by plaintiff. We are unable to know just how much of the excess represents damages of this character, but presumably the jury obeyed the instruction, and allowed something for them. Under the pleadings and evidence, it was error to direct this to be done. Robertson v. Ry. Co., 152 Mo. 382, 53 S. W. 1082; Duke v. Ry. Co., 99 Mo. 347, 12 S. W. 636; Waldopfel v. Transit Co., 102 Mo. App. 524, 77 S. W. 128.

Plaintiff testified that at the time of his wife's injury he was employed in a beef and pork packing establishment, and, in addition,

conducted a boarding house at his home. His wife, without the aid of servants, did all of the cooking and housework for their family and for some 10 or 12 boarders. After her injury he was compelled to employ servants to do this work, for which services he paid \$230. The court, in the instruction under consideration, authorized the jury to compensate him for this expense. The common-law idea that the wife is but a kind of servant to the husband, bound to render to him to the fullest extent her personal services, including the earnings therefrom, has, under statutes enacted for her benefit, and their interpretation by the Supreme and Appellate Courts, given way to more just and enlightened views of the marital relation. The wife has been placed upon an equality with the husband with respect to her property and personal rights. Each of them assumes certain obligations to the other and to their offspring. The husband's duty is to support the family and provide for the education of the children, in return for which the wife owes him her services in caring for the household and in doing the work incident thereto. Her services to this extent belong to him, not because of any inherent superiority in position or right, but as a fair equivalent for his support and protection. But when the wife, through stress of circumstances or out of motives of thrift, is permitted to take upon her shoulders the husband's burden, or a part thereof, and becomes a wage earner, the earnings from her labor belong to her, not to the husband. In this case it does not appear how the fruits of the wife's work in providing for the wants of a house full of boarders were disposed of, but whether the husband alone profited by them, or they went into the family purse, her right to them must be conceded; and her inability to pursue her vocation, caused by the wrongful act of another, vested in her alone the right to recover the damages thus sustained. Rev. St. 1899, c. 51; Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, 28 L. R. A. 412, 46 Am. St. Rep. 468; Dunifer v. Jecko, 87 Mo. 282; Macks v. Drew, 86 Mo. App. 224; Huss v. Culver, 70 Mo. App. 514; Niemeyer v. Niemeyer, 70 Mo. App. 609. It follows that plaintiff's measure of recovery should be restricted to the value of his wife's services in cooking, housework, and other work performed for the family of which he has been deprived through her injury, and should not include services rendered to the boarders.

After the argument in this court, plaintiff entered a remittitur in the sum of \$230 to cover the expenditure for servants' wages; but in view of a retrial of the cause, made necessary by the other errors noted, the pertinency of a determination of this question is apparent.

The judgment is reversed, and the cause remanded. All concur.

DARNELL et al. v. LAFFERTY.*

(St. Louis Court of Appeals. Missouri. June 1, 1905.)

1. APPEAL—QUESTIONS REVIEWABLE.

Rulings in favor of appellant cannot be reviewed where respondents do not appeal.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 3573-3580.]

2. JUSTICES' COURTS — PLEADINGS — SUFFICIENCY.

Under Rev. St. 1899, § 8852, declaring that no formal pleadings shall be required in a justice's court, a statement of a cause of action and account filed before a justice of the peace are sufficient if they advise the opposite party of what he is charged, and bar another action for the same subject-matter.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Justices of the Peace, § 809.]

3. STATUTE OF FRAUDS — MEMORANDUM OF SALE—SUFFICIENCY.

Under Rev. St. 1899, § 3419 (Statute of Frauds), it is the general rule that a memorandum evidencing an agreement for the sale of personal property must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 222, 240.]

4. SAME—TIME AND PLACE OF DELIVERY.

A written statement that defendant had bought of plaintiff certain stock, to be weighed at a named place on a certain date, with 3 per cent. off at $3\frac{1}{2}$ cents per pound, was sufficiently definite as to time and place of delivery to satisfy the statute of frauds.

5. SAME—NECESSITY OF PROVISION AS TO DELIVERY.

A memorandum evidencing the sale of personal property is sufficient to satisfy the statute of frauds, though it does not state the time and place of delivery, it being regarded in such a case as providing for delivery within a reasonable time at the customary place.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 239.]

6. SAME—TIME AND PLACE OF PAYMENT.

Where a contract for the sale of cattle fixed the price at a certain amount per pound, and made no other stipulation as to payment, the price was payable in cash at the time and place of delivery.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 239.]

7. SAME—PARTIES—UNDISCLOSED PRINCIPAL.

A memorandum evidencing the sale of personal property is not rendered insufficient as to designation of the parties because one of them is acting as agent for an undisclosed principal, parol evidence being admissible to prove the agency.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 212, 213, 375.]

8. SAME—DESCRIPTION OF SUBJECT-MATTER.

A memorandum evidencing the sale of personal property is sufficient with regard to the description of the subject-matter if the description is such that, taken together with the facts and circumstances surrounding the transaction, and within the knowledge of the parties before and at the time of the contract, supplied by parol evidence, the subject-matter can be with certainty identified.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 222-224.]

9. SAME—CERTAINTY AS TO SUBJECT-MATTER.

A memorandum evidencing the sale of personal property described as "ten head of cows and heifers" is sufficiently definite in its description of the subject-matter to satisfy the statute of frauds.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by F. L. Darnell and others against Martin Lafferty. From a judgment for plaintiffs, defendant appeals. Affirmed.

Plaintiffs instituted their suit before a justice of the peace in Pike county, praying judgment in damages against defendant on account of the defendant's nonperformance of the contract sued on. As the point in decision here is the sufficiency of the petition and the contract declared on under the statute of frauds, we will set out the petition or statement filed before the justice in full, omitting the caption:

"Plaintiffs, for their cause of action against the defendant, say that the defendant entered into a contract with F. L. Darnell, one of the plaintiffs in this case, in writing, for the purchase of ten head of cows and heifers, which contract is in words and figures as follows, to wit:

"Vandalia, Mo. June 11, 1903.

"This is to certify that I, the undersigned, have this day bought of F. L. Darnell ten head of cows and heifers to be weighed at Curryville, Mo., on August 11th, 1903, with 3% off at $3\frac{1}{2}$ cents per lb.

"[Signed] Martin Lafferty."

"Plaintiffs say that said contract was delivered to said F. L. Darnell and accepted by him, and that he at all times stood ready and willing to deliver the cattle referred to in said contract to the defendant, and caused them to be weighed at the time and place therein stated; but plaintiffs say that on August 11, 1903, the defendant made request that the plaintiff Darnell keep the cattle mentioned in the contract until the 1st of September, and that plaintiff F. L. Darnell was still ready and willing to deliver said cattle to defendant, and caused them to be weighed at Curryville, Missouri, on September 1st, as requested by defendant, although the said plaintiff F. L. Darnell at no time agreed that the time of delivery should be extended until September 1st, but requested a payment of two hundred dollars down on said cattle as a condition for agreeing to such extension of time; but the defendant failed to pay said sum, and that the plaintiff was under no legal obligation to extend the time. Plaintiffs further state that J. W. Lewellyn was at the time of the making of said contract the owner of the cattle mentioned therein, and that his coplaintiff, F. L. Darnell, was acting as his agent in the care and management and sale of said cattle, and was his trustee for that purpose; and that said contract so entered into between defendant and F. L. Darnell was entered into by said F. L. Darnell for and on behalf of his coplaintiff, J. W. Lewel

*Rehearing denied June 19, 1905.

lyn. Plaintiffs say that said defendant, Martin Lafferty, has wholly failed and refused to keep the terms and conditions and covenants of said contract so executed and signed by him, and has declined and refused and failed to receive the cattle mentioned therein either on August 11, 1903, or on September 1, 1903, or at any other date, and has failed and refused to pay the purchase price for same at any time. Plaintiffs say that said cattle, when weighed at Curryville, Missouri, on September 1, 1903, weighed 10,580 pounds, and with three per cent. off at three and one-half cents per pound the purchase price for the same amounted to \$359.19. Plaintiffs say that by reason of the failure and refusal of the defendant to comply with and live up to the terms of his said contract they have sustained damages in the sum of two hundred dollars, in this: that the reasonable market value of the cattle at the time and place of delivery had declined to the amount of two hundred dollars under the contract price, and plaintiffs have been put to expense and inconvenience in bringing said cattle to Curryville, Mo., to be weighed, and by reason of the premises plaintiffs state that defendant is indebted to them in said sum of two hundred dollars by reason of his failure to comply with and carry out the terms of his contract. Wherefore plaintiffs pray judgment against defendant for said sum of two hundred dollars (\$200), together with interest and costs of suit."

The statute of frauds was interposed as a defense. Plaintiffs recovered judgment before the justice. The defendant appealed to the circuit court of Pike county. At the return term of the appeal in the circuit court the cause was continued. At the second succeeding term after the appeal had been lodged and on the circuit court's docket, plaintiffs filed their motion for an affirmation of the judgment of the justice for the reason that no notice of the appeal had been given as required by statute, and that they had done nothing amounting to a waiver thereof. This motion was overruled by the court, and exceptions saved. On this motion the court heard evidence, and examined its records, which were introduced. The court possibly found some of the record against plaintiffs on this hearing. After the ruling on said motion plaintiffs filed a motion to correct the record, which they understood the court had found against them. This motion the court likewise overruled. Plaintiffs expected. In due course the cause came on for trial before a jury. The record discloses that both sides made their opening statements, and "whereupon plaintiffs proceeded to introduce evidence to sustain their cause of action, but upon the objection upon the part of the defendant to the reception of any evidence under the statement of the plaintiffs filed in the cause all evidence was excluded by the court. To the action of the court plaintiffs then and there excepted,

whereupon the court directed the jury to return a verdict for the defendant, which was done." Plaintiffs filed a motion for a new trial in due time. This motion was by the court sustained. The defendant excepted to the action of the court in sustaining plaintiffs' said motion for a new trial, and brings the cause here by appeal. Appellant complains of the action of the trial court in sustaining the motion for a new trial. He also discusses in his brief the action of the court in overruling plaintiffs' (respondents') motions to affirm the judgment and to correct the record, both of which motions were ruled in the appellant's favor in the court below.

Ball & Sparrow, for appellant. J. D. Hostetter, for respondents.

NORTONI, J. (after stating the facts). The action of the circuit court in overruling the motion to affirm the judgment of the justice for want of notice of appeal and the action of the court in overruling the motion to correct the record in the court below are not reviewable here on appellant's appeal. Both of those motions having been determined in appellant's favor, and the respondents not appealing therefrom, the action of the trial court is not reviewable here at this time. It is unnecessary to cite authorities on this proposition.

Section 3852 of the Revised Statutes of 1899, provides that "no formal pleadings upon the part of either plaintiff or defendant shall be required in a justice's court." Under this provision this court and the Supreme Court have repeatedly held that a statement of a cause of action and account filed before a justice of the peace shall be sufficient to advise the opposite party of what he is charged, and to bar another action for the same subject-matter, and this will suffice. Beyond this no formal precision is required. *Doggett v. Blanke*, 70 Mo. App. 499; *Dahlgren v. Yocum*, 44 Mo. App. 277; *Leas v. Pac. Express Co.*, 45 Mo. App. 598; *Bauer v. Barnett*, 46 Mo. App. 654; *Haynes v. R. R.*, 54 Mo. App. 582; *Wilkinson v. Ins. Co.*, 54 Mo. App. 661; *Kansas City v. Johnson*, 78 Mo. 661; *Butts v. Phelps*, 90 Mo. 670, 8 S. W. 218; *Weese v. Brown*, 102 Mo. 299, 14 S. W. 945; *Polhans v. R. R.*, 115 Mo. 535, 22 S. W. 478. The statement filed before the justice is certainly sufficient unless the contract or memorandum set out therein is insufficient to take the case out of the operation of the statute of frauds and perjuries. This is a more difficult problem to solve. Appellant contends that the written contract or memorandum of sale set out in the petition is insufficient, under section 3419 of our statutes, to take the case out of the operation of said statute, and for that reason plaintiffs cannot recover thereon. The general rule is that the memorandum must contain the essential terms of the contract actually completed, expressed with such a

degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties. *Brown, Statute of Frauds* (5th Ed.) § 371; *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800; 2 *Kent's Commentaries* (14th Ed.) § 511; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Benjamin, Sales*, § 250; *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171; *Smith v. Schell*, 82 Mo. 215, 52 Am. Rep. 365; *Springer v. Kleinsorge*, 83 Mo. 152; *Rucker v. Harrington*, 52 Mo. App. 481; 8 *Am. & Eng. Ency. Law* (4th Ed.) 721, 726; *Story, Sales* (4th Ed.) §§ 269, 271; *Reed, Stat. Frauds*, § 392; *Wood, Stat. Frauds*, §§ 345, 270. In *Rucker v. Harrington*, 52 Mo. App. 489, Judge Ellison has well said: "This memorandum must be a memorandum of the contract; that is to say, all of the contract or terms of the agreement, and not of a part of it." In *O'Neil v. Crain*, 67 Mo. 250, our Supreme Court said: "Where a written memorandum of a contract does not purport to be a complete expression of the entire contract, or a part of it only is reduced to writing, the matter thus omitted may be supplied by parol." This case was quoted approvingly by the same court in *Lash v. Parlin*, 78 Mo. 391; also by this court in *Armsby v. Eckerly*, 42 Mo. App. 299. In *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800, the Supreme Court, speaking through *Gantt, P. J.*, cited *O'Neil v. Crain* and *Lash v. Parlin*, and pointed out that the doctrine therein announced arose, no doubt, from the fact that at common law, before the statute of frauds was enacted, a contract or agreement that would not fall within the ban of the statute was not then within the inhibition of the law, and that parol evidence might be heard to supply patent defects therein because the oral contract was good without the writing, and that the court had failed to note this distinction in those opinions, and said: "We fully concur in the statement of the ruling made in those cases which apply to a case not falling within the statute. But as to a case the subject-matter of which is within the statute, we think such a rule must inevitably become subversive of a plain statute, and it is our province to uphold the statutes, and not to nullify them." In *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300, the court, speaking through Judge *Sherwood*, said: "The memorandum being required to be complete in and of itself, parol evidence cannot be admitted to piece out the incomplete writing and make it a complete instrument. At one time in this court the heresy was announced that parol testimony was admissible for the purpose indicated. *O'Neil v. Crain*, 67 Mo. 250. The least erroneous adjudication on this subject is found in *Ellis v. Bray*, 79 Mo. 227; but the contrary and correct ruling was declared in *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800, and followed in *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171." So, upon an examination of the authorities in this state, we find

that, notwithstanding the erroneous doctrine announced in those cases by the Supreme Court, as well as in *Armsby v. Eckerly*, 42 Mo. App. 299, supra, by this court, which followed *O'Neil v. Crain* and *Lash v. Parlin*, the correct rule is that the writing must contain the essential terms of the completed contract, expressed with such a degree of certainty that it may be understood without recourse to parol to ascertain what the parties intended. It becomes necessary then to examine and ascertain what are the essential terms of this contract before we can pass upon the question of whether the memorandum is sufficient to assert itself without parol evidence. In the case at bar the essentials of the contract are: First, the parties; second, the subject-matter; third, the price; fourth, the time, place, and manner of payment; fifth, the time and place of delivery, if such delivery was agreed upon. The memorandum says the cattle were "to be weighed at Curryville, on August 11, 1903, with 3% off at 3½ cents per lb." This certainly shows the time and place of delivery, to wit, Curryville, August 11, 1903. Why should the respondents be required to drive the 10 head of cattle to Curryville, and weigh them on August 11, 1903, and then, after weighing, figure off 3 per cent. of the gross weight in order to ascertain the net amount due thereon at 3½ cents per pound, unless, after all of this, he was to have settlement then and there for the amount due, and upon such settlement, of course, part with the ownership and possession of the cattle? Contracts are to be construed with reference to the well-known customs of the country pertaining thereto, nothing to the contrary appearing. And it is a matter of common knowledge that cattle buyers, upon weighing cattle in the counties of this state, figure off the "drift" agreed upon, and give their checks for the amount due after ascertaining what the amount is with the per cent. figured off. If there was a contract made as to the time and place of delivery, then that portion of the memorandum above quoted is sufficient to cover it. If there was no such contract made between the parties, the transaction cannot fall on that account, as time and place are not required to be incorporated in the memorandum unless it is agreed upon. "The memorandum need not stipulate any time or place for the delivery of goods sold, or for the performance of any other contract, in the absence of such stipulation in the contract." *Brown, Stat. Frauds* (5th Ed.) § 384. When time and place are not agreed upon, the memorandum will be construed as providing for delivery within a reasonable time at the customary place. This question has been expressly decided in Missouri by both the Supreme Court and this court. *Smith v. Schell*, 82 Mo. 215, 52 Am. Rep. 365; *Dunn v. McClintock*, 64 Mo. App. 193. The price was 3½ cents per pound, fixed by

the contract. Nothing to the contrary appearing, it was to be paid in cash at the time and place of delivery.

The parties. Appellant contends with much force that the petition on its face shows that F. L. Darnell, whose name is mentioned in the contract as having sold the cattle to the appellant, was not the owner of the cattle; that his coplaintiff, J. W. Lewellyn, was the real owner of said cattle, and the real party in interest, and that said F. L. Darnell was the agent for Lewellyn and acted for him therein; that these facts do not appear in the memorandum, hence it is necessary, in order to enforce the memorandum, to resort to parol evidence to show this agency—in other words, to show how the respondent Lewellyn, whose name is not mentioned in the contract, became a party to the transaction at all, and what interest he had therein. On this proposition the law is well settled. The acts of an agent within the scope of his authority are always binding upon his principal, and it is wholly immaterial to the party dealing with the agent, the principal being bound thereby, that his dealing is had with the agent, and not with the principal in person. The principal being bound by the contract of his agent, the other contracting party has no reason to complain; nor is there any ground upon which he can complain. So it is that under the statute of frauds Mr. Pomeroy, in his work on Contracts, lays down the rule: "That when an agreement is executed by an agent in his own name, he appearing to be the contracting party, the requisite as to parties is complied with. The principal may maintain a suit to enforce the contract, and it is immaterial whether the principal is actually known during the transaction, or whether the other party supposed he was dealing with the agent personally entirely on his own behalf." Pomeroy, Contracts, § 89. This question has been squarely decided in this state in *Randolph v. Wheeler* (Mo. Sup.) 81 S. W. 419; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Bank of Odessa v. Jennings*, 18 Mo. App. 651; *Briggs v. Munchon*, 56 Mo. 473. "Under the same circumstances it is now the rule that a suit may be maintained and the contract enforced against the principal, even though he is undisclosed, and unknown to the other party at the time of entering into the agreement, provided, of course, it was actually made on his behalf." Pomeroy, Contracts, § 89. Our Supreme Court has recently said: "It is very familiar learning that the agent may enter into a contract for the purchase of land for an undisclosed principal, and the principal may maintain a suit in his own name, and enforce the contract, it being wholly immaterial whether the principal is known or unknown during the transaction, or whether the party supposed he was dealing with the agent personally, and on his own behalf." *Kelly v. Thuey*, 143 Mo., loc. cit. 438, 45 S. W. 300; *Randolph v. Wheeler*

(Mo. Sup.) 81 S. W. 419; *Fry*, Specific Performance (3d Ed.) §§ 238-240; *Wood*, Stat. Frauds, § 400; *Mantz v. Maguire*, 52 Mo. App. 136. Under this rule, had Lewellyn refused to deliver the cattle, Lafferty could have maintained his suit on the contract against Lewellyn, the undisclosed principal, and would have been permitted to show by parol evidence that Darnell was acting as agent for Lewellyn at the time the contract was made. There is no merit in this contention of the appellant. It is always competent to prove the agency by parol in contracts of this kind under the statute of frauds. The competency in this regard does not arise as an exception to the rule that the memorandum must contain the essential terms of the contract and cannot be supplied and pieced out by parol—the parties being regarded as one of the essentials—but is in strict conformity therewith. The essential as to parties is treated as complied with when the contract is made by an agent, even though made in his own name on behalf of an undisclosed principal, because of the well-founded principle arising out of the law of agency that an agent acting within the scope of his authority can bind his principal as effectually as the principal can bind himself, and no right of the other contracting party can possibly be infringed because he contracted with the agent, and not with the principal in person. It is wholly immaterial in law, if the contracting party obligated himself for a sufficient consideration to do or not to do a given act, whether he be required to perform to the agent, with whom he contracted, or to the principal, about whom he knew nothing at the time of the contract. Therefore it is permissible to show by parol that the agent was acting for the principal. "Although parol evidence is not admissible to show which of the parties is the vendor and which the vendee, it is admissible to show that one is merely an agent, and to prove who is his principal." 8 Am. & Eng. Ency. Law, 724; *Benjamin, Sales*, § 219; *Wharton, Agency and Agents*, §§ 403, 404.

Appellant contends the memorandum is insufficient in that it fails to specify how many cows and how many heifers, each, the color, grade, how marked or branded, or otherwise identify the property. It will be observed that the description of the subject-matter in the memorandum is "ten head of cows and heifers." This brings us to the consideration of the question as to what degree of precision in description of the subject-matter is required in sales of personality under the statute of frauds. The question is somewhat difficult of solution. Appellant cites a number of cases. We have examined each with care, and find that *Carrick v. Mincke*, 60 Mo. App. 140, holds that a memorandum must designate a vendee in some appropriate manner. In *Well v. Willard*, 55 Mo. App. 376, the point in decision was what was a

sufficient description of land under the statute. The same point was in decision in *Scarritt v. St. John's, etc., Church*, 7 Mo. App. 174, and in *Schroeder v. Taaffe*, 11 Mo. App. 267; while in *Hill v. Rich Hill Mining Co.*, 119 Mo. 9, 24 S. W. 223, it was the specific performance of a contract regarding the sale of real estate. *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171, was a case involving the sufficiency of a writing pertaining to the assignment of a lease. *Rucker v. Harrington*, 52 Mo. App. 481, is to the effect that a subsequent oral agreement cannot be made to vary a written contract for the sale of land properly within the statute. *Smith v. Schell*, 82 Mo. 215, 52 Am. Rep. 365, holds that it is not essential to include time and place of delivery unless they are agreed upon, as the law will construe a reasonable time and at the vendor's customary place of delivery. It will be readily seen that none of these cases—which are all that have been called to our attention by the appellant on this point—can aid us much in discovering the true rule in the matter under investigation. The books abound in cases on the question of what is a sufficient description of land. The rule in this state in such cases is stated by our Supreme Court in a recent case as follows: "While there is much conflict among the authorities as to what is a sufficient description of property in a memorandum or contract of sale, in order that it may be enforced by the purchaser, the rule to be deduced therefrom is that the land need not be fully and actually described in the paper so as to be identified from a mere reading of the paper; but the writing must afford the means whereby the identification may be made perfect and certain by parol evidence." *Smith v. Wilson*, 160 Mo. 657, 61 S. W. 597; *Black v. Crowther*, 74 Mo. App. 480. Diligent search fails to disclose a single Missouri case where the point in decision is the sufficiency of description of the subject-matter in a memorandum or contract for the sale of personalty under the statute of frauds. The text-writers on this subject lay down the following rule: "It must, of course, appear from the memorandum, what is the subject-matter of the defendant's engagement. Property, which is purported to be bargained for must be so described that it may be identified; * * * but the subject-matter may in any case be identified by reference to an external standard, and need not be in terms explained." *Browne, Stat. of Frauds*, § 385. "It is not necessary that the agreement should contain a very precise description of the property to be sold, as parol evidence is admissible to identify it, where the memorandum or note contains sufficient data to apply the description to the subject-matter by the aid of such evidence, without requiring any aid from such evidence as to the intention of the person sought to be charged, where he owns other property to which the writing might apply." *Wood, Stat. of Frauds*,

§ 353. "The identification must be, it has been said, without recourse to oral evidence; but this broad statement needs to be qualified by the distinction that, 'where a sufficient description is given, parol evidence must be resorted to in order to fit the description to the thing; but where an insufficient description is given, or where there is no description, such evidence is inadmissible.' The evidence is admissible to construe and apply a description, not to show what was intended to be expressed." 1 *Reed, Stat. Frauds*, § 408. "The subject-matter of the agreement must all be included in the memorandum, and must be described with sufficient exactness to render its identity certain upon the introduction of extrinsic evidence, simply disclosing the situation of the parties at and immediately before the time of making the contract. Parol evidence is admissible to show the surrounding circumstances and position of the parties, and thus to explain the meaning and application of the descriptive language, and thereby identify the subject-matter. * * * But if, by this means, the subject-matter is not certainly ascertained, parol evidence cannot be used to go further and actually supply a substantive part of the agreement, which has been entirely omitted from the memorandum or insufficiently expressed. It is enough that the subject-matter is substantially stated, and that no material portion of it is left to be wholly supplied by parol evidence. It need not be set forth with all its details, with perfect, exhaustive accuracy." *Pomeroy, Contracts*, § 90. See, also, *Benjamin on Sales* (6th Ed.) § 213, and *Story on Sales* (4th Ed.) § 269. "A memorandum must definitely fix the subject-matter to which it applies. It is not essential that it contain a particular description of the subject, but it must contain some statement or reference by which it may be completely identified. Parol evidence is admissible to apply words used to the object referred to." 8 *Am. & Eng. Ency. Law* (1st Ed.) 725, 726.

Having thus noticed what the books require in the matter of description of subject-matter, it is next in order to examine as to the mode and manner of applying a general or indefinite description of the subject-matter, and of identifying the chattels therein referred to. The eminent text-writers on the statute of frauds all agree that parol evidence is admissible to apply the description in the writing to the subject-matter sought to be described, and to identify the subject referred to if insufficiently described. *Wood on Statute of Frauds*, § 353, says: "It is not necessary that the agreement should contain a very precise description of the property to be sold, as parol evidence is admissible to identify it." See, also, section 396, where the same author says: "Parol evidence is admissible to identify the subject-matter of the contract," and by way of example says: "Where the vendor of leasehold premises

wrote a letter to his solicitor, stating, 'I have closed with Mr. W. for this place,' it was held that parol evidence was admissible to show what 'this place' was." *Waldron v. Jacobs*, 5 L. R. Eq. 131. So parol evidence was admitted to show what was meant by the expression "your wool" in a letter written by defendant's agent to plaintiff, upon which letter the contract was based. *Macdonald v. Longbottom*, 1 E. & E. 977, affirmed Exch. Ch. Id. 987. *Browne on Statute of Frauds*, § 409, says: "On the other hand, it is competent to show by oral evidence the circumstances under which the written agreement was made, so far as they may tend to aid the construction or application of its contents." See, also, section 375. 1 *Reed, Statute of Frauds*, § 416, says: "Oral evidence is admissible and essential to apply the writing to its subject. The rule is a general one, applying to all writings, whether within the purview of the statute of frauds or not, for, no matter how detailed the description, the last step in process of identification must take place in pais." *Pomeroy on Contracts*, § 90, says: "Parol evidence is admissible to show the surrounding circumstances and position of the parties, and thus explain the meaning and application of the descriptive language, and thereby identify the subject-matter." *Story on Sales*, § 269, says: "Verbal testimony would, of course, be admissible to prove whether the terms of the contract have been complied with, and how far they have been observed, and in what sense they were used by the parties, and what was their technical meaning; but not to prove what they were." *Benjamin on Sales*, § 213, says: "Although parol evidence is not admissible to supply omissions, or introduce terms, or to contradict, alter, or vary a written instrument, it is admissible for the purpose of identifying the subject-matter to which the writing refers. Thus where a written letter contained an agreement to purchase 'your wool,' parol evidence was admitted to apply the letter, and show what was meant by 'your wool.'" As illustrative of this subject, section 418, vol. 1, of *Reed on Statute of Frauds*, is herein inserted, with numerous examples of the description of the subject-matter in a memorandum pertaining to the sales of personality which were held sufficient: "While the same rules apply to personality as those which have been given in the preceding sections, the cases, as a rule, show a somewhat greater latitude of interpretation. The following are some examples of written contracts relating to personality which were regarded as adequately describing the subject-matter: Where there was a contract by letter for purchase of 'your wool,' accepted by a letter of the vendor, parol evidence is admissible to show that the wool was partly that of the vendor and partly some he could acquire through his neighbors. Lord Campbell, holding that the statute of frauds did not apply, said: 'I am of opinion

that when there is a contract for the sale of a specific subject-matter oral evidence may be received, for the purpose of showing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract.' There was parol proof which indicated that one of the parties intimated that, in his own opinion, the wool amounted to a given quantity. It turned out afterwards to be of a greater quantity. A tender of the latter was held good. In the Exchequer Chamber, Byles, J., thought it a case of latent ambiguity. Where the memorandum was as follows: 'Mr. Newell, 32 sack culasses at 39s., 280 lbs.' etc., oral evidence of the trade of the parties was admitted to show that, the one being a baker and the other a flour dealer, a sale of flour was meant. There was also a correspondence between the parties, which indicated the nature of their business. Where the defendant wrote the plaintiff, speaking of 'the boxes which I bought of you at ten shillings,' and requesting the plaintiff to deliver them to a certain third party, 'as also the fine black,' the memorandum was regarded as sufficient. A memorandum which does not give the size and weight, as of bales of cotton, is not, therefore, insufficient; average size and weight being presumed. Semble, that where 'this hemp' is spoken of, parol evidence is admissible to identify a particular lot, though the writing does not specify the quantity. The case in the note, whose syllabus is given at length, is an example of the care with which the meaning of the memorandum made to comply with the statute of frauds is sought to be discovered." In *Halliday v. Lesh*, 85 Mo. App. 235, by a contract in writing, plaintiff agreed to sell defendant a safe of a certain kind, without designating any particular safe. While the statute was not insisted on in this case, plaintiff's salesman was permitted to testify that at the time the order was made plaintiff had a safe answering the description of that mentioned in the order, and that it was included or sold by said order. Held not error. The case of *Ontario Deciduous Fruit Growers' Ass'n v. Cutting Fruit Packing Co.*, 134 Cal. 21, 68 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231, was on a written contract by which the fruit of certain orchards had been purchased. The orchards were described as follows: "Sundry orchards in Ontario and Cucamonga." The court held that it showed on its face that it was not the purpose of the contract to include all the orchards in the district named, and it therefore became necessary to resort to oral evidence to explain what orchards were meant, and that it was proper, therefore, to introduce oral evidence thereon. So much for the authorities and precedents on the question.

The rule permitting the introduction of parol to identify the subject-matter is treated as not subversive of the statute nor inconsistent with the general rule requiring all

of the essential terms of the contract to be in writing, as the law regards a general and somewhat indefinite description of the subject-matter in sales of personalty as a compliance therewith in stating that particular term of the contract, and, if the subject-matter be so designated in the writing that it may be identified by the reception of parol, tending only to endue the court and jury with knowledge of the facts and circumstances surrounding the parties at the time of the transaction and thus fit the description to the subject of the contract, it is sufficient. In a case where the memorandum is silent as to the subject-matter, the law will not permit the term to be added by parol, nor will the law permit the term to be enlarged by adding other subject-matter to the subject-matter therein mentioned. The statute does not require a formal contract, but only such memorandum as men in the haste and hurry of business may be supposed likely to make, but nevertheless of such a definite character in all the essentials of the contract that the intention of the parties, their names, and relation to each other under the contract, can be gathered from the memorandum itself, leaving nothing to be supplied by parol. Wood, Stat. of Frauds, § 344. So, in this case, the subject-matter being designated as "ten head of cows and heifers," it is apparent the statute is complied with by stating this term of the contract. It is plain from the term stated that the vendor was selling 10 head of cows and heifers, and the vendee was purchasing. There is enough here to authorize the reception of parol, showing the facts and circumstances surrounding the transaction, and thus describing the true situation of the parties at the time of making the contract, and thus enduing ourselves with the knowledge and facts in the minds of the contracting parties, we can intelligently apply the words of the memorandum "ten head of cows and heifers" to the subject-matter, to wit, the particular 10 cows and heifers in the minds of the contracting parties at the time, thus positively identifying the subject of the contract.

It is argued, however, that the purpose of the statute is to prevent the perpetration of frauds by means of perjury; that the wholesome purpose thereof is to render it so that dishonest men could not be heard to swear in court that this or that was the bargain, and thus perpetrate a fraud, and it was intended that the writing only should speak. This is true, and the courts have sought to carry out this purpose and intent of the statute, so far as applicable, without erecting an absolute barrier to business. A strict construction is maintained in so far as the terms of the contract are required to be in writing; but the statute must be so construed and applied as will permit the wheels of commerce to move on. However unsatisfactory the doctrine permitting the introduction of parol as herein indicated may

be to those who contend for strict construction, it must be remembered that, however minute and precise in matter of detail a description may be, in the last analysis resort must be had to parol; that the last and final step in all transactions of this kind is the process of identification; and if, perchance, a controversy arise, resort must eventually be had to parol evidence to fit even the most detailed and minute description to the thing described. This is necessarily true by reason of the very universality of the law. No rule of law can be made either by legislation or construction that will work out a just result from black and white in every case; and necessity, which knows no law, has ordained that resort must be had to parol to point out and locate that for which we hold the deed or writing, describing it in all the minutiae of detail and precision. Notwithstanding such minute description, we are unable to locate and identify without the aid of oral testimony. When we stop to reason upon the practical business affairs of life, we must know that what is here stated is true, and the courts construe the statutes in accordance with common sense and reason, as well as with the rules of law.

It is proper at common law to introduce parol to explain and throw light upon the language employed, in order that the intent of the parties may be ascertained; and the statute of frauds makes no change in this rule of evidence. The same rule prevails in reference to the admissibility of parol evidence to explain and apply the note or memorandum under the statute as existed at common law in reference to any written contract. The statute simply requires the contract shall be evidenced by writing, but it leaves the law relating to the effect of the written contract and the admissibility of evidence to explain or apply it as it existed at common law. Wood, Stat. of Frauds, p. 661; Browne, Stat. of Frauds, § 344a; Reed, Stat. Frauds, § 416; *Blest v. Ver Steeg Shoe Co.*, 97 Mo. App. 155, 70 S. W. 1081. These rules are stated by the learned authors and the courts as follows: "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument—or, in other words, to identify the persons and things to which the instrument refers—must, of necessity, be received." Section 1194, *Taylor on Ev.* (8th Ed.). "If the terms be vague and general, or have divers meanings, parol evidence will always be admissible of any extrinsic circumstances tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect." Section 1195, *Taylor on Ev.* (8th Ed.). The Supreme Court of the United States, after reviewing authorities extensively, said: "Without attempting to do what others have said they were unable to accom-

plish—that is, to reconcile all of the decisions on the subject—we think that we may lay down this principle as a just result: That in giving effect to a written contract by applying it to its proper subject-matter, extrinsic evidence may be admitted to prove the surrounding circumstances under which it was made, whenever without the aid of such evidence such application could not be made in the particular case.” *Bradley v. Washington, etc., Packet Co.*, 38 U. S. 89, 10 L. Ed. 72; *Clarke v. Boorman*, 85 U. S. 502, 21 L. Ed. 904; *King v. Ackerman*, 67 U. S. 417, 17 L. Ed. 292; *Reed v. Ins. Co.*, 95 U. S. 30, 24 L. Ed. 348; *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. 689, 30 L. Ed. 734; *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847. While it is true that parol testimony is inadmissible in all cases for the purpose of altering or varying the terms of a written contract, this rule does not obtain when the language employed in the writing is ambiguous, and it is sought by parol to elucidate the writing, rather than alter, vary, change, or extend its terms. It is proper in such cases to receive in evidence such facts and circumstances as will place the court as nearly as possible in the situation of the contracting parties at the time and place of the making of the contract with a view that they be thus better equipped to adjudge in what sense the language therein employed was used, and what, probably, was intended by its use. The result attained in such case is to be derived not from supplying the intention of the parties, but rather must be derived from the words of the document by enduing the court and jury with a knowledge of the facts and circumstances surrounding and immediately connected with the transaction and the true situation of the parties at the time of contracting. *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Riggs v. Myers*, 20 Mo. 239; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Sharp v. Sturgeon*, 66 Mo. App. 191. The rule in this state is stated to be that, the identity of the subject-matter of the contract not being definitely ascertained by its terms, parol testimony is admissible to make it certain. *Bray v. Adams*, 114 Mo. 486, 21 S. W. 853; *Skinker v. Haagsma*, 99 Mo. 208, 12 S. W. 659; *Amonett v. Montague*, 63 Mo. 201; *Long v. Long*, 44 Mo. App. 141; *Halliday v. Lesh*, 85 Mo. App. 285; *Welsh v. Edmisson*, 46 Mo. App. 282; *Philibert v. Burch*, 4 Mo. App. 470; *Greenleaf on Evidence (Lewiss' Ed.)* § 286. *Greenleaf on Evidence*, § 288, says: “It is only in this mode that parol evidence is admissible (as is sometimes, but not very accurately, said) to explain written instruments, namely, by showing the situation of the party in all his relations to persons and things around him; or, as elsewhere expressed, by proof of the surrounding circumstances. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to

several species of goods, to several monuments or boundaries, to several writings, or the terms be vague and general, or have divers meanings, as ‘household furniture,’ ‘stock,’ ‘freight,’ ‘factory prices,’ and the like; or, in a will, the words ‘child,’ ‘children,’ ‘grandchildren,’ ‘son,’ ‘family,’ or ‘nearest relations,’ are employed; in all these and the like cases parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party or to ascertain his meaning in any other respect, and this, without any infringement of the rule, which, as we have seen, only excludes parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself.”

Under the rule above stated, the language employed “ten head of cows and heifers,” being applicable to several head of cows and to several head of heifers, it is competent to show by parol what cows and what heifers were referred to. It seems, from a close reading of the authorities, that the true rule in cases of this kind is that the contract or memorandum under the statute must be complete in its terms; that the statute is complied with, as regards the term “subject-matter,” when the subject-matter is personalty, by a designation of the subject-matter, which, when taken together with the facts and circumstances surrounding the transaction and within the knowledge of the parties before and at the time of the contract, to be supplied by parol, would lead to a certain identification thereof. This, we must admit, is rather broad, and it may seem to be subversive of the wholesome purpose of the statute, but it is the result of the authorities both in this country and England, and there is no doubt but that it is the settled law on the question. The court below erred in sustaining the objection to the sufficiency of the memorandum pleaded in the petition, and acted rightly in granting a new trial herein.

For the reason stated, the judgment granting a new trial is affirmed. All concur.

SIMONS v. WITTMANN.

(St. Louis Court of Appeals. Missouri. June 1, 1905.)

1. BUILDING CONTRACT—BREACH—MEASURE OF DAMAGES.

The measure of damages for breach of a contract to erect a building is the difference between the price at which the contractor agreed to erect it and the reasonable value of the building erected in accordance with the contract requirements.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 293, 294.]

2. SAME—RIGHT TO RECOVER DAMAGES.

Where one who has contracted to erect buildings wholly fails to perform any part of his contract, the other party to the contract may recover damages, though he does not proceed with the erection of the buildings.

3. SAME—REASONABLE COST OF BUILDING—EVIDENCE—PLEADING.

In an action for damages from the breach by defendant of a contract to erect buildings for plaintiff, the latter alleged that after defendant's refusal to perform the contract plaintiff advertised for and received bids for the construction of the same buildings, the lowest one being several hundred dollars in excess of the price at which defendant contracted to do the work and sought recovery for this excess. *Held*, that this allegation was sufficient to authorize the admission of evidence as to the reasonable cost of constructing the buildings.

4. APPEAL—ESTOPPEL TO ALLEGE ERROR.

A party cannot complain that the pleadings did not raise a certain issue as to which evidence was admitted, where he himself introduced evidence on that issue.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3612.]

5. HUSBAND AND WIFE — CONTRACT FOR BUILDINGS ON WIFE'S LAND—RIGHT OF HUSBAND TO DAMAGES.

A husband may recover damages for breach of a contract with him for the erection of buildings on his wife's land.

6. SAME—CONTRACT BY HUSBAND FOR WIFE'S BENEFIT—PARTIES TO ACTION—TRUSTEE OF EXPRESS TRUST.

Where a husband, with his wife's knowledge and consent, and in her presence, entered into a contract for the construction of buildings on her land, he was a trustee, and entitled to sue in his own name for the breach of the contract, under Rev. St. 1899, § 541, providing that a trustee of an express trust may sue in his own name without joining the beneficiary, and declaring that a person in whose name a contract is made for the benefit of another shall be regarded as a trustee of an express trust.

7. AGENCY — CONTRACT FOR UNDISCLOSED PRINCIPAL—RIGHT OF AGENT TO SUE.

An agent contracting in his own name for an undisclosed principal may sue on the contract in his own name.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 512½, 691, 692.]

Appeal from St. Louis Circuit Court; J. W. McElhinney, Judge.

Action by Charles Simons against Adolph Wittmann. From a judgment for plaintiff, defendant appeals. Affirmed.

The suit is for damages alleged to have accrued to plaintiff by reason of defendant's breach of a building contract. On November 17, 1902, defendant, a contractor and builder, entered into a written contract with the plaintiff, whereby he agreed for a consideration of \$3,300, to be paid as the work progressed, on the certificate of the supervising architect, to furnish all materials and labor, and to erect and complete for plaintiff, in good workmanlike manner, as therein provided, four 1½ story cottages on a certain lot of ground situated on the north side of Hoffmeister avenue, near Broadway, in St. Louis county, in accordance with plans and specifications therein provided for. The buildings were to be completed and delivered to plaintiff by March 1, 1903. The petition alleges a breach of this contract in that defendant wholly failed and refused to perform any part thereof, and avers substantially that defendant's refusal to erect said cot-

tages for the price therein agreed upon entailed great loss upon plaintiff; that plaintiff had given public notice, and had received bids for the construction of said cottages, and the lowest bid submitted thereon amounted to \$3,800, which sum is the lowest amount at which plaintiff could procure the erection of such cottages; that defendant's refusal to erect such cottages in accordance with his contract entailed a loss of \$500 upon plaintiff, for which sum he asks judgment. The case was tried before the judge without the intervention of a jury. No instructions were asked or given. There is but slight disagreement as to the facts. The evidence discloses that defendant was the lowest of a number of bidders for the contract which was awarded to him. Thereupon it was reduced to writing, and executed by the parties. In accordance with its provisions, he was also to execute a certain bond, but failed to do so. This suit is on the contract, and not on the bond. Within a day or two after executing the contract, defendant notified plaintiff that he had learned that plaintiff's wife, and not the plaintiff, was the owner of the lot of ground upon which the cottages were to be erected, and he therefore refused to make the bond, or have anything further to do with the contract; that he would not erect the buildings, as he would be unable to run a mechanic's lien on the property to secure his pay in event it became necessary to do so, as plaintiff, with whom he had contracted, did not own the land upon which the buildings were to be erected. Thereupon it was proposed to defendant that plaintiff's wife would sign the contract, and plaintiff's wife offered to sign said contract, thus obviating defendant's objection thereto, but defendant remained obstinate, and declined to do any act under the contract. It was also shown that at the time he entered into and executed the contract sued on bids were opened at plaintiff's residence, plaintiff and his wife, who owned the land, the defendant, and the architect all being present; that plaintiff's wife participated in the conversation and the negotiations there being had pertaining thereto, in pointing out certain changes in the plans and specifications which she desired, etc.; and that the result of this meeting and conversation was the contract between plaintiff and the defendant in the presence of the wife. It was further shown in evidence that, the time for the completion of the buildings having lapsed, the defendant still refused to perform any part of said contract; that the plaintiff did not erect the buildings, nor had he as yet contracted with any person to do so for him. In the absence of proof showing the buildings to have been erected by plaintiff and their reasonable cost, the court permitted plaintiff to prove that the reasonable cost of erecting the four cottages in accordance with the contract within the time provided for, and their reasonable

value when completed in accordance with the contract, would be \$3,600, or \$300 more than the price at which the defendant agreed by the contract to erect them. Upon this state of facts the court found the issues for the plaintiff, and assessed his damages at \$300, the difference between the price agreed upon in the contract and the reasonable value of such buildings provided they were erected in accordance with the contract. The defendant appeals to this court. The errors relied upon for reversal are that the court erred in measuring the damages. He contends that the true measure of damages in the case was the difference in the value of the real estate without the buildings and the value thereof with the buildings erected thereon, and, further, that the allegation of the petition would not permit proof of the reasonable cost or value of the buildings, and, further, that as plaintiff's wife owned the land upon which the buildings were to be erected, plaintiff had no right to maintain this suit. The several assignments will be noticed in the opinion.

W. H. & Davis Biggs, for appellant. Edward N. Robinson, for respondent.

NORTONI, J. (after stating the facts). It is argued by appellant, and we are cited to Lloyd on Building (2d Ed.) § 68, where the learned author says: "Where a breach consists in a failure to erect a building as agreed, the measure is the additional value which would have accrued to the land." We have taken pains to examine closely all of the cases cited by the author in support of the text above stated, and find that many of those cases were controversies between a landowner and a railroad company arising by virtue of an obligation on the part of the railroad to maintain a depot on or at the plaintiff's premises. In some of those cases plaintiff had conveyed to the railroad a right of way and depot grounds in consideration of its erecting and maintaining a depot thereat, and in others the railroad had sold plaintiff grounds for hotel purposes, agreeing to maintain a depot adjacent thereto. Upon these facts the courts hold the covenant as running with the land, and upon suits for a breach of the covenant in failing to maintain or in removing the depots provided for have universally held that, inasmuch as the maintaining of such depots in connection with the railroad would necessarily enhance the value of the lands, and that this was an element in contemplation of the parties when the contract was made, the true measure of damages in such case would be the difference in value of the land with the depot standing as provided by the contract and with the depot removed therefrom; or, in other words, as plaintiff had parted with the right of way and depot grounds in consideration that a depot was to be established, which would enhance the value of their remaining lands, that the measure of their recovery should be

such increased value occasioned by the location of the depot thereupon. Mobile, etc., Ry. Co. v. Gilmer, 85 Ala. 422, 5 South. 138; Louisville, etc., Ry. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Watterson v. Ry. Co., 74 Pa. 208; Houston, etc., Ry. Co. v. Molloy, 64 Tex. 607. No case can be found by us in the books where, for a breach of a builder's contract, as in this case, it was held that the measure of recovery was the difference in the value of the real estate with and without the contemplated building, and we have been unable to find a Missouri case where the suit was for a total failure to perform a building contract. There are numerous well considered authorities, however, from other jurisdictions which are in point, and have materially aided us in arriving at our conclusions.

We cannot agree with appellant's contention that the measure of damages in this case is the difference between the value of the land without the buildings and the value thereof with the buildings erected thereon in accordance with the contract. If this were the measure of damages, it might be that one owning land would contract for the erection of a building much desired by the owner, yet of such a character as not to enhance the value of the land, and in fact depreciate the market value thereof. Upon a breach the contractor could confess his fault, defend against and defeat a substantial recovery upon the grounds that the value of the real estate would not be enhanced by the erection of the buildings. Therefore it has been well said that: "A man may do what he will with his own, having due regard to the rights of others; and if he chooses to erect a monument to his caprice or folly on his premises, and employs and pays another to do it, it does not lie with the defendant, who has been so employed and paid for building it, to say that his own performance would not be beneficial to plaintiff." Chamberlain v. Parker, 45 N. Y. 569; 3 Sutherland on Dam. (3d Ed.) 697. The case of Real Estate Co. v. MacDonald, 140 Mo. 605, 41 S. W. 913, much relied upon by appellant in this behalf, is not in point here. In that case defendant had purchased from plaintiff certain grounds partially on a credit, giving a deed of trust thereon and a certain bond for \$35,000, which bond obligated defendants to erect buildings of the value of \$35,000 thereon. One of the conditions of the sale on the partial credit extended was that the defendant should build 10 buildings on said ground at a cost of \$35,000, before a given time, which, of course, would render the security for the debt secured by the deed of trust much more valuable. The defendant made default, and failed to erect the buildings as required by his bond. In a suit by plaintiff on said bond the Supreme Court held that the bond stood as a security for the difference between the land without and the land with the buildings upon

it; that it was necessary for plaintiff to show the value of the land without the buildings and the value of the land with the buildings in order to arrive at the true measure of recovery. The decision was certainly a correct exposition of the law of that case. It is to be observed that the court passed upon that case, being properly guided by the matters within the contemplation of the parties at the time the bond was executed—that is, the enhancing of the value of the security for the deferred payments of the purchase price which was secured by the deed of trust mentioned—and that case is unlike the case at bar. This measure, applied to the case in decision here, would be violative of that general rule and fundamental principle of the law of damages resting upon the idea of compensation for the wrong done which seeks to compensate for the thing contracted for. 8 Am. & Eng. Ency. Law (2d Ed.) 635; *The Pittsburgh Coal Co. v. Foster*, 59 Pa. 365; *Amer. Surety Co. v. Woods*, 105 Fed. 741, 45 C. C. A. 282; 3 *Sutherland on Dam.* (3d Ed.) 697. We find that when a contractor, as in this case, has, first, wholly failed to perform any part of his contract; or, second, when he has partially completed and abandoned the building; or, third, when he has substantially completed the building, not in accordance with the contract, the same being insufficient and defective in workmanship, skill, or materials furnished, when measured by the requirements of the contract, and there being no waiver on the part of the employer—that in either of such cases the owner or employer had the right to erect the building which has been untouched by the defaulting contractor in the first instance, or continue to completion the partially completed and unfinished building in the second instance, or complete and make good the substantially completed building in the third instance, according to the requirements of the contract, and upon his having erected such untouched building, or completed such partially completed and unfinished building, or made good such substantially and defectively completed building, he is entitled to recover against the defaulting contractor on account of such breach.

(a) The true measure of which recovery in the first instance, if the contractor has been paid in advance for the building, is the value of the building when completed in accordance with the contract.

(b) If he has not been paid in advance for such building, the measure of recovery is the difference in the price at which the contractor agreed to erect the building and the reasonable cost to or the reasonable expenditure of the owner or employer in erecting the building in accordance with the contract requirements. This is true because, by virtue of the contract, the employer is entitled to a building at the hands

of the contractor for the price therein agreed upon, and, upon the contractor defaulting and refusing, doing no act toward performance, the owner has the undoubted right to erect such a building, and, if it reasonably costs him more than the price at which the defaulting contractor was to erect it, he should, in justice, be reimbursed by the contractor for the additional expenditures which the defaulting contractor, by his wrongful act, has entailed upon him. *Laraway v. Perkins*, 10 N. Y. 371; *Chamberlain v. Parker*, 45 N. Y. 569; *Taylor v. Ry. Co.*, 56 Cal. 317; *Cincinnati, etc., Ry. Co. v. Carthage*, 36 Ohio St. 631; *Morrell v. Ry. Co.* (Com. Pl.) 3 N. Y. Supp. 928; *Mayor, etc., N. Y. v. Ry. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; *Gray et al. v. Reed et al.*, 65 Vt. 178, 26 Atl. 526; *City of Sherman v. Connor*, 88 Tex. 35, 29 S. W. 1053; *Neale v. Smith*, 61 Ark. 565, 33 S. W. 1058; *Baker Transfer Co. v. Merchants' Ref., etc., Co.*, 42 N. Y. Supp. 76; *Kidd v. McCormick*, 83 N. Y. 391; *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, 88 Am. Dec. 396; *McCormack v. Lynch*, 69 Mo. App. 524-529; 3 *Sutherland, Dam.* (3d Ed.) §§ 997-999.

(c) The measure of recovery in the second instance for completing the unfinished building, and, in the third instance, for bringing up to the contract requirements the substantially yet defectively completed building, is the difference in the value of the partially completed building when abandoned by the contractor, or the substantially and yet defectively completed building and the reasonable cost or value of the building completed in accordance with the requirements of the contract. *Haysler v. Owen*, 61 Mo. 270-274; *Hirt v. Hahn*, 61 Mo. 496, 498; *Spink v. Mueller*, 77 Mo. App. 85-93; *McCormack v. Lynch*, 69 Mo. App. 524-529; *Fairbanks, etc., Co. v. DeLissa*, 36 Mo. App. 711-722; *Fletcher v. Milburn Mfg. Co.*, 35 Mo. App. 321-328; *Wright v. Sanderson*, 20 Mo. App. 534-541; *Springfield Milling Co. v. Barnard, etc., Mfg. Co.*, 81 Fed. 261-266, 26 C. C. A. 389; *Sunman v. Clark*, 120 Ind. 142, 22 N. E. 113; *Pittsburg Coal Co. v. Foster*, 59 Pa. 365; *Carroll et al. v. Caine*, 27 Wash. 402, 67 Pac. 993; *Village of Brighton v. Auston*, 19 Ont. Rep. 305; 3 *Sutherland, Dam.* (3d Ed.) § 299; 1 *Sutherland on Dam.* (3d Ed.) § 91.

It will be observed that in stating the above rules, we have said the owner or employer was entitled to recover the reasonable cost of erecting the building or completing the building in accordance with the contract. There are authorities holding to the broad statement that a recovery can be had by the employer or owner for the actual cost or expenditure of completing the contract. We are inclined to the opinion that the better rule—that borne out by the most carefully considered cases and the most eminent authorities—is as stated in 1 *Sutherland on Damages* (3d Ed.) § 91: "A party to a contract

which has been broken by the other has a right to fulfill it for himself as nearly as may be; but he must not do this unreasonably as regards the other party, nor extravagantly, but he may expend such sum as will give him what he was entitled to under his contract, though that be more than the price for which the contractor was to have done the work. * * * A person has no right to put others to an expense of such a nature as he would not, as a reasonable man, incur on his own account." The New York court in *Mayor, etc., New York, v. Ry. Co.*, 102 N. Y. 572, at page 577, 7 N. E. 905, at page 906, 55 Am. Rep. 839, having this identical question in decision, says: "But where a covenantee has made repairs which the covenantor was bound, but has neglected, to make, and has proceeded in the usual way, and no fraud is shown, nor any facts to impeach the reasonableness of the account, the sum actually expended in the work is, we think, *prima facie* the sum which he is entitled to recover. In the absence of proof neither fraud, recklessness, nor extravagance will be presumed, and this measure of recovery presumptively gives the covenantor actual indemnity only." We think this is the sound doctrine on the subject. It seems to be sound in law, and in accordance with both reason and justice.

The learned trial judge did not err in permitting respondent to prove the reasonable cost of erecting the buildings provided for under the contract.

It is said that the damages for breach of contract, admeasured by the rules above stated, are obviously just and proper, and that such rules furnish a proper standard by which to measure the employer's damages, because the building, completed in accordance with the contract, is exactly what the employer is entitled to, and thus the principle of compensation is met and satisfied, and by the process of computing damages therein provided for the contractor obtains just what his untouched work or unfinished work or his defective work is worth, and he cannot complain. 3 *Sutherland on Damages* (3d Ed.) § 690.

It is next argued by appellant that damages in cases of this class are allowed upon the principle of compensation, when allowed at all, and that, unless there be some expenditure or outlay on the part of the complaining party, there can be no recovery upon the principle of compensation; that, inasmuch as respondent failed to take up the work after the default of the contractor, and erect the several buildings mentioned, no recovery can be had therein other than nominal damages for the wrongful breach, when the evidence shows that the thing to be done or produced would be of no value to the employer, or if the damage is merely possible or conjectural. This contention no doubt is largely predicated upon appellant's main proposition that the damages accrued,

if at all, to the real estate, and the plaintiff, not owning the real estate, was therefore not damaged, and his wife, who owned the real estate, is not shown to have been damaged. In the total absence of evidence showing the difference in the value of the real estate with and without the buildings, what has been said heretofore is sufficient answer to so much of this argument as is predicated upon that idea. We will say, however, that, while the damages are allowed upon the principle of compensation, as argued by appellant, the law allows compensation upon the theory that those matters which were within the contemplation of the parties at the time of making the contract, and which the contract reasonably required to be performed, are to be compensated for in case of a breach. In this case it was contemplated that for the sum of \$3,300 respondent was to have from appellant four cottages, which were in truth of the value of \$3,600, and in default to furnish the cottages compensation must be made to the extent of the deficiency. The evidence shows the thing he contracted for to be of \$300 greater value than the contract price, and therefore respondent is entitled to compensation from appellant for this amount, of which he was deprived by appellant's breach.

As to the contention that recovery cannot be had until the employer has erected the buildings and ascertained definitely the cost thereof, it is laid down as a rule in 3 *Sutherland on Damages* (3d Ed.) § 699, that: "In such cases the employer is generally entitled to measure his damages by what the necessary expense would be to procure to be done the work which the contractor neglected to do, whether it was done or not; for the same reason that a vendee in an executory contract for the sale of goods need not in fact purchase the goods he was entitled to receive from the vendor in order to have his damages computed on the basis of what they would cost him at the time of the breach." In *American Surety Co. v. Woods*, 105 Fed., loc. cit. 746, 45 C. C. A. 287, the court said: "Where the employé or contractor without legal cause abandons the work unfinished, the right of the employer to sue for the breach of the contract is not dependent on his completing the abandoned work. He may sue at once, and recover of the employé or contractor such damages as, under legal rules, he can show he has sustained." It will be observed that the evidence in this case on the reasonable cost of erecting the buildings was as to the reasonable cost at the time of the contract, and the case was not rendered one of that uncertain class by indefinite testimony as to what might be the cost of the buildings some time in the future, which would necessarily depend upon the fluctuating prices of labor and materials, and therefore render the ascertainment uncertain, indefinite, and conjectural to a great extent. The authorities are

abundant sustaining the right of the employer to sue for his damages before erecting the buildings, as is shown by the following cases: *King v. Nichols*, 53 Minn. 453, 55 N. W. 604; *Cincinnati, etc., Ry. Co. v. Carthage*, 36 Ohio St. 631; *Taylor v. Ry.*, 56 Cal. 317; *Laraway v. Perkins*, 10 N. Y. 317; *Hawley v. Florsheim*, 44 Ill. App. 320; *American Surety Co. v. Woods*, 105 Fed. 741-746, 45 C. C. A. 282; 3 *Sutherland on Damages* (3d Ed.) § 699.

The petition, after prefatory allegations alleging the contract, etc., alleges the breach thereof as follows: "Plaintiff states that defendant has failed and refused to comply with his said contract to erect said cottages for said sum of \$3,300, and has renounced his said contract, and has informed plaintiff that he will not comply with same, or with any part thereof. Plaintiff states that defendant's failure to comply with his said contract to erect cottages for said sum entails a great loss upon plaintiff; that he has given public notice, and has received bids for said construction of said cottages, and that the lowest bid submitted amounts to \$3,860, which sum is the least at which the erection of said cottages can be procured; that defendant's failure to comply with his contract entails a loss upon this plaintiff of five hundred and sixty dollars, for which sum plaintiff prays judgment and for costs." Under this allegation the trial court permitted the respondent to prove what would be the reasonable cost of erecting the buildings, and that such cost would be actually \$300 more than the price at which respondent had contracted to erect them, and thus arrived at the measure of damages. Appellant contends that, inasmuch as there was no allegation of the reasonable cost of the buildings in the petition, the court erred in admitting such testimony. Under our Code, a plain and concise statement of the facts constituting plaintiff's cause of action, provided, of course, the relief prayed thereon is in accordance with the rules of law, is all that is required of the pleader. The petition states the facts constituting the cause of action in a plain and concise manner, and then goes somewhat into detail, and shows that respondent took some pains by advertising, etc., in order to discover just how much it would cost him to have erected the buildings for which he had contracted, and just what was the value of the buildings he was entitled to receive from defendant, and thereby discover the true extent of his damages by reason of the appellant's default, and by this process, from the information contained in the bids which came as a result of his advertising, he arrived at the conclusion that he was entitled to four cottages for \$3,300 at the hands of defendant, which were of the value of \$3,860, and that defendant, in failing to furnish him \$3,860 in value for the agreed \$3,300, had entailed a loss of \$560 upon him. This is the story he pleads in

the petition. The purport of the whole matter is that the prayer is a prayer for damages under the proper rule of law in such case, the measure being the difference between the contract price and the reasonable cost of the completed buildings. This is precisely what plaintiff prays in the petition. Plaintiff, not having erected the buildings, could not plead their actual cost, nor could he plead their reasonable cost or value, except from estimates, which he did, and the \$560 damages asked is the difference between the contract price and the actual value of the completed buildings, as he believed from the bids and estimates he had received. To be sure, it was unnecessary for him to plead the matter of advertisement and having received bids, and to disclose by his petition how he became possessed of the information to the extent of his damage; yet the petition is not bad because he did so plead, as the proper measure of damages is invoked thereby. The learned trial judge did not err in holding the allegation of the petition was broad enough to receive proof of the reasonable cost of erecting such buildings. Appellant says that he "could, perhaps, have brought a dozen witnesses to show that the contract price would be the reasonable cost of the buildings," had he known the court would permit evidence of the reasonable cost under the allegation. If appellant could have brought a dozen witnesses, it certainly was his duty to do so, for it was the law, and not the petition, that made it proper for the court to permit the introduction of evidence as to the reasonable cost of the buildings. This certainly is not the fault of the allegation. The law fixes the reasonable cost as the extreme by which the damage was to be measured. The allegation of the petition could certainly not mislead appellant as to the law of the case. It would be unnecessary to notice the objection further than to say that it appears from the record that appellant's counsel on the trial examined witnesses on the same theory—that is, upon the reasonable cost of erecting such buildings—and participated in that which he now complains of as error. It is well settled that, where the complaining party participates in the alleged error in the court below, he cannot be heard to complain thereon on appeal. *Johnson v. Hutchinson*, 81 Mo. App. 299; *Phelps v. City of Salisbury*, 161 Mo. 1, 61 S. W. 582; *Whitmore v. Sup. Lodge K. & L. of H.*, 100 Mo. 36, 13 S. W. 495.

It is contended by appellant that, inasmuch as the wife of the respondent owned the lands upon which the buildings contracted for were to be erected, therefore any damages resulting from a breach of such contract would be damages accrued to the wife, the real owner, and not to this respondent; therefore respondent cannot recover. This contention is based largely upon appellant's other contention pertaining to the

measure of damages—that the damages resulting from the failure to erect the buildings was damage to the realty, and that the true measure thereof was the difference in value of such real estate with and without the buildings thereon. This proposition having been settled against him, we take it that the last contention now under consideration would not be seriously insisted upon. The contract sued upon is a personal obligation between appellant and respondent in this case. Respondent had the right, if he saw fit, to contract for, and have erected on the lands of his wife, the several houses mentioned, and donate them to his wife. The relationship of husband and wife is a sufficient consideration therefore; and, besides, he would necessarily receive the indirect benefit therefrom by virtue of the benefit to his wife, and no good reason can be seen why he would not be permitted to contract for the construction of buildings upon her property at his cost and recover for a breach of such contract. This was the view expressed by the learned trial court in an able written opinion, which is printed in the record, and we think it is sound. But, aside from this, the testimony shows that at the time the contract was entered into the wife was present in person, participated in the conversation about the buildings, and gave some orders and directions about the plans and specifications thereof; that the contract was signed and closed by her husband in her presence, with her full knowledge and consent. Certainly, under these circumstances, appellant could not be aggrieved, so far as his rights are concerned, as the law clearly would declare the husband the agent of the wife therein, and, if the contract was made for her benefit, as contended by appellant, it is well settled that the law will declare the husband in such case the trustee of the wife, and it is clearly competent for the agent or trustee with whom the contract is made to sue in his own name, or for his undisclosed principal, with whom, in point of law, the contract was made (*Snider v. Express Co.*, 77 Mo. 523; *Rogers v. Gosnell*, 51 Mo. 466; *Nicolay v. Fritschle*, 40 Mo. 67; *Chouteau v. Boughton*, 100 Mo. 416, 13 S. W. 877; *Harrigan v. Welch*, 49 Mo. App. 496); and under the following statute respondent can maintain this suit: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." Rev. St. 1899, § 541.

If appellant's contention that the wife is the real party in interest under this contract is correct, then under the very terms of the

statute the circumstances of this case endow respondent with all the attributes essential to maintain this suit in his own name, the law declaring him a trustee for the benefit of his wife. Aside from this statute, however, it is familiar law in this state that the agent may enter into a contract representing an undisclosed principal, and may maintain a suit in his own name in enforcing such contract, it being wholly immaterial whether the principal is known or unknown during the transaction, or whether the party supposed he was dealing with the agent personally and on his own behalf. *Randolph v. Wheeler*, 182 Mo. 145, 81 S. W. 419; *Kelly v. Thuey*, 143 Mo. 423, 45 S. W. 300; *Darnell v. Lafferty* (Mo. App., decided at this term, but not yet officially reported), 88 S. W. 784. There is no merit in this contention of the respondent, and it is therefore overruled.

The case was well and carefully tried. Finding no error in the record, the judgment is affirmed. All concur.

HARDWICK v. AMERICAN CAN CO.

(Supreme Court of Tennessee. July 12, 1903.)

1. SALES—CONSTRUCTION OF CONTRACTS—OBLIGATION OF BUYER.

Where a contract for the manufacture and sale of stoves fixes the price of the stoves, or a means of ascertaining the price, and obliges the seller to "ship to the order of" the buyer 5,000 stoves within a year from date, the buyer is bound to receive the number of stoves specified within the prescribed period.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Sales, § 445.]

2. SAME—DEFINITENESS OF CONTRACT.

Defendant's predecessor in business had for a number of years been purchasing stoves from complainant, and had had several contracts with complainant for large quantities of stoves, the last of which was in force when defendant succeeded to the business, and was carried out by defendant. Subsequently defendant entered into a contract with complainant which identified defendant with its predecessor, and bound complainant to ship to the order of defendant "5,000 or more stoves" within one year from date. No specification as to the kinds or assortments of stoves was made, but defendant was covering the same territory as its predecessor, had agreed to deal in complainant's stoves exclusively, and the stove trade did not vary from year to year, but dealers required the same kinds of stoves and the same proportional assortment of kinds each year. *Held*, that the contract was not too indefinite to be susceptible of enforcement, but was to be construed in the light of the previous relations and dealings between complainant and defendant's predecessor, as requiring the supply of stoves to be of the kinds and of the assortment supplied under previous contracts.

3. SAME—CONSTRUCTION OF CONTRACTS—INTENT OF PARTIES.

For the purpose of discovering the intention of parties to a contract, the court must view the situation of the parties and their surroundings, so as to place itself in the position which they occupied, and see the things spoken of in the contract as they saw them.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 730.]

4. SAME—EXECUTORY AND EXECUTED CONTRACTS—DISTINCTION.

Where parties agree upon the terms of a sale of personalty, and annex no conditions to the contract, the contract becomes an executed one, and title to the property passes without any formal delivery or payment of money; but when it is contemplated that something be done to complete the sale, such as weighing, selecting, delivering, or some other act, the contract is executory, and title does not pass until the specific goods are ascertained and appropriated in the mode agreed upon.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 162-170.]

5. SAME—BREACH OF CONTRACT—DAMAGES—RESALE.

Where a contract of sale, either executed or executory, is broken by the buyer, and the seller determines upon a resale, and makes the same fairly, and after reasonable notice and with proper diligence, the difference between the price realized on the resale and the contract price, plus interest and expenses of sale, becomes the amount due from the buyer to the seller, and is conclusive on both parties on the question of damages.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1101, 1107.]

6. SAME—ACTIONS—DAMAGES—ELECTION—RESALE AFTER SUIT.

A seller who seeks to recover from the buyer, after breach of contract by the latter, damages as ascertained by a resale, must sue for such damages, and cannot sue for damages generally, and then, by virtue of a resale made after the commencement of suit, recover damages on the basis of such resale.

7. SAME—GENERAL DAMAGES—MEASURE.

The measure of damages, not liquidated by a resale, for the breach by a buyer of a contract of sale, is the difference between the contract price and the market price at the time and place of delivery.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1098-1106.]

8. SAME—EVIDENCE—PRICE REALIZED ON RESALE.

In a suit by the seller to recover from the buyer the difference between the contract price of the goods and the market price at the time and place of delivery, the price realized upon a resale of the goods by the buyer may, if otherwise competent, be given in evidence on the question of market price, but is not conclusive.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 271.]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Bill by J. H. Hardwick, trading under the name of the Cleveland Stoveworks, against the American Can Company. From a decree for complainant, defendant appealed, and, the appeal being referred to the Court of Chancery Appeals, which affirmed the decree, defendant appeals from the decree of the Court of Chancery Appeals. Reversed.

Wheeler & Trimble and White & Martin, for appellant. Brown & Spurlock and Pritchard & Sizer, for appellee.

NEIL, J. The complainant, trading under the name of the Cleveland Stoveworks, entered into the following contract with the defendant company, viz.:

"The Cleveland Stoveworks, of Cleveland, Tennessee, contracts and agrees to ship to

the order of the American Can Company of Atlanta, Georgia, five thousand or more stoves, which are to be shipped within one year from date." There were other provisions not necessary to set forth here, but which, so far as may be required, will be stated later, in their appropriate place.

The bill in the present case was filed to recover damages for the breach of this contract. It alleged that the complainant had manufactured the 5,000 stoves, and had tendered them to the defendant, but that the latter had taken only 1,191, declining to receive the remaining stoves.

The defenses, so far as necessary to be here stated, were that the defendant was not bound to order any of the stoves at all; that, under the contract, it had the option to take the whole number named, or any less number, or none; secondly, that the contract was too indefinite for enforcement.

The damages claimed in the bill were laid at \$15,000. The case was tried before the chancellor, and resulted in a judgment in favor of the complainant for the sum of \$5,500. When the case reached this court on appeal, it was referred to the Court of Chancery Appeals. That court added two items, amounting to something over \$100 to the recovery, and affirmed the decree of the chancellor. From the decree of the Court of Chancery Appeals an appeal has been prayed and prosecuted to this court, and errors have been assigned here.

The first error assigned makes the point that the Court of Chancery Appeals erred in refusing to sanction the first defense above set out.

There was no error in the matter complained of. The contract, in portions which we have not quoted, fixed the price of the stoves, or a means of ascertaining the price. The wording of the instrument which we have quoted is peculiar, it is true, in that the obligation is, in terms, only upon the complainant "to ship to the order of" the defendant so many stoves; but we think that no other conclusion can be reached than that the complainant was to furnish and the defendant was to receive at least 5,000 stoves within the time limited—one year from the date of the contract. The obligation of the complainant to furnish must in sound reason find its correlative in a corresponding obligation on the part of the defendant to receive.

In order to a proper understanding of the second defense, it is necessary that we should state the facts found in respect thereof by the Court of Chancery Appeals.

That court finds that the defendant, American Can Company, had purchased the plant and business of the Conklin Factory, located at Atlanta, Ga., and continued the business of the latter concern at the same place; that for 10 years prior to the date at which the Conklin Factory was purchased by the

defendant the complainant had been selling stoves to the Conklin Factory, and had had several contracts with that organization, each for 5,000 stoves, the last of which was made on August 8, 1900, and was in force when the Conklin Factory was purchased by the defendant company, and that the latter assumed and carried out this contract, the complainant furnishing thereunder 5,000 stoves, or more; that, after the making of the contract last mentioned, complainant proceeded with the work of making stoves of different kinds, such as he thought would be suitable to the trade, and of such patterns as he had previously sold to the Conklin Factory.

The Court of Chancery Appeals further finds that, at the expiration of the contract last referred to, complainant addressed a letter to the defendant, inclosing the draft of a new contract, and on June 19, 1901, he again wrote, asking a return of the paper as soon as possible, assigning as a reason for the request that he wished to be prepared with an adequate amount of iron for the making of the stoves; that, after a number of letters had passed, the defendant, through its proper officer, said it was willing to make the contract as soon as they could agree upon the price of No. 2 pig iron, which regulated the price of the stoves; that after an agreement had been reached upon this subject the writing was executed and returned to the complainant.

It is further found that, after the execution of the writing, complainant proceeded to manufacture stoves of about 20 different sizes and kinds, as embraced in the contract; that defendant gave no specifications as to the kind it wished, and, therefore complainant took the sales he had previously made to the Conklin Factory for previous years, and made an estimate for the existing contract on a basis of the average taken in such previous years; "that complainant acted upon this theory, and adopted this method for ascertaining what assortment defendant would have ordered, had it complied with the contract (that is, had the defendant taken the assortment ordered by it [or its predecessor] for previous periods, and under prior contracts), thereby assuming that the same assortment would be required under the present contract, inasmuch as the defendant was supplying the same territory covered by previous contracts; * * * that defendant was to order and take from complainant all the stoves necessary to supply for the term agreed upon the trade of the Conklin Factory, the defendant expressly stipulating that it would not handle, buy, or sell the stoves of any other manufacturer during the existence of the contract; that, taking one year with another, a dealer will sell practically the same assortment of sizes each year, and that, where a manufacturer has supplied a wholesale dealer for a number of years, he would become familiar with the

assortment the purchaser would require, and that the number of stoves would be taken in assorted sizes"; that the defendant was to take its entire requirement of stoves from complainant during the time stated in the contract, and "in such an assortment as to sizes and kinds as defendant needed to supply its trade"; that the parties themselves, by their conduct and correspondence construed the contract as requiring the defendant to order and receive at least 5,000 stoves during the time fixed in the contract, and that complainant was bound to ship that number to defendant's order within the year; that both parties to the contract so understood it.

In addition to the foregoing findings, we shall now set out certain clauses of the written contract sued upon not previously copied. They are as follows:

"In consideration of the agreement or contract of the Cleveland Stoveworks, as aforesaid, the said Conklin Factory, of the American Can Company, agrees and binds itself not to handle, buy, or sell, or offer to buy or sell, stoves from any manufacturer, jobber, commission man, or broker, from and after this date, for a period of one year, unless and provided, the Cleveland Stoveworks are unable to fill the orders of the Conklin Factory, of the American Can Company, with a reasonable degree of promptness, and in that event reasonable concessions will be made as to the quantity to be taken * * * and said Cleveland Stoveworks in consideration of the agreement of the Conklin Factory, of the American Can Company, agrees not to sell stoves in the State of Georgia to any other party or parties, unless the sale is made with the permission and full consent of the Conklin Factory, of the American Can Company, within a period of twelve months from date."

It will be perceived from the designation of the contracting parties in the foregoing excerpt that the defendant company identifies itself with the Conklin Factory, treating itself as a continuation of that concern, in respect of the business to be transacted, although the contract was signed and executed in the name of the American Can Company.

The question arising on the foregoing facts is whether the contract is sufficiently definite for enforcement.

The following authorities will shed light upon the inquiry:

It has been held that a contract to supply the requirements of a party during a fixed period does not mean simply so much of the article mentioned as he may choose to take, but so much as his business may need and require. Thus it was held that a contract by a lumber company for its requirements of coal for a certain season was not void for uncertainty and want of mutuality, when it was meant to call for the amount of coal which the corporation should need in its business

for the season, not merely what it might choose to require. The court said that, when a contract is susceptible of two constructions, that one should be adopted which will give operation to it, rather than one which will render it inoperative; also that a contract should be construed in such a way as to make the obligations imposed by its terms mutually binding upon the parties, unless such construction is wholly negated by the language used. *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529.

In *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218, the plaintiff made a proposition by letter to "furnish" certain steamers owned by defendant with coal for the year 1888 at a stipulated price, which offer defendant accepted by letter. Thereafter, and until about the middle of the year, plaintiff did furnish defendant all of the coal required for the use of the steamers named, and then the defendant sold the steamers, and ordered no more coal, whereupon the plaintiff sued for damages for breach of the contract. It was held that the contract bound plaintiff to furnish, and defendant to order and pay for, all the coal which would be required by the steamers mentioned during the year covered by the contract, and while the amount was not fixed, and could not have been at the time the agreement was made, yet it was ascertainable by its terms, and therefore certain within the maxim, "Id certum est quod certum reddi potest." *s. c.*, 15 L. R. A. 218. It was also said in this case that the fact that the defendant deemed it best to sell the steamers could not be permitted to relieve him of the obligation to take the coal which the ordinary and accustomed use of the ships required; that the provisions of the agreement did not admit of a construction that it was to terminate in the event of a sale or other disposition of the ships by the defendant. 130 N. Y. 646, 29 N. E. 142, 15 L. R. A. 218.

A contract between a manufacturer of pig iron and one engaged in a business requiring the use of pig iron "that the former will supply to the latter, and the latter will purchase from him, all the pig iron which he will need, use, or consume, in his business," for a fixed period, was held valid and binding, and required the purchaser (the appellee) to take "such a quantity of pig iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business." *Nat. Fur. Co. v. Keystone Mfg. Co.*, 110 Ill. 427.

A contract by one person to sell another "all the straw he has to spare, not exceeding three tons," was held valid and binding, and it was held that the quantity could be shown by parol evidence. *Parker v. Pettit*, 43 N. J. Law, 512.

And a contract to furnish a canning factory "all the cans they will use for packing in their factory" during a certain period is

valid and binding. *E. G. Daily Co. v. Clark Co.*, 128 Mich. 591, 87 N. W. 761.

So, in a contract to buy "all the ice necessary" to carry on the purchaser's business during a stipulated period, the quantity is measured by the necessities of the business, which is presumed to continue for the time agreed on. *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227.

A contract to furnish "all the tire steel * * * which will be used in the buyer's works" within a fixed period, not to exceed fourteen thousand sets, not to be less than ten thousand sets, binds the purchaser to take and the seller to furnish "the quantity reasonably required for use in the buyer's works up to the date named, within the amounts specified." *Staver Carriage Co. v. Park Steel Co.*, 104 Fed. 200, 43 C. C. A. 471.

A contract whereby one party agrees to sell, and the other to buy, all the oil which the purchasers "may require for their own use for a period of twelve months," was held valid and binding on both parties; it appearing that the purchasers owned a manufacturing plant at which oil was used, and parol evidence being admitted to show "its daily capacity for the consumption of such oil as was ordered." The written contract covered three different grades of oil at as many different prices, neither the total quantity nor the proportions of the different grades being specified; but the court held that, when the contract was "read in the light of the previous business relations of the parties," it was plain that it meant that the purchaser "should buy what oil it should require for its use in its manufacturing business." *Manhattan Oil Co. v. Richardson Lubricating Co.*, 113 Fed. 923, 51 C. C. A. 553.

The substance of the complainant's contention is that when the parties made the contract they had in mind some standard by which their conduct thereunder was to be regulated, and that that standard must be found in the previous relations existing between the complainant and the defendant's immediate predecessor, which it had incorporated into itself, and with the defendant itself in its assumption and executing of the last preceding contract with such predecessor. It was known, of course, and figured in the calculations of the parties, that the complainant was manufacturing 20 different kinds of stoves, that he had patterns therefor, and that his business was of the character thus indicated. It was known also that the defendant was buying to supply a special character of trade, and that the stove business was uniform, in that, one year with another, the same trade would take about the same assortment of grades and sizes. Hence it is seen that the character, kind, and quality, in short, the assortment, of stoves covered by the contract, all lay within reasonable limits, and could be ascertained with reason-

able certainty. It cannot be doubted that in the ordinary course of business, in respect to which men generally make their calculations, if the defendant had carried out its contract and ordered the 5,000 stoves, it would have ordered substantially the same kinds of stoves which were used to supply the same trade under previous contracts with the Conklin Factory, as it anticipated doing when the contract was entered into. Equally there can be no doubt, under the facts found by the Court of Chancery Appeals, that the defendant's failure to carry out the contract by ordering the 5,000 stoves resulted from its determination pending the running of the contract to drop a certain class of its customers, which it had previously supplied, viz., retail dealers. Having dropped these, it then desired to escape from the contract, and is now using the element of apparent uncertainty supposed to reside in the contract to elude the obligation to faithfully carry it out. It is the duty of the court, however, to ascertain, if it can, the meaning which the contract bore in the minds of the parties, and to enforce that meaning or intention. For the purpose of discovering this intention, we must view the situation of the parties and their surroundings so as to place ourselves in the position which they occupied, and thus be able to see the things spoken of in the contract as they saw them. Taking this point of view, with the aid of the facts found by the Court of Chancery Appeals, we think it clear that the meaning of the contract is as above indicated, and that this enables us to attain substantial certainty.

As opposing the conclusion thus reached, we are referred by defendant's counsel especially to the case of Kimball Bros. v. Deere, Wells & Co., 108 Iowa, 676, 77 N. W. 1041. That case, however, is not parallel in its facts, nor does it cover the present case in principle. In that case, it is true, the plaintiffs agreed to furnish the defendants certain scales, known as "Columbia Scales," made from patterns then in use by the Columbia Scale Company, which the defendant was to sell in a certain territory named; and it is also true that there were several different kinds of scales of the particular make referred to, selling for different prices, and the contract did not specify what special kinds of scales the defendants were to take. After ordering a number of scales, the defendants refused to take any more, whereupon the plaintiffs sued for damages. The contract was for 150 sets of scales. The court held that the plaintiffs were entitled to recover damages for so many sets of scales as the defendants had refused to take less than the contract number, but that they would only be liable for the cheapest kind of scales, on the theory that the choice or selection lay with the defendants. One important element, however, that appears in the present case, did

not appear in the case referred to; that is, the previous history of the dealings of the parties, furnishing a basis for ascertaining the assortment of goods which they had in mind.

We are also referred to the case of Hixon v. Hixon, 7 Humph. 33, wherein it appeared that a defendant had contracted to pay a debt either in Tennessee, Alabama, or Georgia money, and it was held that he had the right to settle in the cheapest money. To the same effect, *Miller v. McKinney*, 5 Lea, 93, and *Miss. & Tenn. R. Co. v. Green*, 9 Heisk. 583, 593.

These cases and others of the same kind cited in the brief of defendant's counsel are distinguishable on the ground already stated; the vital difference between the cases referred to by defendant's counsel and the case before the court being found in the fact that in the latter the parties, in dealing with each other, had reference to former dealings between them, and so mutually understanding each other, contracted with reference thereto, and intended that substantially the same course of conduct should be pursued between them.

On the grounds stated, we are of opinion that the second defense is not well made, and that the chancellor acted correctly in directing a reference on the basis of such former dealings between the complainant and the defendant and its predecessor.

The next point for consideration arises in the following manner:

On the 3d of August, 1902, after the breach of the contract, the complainant gave notice to the defendant that he would sell the goods on the 25th of the same month, unless the defendant should come forward and comply with the terms of its contract. The goods were not sold on the day fixed in the notice, nor at any other time before the filing of the bill, but afterwards—in fact, a considerable time after the bill had been filed. The bill was filed on the 1st day of September, 1902, to recover damages generally for the failure of the defendant to take the goods, and hence really for the difference between the contract price and the market value at the time and place of delivery. It did not seek to recover the difference between the contract price and the price realized upon the resale, and did not seek to recover the expenses of such resale, and, indeed, could not have done so, because, as stated, the resale took place after the bill was filed. Yet the chancellor decreed "that complainant is entitled to recover the deficiency, if any, between the price realized for said stoves under such resale and the price which complainant would have received from them under the contract if said stoves had been taken and paid for by defendant in accordance with the terms of the contract, and in addition thereto the reasonable and necessary expense to complainant of reselling said stoves

and of caring for them and keeping them in salable condition until they were sold"; and he directed a reference to the master on this basis, and the decree in favor of the complainant, before referred to, was based upon a report made by the master pursuant to the terms of the decree above stated. The Court of Chancery Appeals affirmed this action of the chancellor. The question now to be determined is whether this action was correct.

In order to a more satisfactory disposition of the matter, we shall consider the law applicable to both executed and executory contracts of sale, in respect of the vendor's right of resale upon the purchaser's refusal to take the goods.

Before proceeding further, we pause to state the meaning which we attach to the terms "executed" and "executory," as applied to contracts of sale.

As pointed out by Mechem in his work on Sales, there is in the authorities a want of precision in the use of the term "sale." "It seems impossible," says this author, "for courts and textwriters to agree either as to the meaning of the word, or as to the essential elements of the idea which it represents. According to some, the sale is the transfer of the title. According to others, it is the agreement to transfer. In the case of the agreement for the present transfer, where the law executes the agreement by deeming the title as transferred accordingly, it can be matter of small moment whether the word be applied to the agreement or to the transfer, because the making of the former operates at once to effectuate the latter; but, where time or the performance of conditions is to intervene between the agreement and the transfer, it is necessary to have appropriate words to indicate these two ideas. It is, indeed, true here that the effectual thing upon which the law operates to produce the transfer is still the agreement of the parties; but before the law so operates the agreement of the parties requires to be aided, supplemented, or completed by the lapse of time or the performance of conditions precedent, and during this interval the attitude or relation of the parties needs often to be definitely determined. * * * The common law clearly recognized these two forms, and applied to each a well-known name. Thus if by the terms of the agreement the property in the thing sold passed immediately to the buyer the contract was termed in the common law 'a bargain and sale of goods'; but if the property in the goods was to remain for the time being in the seller, and only to pass to the buyer at a future time, or on the accomplishment of certain conditions—as, for example, it was necessary to weigh or measure what was sold out of the bulk belonging to the vendor—then the contract was called in the common law an 'executory agreement.' The attempt to distinguish these forms has frequently been made by

applying the term 'executed sale' to the former, and 'executory sale' to the latter; but this attempt has not proved entirely satisfactory, not only because the terms have not always been used in the same sense, but because the so-called executed sale may be executed in part only; that is, so far as to pass the title, while it remains executory in part, as where delivery or payment is postponed." *Id.* §§ 5, 6.

The common-law nomenclature was accepted in our case of *Harding v. Metz*, and the distinction noted between the two classes of contracts in the following language: "If parties agree upon the terms of sale of personalty, and annex no conditions to the contract, the property passes to the buyer without delivery or tender of price. *Potter v. Coward*, Meigs, 22; *Benj. on Sales*, 218. This is a bargain and sale as distinguished from an executory agreement. *Benj. on Sales*, 218. The latter contemplates that something is to be done to complete the sale, such as weighing, selecting, delivering, or other act, and is converted into a bargain and sale by the appropriation in the mode agreed upon of specific goods to the contract. In either case, as soon as the specific goods sold are ascertained, either by the original contract or subsequent appropriation, the property vests in the buyer without payment, if no condition be annexed to the contract." 1 *Tenn. Ch.* 610, 611, 612.

So soon as the vendee says, "I will pay the price demanded," and the vendor says, "I will receive it," the vendee has the right to demand the thing sold, and the vendor the consideration. They are mutually entitled, the one to his action for the thing, and the other to his action for the price. *Potter v. Coward*, *supra*; *Pulse v. State*, 5 *Humph.* 108, 109; *Rawls v. Patterson*, 1 *Bart.* 370; *Bond v. Greenwald*, 4 *Heisk.* 463; *Shaddon v. Knott*, 2 *Swan*, 362, 58 *Am. Dec.* 63; *Broyles v. Lowrey*, 2 *Sneed*, 25; *Bush v. Barfield*, 1 *Cold.* 98; *Williams v. Allen*, 10 *Humph.* 338, 51 *Am. Dec.* 709; *Barker v. Reagan*, 4 *Heisk.* 598. When the contract is complete according to the agreement of the parties, leaving nothing further to be done by either, then the title passes, although there is no formal delivery or payment of the money. *R. Co. v. Ford*, 11 *Heisk.* 390; *Barker v. Freeland*, 91 *Tenn.* 112, 18 *S. W.* 60. But this rule will prevail only in the absence of a contrary stipulation. The parties may annex any qualification to the general terms of the contract that they may agree upon, and the title will not pass when it appears from the contract that the parties interested in it intended it should not. *Id.*

In the use of the expression "executed contracts of sale," herein, we mean those in which the title to the goods has passed. By the expression "executory contracts of sale" we indicate those in which the title has not passed.

Under the former the property belongs to the vendee, and the vendor, in making the resale, sells as his agent. If the resale has been properly made (that is, fairly and after reasonable notice and with proper diligence), it fixes absolutely the amount due from the vendee to the vendor (that is, the difference between the contract price and the price realized upon such resale), and the action is for that sum, with interest, and with expenses added. *McClure & Crozier v. Williams*, 5 Sneed, 718; *Williams v. Godwin*, 4 Sneed, 557; *Barker v. Reagan*, 4 Heisk. 590; *Slaughter v. Marlow* (Ariz.) 31 Pac. 547; 2 Mech. on Sales, § 1643.

Does a different rule apply in the case of executory contracts of sale? Defendant's counsel insist that there is a different rule for this class of cases, and cite in support of their contention the case of *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. 569, 12 C. C. A. 306. The case is in point, but a careful examination of the question has convinced us that the weight of authority in this country is the other way. *American Hide & Leather Co. v. Chalkley & Co.* (Va. 1903) 44 S. E. 705; *Pratt v. Freeman & Sons Mfg. Co.* (Wis. 1902) 92 N. W. 868; *Nelson v. Cal. Hirsch & Sons Iron & Rail Co.* (Mo. App.) 77 S. W. 590, 595; *John A. Roebling Sons Co. v. Lockstitch Fence Co.* (Ill.) 22 N. E. 518; *Cole v. Zucarello*, 104 Tenn. 64, 56 S. W. 850; 2 Mech. on Sales, §§ 1645-1649, 1689, 1690, 1692; 24 Am. & Eng. Ency. Law (2d Ed.) 1139, 1140.

In *American Hide & Leather Co. v. Chalkley & Co.*, supra, it is said:

"The doctrine is that where a contract of sale is executory, and the title and possession still remain in the seller, his remedy against the buyer, who wrongfully refuses to accept and pay for the goods, is an action of assumpsit on a special count to recover damages for the breach of the contract.

"It is said that the seller cannot maintain an action for the agreed price, as he could do if the title had passed, but must sue for indemnity for the loss of his bargain; the quantum of damages which he has sustained, and the measure of his recovery, being the difference between the contract price of the goods and the net price which they produce at a resale, fairly made, after deducting all expenses incurred by the seller in taking care of the goods and selling them.

"In such case the seller should give the buyer notice that he intends to sell and hold him responsible for the loss. This notice, it will be observed, is not a notice of resale, but a notice that the seller will assert his right of resale, and bind the buyer by the price obtained.

"In the case in judgment the property in the goods had not passed. The contracts were for the sale of nonspecific hides, being an agreement merely to sell hides of a par-

ticular description. But the specific hides upon which the contracts were to operate had not been agreed upon, and the rule in such case is that the property in the goods does not pass until an appropriation of the specific goods has been made with the assent of both seller and buyer. *Benj. Prin. of Sales*, rule 23, p. 81.

"In the case at bar the plaintiff notified the defendant that he would sell the hides at his risk, unless received."

In that case the defendant below was held liable for the expense of sale, or (the same thing) credited with the proceeds of sale, less the expense.

In *Pratt v. Freeman & Sons Mfg. Co.*, supra, it is said:

"Immediately upon the vendee's refusing or neglecting, when required to do so, to comply with the sale contract by paying for the property, and so accepting delivery thereof, the cause of action of the vendor becomes complete, and his right to enforce the same by such appropriate remedies as he may elect to pursue perfect. If he chooses to liquidate his damages by a sale of the property, and incidentally to recover his loss, so far as the proceeds of sale will effect that result, failure to give notice of the intention to sell the property, and failure to do that which is reasonably necessary to secure the best price obtainable therefor, does not give the vendee any right to rescind his contract, but renders the result of the sale not binding on him as to the amount of the vendor's loss by the former's breach; and he will remain liable to the latter for the full market value of the property, less his actual damages, independently of the sale. The sale in such circumstances is but a method, as before indicated, of enforcing a right to damages for breach of contract, or of making evidence of the precise amount of such damages. The sale, when properly conducted—the executory vendee having been so notified of the intention to make it as to give him reasonable opportunity to prevent it by paying his debt—constitutes a basis binding on him, for computing the damages for which he is liable. The rule governing the subject was laid down in *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, 91 Wis. 667, 65 N. W. 513, in these words:

"If a resale is made, and the evidence shows that all reasonable efforts were made to secure the best price obtainable, or that the price obtained was a fair one, it settles the question of the market value, so that the damages become liquidated."

"The idea is that, when the executory vendee of property breaks his agreement to take and pay for the property, the measure of damages is the difference between the market value thereof and the contract price; but the vendor must necessarily establish that as a basis for his claims. If he sues for his damages without selling the property, or without selling the same with proper re-

gard to the rights of the executory vendee, he takes upon himself the burden of establishing the fair market value of the goods at the time of the breach. So it is said that notice to the vendee of the vendor's intention to make the sale, and the sale with proper regard to the interests of the former, merely creates definite and conclusive evidence of such market value. *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, supra; *Gehl v. Produce Co.*, 105 Wis. 573, 81 N. W. 666; *Davis Sulphur Ore Co. v. Atlanta Guano Co.*, 109 Ga. 607, 34 S. E. 1011; *Mechem on Sales*, 1649, 1650."

It is a sound deduction from the foregoing principles that, if the complainant seeks to recover the damages liquidated by a resale, he must sue therefor. He cannot sue for damages generally, and, by virtue of a resale made after the filing of the bill, recover such liquidated damages, together with the expenses incurred in effecting such sale. When the damages have been so liquidated, the right of action is to recover those damages, and the expenses incurred in effecting the liquidation. If the sale has been properly made, it is binding on the vendee, and also binding on the vendor. He has elected to adopt that remedy out of the three (*Cole v. Zucarello*, supra; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 75, 35 N. E. 415), which the law allows to him. We do not say that if a vendor has made an ineffectual sale—one not binding on the vendee, by reason of the absence of a proper notice upon the subject, or the existence of some other defect—he could not sue for and recover his damages on showing the market value at the time and place of delivery by other evidence, and so furnishing a basis for ascertaining the difference between such market value and the contract price. What we do hold is that if he base his right to recover, as to amount, upon a resale, such resale must be made before the filing of the bill.

From the foregoing discussion, it is apparent that the chancellor and the Court of Chancery Appeals were in error in rendering a decree in favor of the complainant on the basis of the resale made after the filing of the bill.

For this error the decree will be reversed, and the cause remanded for a retrial, with leave to the complainant to take a reference under the bill as at present framed to ascertain the damages sustained by the complainant by the breach of the contract on the part of the defendant, the measure of which damages will be the difference between the contract price and the price at the time and place of delivery. On this reference the testimony taken concerning the price realized upon the resale, where otherwise competent, may be read for what it may be worth towards showing the market price at the time and place of delivery, but not as conclusive on said question.

Other points made in the briefs of coun-

sel are considered and disposed of in a memorandum opinion filed with the record, but they need not be adverted to here.

Let a decree be entered as above indicated. The complainant will pay the costs of the appeal.

BARNES v. STATE

(Court of Criminal Appeals of Texas. June 23, 1905.)

INTOXICATING LIQUORS—ILLEGAL SALE—EXCHANGE.

Where an employé of the owner of a still delivered brandy in exchange for peaches and for the revenue license on the brandy, he was guilty of a sale of intoxicating liquor.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 160.]

Davidson, P. J., dissenting.

Appeal from Van Zandt County Court; Jno. W. Davidson, Judge.

Joe Barnes was convicted of violating the local option law, and appeals. Affirmed.

Yantis & Hubbard, O. H. Reese, and Jno. S. Spinks, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law; his punishment being fixed at a fine of \$25, and 20 days' confinement in the county jail.

The facts of the case show that Tom Hill owned a still in Van Zandt county, and that Joe Barnes was working for said Hill. Berry Smith (prosecutor) carried some peaches to the still, and Joe Barnes, as an employé of Tom Hill, delivered to Smith a jug of brandy; Smith at the time paying \$1.10, the revenue license. This was after the peaches had been manufactured into brandy—in other words, advanced him peaches in exchange for his brandy. The court charged the jury that the exchange of peaches for liquor would constitute a sale. This charge is correct. See *Parker v. State*, 77 S. W. 783, 3 Tex. Ct. Rep. 865; *Stanley v. State* (Tex. Cr. App.) 64 S. W. 1051. Certainly the payment by Smith of the revenue license to the defendant would within itself constitute a sale of the brandy, since the brandy was delivered as part consideration for the revenue license paid and peaches furnished. Nor does the fact that defendant has no interest in the manufactured brandy present any defense for the sale of the same. He was certainly equally guilty with his principal, Hill, in the sale of the brandy. No error appears in this record, and the judgment is affirmed.

DAVIDSON, P. J. I dissent. The Parker Case has absolutely no bearing on the question here involved. The Stanley Case was decided on a question of exchange, where fruit was traded for brandy. Here the party received only his half of the brandy out of

his own peaches, paying the owner of the still the other half for his services and labor in making the brandy. Hill owned the still, and the other party owned the peaches. It was more nearly related to partnership on the results, and not a sale. Appellant was only an employé of the owner of the still, and assisted in delivering the owner of the peaches his half of the brandy.

BARNES v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1905.)

1. INTOXICATING LIQUOR — ILLEGAL SALE — GIFT — EVIDENCE — QUESTION FOR JURY.

In a prosecution for violation of the local option law, evidence held to require submission to the jury of the question whether the transaction was a sale or a gift.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 329.]

2. SAME — FURNISHING MATERIAL FOR MANUFACTURE — EXCHANGE.

Where the owner of fruit has it manufactured into liquor, receiving the product of the identical fruit furnished, the distiller is not guilty of a sale of liquor; but if the fruit is exchanged for liquor already manufactured, or if the distiller furnishes the owner of the fruit liquor in advance, the transaction is a sale.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 160.]

3. CRIMINAL LAW — JURORS — COMPETENCY — FIXED OPINION — EVIDENCE.

Where several prosecutions were pending against defendant, he was entitled to inquire of jurors who had heard the evidence in a case previously tried if they would have a fixed opinion as to the guilt of accused if it should transpire that the evidence in the two cases was similar.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 428, 460.]

Appeal from Van Zandt County Court; Jno. W. Davidson, Judge.

Joe Barnes was convicted of violating the local option law, and appeals. Reversed.

Yantis & Hubbard, C. H. Reese, and Jno. S. Spinks, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and appeals.

Henry Cornelius, state's witness, testified substantially as follows: "I carried a load of fruit to the still down near Joe Barnes. After I passed Barnes' house I met him at his well, about 100 yards east of his house. I told him I had fruit, carrying to the still, and asked him if I could get some brandy, or if there was any chance or any way to get some brandy. He studied for a moment, and said Mr. Smith, the revenue man, told him he could let them have a little brandy when they brought fruit, but to be certain to keep an account of it. I then gave him a pint bottle, and drove on down to the still, and delivered my fruit to John Barnes. When I came

back to Joe Barnes' [defendant's] house, he told me to look, setting by a large post-oak tree, about 100 yards up the road west of the house, and I would find my brandy. When I started home I went by the tree, and found the pint of brandy. I did not pay defendant, Joe Barnes, one cent for the brandy, or promise to pay him anything. I did not give him fruit for the brandy. The only thing I ever paid was my part of the revenue when I got my brandy distilled from the fruit that I carried to the still. I never delivered any fruit to Joe Barnes, nor was he at the still when I delivered my fruit to John Barnes. I carried the fruit to the still, and they told me it would take about $4\frac{1}{2}$ bushels to the gallon, and then I would get a gallon for about nine bushels of peaches. I was to pay one-half of the revenue. The brandy I got was intoxicating." Tom Hill testified substantially: That he owned the still near Joe Barnes [defendant]. Joe had no interest in the still, and there was no agreement between him and Joe that he was to pay him one-half of the proceeds of the still, but he really intended to pay him half the proceeds after paying the expenses, but said nothing to Barnes about it. Barnes never received anything. The brandy was stored at Joe Barnes' house, as that was the place designated by George Smith, the revenue man. That he made up fruit at the still on the halves; keeping one half himself, and giving the other to the customer. Each party paid his revenue. George Oldfield testified for the state that he worked at the still. Was employed by Joe Barnes. Barnes had been hauling fruit to the still, and had some there when witness was at work there. One day Constable Ed Mills came out to the still, and Joe Barnes wanted to give Mills a bottle of brandy. About this time Jim Hunt came up and took the cup, and told Barnes that he (Barnes) could not do that, and Barnes remarked that he guessed a man could give away his own stuff. Defendant on another occasion told witness that he was to get one-half the profit made from the distillery, but "he had to keep it damn still." Ed Mills, another witness for the state, testified he was constable of precinct No. 1. Was at the still at Joe Barnes', and Joe gave him a small drink of brandy. Hunt interfered, and defendant said it looked like a man could give away his stuff. Never heard defendant claim any interest in the still. This is, in effect, all the testimony regarding the sale.

Our Constitution and the laws enacted thereunder inhibit only a sale of intoxicating liquors in local option territory, but do not undertake to prevent one from manufacturing his own brandy or whisky; and it might not be a violation of the law for one to take his own peaches to a distillery and have the same made into brandy, getting the brandy out of his identical peaches, and paying the still out of the peaches. But we do not understand this to be the condition here. It is

not pretended that the pint of brandy in question was made from the peaches furnished by appellant. It seems he applied to Joe Barnes, who, from the proof offered by the state, was interested in the still, to get a pint of brandy. The evidence further shows that Barnes at first hesitated, but finally told him that he could; that Smith, the revenue man, told him he could let the boys have a little brandy, when they brought fruit, but to be certain and keep an account of it; that he delivered the fruit, and the brandy was placed by Barnes at a convenient place, so that appellant could get it on his road home. From this it will appear that there was an issue as to whether or not appellant, Barnes, made a sale of the pint of brandy to the prosecutor. True, prosecutor, in his testimony, states that he paid nothing for the brandy, except his part of the revenue license. However, we do not gather from the circumstances of the case that appellant was making a gift of the brandy to the prosecutor, who expected to be repaid out of the product of the prosecutor's peaches when they should be made into brandy. At least, there was evidence here from which the jury might infer a sale, and they should have been left, under proper instructions, to determine this question. The court instructed the jury on this point as follows: "Should you find and believe from the evidence beyond a reasonable doubt that defendant, Joe Barnes, did, in the county of Van Zandt and state of Texas, on the 6th day of August, 1904, deliver to Henry Cornelius intoxicating liquors in exchange for peaches, then you are charged that such exchange would constitute a sale; and, if you so find and believe, you will find defendant guilty, and assess his punishment," etc. This was a presentation of the state's theory. On the other hand, appellant requested the court to give the jury the following instruction: "You are further charged that, although you may believe that the witness Henry Cornelius secured the intoxicating liquor from defendant, Joe Barnes, but, before you can convict, you must believe that something of value—a consideration—passed from the prosecuting witness, Henry Cornelius, to the defendant, Joe Barnes, as the mere passing of the intoxicating liquor to the said Henry Cornelius would not constitute a sale under the law." The court refused to give this charge, and this action of the court is assigned as error. We think that the evidence on the point required of the court an instruction to the above effect, inasmuch as Cornelius denied paying anything for the same, and relates circumstances that would suggest appellant might have simply given the pint of brandy to him, and placed it by the tree so that he could get it. It will be seen that appellant contends that the pint of brandy was a mere gratuity, and was not paid for out of prosecutor's share of the brandy. However, if there was an implied sale, under the circumstances, and the pint

of liquor was not taken out of appellant's portion of the brandy, which he subsequently got, he evidently still owes appellant for this bottle of brandy. On the other hand, if it was a mere gift, as claimed by appellant, he should not have been convicted. We would further make the following observations as to this case: If the facts show that it was simply an exchange or barter of so much of prosecutor's peaches for brandy, it would constitute a sale. *Commonwealth v. Clark*, 14 Gray (Mass.) 367. There the rule appears to be laid down that one can have his grain or peaches manufactured into liquor, paying therefor toll out of his grain or peaches to the person manufacturing the same; but he must get his whisky or brandy out of the identical product furnished the distillery, and not out of something else. In case he does not get it out of the identical product furnished, it would be an exchange on his part, and, as is held by this court, an exchange is a sale; that is, if one takes peaches to a distillery, and there exchanges the same for so much brandy, the party exchanging with him and furnishing the liquor would be guilty of a sale of the same, or if the distillery should receive peaches for the purpose of being distilled into brandy, and furnish the party bringing such peaches brandy in advance, it would be an exchange, and consequently a sale. On another trial, if the evidence suggests these matters, they should be presented to the jury.

Appellant questions the action of the court in impaneling the jury. There are nine bills of exception reserved to the court's action with reference to nine jurors. It is shown that there were five cases against appellant, wherein he was charged with violating the local option law in Van Zandt county, and one of said cases, to wit, No. 2,332, had been tried the day before this case was called for trial, and that five of the jurors on the regular panel, and who were then in the box, served upon said jury, and that they returned a verdict of guilty. The remainder of said panel remained in the courtroom and heard the evidence in said cause. It is charged that the main facts in all five cases are essentially the same. The bills of exception show as to each of said jurors that when they were being examined on their voir dire, they were asked the following question: "If the facts in this case now being tried were similar to the case tried on yesterday, if they had a fixed opinion in the case?" The bill shows that the juror would have answered, if the facts were similar as the case tried yesterday, he would have a fixed opinion, and that appellant then challenged said jurors for cause. The court explains this bill as follows: "That the juror was asked by defendant's counsel whether he had an opinion as to the guilt or innocence of the defendant, provided the facts of this case should be the same or similar to the facts in the preceding case against defendant, which

question was objected to by the state, and the objection was sustained by the court, and the juror was not permitted to answer the question. But said juror did say, in answer to another question, that he knew nothing about this case, and had no opinion in it whatever." As stated, similar proceedings were had with reference to nine jurors. It occurs to us that the explanation of the court fails to give a sufficient reason for his refusal to permit appellant's interrogatory and the expected answer of the juror. If the proof showed the two cases arose out of the same transaction or exactly similar transactions and the facts were the same, it occurs to us that it would be a cause for challenge. But even conceding that it would not be, still appellant had the right to question the juror upon the matter inquired about, in order that he might intelligently exercise his right of peremptory challenge. *Gilmore v. State*, 37 Tex. Cr. R. 81, 38 S. W. 787. The record does not show that either of said jurors served on the jury on the trial of this case, or even that appellant exhausted his peremptory challenges; but we know that he had but three peremptory challenges, and there were nine of these jurors subject to this objection. Evidently some of them must have sat upon the jury. On the full investigation of the matter, it might have appeared that the jurors were not at all disqualified; that the cases arose out of different transactions, and in their essential features were not similar. But the inquiry, as stated before, should have been permitted. We think the court committed error in refusing to authorize the inquiry.

For the errors discussed, the judgment is reversed and the cause remanded.

DAVIDSON, P. J. I concur in the reversal, but further believe the facts do not prove a case. The state disproved a sale and proved a gift of a pint of brandy. Under all the authorities, a gift is not a sale. There is nothing anywhere in the evidence that Cornelius owed appellant anything for the brandy. Cornelius swears positively he did not, and no evidence contradicts him directly or indirectly. This judgment should have been reversed for want of evidence to support it. Appellant was only an employé of Hill, the owner of the still, and gave Cornelius a pint of brandy gotten out of his (appellant's) house, and not at the still.

NELSON v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1905.)

1. THEFT FROM THE PERSON—INSTRUCTIONS—HARMLESS ERROR.

In a prosecution for theft from the person, where the evidence showed that the prosecuting witness knew when the property was taken, a charge that the theft must be committed without the knowledge of the person from whom the

property is taken, if erroneous, was harmless as to defendant.

2. SAME—EVIDENCE—RES GESTÆ.

In a prosecution for theft from the person, the evidence showed that defendant, under pretext of buying prosecutor's watch, snatched it from the latter's hands, and while running away was caught by an officer. Prosecutor was permitted to testify that he told the officer, in defendant's presence, of the taking of the watch, and that defendant was the thief, which testimony was corroborated by the officer. The witnesses were also permitted to state that defendant then said that at the time of the theft he was at a saloon, and did not commit the theft. It appeared that but a few minutes elapsed between the capture of defendant and the time when prosecutor reached him and the officer. *Held*, that the testimony was *res gestæ* and admissible.

3. SAME.

The saloon keeper being present as a witness, testimony of prosecutor as to what the former said respecting the investigation was properly excluded.

4. SAME—OFFICIAL STENOGRAPHER—ABSENCE FROM TRIAL—EFFECT—ERROR.

In a prosecution in the criminal district court of a county not included in the act relating to court stenographers, though the commissioners' court of the county raised no objection to the court employing a stenographer and drawing on the county for his compensation, when the case was a short one, it was not error to proceed with the trial after defendant's counsel was given opportunity to procure a stenographer in place of the official one, whose absence by reason of illness was not noticed until after the trial had commenced, though neither defendant's counsel nor the deputy sheriff, also sent by the court to secure a stenographer, secured one.

5. SAME—SUFFICIENCY OF EVIDENCE.

In a prosecution for theft from the person, evidence examined, and *held* sufficient to sustain a conviction.

Appeal from District Court, Dallas County; El. B. Muse, Judge.

J. P. Nelson was convicted of theft from the person, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft from the person, and his punishment fixed at confinement in the penitentiary for a term of two years.

Appellant's first bill of exceptions complains of the following portion of the charge of the court: " * * * The theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away." Appellant says that the court erred in so charging the jury, in that part which states that the theft must be committed without the knowledge of the person from the property is taken, for the reason that there was no evidence that the theft, if any, was committed without the knowledge of the person from whom the property was so taken. As insisted by appellant, the evidence shows that prosecuting witness knew when the property was taken. This being so, we are at a loss to understand how the charge com-

plained of could have injured appellant. If it be conceded that the charge was erroneous, the error is harmless, so far as appellant is concerned.

The evidence shows substantially that prosecuting witness was accosted by appellant with the statement that he wanted to buy his watch. He took the watch out of his pocket, and held it in his hand, while appellant looked at it. Appellant grabbed the watch so suddenly as not to permit witness to resist the taking, and ran. Prosecutor followed him, and an officer intercepted and caught appellant. In a few moments prosecuting witness ran up. By appellant's second bill, he complains that prosecutor, Oliver, was permitted to testify that at the time of the arrest of defendant by Police Officer Hall, as soon as Oliver ran up to defendant and the officer, he (Oliver) told Hall, in the presence of defendant, that he held his watch in his hand for defendant to see; that defendant snatched it away from him and ran; that he (Oliver) followed defendant; that defendant was the person who got his watch. To this appellant objected because the same was hearsay and inadmissible, defendant was under arrest at the time; that it was in effect permitting the witness Oliver, who was the only witness who testified as to the theft, to corroborate himself, and strengthen the weight of his testimony given before the jury that defendant was the man who committed the theft; that, while the statement was made immediately after the theft, the same could not be *res gestæ*, for the reason that it was the narration of a past event. The bill further shows that Officer Hall was permitted to state that the same statement was made to him that Oliver testified to. The bill further shows that "the court, over the objection of appellant, permitted witnesses Hall and Oliver to state what defendant said at the time he was under arrest and unwarned, after having been charged with the theft by witness Oliver, to wit, that he was at the saloon of Alf Martin at the time the offense was committed, and was not the party who committed it. In the same connection the state was permitted, over the objections of defendant, to ask witness Oliver, after the statement of defendant was made, if he (Oliver) did not make an investigation to find out whether or not the statement of defendant was true; and witness Oliver stated that he made such investigation, and was further permitted to state by whom such investigation was made, and how, to wit, that he (Oliver) and Officer Hall, taking defendant with them, went to the saloon of Alf Martin for the purpose of making this investigation, and that they made the same. Whereupon counsel for state, over defendant's objection, asked witness Oliver to state to the jury what was the result of the investigation (meaning thereby, what did Alf Martin say about it?)" Appellant objected, and this portion of his objection was sustained; and, sustaining the

objection, the court gave as his reason for so doing that the witness Martin was present, and could answer for himself. The court appends this explanation to the bill: "The witness Hall, the policeman, went by Alf Martin's saloon, but had no talk. There was music and dancing in the saloon. Hall, in passing, simply said, 'Cut that out' (referring to the music). Some one on the inside replied, 'All right, copper.' Alf Martin was under the rule. The court did say that 'Alf Martin is here as a witness, and can speak for himself,' and overruled state's witness in regard to what investigation, if any, Hall made as to Nelson's statement that he was at Alf Martin's saloon. See statement of facts and Martin's testimony. Oliver and Hall each testified that only a few moments elapsed between the time Nelson ran into Hall's arms and the time when Oliver came up." We think all of this testimony was *res gestæ*. However, as appellant insists, it was not proper for the court to permit Oliver to testify to his investigation at the Martin Saloon. From the bill it appears that this was excluded.

Appellant's third bill complains of the failure of the court to permit appellant to have the official stenographer take down the testimony. The bill shows that the stenographer was sick. Appended to the bill is this qualification: "The jury had been impaneled, and witness Oliver had advanced some distance in his testimony, before counsel for defense noticed the absence of the stenographer. The court suspended, and gave counsel for defendant an opportunity to go out and look for a stenographer. He came back after some time without one. The court then instructed the deputy sheriff to see if he could find one. The deputy was gone some time, and failed to find a stenographer. The trial then proceeded. The case was a short and simple one—practically only three witnesses in the case as to any issue raised. The act creating court stenographer does not include the criminal district court of Dallas county in its terms, though the commissioners' court of Dallas county has raised no objections to this court having one, and drawing on the county for the compensation of same." There was no error in the ruling of the court. *Andrews v. State*, 78 S. W. 918, 8 Tex. Ct. Rep. 572.

The evidence being sufficient, the judgment is affirmed.

RUIZ v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1905.)

CRIMINAL LAW — APPEAL—RECORD—SUFFICIENCY TO SHOW ERROR.

Under Code Cr. Proc. 1895, art. 723, requiring the reversal of a judgment of conviction when it appears by the record that any of certain statutory requirements have been disregarded, providing the error is excepted to at the trial, a record without a bill of exceptions or

statement of facts is insufficient to show prejudicial error in the instructions of the court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2818.]

Appeal from District Court, Val Verde County; B. C. Thomas, Judge.

Tranquillino Ruiz was convicted of murder in the second degree, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment fixed at 25 years' confinement in the penitentiary. The record is before us without bill of exceptions or statement of facts. The motion for new trial relates only to alleged errors in the charge of the court. Under article 723 (Code Cr. Proc. 1895), the facts not being before us, we cannot determine whether or not appellant was injured by such charges, conceding them to be erroneous.

No error appearing in the record, the judgment is affirmed.

KOCH v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

LOCAL OPTION—ELECTION—ORDER—TIME OF MAKING.

An order for a local option election may be made either at a regular or special session of the commissioners' court.

Appeal from Bell County Court; W. R. Butler, Judge.

George Koch was convicted of violating the local option law, and appeals. Reversed.

McMahon & Curtis, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$50, and 20 days' confinement in the county jail.

The indictment alleges the sale to L. S. Ray. His testimony is positive that he bought the whisky from appellant. A clear preponderance of the testimony, however, is in favor of appellant. Appellant insists that the court erred in refusing a new trial on the ground of newly discovered evidence. This motion should have been granted. Diligence is shown, and the testimony is material.

Appellant insists that the local option law is not in operation in Bell county, for the reason that the order for the election was made at a special session of the commissioners' court, whereas the order recited that it was at a regular session. We have repeatedly held that the order may be made either at a regular or special session of the commissioners' court. *Loveless v. State* (Tex. Cr. App.) 49 S. W. 602; *Abbott v. State* (Tex.

Cr. App.) 57 S. W. 97; *Hanna v. State* (decided at the present term) 87 S. W. 702.

The judgment is reversed, and the cause remanded.

LONG v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

CRIMINAL LAW—NEW TRIALS—ABSENT WITNESSES.

In a prosecution for bringing stolen horses into the state, the prosecuting witness testified that he was joint owner of the property with his brother, and did not know of his own knowledge that defendant did not have his brother's consent to take the animals. Defendant had asked for and been refused a continuance on the ground of the absence of prosecuting witness' brother, who, it was claimed, would testify to owning a half interest in the horses, and that defendant had his permission to use the same at any time he wished. A motion for new trial was made, to which was attached the affidavit of the absent witness deposing to substantially the same facts as stated in the motion for continuance. *Held*, that a new trial should have been granted.

Appeal from District Court, Montague County; D. E. Barrett, Judge.

W. H. Long was convicted of bringing stolen horses into the state, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of bringing two stolen horses from the Chickasaw Nation, Ind. T., into Montague county, Tex., and his punishment assessed at two years' confinement in the penitentiary. The indictment alleges the property to be that of J. W. Weldon. Prosecutor testified that he (J. W. Weldon) and his brother James Weldon owned an iron-gray three year old filly and a brown four year old filly jointly; that they were running in the field at prosecutor's place, in the Chickasaw Nation, Ind. T. Prosecutor subsequently found them at Bowie, Montague county. The proof shows that appellant brought the horses there, and sold them to Southard. Appellant made a motion for continuance for want of the testimony of James Weldon, alleging that said Weldon was sick and unable to attend court, and no amount of diligence could have secured his attendance; that he lived over Red river, a short distance from Montague county; that appellant, being ignorant of the law, did not make an effort to secure the testimony of said absent witness by deposition; that appellant expected to prove by said witness that the animals in question, alleged to have belonged to J. W. Weldon, did not belong to him, but belonged to J. H. Weldon and said James Weldon, and each of them owned a half interest in said horses, and that J. W. Weldon owned no interest in said horses, and that said horses were in possession of J. H. and James Weldon joint-

ly; that they were the owners and exercised full control over said horses. By said absent witness appellant expected to prove further that he often used said horses and other stock of said absent witness, even without his consent, and that he had the full consent and leave from James Weldon to use said horses whenever he wished, and the full permission to take said horses into his (defendant's) possession at any time he wished. Attached to the motion for new trial is the affidavit of James Weldon, in which he swears that he and Alvin Clifton Weldon are the absolute and exclusive owners of the horses in question, which said witness swears he understands were found in possession of W. H. Long, in Bowie county, on Saturday, January 21, 1905; that defendant had been about witness a great deal, assisting him in handling his horses, and, because of witness' confidence in defendant's judgment of horses, in talking to defendant witness had used language that warranted defendant in understanding that he would be authorized to sell or trade his horses, provided he accounted to witness for the proceeds arising from such sale or exchange. Alvin Clifton Weldon's affidavit states that one of the animals in question belonged to him. Where the affidavits of the absent witnesses are attached to the motion for new trial, and the same is material testimony to defendant, under the holding in *Baines v. State*, 61 S. W. 119, 1 Tex. Ct. Rep. 816, the lower court should grant a new trial. Furthermore, we believe the testimony is rendered probably true by the facts of this case, since the prosecuting witness himself swears that he was joint owner of the property with his brother James Weldon, and that he did not know of his own knowledge that appellant did not have his consent to take the animals. The absent witnesses swear circumstantially that appellant did have his consent to take the animal. This being the state of the record, waiving the question of diligence in procuring the testimony of the absent witness, we think the court should have granted a new trial.

The judgment is accordingly reversed, and the cause remanded.

RUTHERFORD v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

1. INTOXICATING LIQUOR—LOCAL OPTION—ILLEGAL SALES—CHARACTER OF DRINK SOLD—INSTRUCTIONS.

In a prosecution for violating the local option law by selling "hop ale," where there was evidence that hop ale was a nonintoxicant, a requested instruction that, if hop ale was a nonintoxicant, or if there was a doubt of its being an intoxicant, defendant should be acquitted, should have been given.

2. SAME—BURDEN OF PROOF—INSTRUCTIONS.

In a prosecution for violating the local option law the burden is on the state to show be-

yond a reasonable doubt that the liquor sold was intoxicating, and a charge that if the jury believe that such liquor was not an intoxicant they should acquit defendant improperly places the burden of proof upon defendant.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 285, 276.]

3. SAME—EVIDENCE—PRIOR SALES—COMPLICITY OF DEFENDANT.

In a prosecution for violating the local option law, where defendant was not and had not been connected with the place of business at which the liquor was sold, but was merely assisting the proprietor on the particular day on which the sale was made, testimony that witness had drunk liquor at the place of business in question about two and a half years before the date of the sale in question was inadmissible.

4. SAME—INTOXICATING PROPERTY OF LIQUOR—EVIDENCE—PRIOR SALES.

In a prosecution for violating the local option law by the sale of "hop ale," testimony of a prior sale of "hop ale," or of any other liquid, is incompetent to prove the intoxicating property of the liquor sold on the occasion in question, in the absence of proof that the liquor sold on the prior occasion was of the same sort as that sold on the occasion in question.

Appeal from Bosque County Court; P. S. Hale, Judge.

Jack Rutherford was convicted of violating the local option law, and appeals. Reversed.

Dillard & Word and H. J. Cureton, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for violating the local option law. There was testimony—perhaps a preponderance—introduced going to show that the hop ale charged to have been sold was a nonintoxicant. Special instructions were requested to the effect that, if the hop ale was a nonintoxicant, or if there was a doubt of it being an intoxicant, appellant should be acquitted. The court erred in not so instructing the jury. *Patrick v. State*, 78 S. W. 947; *Mayne v. State*, 86 S. W. 329, 12 Tex. Ct. Rep. 806; *Ulloth v. State* (decided at the present term) 87 S. W. 822.

The question of good faith and mistake was also an issue in this case under the testimony. The court erred in refusing the charge asked by appellant covering this phase of the case. See the same authorities.

In the seventh paragraph of the charge the court thus instructed the jury: "If you believe from the testimony that defendant sold the hop ale to Jeff Barnes, as testified by said witness Barnes, and if you further believe from the testimony that said hop ale, if any, was not an intoxicant—that is, if you believe it was not of such quality as to produce intoxication when taken into the stomach in such quantities as may practically be drunk—then, if you so believe, you will acquit the defendant." Exception was reserved to this charge, and a counter charge asked. The objection is that it shifts the burden of proof, and required the jury to believe the liquid sold was not a nonintoxicant in order to acquit, whereas the law re-

quires that the jury must believe the liquid to be an intoxicant before they can convict. The exceptions to this charge were well taken. The sale of an intoxicant is a prerequisite to a conviction under a charge of violating the local option law. Unless the state can show this beyond a reasonable doubt, an acquittal should be awarded. The jury are not required to believe the liquid is not a nonintoxicant; nor is it upon the defendant to show that it is not a nonintoxicant. The state must prove beyond a reasonable doubt that it is an intoxicant, and the jury should be so instructed.

Over the appellant's objection, Thompson was permitted to testify that he had drunk hop ale at Fred Uloth's place of business about two and a half years before this sale is alleged to have occurred. Appellant was in no way connected with Fred Uloth's business at the time of the prior sale, and was only assisting him for the day on which the sale here is alleged to have occurred; and it would make no difference as to what was sold by Fred Uloth two and a half years before this transaction, so far as the defendant is concerned. Nor, in any event, would such testimony be admissible. The transaction, occurring two and a half years prior to this time, would not be introduceable against appellant; and, besides, before the sale of hop ale or any other liquid could be used against appellant to prove the intoxicating property of the article he did sell, it must be shown that they are the same sort of liquid.

The remaining questions were disposed of in *Uloth v. State* (decided at the present term) 87 S. W. 822, and it is not necessary to enter into a discussion of them.

The judgment is reversed, and the cause remanded.

BROWN v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

1. FALSE PRETENSES—FRAUDULENT SALES—EVIDENCE.

Where an indictment alleged that defendant, in conjunction with another, procured the sale to prosecuting witness of a lot which defendant falsely represented to be owned by his accomplice, the deed from the accomplice to the prosecuting witness, executed after the payment of money by the latter, was admissible in evidence, although not set out in the indictment.

2. SAME—EVIDENCE—TITLE TO PROPERTY.

In a prosecution for swindling by means of a pretended sale of property, induced by false representations as to ownership, testimony of prosecuting witness that a certain person told him, in defendant's absence, that witness had acquired no title to the lot by his deed, was hearsay and inadmissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 950.]

3. SAME—INSTRUCTIONS—RELIANCE ON REPRESENTATIONS.

In a prosecution for swindling by means of a pretended sale of property, induced by

fraudulent representations as to ownership, a charge that it was the duty of prosecuting witness to ascertain the truth or falsity of the statements, if he had the means at hand for so doing, and he could not rely upon the statements and claim that he was defrauded, was properly refused.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Pretenses, §§ 14, 27.]

4. SAME—DISPOSSESSION OF PERSON DEFRAUDED.

In order to constitute one guilty of swindling by means of a pretended sale of property, induced by false representations as to ownership, it is not necessary that the defrauded purchaser be involuntarily dispossessed of the property sold to him.

Appeal from Atascosa County Court; W. M. Abernethy, Judge.

El. Brown was convicted of swindling, and appeals. Reversed.

J. W. Preston and N. A. Rector, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant's punishment was fixed at a fine of \$100, and 24 hours in the county jail, under an indictment charging swindling of property under the value of \$50, to the effect that appellant falsely represented that one J. H. Walker owned a certain lot, to wit, lot No. 221, located in the town of Pleasanton, Atascosa county, state of Texas, and had a right to dispose of the same, and, by false and fraudulent representations so made, procured from one Valente Mauricio the sum of \$20 in money, and one certain note, alleged to be of the value of \$20, which was a vendor's lien upon said lot.

Bill No. 1 complains that the court permitted the state, over the objection of appellant, to introduce in evidence the deed from J. H. Walker and wife to prosecuting witness. The objection was that the proof showed that the money and note were delivered to Valente Mauricio before said deed was signed, and that after the delivery of said note and money by said Mauricio to this defendant, in Pleasanton, this defendant went to the country, to the residence of J. H. Walker, and procured said deed; said deed not being set out in the indictment; there being no express allegation of a sale and delivery of said lot No. 221 to Valente Mauricio. The indictment does allege that appellant, Brown, in conjunction with J. H. Walker, procured the sale of said lot 221 to the prosecuting witness. We see no reason for holding that the deed must be set out in the indictment.

Bill No. 2 complains that the court permitted Valente Mauricio to testify, over the objections of this defendant, that H. G. Martin told him (Mauricio), the defendant not being present, that he (Mauricio) had acquired no title to lot 221 by his deed from J. H. Walker. This testimony was clearly hearsay, and was placing the opinion of the witness Martin as to the validity of the title in question before the jury, which constitutes reversible error. As to who had title to the

property was the issue in the case. The court committed error in permitting the opinion of the witness as to its validity to be introduced; the records being the best evidence of title, outside the proof of heirship, which must necessarily be done by oral testimony.

Appellant requested the following special charge: "You are charged that if defendants, or either of them, made any false statements to Valente Mauricio, as alleged in the indictment hereof, if you find that they or either of them made such false statement, then, if you find that said Mauricio had the means at hand of ascertaining the truth or falsity of said statement, then it was his duty to do so, and he could not rely upon said statement and claim he was defrauded." There was no error in refusing to give this charge. Nor did the court err in refusing the charge No. 5, wherein appellant asked the court to charge the jury that, if prosecuting witness voluntarily left the lot without having been dispossessed of the same, defendant would not be guilty. This is not the law.

For the error pointed out, the judgment is reversed and the cause remanded.

COX v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

1. ANIMALS — RESTRAINT — LOCAL OPTION ELECTIONS.

Acts 26th Leg. p. 220, c. 128, § 3, prescribes the essentials of a petition for a stock law election. Section 4 provides that upon the filing of such petition the commissioners' court "at the next regular term thereof" shall pass an order for an election. *Held*, that a petition filed during a regular term of the commissioners' court cannot be acted upon by the court at that term.

2. SAME.

Under Acts 26th Leg. p. 220, c. 128, § 3, requiring the petition for a stock law election in a subdivision of a county to particularly describe such subdivision and designate the boundaries thereof, a petition for an election in a given precinct, which merely designates the precinct by number, and fails to give the boundaries thereof, is fatally defective.

Appeal from Collin County Court; F. E. Wilcox, Judge.

J. W. Cox was convicted of unlawfully permitting cattle to run at large, and appeals. Reversed.

H. L. Davis and Abernathy & Mangum, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was indicted for unlawfully permitting 12 head of cattle to run at large in Justice Precinct No. 4 of Col-

lin county, in violation of the stock law then in force, and upon conviction his punishment was fixed at a fine of \$5. This election was held under chapter 128, Acts 26th Leg., p. 220. Section 3 thereof provides: "Such petition shall set forth clearly the class or classes of animals enumerated in the preceding article which the petitioners desire shall run at large in such county or subdivision, as the case may be, and if the petition be from the free-holders of a subdivision of any county, such subdivision shall be particularly described, and the boundaries thereof designated." Section 4 provides: "Upon the filing of such petition the commissioners' court at the next regular term thereof shall pass an order directing an election to be held throughout the county, or particular subdivision thereof," etc. It will be noted from this section that the petition must be filed prior to the next regular term of the commissioners' court. A similar question to the one now under consideration was passed upon by us in a hog law case. *Roberson v. State*, 70 S. W. 542, 6 Tex. Ct. Rep. 20. We there held that the petition for the election to prohibit the running at large of hogs, filed during the term of the county commissioners' court, cannot be acted upon and election ordered until the next regular term. It will be noted in that decision that the statute governing hog law elections, so far as the petition is concerned, is the same as that required in stock elections. Each of them provides that the petition must be filed prior to the next regular term of the commissioners' court. The evidence shows quite conclusively, we take it, that the petition was filed during the regular term of the court. At any rate, this is a jurisdictional fact that the state has not affirmatively established to the contrary. The evidence in the record clearly shows that it was filed at the regular term. Furthermore, we note that the petition merely gives the number of the justice precinct in which the stock law election is to be held. The statute says it must give the boundaries. We are not at liberty to disregard the plain provision of the statute, yet we see no reason for giving the boundaries of a precinct when the number is given; but the statute says it is necessary. This being true, the petition is defective in both particulars; that is, the petition fails to give the boundaries of the precinct, and the evidence shows that it was filed at the regular term of the commissioners' court that ordered the election instead of being filed prior thereto. This being true, it vitiates the entire election. We do not deem it necessary to discuss the various other questions raised by appellant.

The judgment is accordingly reversed, and the prosecution ordered dismissed.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1905.)

1. BURGLARY — EVIDENCE — IDENTIFICATION OF DEFENDANT—BURGLARIOUS INTENT.

In a prosecution for burglary, where it appeared that the only property taken was a watch, of which defendant was found in possession, and which he sold early in the morning after the burglary, and there was evidence that the burglar took the watch from a certain room while in the house, and was subsequently seen in the room of another, who was unable to positively identify him, testimony that the watch belonged to the occupant of the room from which it was taken, and was afterwards identified by him at a pawnshop as the watch taken from his room on the night in question, was admissible to identify defendant and connect him with the burglary, and to show that the burglary was committed, as alleged, for the purpose of committing theft.

2. SAME—INDICTMENT—VARIANCE.

In a prosecution for burglary, where it appeared that the burglar entered the owner's room for the purpose of committing theft, evidence of the taking of a lodger's watch from the room of the latter was not a variance from an indictment alleging that the house was in the possession of and under the control of the owner, and that the burglar entered the same with the intent to steal personal property belonging to the owner.

3. SAME.

In a prosecution for burglary, evidence that the proprietor of the house burglarized was not the owner thereof, but was merely a tenant, shows the proprietor to have been a special owner, within the meaning of the statute, and is not a variance from an indictment alleging ownership in and occupancy of the house by the proprietor.

Appeal from District Court, Jefferson County; L. B. Hightower, Judge.

Dick Johnson was convicted of burglary, and appeals. Affirmed.

Matt Cramer, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a burglary conviction. The state introduced the following testimony: Martin Sweeney occupied and controlled a certain room in the dwelling house of Charley Bryant; the house alleged to have been burglarized by defendant on the night of September 28, 1904. That a certain watch, the only property missed or taken from said dwelling house, was the property of Martin Sweeney, and was taken from his room, which was a room in said house. That said watch was afterwards identified by said Sweeney at a pawnshop as being the same watch taken from his room on said night. Exception was reserved on the ground that this testimony was irrelevant, incompetent, immaterial, and fatally variant from the allegations in the indictment as to ownership, and it did not prove any issue or throw any light upon any issue in the case, and was prejudicial. This bill was approved with the following qualification: "The testimony also showed that the room Sweeney

occupied was one of the rooms in Charley Bryant's private residence, which said residence was rented and controlled by Bryant, and Sweeney was a roomer in said residence, renting from Bryant." This testimony was admissible. The facts disclose that Sweeney occupied an adjoining room to that of the alleged owner, Bryant; that the burglar took Sweeney's watch from his room while in said house, and was subsequently seen in Bryant's room, at the dresser, handling a watch or jewelry of some kind. Bryant was unable to positively identify appellant, or with any degree of certainty say that he was the man who entered his room. Appellant was found in possession of the watch and disposed of it about 2 o'clock at night. The burglary occurred on the night of the 28th, and appellant sold this watch on that night about 2 o'clock in the morning. This evidence was introduceable for two purposes, under this record: First, as a means of identifying appellant and connecting him with the burglary; and, second, to show the intent with which that burglary was committed, as the indictment charges the burglari-ous entry for the purpose of committing theft, and the burglar did not succeed in securing any property in Bryant's room. It is true, the evidence was sufficient, independent of the watch, to show the purpose with which the burglar entered Bryant's room; but the fact that the burglar took Sweeney's watch from his room cogently illustrated the purpose for which he entered the house, and it was a potent fact in identifying appellant as the burglar.

Nor is there any merit in the contention that the introduction of the evidence in regard to this watch taken from Sweeney's room was variant from the allegation in the indictment that the house was under the control of Bryant. The fact that Sweeney had rented and slept in one of the rooms in the house, and it was entered, and his watch taken, would not be a variance, under the allegations that the house was in possession of Bryant, when the facts, as in this case, also show that the burglar entered Bryant's room for the purpose of committing theft. The indictment did not charge the ownership of the watch in Bryant, nor did it allege that any of Bryant's property was taken. The allegation was that he entered Bryant's house with the intent to fraudulently take, steal, and carry away the personal property belonging to Bryant, etc.

It is contended that because Bryant did not own the house, but was only a tenant (that is, controlled it as renter), the evidence was variant from the indictment, which alleged ownership in and occupancy of the house by Bryant. There is no merit in this proposition. He was in control of the house as such renter, and was special owner, within the contemplation of the statute. *Linhart v. State*, 33 Tex. Cr. R. 504, 27 S. W. 260; *Reed v. State*, 34 Tex. Cr. R. 597, 31 S. W.

404; *Willis v. State*, 83 Tex. Cr. R. 168, 25 S. W. 1119.

The evidence amply sustains this conviction, and the judgment is affirmed.

BROOKS, J., absent.

CROW v. STATE.

(Court of Criminal Appeals of Texas. June 21, 1905.)

1. MURDER—EVIDENCE—DANGEROUS DISPOSITION OF DECEASED.

In a prosecution for murder, evidence that a short time before the difficulty in which deceased was killed he was under the influence of liquor, quarrelsome, and had to be held in order to prevent him from killing his brother, was admissible if defendant had knowledge of these facts.

2. SAME—PROVOKING DIFFICULTY—EVIDENCE.

In a prosecution for murder, evidence that defendant, after having a difficulty with deceased, went for his pistol, and returned for the purpose of renewing the difficulty or killing deceased, but said nothing and did nothing to deceased, when he reached him, to provoke a difficulty, was not sufficient to justify a charge on provoking the difficulty.

3. SAME — SELF-DEFENSE — LIMITATION OF RIGHT.

Where, in a prosecution for murder, the evidence showed that deceased started toward defendant with a knife, and continued to approach after having been warned to stop, whereupon defendant fired, and deceased fell, immediately arose, and was shot again, it was error to charge that, if the jury should find that after defendant shot deceased, rendering him incapable of inflicting any injury, and afterward, when all real and apparent danger had passed, shot deceased again, he would be guilty of murder in the first or second degree or manslaughter.

Appeal from District Court, Ellis County; J. B. Dillard, Judge.

J. W. Crow was convicted of murder, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment fixed at 15 years' confinement in the penitentiary.

While McAllister was testifying, appellant proposed to prove by him that he saw deceased, Sam Brown, not a great while before the homicide, in the town of Red Oak, drunk, or under the influence of whisky, and while in this condition undertook to kill his brother, Gus Brown, with a meat ax; and, further, that witness and others had to hold deceased in order to prevent him from killing his brother with the meat ax; and, further, that said passion or anger on the part of deceased was not caused by any act or conduct on the part of Gus Brown. The court sustained the state's objection, because he did not believe the particular character of testimony was introduceable to show the reputation of the deceased. The trial court may have been correct in holding that the par-

ticular act would not prove general reputation. We understand this testimony was not offered for the purpose of proving reputation of deceased, but for the purpose of showing that he was a dangerous man while intoxicated or under the influence of whisky. It was abundantly shown by witnesses for the defense that deceased was a dangerous and violent man when intoxicated or under the influence of intoxicants. However, this was contradicted by evidence for the state. If appellant knew as a fact, or it was brought home to his attention, that deceased was a dangerous man, and liable to execute threats when under the influence of intoxicants, it was the subject of legitimate inquiry or proof before the jury. This, we understand, has been the rule in Texas since *Childress' Case*. Reputation of a certain character is introduceable under the idea that, this reputation being general, everybody would be cognizant of that fact. Its office is simply to bring notice to the party who seeks to take advantage of that reputation, and from which the presumption arises that he was cognizant of such reputation. A party can as well take advantage of the knowledge of this characteristic of the deceased where it is brought to his actual attention or knowledge as if he knew it from general reputation. If appellant knew of the particular instance sought to be proved by the witness, he was entitled to show it. Whatever enters into the defendant's mind, and prompts his action, is the subject of legitimate inquiry. Where the violent or dangerous reputation of deceased is at issue, it is proper to prove the acts of the deceased showing the dangerous character, if knowledge of this characteristic is brought home to the accused. The effect upon the mind would be practically the same whether the information was from general reputation or from knowledge of the facts themselves.

The law of self-defense is burdened with a charge on provoking the difficulty. The evidence does not suggest the issue of provoking the difficulty. Somewhere from 15 to 30 minutes before the tragedy there had been trouble between appellant and deceased. They had been to the little village of Red Oak. Deceased was drinking to a considerable extent, if not drunk. Returning from Red Oak, they stopped at the residence of Mrs. Cavitt, where appellant obtained his clothing that had been washed, and placed it in the wagon. Deceased took the clothes, tore open the bundle, and scattered them about on the muddy ground. Appellant expostulated with him. This brought on a fight between them, deceased being the aggressor, in which he used a knife. They were separated by Parks. Appellant left; went to Cherry's, where he resided; was gone 15 to 20 minutes, and returned. As he came out of the field, a short distance from the wagon, deceased alighted from the wagon, and went towards him, and, appellant says, with his drawn knife.

He urged deceased not to come upon him, and fired one shot to frighten. Deceased continued to approach, and appellant continued to warn him not to come, and, finally, when he got within a few feet, fired the second shot. This rather stunned deceased, but he straightened up, and, some of the witnesses say, "got hold of or clinched defendant." Appellant pushed him back and fired the third shot. The testimony at this point varies somewhat as to the immediate acts of the parties. But this is a sufficient statement to illustrate the immediate environments of the difficulty. One or two witnesses testified that while appellant was coming back from his residence he was heard to use the expression in a loud tone of voice, "God dog my rowdy soul, I am coming." At this time he was some distance away from the scene of the tragedy. Those who were nearest did not hear appellant use any expression, but heard the noise, or loud talking, down at the wagon, where deceased was, or in that direction. As we understand this record, the only evidence indicating any act or word on the part of appellant tending to bring on a difficulty was the expression above used. This was not heard by deceased or those parties working in the cotton field who were much nearer appellant than deceased. We do not believe this evidence suggested the theory of provoking the difficulty. If appellant, after the first difficulty with deceased, went off, got his pistol, and returned for the purpose of renewing the difficulty or killing deceased on account of the previous trouble, and said nothing and did nothing to deceased, when he reached him, to provoke a difficulty, that issue would not be in the case. The testimony shows that after he reached the scene of the difficulty he asked deceased and urged him not to come upon him with the knife; that he did not want to kill or hurt him, and wanted no trouble with him. We think there was error on the part of the court in charging this theory of the law.

The court further charged the jury curtailing the right of self-defense to the effect that, when the right of self-defense ceases, then the right of appellant to shoot also ceases. This is a correct proposition of law, if the charge had stopped at this point. But it went farther, and instructed the jury that if they should find, after defendant shot deceased, thereby rendering him incapable of inflicting any injury upon his person, and they should further find that defendant knew of this disabled condition of his adversary, and that all real and apparent danger to his life had passed, he then shot deceased in the head, causing death, he would be guilty of murder in the first or second degree or manslaughter, as the facts might show the grade of offense to be, the penalty therefor to be determined by the jury under the evidence before them under the principal charge of the court in relation to murder in the first

degree, murder in the second degree, and manslaughter. This charge with reference to the grades of homicide, and the application of this principle, seems to be very much confused. Exception was reserved to this charge, and, as the charge is given, we believe the exceptions are well taken. It is a correct proposition to assert under the law of self-defense, where danger to life or serious intent to injure has passed, the right of self-defense ceases. But if the right of self-defense is once operative, it continues until all danger to life or the infliction of serious bodily injury has passed. In a difficulty where one of the parties is killed, covering a space of a very few seconds, it is a very difficult proposition for the court to charge curtailing the right of self-defense. Under the strongest evidence for the state, and as strongly stated as the prosecution could demand, the whole difficulty occurred covering a space of a very few feet and in a short time. The events crowded themselves together suddenly, and very hurriedly. Under the state's theory appellant fired three shots. The first evidently missed; the second struck the body of deceased, and he fell; and in the act of getting up the third shot was fired into the head of deceased. We do not understand how, if the right of self-defense existed by reason of the fact that deceased was approaching appellant with a drawn knife, and was shot down, and in getting up was fired upon by appellant and killed, the facts could have raised murder in the first or second degree. It would be a rapid transition of the mind to so place it in a cool reflective condition as to bring it within murder in the first degree under such circumstances, or even to suggest murder upon implied malice. Under no possible condition of facts or state of mind does it occur to us that a man's mind could be sufficiently cool and calm under that condition of facts to pass it suddenly to such a condition as to show express or implied malice. We are only discussing now the theory given in this charge; that is, passing from a case of self-defense to murder in the first or second degree under the condition of things existing at the time. This charge should not have been given.

For the errors indicated, the judgment is reversed, and the cause remanded.

TEXAS & N. O. R. CO. v. RUCKER.

(Court of Civil Appeals of Texas. March 31, 1905.)

1. COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

In a suit by a carrier to enforce the lien given by Rev. St. 1895, arts. 327, 328, 330, which authorize the sale to pay freight charges of live stock remaining unclaimed for 48 hours after its arrival at destination, the value of the live stock upon which the lien is asserted, and not the amount of the freight charges, determines the jurisdiction of the trial court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 415.]

2. SAME.

In a suit by a carrier to recover freight charges, where the petition also seeks to recover the possession of the property for the transportation of which the charges are due, and which was wrongfully taken from it, the value of the property to which the right of possession is asserted, and not the amount of the freight charges, determines the jurisdiction of the trial court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 415.]

Appeal from Liberty County Court; M. D. Rayburn, Judge.

Action by the Texas & New Orleans Railroad Company against C. T. Rucker. From a judgment of dismissal, plaintiff appeals. Reversed.

See 87 S. W. 818.

Baker, Botts, Parker & Garwood and Stevens & Pickett, for appellant. Marshall & Dabney, for appellee.

PLEASANTS, J. Appellant brought this suit in the county court of Liberty county to recover the sum of \$55.50 alleged to be due as freight charges for the transportation over its railway of 18 head of steers belonging to appellee, and to foreclose a carrier's lien on said steers for the amount of the freight charges. Appellee demurred to the petition on the ground that it shows upon its face that the lien sought to be enforced was only a common-law carrier's lien, and therefore the amount of the debt claimed, and not the value of the property upon which the lien was asserted, was the amount in controversy, and, this amount being less than \$200, the court was without jurisdiction to try the case. The court sustained the demurrer and dismissed the suit; hence this appeal. The affidavit for sequestration filed with the original petition alleges the value of the steers to be \$900.

It is a well-settled general rule of decision in this state that in a suit to enforce a lien upon personal property the value of the property upon which the lien is asserted, and not the amount of the debt claimed, determines the jurisdiction of the court. *Marshall v. Taylor*, 7 Tex. 235; *Smith v. Giles*, 65 Tex. 341; *Cotulla v. Goggan*, 77 Tex. 32, 13 S. W. 742; *Real Estate Co. v. Bahn*, 87 Tex. 583, 29 S. W. 646, 30 S. W. 430; *Lane v. Howard*, 22 Tex. 7.

Appellee's contention is thus stated in his first counter proposition to appellant's assignments of error: "The court did not err in sustaining defendant's exceptions to the jurisdiction of the county court, because plaintiff having sued for \$55.50 and to foreclose an alleged lien, to wit, a carrier's common-law lien, which arises by implication of law, on certain cattle alleged to be of the value of \$900, the amount or matter in controversy that governed the jurisdiction was \$55.50, and not the value of the property which it is sought to charge with the payment of the \$55.50. It is only in cases of contract liens

that the value of the property may be looked to to determine the jurisdiction of the court, and the case at bar is not one on a contract lien."

The case of *Lawson v. Lynch*, 9 Tex. Civ. App. 582, 29 S. W. 1123, is cited in support of this contention. In that case the plaintiff asserted a landlord's lien upon the crop of his tenant. The suit was brought in the justice court, the amount of the indebtedness claimed being less than \$200. A distress warrant was sued out and levied upon corn and cotton the value of which exceeded \$200. In discussing the question of whether the defendant's plea to the jurisdiction should have been sustained, Justice Williams, speaking for this court, refers to the cases above cited, and distinguishes them from the case under consideration. While the opinion does state that the rule that the value of the property upon which the lien is claimed determines the jurisdiction of the court had only been applied in cases in which the lien asserted was created by contract or act of the parties the decision of the case is not based upon that ground, but upon the provisions of the statute directing the manner of the enforcement of the landlord's lien. The following quotation from the opinion shows upon what ground the decision was based: "In each of the cases mentioned the lien was created by contract or act of the parties upon specific chattels. The lien of the landlord is by law given generally upon the crops of the tenant and upon property furnished him by the landlord, but is a charge upon no more of such property than is necessary to pay the debt. The distress warrant issues 'to seize the property of the defendant or so much thereof as will satisfy the demand.' If the case is within the jurisdiction of the justice of the peace, the sheriff is to be directed to return the writ to that court; otherwise it is to be returned to the court having jurisdiction of the amount in controversy. Rev. St. 1895, art. 3246 [3118]. Here the amount in controversy necessarily means the debt sued for, because the justice of the peace issuing the writ could only be governed by the amount sued for in giving the proper directions as to its return, as he could not determine in advance the value of the property which would be levied on. The plaintiff in suing out the writ is not required to state the value of the property subject to the lien. So that, while the landlord may charge any and all of the crops of the tenant with his lien, the judgment in his favor can reach and appropriate to its payment only so much as is necessary to satisfy the debt sued for and found to be due, and can therefore only affect the property to that extent. If the court has jurisdiction to adjudge the debt, it can see to its satisfaction out of the crops as well as it can provide for the enforcement of its judgments by attachment or execution. If jurisdiction exists over the cause of action asserted, it cannot be defeated by the accident that

the sheriff, after the institution of the suit, levies upon property of greater value than the debt."

We think it clear that this case does not sustain appellee's contention that the rule above mentioned only applies when the lien is created by contract.

Of the remaining cases cited by appellee in support of his proposition the cases of *Dazey v. Pennington*, 10 Tex. Civ. App. 326, 31 S. W. 312, *Irvin v. Bexar County*, 63 S. W. 550, 2 Tex. Ct. Rep. 862, and *Yelser v. Taylor* (Tex. Civ. App.) 31 S. W. 84, are cases in which a landlord's lien was sought to be enforced; and the case of *Allen v. Glover*, 65 S. W. 379, 3 Tex. Ct. Rep. 420, is one in which a farm laborer's lien was asserted. All of these cases follow the rule announced in *Lawson v. Lynch*, and the decision in each of them was controlled by the provision of the statute which only authorizes so much of the crop to be seized and sold as might be necessary to satisfy the debt sued for.

The case of *Smith v. Giles*, supra, settles the question we are considering adversely to appellee. Plaintiff in that case sued to foreclose a laborer's lien under article 3180 of the Revised Statutes of 1895, and our Supreme Court held that the value of the boat upon which the lien was claimed determined the jurisdiction of the court.

The carrier's lien at common law was merely a right to hold the property until the freight charges were paid. *Jones on Liens*, vol. 1, p. 7. But our statute has enlarged this right by authorizing the carrier to sell the property if it is not claimed within a certain time. Rev. St. 1895, arts. 327, 328, 330.

The petition in this case alleges that appellee had refused to pay the charges due for the transportation of the steers, and had without the knowledge or consent of appellant taken them from its possession. Appellant had the right to refuse to deliver the property until the charges were paid, and if such payment was not made within 48 hours after the steers arrived at their destination it could, under the articles of the statute before cited, have sold them, and applied the proceeds to the payment of the freight charges. Appellee having wrongfully taken the property from appellant's possession, and thus prevented it from pursuing its statutory remedy, it could resort to the courts for the enforcement of its rights.

The common-law lien is upon the whole of the property, and these statutes authorize the sale of all of the property upon which the charges are due, and do not, as the landlord's lien statute, restrict the right of sale to so much of the property as may be necessary to pay the charges. Such being the character of the lien sought to be enforced by appellant, the value of the property upon which the lien was asserted determines the jurisdiction of the court, and, that value being an amount within the jurisdiction of the court

below, the exception to the petition for want of jurisdiction should have been overruled.

If appellant was not entitled to have the lien foreclosed and the property sold in satisfaction thereof, it was clearly entitled to regain possession of the steers, and hold them until the freight charges were paid, and its petition asks this relief. In a suit of this character the value of the property to which the right of possession is asserted necessarily determines the question of jurisdiction.

The judgment of the court below is reversed, and the cause remanded for trial.

Reversed and remanded.

ST. LOUIS, S. F. & T. RY. CO. v. SHAW.

(Court of Civil Appeals of Texas. May 24, 1905.)

EMINENT DOMAIN — RAILROADS—NOISE AND SMOKE OF TRAINS—DAMAGES TO PROPERTY OWNER.

A property owner may recover damages for personal annoyance and inconvenience suffered by her and her family on account of the noise, smoke, and vibration caused by the operation of a railway near her residence, though her property was not damaged, and no negligence was shown in the operation of the defendant's trains or in the use of its property.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 278-281.]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Action by Libbie Shaw against the St. Louis, San Francisco & Texas Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. H. Yoakum and Head, Dillard & Head, for appellant.

FISHER, C. J. Appellee's petition against the railway company substantially alleges that she was on the 1st day of January, 1901, and now is, the owner of certain lots described in the petition, situated in the city of Denison, upon which she had a two-story residence building of nine rooms, which at the time alleged, and long prior thereto, was occupied as a residence for herself and family, in which she conducted a boarding house; that on or about the 1st day of April, 1901, defendant built and constructed its main line of railroad, about 100 feet west of plaintiff's property, and across Main street, in the city of Denison, and about 100 feet from and opposite plaintiff's property defendant built and constructed a freight depot and five switch tracks, and since that date, both day and night, is continuously engaged and is now engaged in the operation of engines and cars over its main line and switches, receiving and discharging freight from its cars into its depot, and delivering freight to shippers and consignees from depot to wagons and drays, trucking freight over its plank floors at said depot and sheds thereat, and will continue to so operate engines and cars

and truck freight in the future; that the depot is constantly surrounded by a great number of wagons and drays, hauling freight therefrom, which creates constant flying cloud of dust, and a large portion of which settles on, in, and about plaintiff's residence and premises; that defendant's cars, road engines, and switch engines are, and since the construction of its road have been, during all hours of the day and night, operated on and over its line of road and switch tracks, making up trains and switching cars on its said tracks; that loud and disagreeable noises are made by defendant during all hours of the day and night in the operation of its cars and engines, as follows: By ringing the bell and blowing the whistles upon, and popping and escaping of steam from, its engines, the bumping of cars together, loud yelling, talking, cursing, and swearing by defendant's employes engaged in the operation of said engines, which said disagreeable noises are constantly and distinctly heard by plaintiff and all others at her said residence, and throughout all parts thereof, and by which plaintiff, her children and boarders, were constantly annoyed and harassed during the daytime, and kept awake, causing them loss of sleep and rest at night; that in the operation of defendant's engines upon its said line of railroad and switches there is constantly emitted from said engines sparks, cinders, and coal smoke in large quantities, which is carried by the wind on and into and through plaintiff's residence, and upon her furniture, drapery, carpets, etc., therein, and thereby causing noxious and offensive and unhealthy odors and vapors to suddenly permeate all parts of the premises; and that by reason of the noises, smoke, cinders, dust, dirt, odors, etc., plaintiff's residence has been rendered almost uninhabitable, and plaintiff has been thereby constantly and greatly annoyed and discomforted in the use and enjoyment of her home, and will in the future be so annoyed by the operation by defendant of its cars, and by reason thereof has sustained actual damages in the sum of \$2,000. Plaintiff further alleges that the damages sustained to her property was \$2,000.

Subdivision 1 of the charge of the trial court submits to the jury the issue as to the annoyance and inconvenience and damage sustained by plaintiff from the noises, dust, cinders, smoke, and odors alleged in the petition that affected the plaintiff's use and enjoyment of her residence. Other provisions of the charge also submit to the jury the question as to the depreciation in the value of plaintiff's property by reason of the facts alleged. The jury in their verdict only found for plaintiff on the issue submitted in paragraph 1 of the charge, and found in favor of the railway company as to the other issue and damages submitted.

We find that there is evidence in the record which tends to support the verdict and judg-

ment on the issue found by the jury in appellee's favor.

The appellant in its assignments of errors contends that the verdict and judgment is erroneous on the issue found in favor of appellee, for the reason (1) that the damages sustained by reason of the personal annoyance and inconvenience suffered by the plaintiff and her family, on account of the noise, smoke, vibrations, etc., caused by the operation of the railway near her residence, could not be recovered unless there had also been a finding for the plaintiff to the effect that her property was damaged; (2) that as the evidence showed that the railway company was not guilty of negligence in the operation and movement of its trains, engines, etc., and in the use of its property, plaintiff could not recover, although she suffered annoyance and inconvenience in the manner complained of. We regard these questions, together with others raised in appellant's brief, as settled against appellant's contention. *Daniel v. Railway Co.*, 96 Tex. 327, 72 S. W. 578; *M., K. & T. Ry. Co. v. Anderson* (Tex. Civ. App.) 81 S. W. 782, 788.

We find no error in the record, and the judgment is affirmed.

Affirmed.

INCE v. STATE.

(Supreme Court of Arkansas, June 17, 1905.
On Rehearing, July 15, 1905.)

1. HOMICIDE — MOTIVE — INSTRUCTIONS—INVASION OF PROVINCE OF JURY.

An instruction, on a trial for homicide, that the failure to show a motive is a circumstance in favor of defendant to be considered by the jury, is properly refused as invading the province of the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1790.]

2. TRIAL—CONDUCT OF COURT—REMARKS TO JURY—ERROR—CRIMINAL LAW.

On a trial for homicide the jury returned a verdict of guilty, but demanded an investigation into defendant's sanity. The court informed the jury that it would not be proper to attach any condition to the verdict, and in case of conviction defendant could not be executed until after a specified time, and it would be supposed that his attorney would look after his interest. The jury retired, and returned a verdict of guilty. *Held*, that the remarks of the court did not constitute reversible error, especially as the court, on defendant's exception to the language, withdrew it, and instructed that the verdict should be on the evidence alone.

3. SAME—EXCEPTION TO ADMISSION OF EVIDENCE—MOTION FOR NEW TRIAL—NECESSITY.

An exception to the admission of evidence on a trial for crime, not brought forward in the motion for a new trial, will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2676-2679.]

4. SAME—SEPARATION OF JURY—SUBJECTING JURORS TO IMPROPER INFLUENCE—BURDEN OF PROOF.

That a juror, during the selection of a jury in a homicide case, left the jury box, and

occupied for a short time a seat among the audience, was not sufficient to cast on the state the burden of proving that he was not exposed to improper influence to defeat a reversal of a verdict of guilty.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3098.]

5. SAME—GROUND FOR REVERSAL.

A juror, during the progress of selecting a jury for a homicide case, left the jury box, and for a while sat among the audience. It was not shown that he was subjected to any improper influence. *Held*, that the court did not err in refusing to set aside the verdict of conviction on the ground of the separation of the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2039-2045.]

6. SAME—INSANITY OF ACCUSED—MOTION TO STAY SENTENCE.

A motion in arrest of judgment, on conviction of crime, on the ground of present insanity of defendant, should be treated as a motion to stay sentence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2497, 2498.]

7. SAME—PLEA OF ISSUE OF INSANITY AT TIME OF TRIAL OR SENTENCE.

Under Kirby's Dig. § 2440, providing that a defendant may show against the judgment of conviction that he is insane, and, if the court is of the opinion that there is reasonable ground for believing that he is insane, the question of his sanity shall be determined by a jury, a verdict of guilty, notwithstanding the defense of insanity, does not bar a plea of insanity at the time of trial or at the time of sentence, and the verdict of guilty is conclusive only of defendant's sanity at the time of the commission of the crime.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2497, 2498, 2555.]

8. SAME—INSANITY AT TIME OF TRIAL OR SENTENCE—EVIDENCE.

On a trial for murder, the evidence on the issue of defendant's sanity at the time of the commission of the offense was conflicting. The jury first returned a verdict of guilty, but demanded an investigation by experts into defendant's condition. On the court refusing to accept the verdict, the jury returned a verdict of guilty. *Held* to show sufficient grounds for believing that defendant was insane at time of trial or sentence, requiring the court to impanel a jury to inquire into his condition, as provided by Kirby's Dig. § 2440.

On Rehearing.

9. CRIMINAL LAW—REMARKS OF JUDGE—VERDICT.

On a trial for homicide the jury returned a verdict of guilty, but demanded an investigation into defendant's sanity. The court informed the jury that it would not be proper to attach any condition to the verdict, and in case of conviction defendant could not be executed until after a specified time, and it would be supposed that his attorney would look after his interests. The jury retired and returned a verdict of guilty. There was evidence tending to support the plea of insanity. *Held* to justify the setting aside of the verdict.

Hill, C. J., dissents.

Appeal from Circuit Court, Yell County; William L. Moose, Judge.

James W. Ince was convicted of murder in the first degree, and he appeals. Reversed.

The defendant, James W. Ince, was indicted, tried, and convicted of the crime of murder in the first degree by killing his wife and

three children. Counsel was appointed by the court to conduct his defense, and a plea of insanity was interposed. The fact that he committed the homicide is not disputed, and the proof discloses a most shocking deed. According to defendant's confession, he arose at an early hour in the morning and with an ax killed his wife and their three small children, the youngest being an infant in the arms of the mother. The particular phase of insanity with which the defendant is claimed by his counsel to be afflicted is homicidal mania, which is defined to be a deranged condition of mind whereby there is an irresistible impulse to commit homicide. It is proved that the defendant's father is so afflicted and is now confined in an insane asylum in another state. A great deal of other testimony was introduced, pro and con, as to the mental condition of the defendant at the time of the homicide. The court refused to give the following instruction asked on behalf of the defendant, and such refusal is assigned as error: "(3) While in case of homicide the jury may properly consider the motive which prompted the act itself, or the want of motive, if no motive be shown it is a circumstance in favor of the defendant's innocence, to be considered by the jury." The jury, after deliberating several hours, returned into court with the following verdict: "We, the jury, find the defendant guilty of murder in the first degree, but demand that a thorough investigation by experts be made into defendant's sanity—sixty days' limit." The court refused to accept this verdict, and said to the jury: "Gentlemen, the verdict is not in usual or proper form. It will not be proper to attach any condition or limitations to the verdict. In case of conviction, the defendant cannot be executed for more than 30 days, and the supposition is that defendant's attorneys will look after his interest in all proper ways." Counsel for defendant excepted to this language, and the court thereupon said further to the jury: "Gentlemen, upon reflection, I desire to withdraw what I said in regard to defendant's attorney looking after defendant's interest. It would be improper for me to say anything to you that could be construed as an inducement or argument for you to find the defendant either guilty or innocent, and I do not mean to do so. Your verdict should be upon the facts and evidence before you now, and with no reference to any step that may or may not be taken in the case hereafter; and your verdict must not contain any conditions." The jury then retired, and in a short time returned a verdict of guilty as charged in the indictment. Before sentence was pronounced on the defendant, his counsel filed and presented to the court a motion in arrest of judgment, setting forth as grounds "that the defendant is now insane." The court overruled this motion, and sentenced the defendant in accordance with the verdict.

Sam T. Poe, Tom D. Patton, and Priddy & Chambers, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

McCULLOCH, J. (after stating the facts). 1. Counsel urge that the court erred in refusing the third instruction asked by defendant, that, "if no motive be shown, it is a circumstance in favor of the defendant's innocence, to be considered by the jury." In criminal prosecutions it is competent to introduce testimony of facts and circumstances tending to show a motive or absence of motive for the commission of the crime by the accused, as tending, with more or less force, to establish his guilt or innocence. It is not improper for the court to instruct the jury that they may consider such testimony for that purpose. But this should be done in connection with all other facts and circumstances proved, and it is not proper for the court in the instructions to single out the proof of motive or absence of motive and tell the jury that they may consider that as a circumstance in favor of his guilt or innocence. Especially is this true where the language of the instruction is not guarded by a further instruction in the same connection that the jury are the exclusive judges of the weight and sufficiency of such testimony. To have given the instruction in the form asked the court would have placed an undue weight upon the proof of absence of motive, thus invading the province of the jury. It would have been error for the court to single out the question of motive for the crime and point to it as a proper subject of consideration as an evidence of defendant's guilt, and it would have been equally erroneous and improper to point to the want of motive as an evidence of his innocence. We find no error in this ruling of the court.

Nor do we find any prejudicial error in the remarks of the court to the jury in declining to accept the conditional verdict offered. The learned judge should have contented himself with declining to accept the imperfect verdict, without any remarks or reference to the course which the defendant's counsel could take in the future; but we think that there is nothing in his remarks calculated to prejudice the rights of the defendant before the jury. Especially is this true in view of his remarks to the jury a few minutes later.

2. Counsel press, as grounds for reversal, other alleged errors of the court, some of which were not preserved in the motion for new trial. This is true of the exception to the testimony introduced by the state showing, as a motive for the crime, the ill will of defendant towards his wife's father. It is urged that this was too remote to serve as a motive, but the exception to this ruling of the court is not brought forward in the motion for new trial.

It is contended that certain members of the trial jury were allowed to separate from

their fellow jurors during the progress of the trial, but we think that the testimony introduced on the hearing of the motion for new trial shows that these jurors were not subjected to any improper influences. One of the jurors is shown to have left the jury box during the progress of selecting the jury (after he had been accepted as a juror) and occupied for a short while a seat among the audience. This was before the completion of the jury and presentation of the case, and it is not shown that this juror was subjected to any improper influence. The separation of the juror at that time and under those circumstances was not sufficient to cast upon the state the burden of showing that he was not exposed to improper influence. This occurred in the presence of the court and whilst the jury was being selected, and we cannot say that he erred in his conclusion that the rights of the defendant had not been prejudiced by this indiscretion on the part of the juror.

3. Appellant's motion in arrest of judgment on the ground of present insanity did not state statutory grounds for arrest of judgment, but should have been treated as a motion to stay sentence, and, as such, the court erred in overruling it. The statute reads as follows: "He may also show that he is insane. If the court is of opinion that there is reasonable ground for believing he is insane, the question of his insanity shall be determined by a jury of twelve qualified jurors, to be summoned and impanelled as directed by the court. If the jury do not find him insane, judgment shall be pronounced. If they find him insane, he must be kept in confinement, either in the county jail or lunatic asylum, until, in the opinion of the court, he becomes sane, when judgment shall be pronounced." Kirby's Dig. § 2440. The fact that a plea of insanity has been interposed as a defense to the crime charged in the indictment and a verdict of guilty returned does not bar a plea of insanity at the time of the trial or at the time of sentence. Either plea may be offered after trial and verdict. The verdict of the jury was conclusive only of his sanity at the time of the commission of the homicide. *State v. Helm*, 69 Ark. 167, 61 S. W. 915; *Linton v. State*, 72 Ark. 532, 81 S. W. 608.

Upon suggestion of the insanity of appellant, and reasonable grounds appearing for believing him to be insane, the court should have impaneled a jury to inquire into his condition. The testimony as to the mental condition of appellant at the time the homicide was committed was conflicting, though none of the testimony was directed to his condition at the time of the trial and verdict. The jury, by the verdict first brought into court, demanding that an "investigation by experts be made into defendant's condition," demonstrated that after hearing all the evidence they had some misgivings as to his sanity, though a short time later they said

by their verdict that they believed beyond a reasonable doubt that he was sane when he committed the homicide. We think, from this, that there were sufficient grounds for believing him to be insane, and that the court should have impaneled a jury to inquire into his condition.

Finding no prejudicial error in the trial, the verdict will not be disturbed, but the cause is reversed, and remanded with directions to the court before sentence to impanel a jury to inquire into the sanity of appellant.

BATTLE, J., dissents, holding that the case should be reversed and remanded for a new trial.

On Rehearing.

MCCULLOCH, J. Learned counsel for appellant, in a petition for rehearing, insist that the trial judge, in telling the jury, when the conditional verdict was brought into court, that the defendant could not be executed within 30 days, "and the supposition is that defendant's attorneys will look after his interest in all proper ways," committed error to the prejudice of the defendant, which was not removed by the subsequent withdrawal of the remarks. Counsel argue with much force that the jury, from this statement, notwithstanding the subsequent withdrawal of the statement, were led to believe that the question of the defendant's mental capacity to commit the crime would be taken care of later by counsel, and that the verdict of conviction would not be conclusive of that question. They argue that the conviction attached to this verdict offered had reference to the mental capacity of the defendant at the time the homicide was committed, and not to his present mental capacity, and that the jury, by attaching the condition, expressed a doubt as to his mental capacity when he committed the homicide.

We adhere to the conclusion, formerly rendered, that the remarks of the court, taken as a whole, were not calculated to prejudice the rights of the defendant before the jury. Still, after a careful examination of the record, we are impressed with the belief that the jury, in attaching the condition to this verdict, meant to express a doubt as to the mental capacity of the defendant to commit the crime, and to require a further investigation of that question, and we do not feel sure that, when this unconditional verdict was subsequently returned, the jury had been made to understand that such verdict was conclusive of that question. There is considerable testimony tending to sustain the plea of insanity. The peculiar atrocity of the act, its inexcusability, the total absence of provocation or motive, the conduct of the accused for a few weeks before the homicide, the fact that his father was shown to be afflicted with the homicidal mania, and the opinions of several physicians and an expert of great experience in the treatment of diseases of the mind, all tend with much force to show that

It was not the act of a sane man. We do not mean to say that the evidence is insufficient to sustain the verdict of the jury on this question of the defendant's mental capacity to commit the crime; but the evidence in support of the plea is of such persuasive force, taken in connection with the condition attached to the verdict implying a doubt of defendant's sanity, that we are not content to allow the verdict and death sentence to stand. No harm can result from the delay of another trial, and we are constrained to believe that a due regard for justice demands it. The defendant made full confession of the homicide, and there is no probability of the evidence being lost on account of the delay of another trial. The case rests solely upon the question of the defendant's sanity.

The petition for rehearing is granted, and the cause is reversed and remanded for a new trial.

BATTLE, J. I concur as to the judgment of the court, but not as to the reasons given.

The jury, after being out some time, returned into court a verdict which, I think, indicated that they had not agreed as to the sanity of the appellant at the time of the commission of the offense with which he was charged. The court then said to them: "Gentlemen: The verdict is not in the usual or proper form. It will not be proper to attach any condition or limitation to the verdict. In case of conviction, the defendant cannot be executed for more than 30 days; and the supposition is that defendant's attorneys will look after his interest in all proper ways." Appellant excepted to the last remark. The court withdrew that remark, but did not correct or explain it, and left the impression made by it remaining in full force. The result was the jury returned a verdict in about 25 minutes, in which they found the defendant guilty of murder in the first degree as charged in the indictment. I think the remark was prejudicial, and that appellant is entitled to a new trial.

WOOD, J., concurs with me.

HILL, C. J. (dissenting). My first impressions of this case were that it should be affirmed in entirety, but after consultation and consideration I concluded that the disposition made of the case on the hearing was the right decision to render. That decision gave full weight to the first verdict of the jury demanding an inquiry into the sanity of the defendant, and gave full weight to the second verdict, which found he was sane when he committed the crime. The evidence is ample to sustain the verdict of guilty, and I can see no reversible error in any of the proceedings in the trial, and to direct an inquiry into the present sanity or insanity of the defendant is the utmost which any occurrence at the trial demands, in my opinion; and therefore I dissent from the decision granting a new trial.

ANDREWS v. MINTER.

(Supreme Court of Arkansas. June 10, 1905.)

LANDLORD AND TENANT—SALE BY LANDLORD—TENANT'S DAMAGES.

In an action by a tenant for damages because of the landlord's refusal to deliver possession, the measure of damages was the difference between the agreed rental and the rental value.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 453.]

Appeal from Circuit Court, Benton County; John N. Tillman, Judge.

Action by W. L. Minter against Lucinda Andrews. From a judgment in favor of plaintiff, defendant appeals. Affirmed on condition that plaintiff remit a specified portion of his judgment, otherwise reversed.

Rice & Patton, for appellant. E. P. Watson, for appellee.

BATTLE, J. W. L. Minter rented from Lucinda Andrews a certain dwelling house and lot in Bentonville, Ark., for six months from March 30, 1903, for which he agreed to pay \$8.33½ per month. He caused to be hauled and placed on the lot two loads of manure at a cost of \$5. This was done with the knowledge and consent of Mrs. Andrews. She sold the house and lot, and refused to deliver him possession. He sued her for damages, and recovered \$100.

He testified that the rental value of the house and lot was from \$12 to \$15 per month; other witnesses, that it was less. The damage he was entitled to recover was the difference between the price he agreed to pay and the rental value. 3 Sutherland on Damages (3d Ed.) p. 2578. He was entitled to recover on account of this difference, according to his own testimony, \$22, and \$5 for the manure, making \$27.

If he will within one week remit \$73, his judgment will be affirmed for \$27 and 6 per cent. per annum interest from October 3, 1903, the date of his judgment, and costs of the trial court; otherwise the judgment will be reversed, and the cause remanded for a new trial.

COGBURN v. STATE.

(Supreme Court of Arkansas. June 17, 1905.)

MURDER—PROOF OF KILLING — MITIGATING CIRCUMSTANCES—PREPONDERANCE OF EVIDENCE—STATUTES—INSTRUCTIONS.

Kirby's Dig. § 1765, provides that, a killing being proved, the burden of proving mitigating circumstances devolves on accused, unless by the proof on the part of the prosecution it is manifest that the offense amounted only to manslaughter or that there was justification; and, by section 2387, when there is a reasonable doubt of the defendant's guilt on the testimony he is entitled to an acquittal. On a prosecution for murder the court correctly charged on self-defense, and gave section 1765 as an instruction, but subsequently stated that while if, on the whole case, there was a reasonable doubt,

there must be an acquittal, yet, as to matters of mitigation, accused would be required to furnish a preponderance of the evidence. *Held*, that such statement was erroneous.

Appeal from Circuit Court, Pike County: James S. Steele, Judge.

George Cogburn was convicted of murder in the second degree, and he appeals. Reversed.

Robt. L. Rogers, Atty. Gen., for the State.

RIDDICK, J. The defendant, George Cogburn, was indicted by the grand jury of Montgomery county for murder in the first degree on account of the killing of Jim West. On the trial the evidence tended to show that Cogburn and West had previously had a fight, and that there was a bad state of feeling between them. West said afterwards that Cogburn had hit him with a rock, and some of the witnesses stated that West threatened to get even with him; saying that he intended to "peck his head with the same rock." Still others testified that he had threatened to kill him. With this state of feeling between them, they attended a picnic at Fancy Hill, in that county, on the 25th day of July, 1903. West was in company of one Perrin. George Cogburn, the defendant, and one of his cousins had a lemonade stand at the picnic, and several of his brothers were at the picnic. Cogburn and his brothers were probably anticipating trouble from West, for they had with them at the lemonade stand two Winchester rifles. West and Perrin came up to the stand, Perrin having a Colt's 44 pistol in his hand; and some of the witnesses say that West had a pistol also. Cogburn and his brother, being perhaps apprehensive that West and Perrin were about to assault them, fired upon them with the Winchester rifles, killing both of them almost instantly. Several witnesses for the state testified positively that at the time of the shooting neither West nor Perrin was making any hostile demonstration toward the defendant or his brother. On the other hand, several witnesses testified for the defendant that Perrin and West approached the lemonade stand in a threatening manner; that, as they approached, Andy Cogburn, a brother of George, commanded the peace, to which Perrin and West replied, "Damn your peace;" that Perrin made a demonstration as if he was about to shoot Andy Cogburn, when the defendant said, "Hold on there;" that Perrin then turned and fired at defendant a Colt's 44 revolver, who returned the fire with his rifle, and that about this time West also fired at defendant with a pistol; and that defendant then turned and shot him. Other shots were fired by a brother of the defendant. In other words, the testimony of a number of witnesses for the state tended to show that defendant was guilty of murder, while, on the other hand, the testimony of other witnesses, most of whom were related to the defendant, tended to show that he shot in self-defense. The jury found the defendant guilty

of murder in the second degree, and assessed his punishment at five years in the penitentiary.

On the trial the court gave the jury very full instructions in reference to the law of self-defense and the other points involved in the case, and we see no error in these instructions. Among them was the following, which is a copy of the statute: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve upon the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." Kirby's Dig. § 1765. This section of the statute, it will be seen, is a rule of law to be applied when the killing has been proved, and where nothing is shown to justify or excuse such act. In such a case it may well be presumed that there was no justification, or the defendant would have shown it. In commenting on this instruction the attorney for the state said: "The court tells you that, under this instruction which I read to you, that, the killing being proved, the burden of proving circumstances of mitigation and justification devolves on the accused. Under this law, after we introduced Jim West we could have rested our case, and the burden was upon them to establish justification, and, if they fail to satisfy you by a preponderance of evidence that the killing was justifiable, then you should convict him." To which the defendant objected, and the court said: "While it is true that if, upon the whole case, they had a reasonable doubt, they must acquit, yet, as to matters of mitigation, he would be required to furnish a preponderance of the evidence." Now, the argument of the prosecuting attorney, as shown in the record, was not in accordance with the law. For, while it is true, as our statute declares, that, when the killing is proved, the burden of showing circumstances that mitigate or excuse the crime devolves upon the accused, where there is nothing in the evidence on the part of the state that tends to mitigate, excuse, or justify the killing, still the burden on the whole case is on the state; and, when evidence is introduced either on the part of the state or the defendant which tends to justify or excuse the act of the defendant, then, if such evidence, in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt as to the guilt of the defendant the jury must acquit. This is settled in this state by the statute which declares that "when there is a reasonable doubt of the defendant's guilt upon the testimony in the whole case he is entitled to an acquittal." Kirby's Dig. § 2387. But if this statement of the prosecuting attorney was correct—that when the killing is proved the defendant must show by a preponderance of the evidence that the killing was justifiable—the

jury would have to reject his defense whenever it was not supported by a preponderance of the evidence. This would limit the doctrine of a reasonable doubt to the fact of the killing, and, when that was established beyond a reasonable doubt, it would put the burden on the defendant of establishing justification by a preponderance of the evidence; and, if he failed to do so, the jury would be required to convict him, even though the evidence adduced by him was sufficient to raise a reasonable doubt as to his guilt. But it cannot be said that the defendant must make out his defense by a preponderance of the evidence, and also that he is entitled to an acquittal if on the whole case the jury have a reasonable doubt of his guilt, for the two propositions are to some extent inconsistent. Testimony not sufficient to establish a fact by a preponderance of the testimony may be sufficient to raise a reasonable doubt as to the existence of the fact. To tell the jury that they must convict unless the fact of self-defense is established by a preponderance of the testimony, and also that they must acquit if they have a reasonable doubt as to whether the defendant acted in self-defense, is telling them to follow two rules which may lead to very different results. The statute, it will be noticed, says nothing about preponderance of evidence. It says that, the killing being shown, the burden is on the defendant to show facts that justify or excuse the homicide. When, however, he introduces his proof, the question, says Mr. Wharton, arises: "Is it sufficient for him if he raises a reasonable doubt as to the defense he advances? Or must he establish this defense by a preponderance of proof in order to entitle him to an acquittal?" He answers the question by saying that when the defense traverses some essential ingredient of the indictment, such as malice or premeditation, it is sufficient if the proof raises a reasonable doubt. If the defendant undertakes to show that the act was done in necessary self-defense, this tends to rebut the allegation of malice; and, if the jury have a reasonable doubt on that point, they should acquit, for that is a reasonable doubt as to whether an essential charge in the indictment is true or not. It is otherwise when the defense does not traverse any essential averment of the indictment—for instance, when former conviction or acquittal of the same offense is set up. Wharton's Crim. Neg. §§ 331, 334. Our statute, as before stated, has answered the question for this state in the same way, by declaring that, when there is a reasonable doubt on the whole case, the jury must acquit; thus showing that the defendant is not required to make out his case by a preponderance of the evidence. The statement of the law made by the prosecuting attorney was clearly wrong, and when objection was made to it the court should have stopped him and told the jury to disregard that statement. *Tanks v. State*, 71 Ark. 450, 75 S. W. 851. But the court did not do so,

and, in effect, told the jury that while, if they had a reasonable doubt on the whole case, they should acquit, yet that as to matters of mitigation the defendant must furnish a preponderance of the evidence. We have already shown that this statement of the law is contradictory, and is not correct. As defendant did furnish the evidence of several witnesses tending to show that the killing was in self-defense, he had the right to have the jury told that it was not necessary for his acquittal that the evidence on this point should preponderate in his favor, but that, if it only raised a reasonable doubt of his guilt on the whole case, he was entitled to an acquittal. The court so stated the law to the jury in his general instructions, but permitted the prosecuting attorney to argue to the contrary before the jury. This ruling of the court upon objection to the argument was, we think, erroneous and prejudicial to the defendant, for which the judgment must be reversed, and a new trial ordered.

It is so ordered.

BURNS v. ST. LOUIS SOUTHWESTERN RY. CO.

(Supreme Court of Arkansas. June 10, 1905.)

1. RAILROADS—NEGLIGENCE—WALKING ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where one walking on a switch track in a railroad yard, and who was familiar with the tracks, looked and saw a train starting, and thought that it was moving upon the track on which he was walking, and he stepped over to another track, and was injured by the train, which was moving on that track, he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1287, 1294.]

2. SAME—DISCOVERED PERIL—NEGLIGENCE.

In an action for injuries received by one walking on a railroad track, *held*, that the evidence failed to show negligence on the part of the operatives of a locomotive in not stopping the train after discovering plaintiff's peril.

Appeal from Circuit Court, Monroe County; Geo. M. Chapline, Judge.

Action by Burns against the St. Louis Southwestern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

On the 14th day of October, 1901, appellant was conducting a hay, farming implement, and lumber business at Stuttgart. This business brought him often to appellee's depot at Stuttgart, where he had barns on each side of the numerous switches of appellee at the depot, and wagon scales between the barns, where hay and other farm products were weighed. He often daily passed over the many switches, as well as the "main" and "passing" track at the depot. On the day appellant was injured, to use the language of his counsel in describing the injury: "He had just left the depot, and saw a train standing just northeast of the depot at the tank, and knew that it could not get

on the 'passing' track until it came 80 steps south of the depot, and about the time said freight train reached said passing track he turned round and looked at it, and saw it turn, as he thought, on the passing track which he was then on, as it was the custom of trains of that kind to do. He was familiar with the different trains on the Cotton Belt Railroad. Some are local freight trains, and some are through freight trains, and there are 15 or 20 passing during the day. Now, he walked down the passing track for some distance, which was the common walkway, and, hearing the train move rapidly, thought it would be safer to step over on the main track and be further away, so it could pass. Now, he used his eyes, and he thought he saw it go on the passing track, as it was the custom of that class of trains to do so." The train ran him down while he was on the main track, injuring him severely. He brought suit, setting out in minute details the situation at the depot of the houses, trains, tracks, and all the circumstances of the unfortunate occurrence. His specifications of negligence were that the train was running at an unusually rapid speed—at least 14 miles per hour—when it should have been running not exceeding 4 miles per hour in obedience to the city ordinance; that the men in charge of the train were not keeping a constant lookout—had they done so, they could have prevented the injury; that on account of the unusual speed the train could not be stopped after appellee's servants discovered his situation, whereas it might have been stopped after seeing him, had the train been running not more than 4 miles per hour, as required by the ordinance, etc. The answer denied all material allegations, and set up contributory negligence. After the evidence was in, the court, at the request of appellee, directed a verdict in its favor.

H. A. Parker, J. R. Parker, and C. E. Pettit, for appellant.

S. H. West and J. O. Hawthorne, for appellee.

Continental Imp. Co. v. Stead, 95 U. S. 161, 24 L. Ed. 408; Ry. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Schofield v. Ry., 114 U. S. 615, 5 Sup. Ct. 125, 29 L. Ed. 224; Ry. v. Blewett, 65 Ark. 235, 45 S. W. 548; Brennan v. Delaware Railroad, 83 Fed. 124, 27 C. C. A. 418; Tucker v. Baltimore Ry. Co., 69 Fed. 518, 8 C. C. A. 416.

WOOD, J. (after stating the facts). It is unnecessary to discuss the evidence at length. The appellant was guilty of contributory negligence, according to the undisputed facts, and it was the plain duty of the court to declare, as matter of law, that appellant had no cause of action.

On the question of contributory negligence this was the testimony of appellant himself, as abstracted by his counsel: "He started

from the depot to go to a pair of scales to weigh a load of hay, and he was on what is called the 'passing track,' and, remembering that a freight train was at the tank just northeast of the depot, about 100 yards, and hearing it start from the tank, when it got just southwest of the depot a few feet—a point where all the switches branch out—he looked back, and thought he saw the engine heading for the passing track, which it was customary for trains of that kind to do. He then stepped across the usual traveled way between the two tracks, and, to be sure he was out of the way, he stepped over in the center of the main track, and immediately the engine struck him, when he was just about at the southern or western edge of College street, on a line with the western line of College street. After he stepped on the main track he walked at least thirty yards, or ninety feet, before he was struck." This leaves nothing for the jury. According to familiar rules often announced by this court, appellant did not make that use of his senses for his own protection which the law exacts before he can recover for the negligence of the company that concurred in his injury. *Ry. v. Martin*, 61 Ark. 549, 38 S. W. 1070; *Ry. v. Blewitt*, 65 Ark. 235, 45 S. W. 548; *Ry. v. Crabtree*, 69 Ark. 134, 62 S. W. 64.

Appellant's great familiarity with the tracks and trains where he was injured, and the ever imminence of peril where there was so much passing and switching, should have kept his sense alert, and have caused him to walk between the railroad tracks, where, according to the witnesses, it was "nice and smooth," and free from all danger. The law wisely and justly holds the company liable for its own acts of negligence which result in injury to another. But there would be no reason or justice in holding it responsible for the mistakes of another which it did not cause, and could not prevent, and but for which there would have been no injury notwithstanding its own negligence. *Ry. v. Cullen*, 54 Ark. 431, 16 S. W. 169; *Ry. v. Ross*, 56 Ark. 271, 19 S. W. 837; *Ry. v. Tipsett*, 56 Ark. 457, 20 S. W. 161; *Catlett v. Ry.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; see, also, *Ry. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641, and other cases cited in appellee's brief.

There is no proof whatever that would warrant the conclusion that appellee wantonly, maliciously, or intentionally injured appellant, or was guilty of such negligence after discovering appellant's peril as to make an inference of this kind justifiable. *Mo. Pac. Ry. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641. On the contrary, appellant alleges in his complaint that "they were running the train at such an unusual speed that it could not be stopped after seeing him," and the evidence on the part of the engineer and fireman was affirmative and positive that they "did not see him on the main line, and never knew he was there until after the ac-

cident," thus distinguishing the case in this respect from the recent case of *Ry. v. Johnson* (Ark.) 86 S. W. 232, and *Ry. v. Hill*, 73 Ark. —, 86 S. W. 803.

Judgment affirmed.

JOHNSON, BERGER & CO. v. DOWNING.

(Supreme Court of Arkansas. June 17, 1905.)

1. NOTES — COLLATERAL SECURITY — NOTICE OF NONPAYMENT.

Where defendant, after transferring a third person's note to plaintiffs as collateral security for a debt, executed his note for the full amount of his indebtedness, he thereby waived any liability to him as indorser because of failure to make demand and give notice of nonpayment.

2. SAME — COLLECTING COLLATERAL—DILIGENCE.

Where plaintiffs retained as collateral a note of a third person transferred by defendant before executing his note to them, they were bound only to use reasonable diligence to collect it, and were liable only for gross negligence in failing to collect the note and protect defendant from loss, and he cannot complain of mere delay in forcing payment of the collateral note.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1007, 1067.]

3. INTEREST—RATE AFTER MATURITY.

Where a note bearing 10 per cent. interest contains no stipulation for interest after maturity, interest must be computed at 10 per cent. from date to maturity and thereafter at 6 per cent.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 231.]

Appeal from Poinsett Chancery Court; Edward D. Robertson, Chancellor.

Action by Johnson, Berger & Co. against A. R. Downing. From a decree for defendant, plaintiffs appeal. Reversed.

Appellants, Johnson, Berger & Co., a firm of merchants at Jonesboro, Ark., brought this suit in chancery to foreclose a mortgage executed to them by appellee, A. R. Downing, on January 8, 1899, upon certain land in Poinsett county, to secure payment of a debt in the sum of \$521.31, evidenced by promissory note. The greater part of the note is admitted to have been paid; the only dispute being as to two credits claimed by appellee, which, if allowed, extinguished the balance of the debt. These disputed credits are as follows: That appellee indorsed and delivered to appellants, as collateral security, the negotiable promissory note of one Cox and two other persons, for the sum of \$100, dated September 27, 1898, due and payable 49 days after date, but which was never paid, nor the amount credited to appellee, though the appellants could (so it is alleged by appellee), by proper diligence, have collected said note; and he alleges that appellants neglected to present said note at maturity to the makers, and to notify appellee, as indorser, of the nonpayment thereof. Also that appellee indorsed and delivered to appellants, as collateral security, the note of one Cahoon for the sum of \$80, secured by chattel mortgage, and that appellants, without

the knowledge or consent of appellee, permitted Cahoon to sell the mortgaged chattels to other parties, who assumed payment of the note, but paid only \$70 thereof, and that the balance of \$10 and interest should be credited on appellee's note. These two credits, if allowed, are sufficient to extinguish the balance claimed by appellants to be unpaid on appellee's note. The chancellor found in favor of the defendant, allowing the credits, and entered a decree accordingly, from which decree the plaintiffs, Johnson, Berger & Co., appealed.

Friersen & Frierson, for appellants. N. F. Lamb, J. F. Gantney, and J. M. Virgin, for appellee.

McCULLOCH, J. (after stating the facts). According to the pleadings and testimony in the case, the Cox note was delivered by appellee to appellants as collateral security for debt owing by the former to the latter. The note bears date of September 27, 1898, and was payable in 49 days after date, and therefore fell due on November 15, 1898. The evidence is conflicting as to whether appellants presented this note to the makers, and in due time notified appellee of its nonpayment; but it is undisputed that the note was indorsed and delivered to appellants by appellee before maturity, or at least some time before the date of the execution of appellee's note to appellants, December 13, 1898. This being true, appellants cannot be held liable for a failure to make demand of payment and notice of nonpayment. Appellee, by subsequently executing to appellants his note and mortgage for the full amount of his debt, waived any liability of appellants to him as indorser by reason of their failure to have made demand and given notice of nonpayment. If he intended to insist upon a credit of the amount of the Cox note, he should have claimed it before executing his note to appellants for the full amount of his debt. By retaining possession of the Cox note as collateral security to appellee's note to them, appellants were bound only to use reasonable diligence to collect it, and are liable only for gross negligence in failing to take the proper steps to collect the note and protect appellee from loss. *Colebrook on Col. Securities*, § 114; *Jones on Pledges & Col. Securities*, §§ 692, 693; 22 Am. & Eng. Ency. L. pp. 901, 902; *Hanover Nat. Bank v. Brown* (Tenn.) 53 S. W. 206; *Reeves v. Plough*, 41 Ind. 204; *Cooper v. Simpson*, 41 Minn. 46, 42 N. W. 601, 4 L. R. A. 194, 16 Am. St. Rep. 667.

The evidence in this case does not show (the burden of proof being upon the appellee to establish that fact) that appellants failed to exercise due diligence to collect the note, or that any loss resulted from appellants' alleged failure to present the note for payment and promptly notify appellee of the nonpayment. Appellants were not liable for mere delay in enforcing the collateral, especially

where there has been no demand upon them to sue the makers of the note. *Colebrook on Col. Securities*, § 208; *Friend v. Smith Gin Co.*, 59 Ark. 86, 28 S. W. 374.

Appellee had a perfect right to pay off the debt to appellants at any time, and require a surrender of the collateral note, but, having failed to do this, or make demand upon appellants to sue on the note, he cannot complain of mere delay on the part of appellants in forcing payment of the collateral note. The same may be said of the Cahoon note. The evidence does not show that appellants ever accepted the note as a pro tanto payment, or otherwise than as collateral security, or that they ever consented to a sale of the mortgaged chattels. At most, they were only guilty of delay in bringing suit to enforce the security. We think the chancellor erred in allowing appellee credit for either of these notes.

The note sued on stipulated that it should bear "interest from date at the rate of ten per cent. per annum," without any stipulation for interest after maturity. Under the rule established by many decisions of this court, interest must be computed at the rate of 10 per cent. from date to maturity, and thereafter at 6 per cent. *Newton v. Kennedy*, 31 Ark. 626, 25 Am. Rep. 592; *Pettigrew v. Summers*, 32 Ark. 571; *Gardner v. Barrett*, 36 Ark. 476; *Johnson v. Myer*, 54 Ark. 437, 16 S. W. 121. Computing interest according to this rule, and after allowing appellee all credits for payments made, including the payment of \$56.09 made since the commencement of this suit, we find that appellee is still indebted to appellants in the sum of \$124.38, with interest at 6 per cent. per annum from February 4, 1902, the date of the last payment.

The decree is therefore reversed and remanded, with directions to enter a decree in favor of appellants for the above amount and interest aforesaid, and costs of suit, and that the mortgage be foreclosed.

LITTLE ROCK RY. & ELECTRIC CO. v. CITY OF NORTH LITTLE ROCK.

(Supreme Court of Arkansas. June 17, 1905.)

1. INJUNCTION—RECIPROCAL OPERATION.

Kirby's Dig. § 5522, authorizes parts of one municipal corporation to be annexed to another, and provides that, if a majority of those voting at the election held to determine the advisability of annexation shall vote in favor of annexation, the council shall so declare and record it, after which the consolidated territory shall constitute a municipal corporation. After an election to determine the question of consolidation had been held, the council of the annexing municipality was, at the instance of the other municipality and a private corporation, enjoined from declaring the result, which was in favor of annexation. Pending the injunction the municipality to which the annexed territory had formerly belonged granted to the private corporation a franchise to construct and operate a street railroad in the annexed territory. *Held*, that the franchise was

void; the city having no right to grant it during the pendency of the injunction.

2. MUNICIPAL CORPORATIONS — EXERCISE OF INVALID FRANCHISE—ESTOPPEL.

The fact that pending the injunction the private corporation expended a large sum in partially constructing its road without objection from the annexing municipality did not estop the latter from asserting the invalidity of the franchise.

3. SAME—ANNEXATION OF TERRITORY—COMMENCEMENT OF JURISDICTION.

Kirby's Dig. § 5522, authorizes parts of one municipal corporation to be annexed to another, and provides that, if a majority of those voting at the election held to determine the advisability of annexation shall vote in favor of annexation, the council shall so declare and record it, after which the consolidated territory shall constitute a municipal corporation. *Held*, the jurisdiction of the annexing municipality over the annexed territory commences when the result of the election is declared, and does not relate back to the time when the election was ordered.

4. SAME — FRANCHISES — ENJOYMENT—CONDITIONS PRECEDENT.

Where an ordinance granting a franchise to a street railway company provided that before the rights conferred should be enjoyed the company should obtain from the county court a confirmation of the right of way over a bridge, the obtaining of the consent of the county court was a reasonable and enforceable condition precedent to the acquisition of any rights under the franchise.

5. SAME—REASONABLE TIME.

Where an ordinance granting a franchise to a street railway company provided that, before the rights conferred should be enjoyed, the company should obtain from the county court a confirmation of the right of way over a bridge, the company was required to obtain the consent of the county court within a reasonable time, but one month was not a reasonable time.

Battle and Wood, JJ., dissenting.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Action by the city of North Little Rock against Little Rock Railway & Electric Company. From a judgment for plaintiff, defendant appeals. Reversed.

On the 16th of March, 1903, the General Assembly passed an act authorizing parts of one municipal corporation to be annexed to another municipal corporation. This act is contained in section 5522, Kirby's Dig. On the 11th of May, 1903, petitions were filed with the town council of the town of North Little Rock, signed by a majority of the citizens of that town and a majority of the citizens of the Eighth Ward of the city of Little Rock, praying for the annexation of the Eighth Ward of Little Rock to the incorporated town of North Little Rock. On the 15th of June, 1903, an ordinance was passed, calling for an election to be held in the affected territory on the question of annexation, pursuant to the terms of the act. The election was called for July 21, 1903. On the 6th of July, 1903, the city of Little Rock, its mayor and aldermen and numerous citizens and corporations—among the latter, the appellant, which will hereafter be called the "Street Railway Company"—

filed a complaint in the Pulaski chancery court against the town of North Little Rock. The complaint set forth fully the relation of the Eighth Ward to the city of Little Rock, and the alleged effect upon it and the city of Little Rock, should the proposed annexation to North Little Rock be consummated. The complaint alleged that the act under which the proceedings were progressing was unconstitutional, for various reasons set forth therein, and consequently the whole proceeding under it was void, and sought to arrest by injunction the election ordered for July 21st. The complaint further alleged: "Complainants further state that, unless defendants are restrained from holding such election and proceeding further under said act, defendants will hold said election, will declare the result in favor of disannexation, and will then proceed to grant all kinds of franchises, privileges, licenses, and contracts of public nature; that said franchises, privileges, and contracts will conflict with those heretofore granted by the said city of Little Rock; that it will grant street car, lighting, and water franchises to parties other than those to whom they have been granted by said city." Other probable conflicts in rights and jurisdiction were alleged to be imminent. The prayer was to restrain the holding of said election, and from taking any further steps towards annexing the Eighth Ward to North Little Rock. On July 16th a demurrer was sustained to the complaint and the injunction refused, and the city of Little Rock and its coplaintiffs appealed to the Supreme Court. The court was not then in session, and application was made to Hon. Henry G. Bunn, then chief justice of the Supreme Court, for an injunction pending the appeal. The petition to the chief justice recited the status of the annexation proceedings and the litigation, and alleged "that for the reasons and grounds set forth and referred to in said complaint, and for others hereinafter set forth, it is of the utmost importance that a temporary restraining order should be issued by your honor in vacation of said Supreme Court, to restrain said defendants from all further proceedings in the matters set forth and referred to in said complaint and exhibits, during the vacation of said Supreme Court, and until its further order." Then other and additional reasons were alleged why the injunction should issue. This further statement appears in the petition: "Plaintiffs further state that the granting of the injunction herein prayed for will work no injury or detriment to the defendants; that it will only result, so far as the defendants are concerned, in a postponement of the election, if said act is hereafter adjudged to be constitutional; that said injunction will in all respects merely result in the maintenance of the status quo of the parties, property, and interests herein involved." On July 18th Chief Justice Bunn

refused to enjoin the holding of the election, allowing the proceedings to go to the extent of holding the election, counting the votes, and completing the election returns, but enjoined the declaration of the result, and from entering the same on the record of the proceedings of the council of North Little Rock, and enjoined North Little Rock from doing any act towards the assumption of jurisdiction or control over the property or affairs of the Eighth Ward, or the exercise of any municipal function whatever over the same, and from interfering with the existing jurisdiction of the city of Little Rock, until the further orders of the Supreme Court, or one of the judges thereof. It was further ordered that the ballots and returns of the election were to be counted and cast up and transmitted to the council of North Little Rock, and, without opening or further action thereon, were to be kept until the further orders of the Supreme Court, or one of the judges thereof.

The act under which this proceeding was held provided that, if a majority of those voting at the election should vote in favor of annexation, the council "shall so declare and enter [it] upon its record book of proceeding." And "thereafter the said consolidated territory, and the inhabitants thereof, shall constitute a municipal corporation of this state," etc. The declaration of the vote in favor of annexation, and the record thereof, constituted the point where the jurisdiction of the enlarged corporation began. The chief justice allowed the proceedings to go to this point, but arrested the changes of jurisdiction until the appeal was heard and determined. The vote at the election July 21st resulted in 475 votes for annexation, and 44 against it. The returns were counted, cast up, and delivered pursuant to the order, but the declaration and record of the result stayed by this injunction. On February 6, 1904, the Supreme Court affirmed the decision of the chancellor, and on February 22d time for filing motion for reconsideration was waived, the injunction dissolved, and the annexation proceedings then completed. On the 25th of June, 1903—the same being after the election was ordered and before it was held—the council of the city of Little Rock granted to the street car company a franchise to build and maintain a street railway over certain streets in the Eighth Ward. The franchise, however, contained conditions, so far as material, in substance as follows: That before the rights conferred should be enjoyed the free bridge over the Arkansas river (the Eighth Ward being on the north side of the river) should be so strengthened to bear with safety the weight of the cars. Details in regard to this were provided for in the ordinance. The next condition is: "Nor shall said rights herein granted be enjoyed until the grant hereby made of a right of way over the said free bridge has been confirmed by the coun-

ty court of Pulaski county." The bridge was constructed by the county of Pulaski, and not by the city of Little Rock. It was further provided that the grant would be void unless within 30 days after said confirmation by the county court the street car company should begin the work of laying tracks and strengthening the bridge, and prosecute the work with reasonable dispatch, and complete it within 18 months; but it was provided that, if the work was stopped by judicial proceeding, the time it was so suspended should be excluded. The ordinance provided that it should not be operative until the street car company should accept its terms and conditions in writing, within 15 days, and deposit with the city treasurer \$10,000 in cash, or, at its option, a good bond in that sum, conditioned to comply with the terms of the ordinance, and containing, among others, this condition: "If the county court declines to confirm the right of way herein granted, then the council reserves the right to revoke this ordinance at such time as it sees fit, or wait on said confirmation at its option." In another section it is provided that such confirmation shall not be necessary if there is obtained a final judgment of the Supreme Court holding the right of way valid without such confirmation. It is conceded that no litigation has been begun or had wherein this question could be finally passed upon by the Supreme Court. The final section is that the ordinance should be a binding contract between the city of Little Rock and the street car company upon its passage, and the acceptance in writing, and depositing the cash or bond. The ordinance was duly passed. It was accepted in writing within the time, and the bond duly made and delivered. On the 10th of August, 1903, the city council of Little Rock materially amended this ordinance. The part important here is that the provision requiring confirmation of the grant of right of way by the county court of Pulaski county to be obtained before any rights therein conferred became operative was stricken out, and the company given an absolute franchise to construct and maintain a street car line over certain streets in the Eighth Ward. Similar provisions were made as to acceptance in writing, the giving of bond, and other matters not entering into this case. This was passed, as stated, on the 10th of August, while the injunction suit was pending in the Supreme Court, and while the temporary injunction of Chief Justice Bunn was in force. After the passage of this ordinance, and before the case was finally determined, the street car company began the construction of its line in the Eighth Ward, laid considerable track, and spent in all about \$27,000 on the work. It was not completed in any part or ready for operation when the decision in the injunction suit was rendered by the Supreme Court. After the latter event the town of North Little Rock, which had been advanced

to the grade of a city of the first class, brought this suit to annul the franchises, and succeeded in the chancery court.

Ashley Cockrill and Rose, Hemingway & Rose, for appellant. James P. Clarke, for appellee.

HILL, C. J. (after stating the facts). 1. The franchise sought to be enjoyed was granted by the council of Little Rock August 10, 1902, when the jurisdiction of the city of Little Rock over the Eighth Ward thereof, where the franchise was to have been enjoyed, would have ceased for all purposes but for the injunction granted at the instance of the city of Little Rock, this appellant company, and other parties to the suit. One of the grounds relied upon for the injunction was the probability that the other municipality seeking to absorb this territory would grant therein street car franchises conflicting with those theretofore granted by the city of Little Rock. So far as this record shows, the franchise to this company, granted subject to several conditions set out in the statement of facts, was the franchise sought to be protected against encroachment and conflict. This franchise was amended after the injunction so as to take out the conditions which prevented it from becoming at once operative. The injunction was granted upon this and other allegations, and unquestionably was intended to preserve the status quo of the two municipalities, so far as the Eighth Ward was concerned, pending the appeal to determine whether or not the proceedings for its annexation to North Little Rock were valid. Lord Chancellor Eldon held that where a party obtained an injunction which prevented his adversary from pursuing and enjoying rights, and the injunction was finally dissolved, the party could not take advantage of any rights which he had thus wrongfully prevented his adversary from enjoying. The Lord Chancellor said: "If there be a principle upon which courts of justice ought to act without scruple, it is this: To relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party against whom the relief is sought. That proposition is broadly laid down in some of the cases." In such cases it is reasoned by the great chancellor that the plaintiff seeking relief by the mere circumstance of filing the bill would be required to submit to everything conscience and justice required; that the plaintiff seeking the relief impliedly says he asks it on the terms of putting his adversary in exactly the same situation if it be determined in his favor. *Pultenay v. Warren*, 6 Vesey, Jr., Chan. Rep. 73. This principle has found secure lodgment in equity jurisprudence, and is applied to varying kind of cases involving its application. Frequently it is applied when an injunction stays an action and it becomes

barred, or right to execution lapses; and in many other cases, when an injunction wrongfully prevents the assertion of a right or causes it to lapse, then the court treats the plaintiff wrongfully causing this effect to be reciprocally bound by the injunction. *Mercantile Trust Co. v. St. L. & S. F. Ry. Co.* (C. C.) 69 Fed. 193; *Hutsonpeller's Adm'r v. Storer's Adm'r*, 12 Gratt. (Va.) 579; *Marshall v. Minter*, 43 Miss. 686; *Work v. Harper*, 66 Am. Dec. 549; *Sugg v. Thrasher*, 30 Miss. 135. Chief Justice Schofield, in applying this doctrine in a case in Illinois, said: "The only function of an injunction is to stay threatened action and suspend the conflicting claims of right of the respective parties where they are until they can be properly adjudicated. 2 Daniell, Ch. Pr. (5th Ed.) 1639, and note. And so it must necessarily follow that to allow one party to obtain any advantage by acting when the hands of the adverse party are thus tied by the writ, or the order for it, is an abuse of legal process which cannot be tolerated." *Lake Shore Ry. Co. v. Taylor*, 184 Ill. 603, 25 N. E. 588. While the hands of the city of North Little Rock were effectually tied by the injunction sought at the instance of the city of Little Rock and the street car company, then the street car company obtains from its coplaintiff the franchise in question in territory over which the city of Little Rock would not have had at that time a vestige of jurisdiction except by reason of the injunction preserving the status quo in regard to franchises as well as police and municipal control. The statement of the situation shows more clearly than argument that it is inequitable to allow rights to be thus acquired.

It is argued that these cases proceed upon the ground that the party obtaining the injunction has violated its spirit, or that the restraining party took advantage of something he could not have had before, or that the position of the party enjoined was more favorable before the injunction. Many of the cases do proceed on such propositions, but the underlying principle is that the injunction acts reciprocally, and binds in spirit the moving party, while binding expressly the other. While the city of Little Rock could have granted an absolute franchise the day it obtained the injunction, it did not do so, and when it did grant the absolute franchise the city of North Little Rock was then under injunction from granting such franchise. If it had not been under such injunction, it could have then granted a franchise over these streets, and the city of Little Rock could not have done so. The court is of the opinion that the principles of these cases apply to this case.

2. Counsel for the appellant contends that the city has no property interests in the streets; that it is a mere agent of the state, to whom the state has delegated control of the streets, and the state in the first in-

stance, and the city in the second instance, is but a trustee for the public. Many authorities are cited on this proposition, and it is summed up in a recent case in the Supreme Court of the United States in this language: "The statutes show that there was lodged by the Legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated. * * * That, in passing ordinances based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the state, as an agency of the state, cannot in reason be disputed." *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102. The argument of counsel on this line is fully conceded as established in principle and by authority. But it does not follow from this status of the city that it may by its own act prolong its governmental agency, and grant rights otherwise divested from it by the state. In this case the state, by appropriate legislation, authorized the transfer of the control of the streets in question from one agent to another agent. The holding agent prolonged its holding by this injunction, contrary, as it was afterwards determined, to the act of the Legislature. Can it be said that on account of these governmental functions it is freed of the ordinary rules governing litigants? In *City of Ft. Smith v. McKibben*, 41 Ark. 45, 48 Am. Rep. 19, the statute of limitations was invoked against the city's control of an alley of the city of Ft. Smith. The doctrine of governmental agency was there presented, but this court held, on a conflict in the authorities, that the weight of authority and the better reason were in favor of applying the statute. In *Town of Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. 319, this court quoted approvingly from *Bailey v. Mayor of New York*, 3 Hill, 551, 38 Am. Dec. 669, as follows: "A municipal corporation, when in the exercise of franchises and the prosecution of works for its emolument or advantage, and in which the state in its sovereign capacity has no interest, is answerable as a private corporation, although such works may also be in the nature of great enterprises for the public good; and powers granted exclusively for public purpose belonging to the corporation in its public, political, or municipal character." Powers granted for private advantages, though the public may also derive benefit therefrom, are to be regarded as exercised by the municipality as a private corporation." In that case an estoppel was invoked against the town of Searcy. In fact, an estoppel may be invoked against the government of the United States, the government of a state, or a municipality. *State of Indiana v. Milk* (O. C.) 11 Fed. 389, and numerous authorities

there cited; *La Fayette Bridge Co. v. Streator* (C. O.) 105 Fed. 729; *United States v. La Chapelle* (C. O.) 81 Fed. 152. In the case of *Indiana v. Milk*, supra, Judge Gresham said: "Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel." If the state may be estopped, certainly the agent of the state, who prolongs the power of the state in itself, may be estopped by reason of its action in so prolonging this power. Passing, however, from the governmental agency of the city to the result of the action of the city in pursuance of this agency: In the recent case, heretofore referred to, of *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, the court said "that in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract." Citing authorities. Then the court considered the question as one of general law, without treating the decisions of Ohio as binding, and reached the same conclusion. A like view is taken of the question in this state. "Now, a grant which has been accepted and acted upon by the grantee is a contract, within the meaning of the Constitution of the United States, which forbids laws impairing the obligation of contracts." *Hot Springs Elec. Light Co. v. Hot Springs*, 70 Ark. 300, 67 S. W. 761. There is the general rule. *McQuillan, Mun. Ord. § 238*. The grants in this case were duly accepted, and constituted contracts; and hence it follows, aside from any estoppel of the governmental agency, that the grant in question was a contract right, and subject to all the protection and liability of other contractual rights, and among the latter is the sound equitable rule that such rights cannot be acquired in violation of an injunction obtained for the benefit of the contracting parties. All of these reasons would be applicable if a stranger had obtained the franchise, but when it is obtained from one party to the injunction in favor of a coplaintiff therein they are doubly applicable. Without pursuing the question further, the court is of opinion that neither the city of Little Rock nor the street car company can hold rights acquired over the streets of the Eighth Ward during the life of the injunction.

3. An estoppel is sought against the city of North Little Rock on account of its permitting the street car company to partially construct its line over these streets, and expend about \$27,000, without protest or resistance. The city of North Little Rock was enjoined from interfering in any manner with the jurisdiction and control of the city of Little Rock over the Eighth Ward. The street car company was acting with open eyes. If it won its injunction suit its rights were perfect, and necessarily it knew that if it lost that its rights were builded solely on

rights acquired while it tied the hands of the other municipality from exercising control over these streets. The case does not call for an estoppel on this ground against North Little Rock. The decree in the court below allowed the street railway company 60 days to dispose of or remove the rails, cross-ties, and other material placed by it on the streets, and that is as favorable as it can ask on this score.

4. Deciding that no rights can be sustained under the ordinance of August 10, 1902, does not dispose of any rights which the street car company may have under the ordinance passed June 25, 1902. It is true that the ordinance of August 10th repealed the conditions precedent therein to its vesting at once, and attempted to vest the franchise forthwith; but the view the court takes of that ordinance renders that action entirely nugatory, and leaves in force whatever rights the street car company may have had when the jurisdiction of the municipalities over the Eighth Ward would have been changed but for the intervention of the injunction. The appellee seeks to avoid that proposition by invoking the doctrine of relation, and contends that the final act of annexation was carried back to the date the election was ordered, June 15, 1903. That contention overlooks the plain provision of the act under which the proceedings were had. It declares that upon the declaration of the vote favorable to annexation by the council, and entering it upon the record of the council, such actions constitute the change of jurisdiction. Those acts raise the new flag over the territory annexed. The obtaining of the consent of the county court of Pulaski county to the use of the free bridge before the franchise could be enjoyed was clearly a condition precedent to its vesting, and was a reasonable and enforceable condition precedent. Joyce on Electric Law, §§ 187, 352, and 358, and authorities cited in notes. This and the other conditions mentioned in the ordinances would have to be complied with within a reasonable time. In determining reasonable time, the subject-matter and all the circumstances are to be considered, as there can never be a fixed rule on such a subject. In this case the ordinance was passed June 28, 1903, and the election was held July 21st; and the result would have at once been declared, and the jurisdiction changed, but for the injunction. The rights of North Little Rock must be determined as of the date when it should have acquired jurisdiction. That date was less than one month after the passage of the ordinance. Therefore North Little Rock assumed jurisdiction over the Eighth Ward, subject to a valid ordinance granting a franchise to certain streets therein, subject to conditions precedent to be performed in a reasonable time from June 25, 1903. The subsequent proceedings did not alter that

status, for the jurisdiction when assumed, in February, 1904, was, so far as these parties were concerned, as of date July 21, 1903, or as soon thereafter as the vote could be declared. The rights acquired after that date should be cut off, and those acquired prior thereto given full force.

The court is of opinion that one month was not reasonable time to allow the street car company to comply with the conditions precedent, and it follows therefore that the street car company still has a reasonable time under the ordinance of June 25, 1903, to comply with the conditions precedent.

The decree of the chancellor canceling and annulling the ordinance of June 25, 1903, is erroneous, and the same is hereby reversed. The decree canceling and annulling the ordinance of August 10, 1903, and all other matters therein, except as above stated, are affirmed.

BATTLE, J. (dissenting). Judge Dillon says: "Public streets, squares, and commons, unless there be some special restriction when the same are dedicated or acquired, are for public use; and the use is none the less for the public at large, as distinguished from the municipality, because they are situated within the limits of the latter, and because the Legislature may have given the supervision, control, and regulation of them to the local authorities. The Legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places." He further says: "Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is in either case of the essence of the street that it is public, and hence, as we have already shown, under the paramount control of the Legislature, as the representative of the public. Streets do not belong to the city or town within which they are situated, even although acquired by the exercise of eminent domain, and the damages paid out of the corporation treasury. The authority of municipalities over streets they derive, as they derive all their other powers, from the Legislature—from charter or statute. The fundamental idea of a street is not only that it is public for all purposes of free and unobstructed passage, which is its chief and primary, but by no means sole, use." 2 Dillon on Municipal Corporations, §§ 656, 683. "The city corporation, as freeholders of the streets and highways in trust for public use, is but an agent of the state. Any control which it exercises over them, or the power of regulating their use, is a mere public or governmental power delegated by the state, subject to its control and direction, and to be exercised in strict subordination to its will. The

corporation as such has no franchise in connection with the use of the streets for the transportation of passengers." *People v. Kerr*, 27 N. Y. 213; *City of Chicago v. Rumsey*, 87 Ill. 348, 355; *State ex rel. v. Madison St. Ry.*, 72 Wis. 617, 619, 40 N. W. 487, 1 L. R. A. 771; *Stanly v. City of Davenport*, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216. Neither the state nor cities have any proprietary interest in the street. The public they represent has no interest in the soil. *Reichert v. Railway*, 51 Ark. 491, 497, 11 S. W. 696, 5 L. R. A. 183. The power and control either has over the same is governmental. When they grant an easement over the street, not common to the public at large, they do so not because they have any proprietary interest in the land, but because of their control over the streets in a governmental capacity. *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493, 529; *City of Detroit v. Detroit City Ry. (C. C.)* 56 Fed. 867, 874; *City Ry. v. Citizens' Ry.*, 166 U. S. 557, 563, 17 Sup. Ct. 653, 41 L. Ed. 1114.

Under the statutes of this state, city councils have the care, supervision, and control of all the public highways, streets, and alleys within the city, and may grant an exclusive privilege of the streets of the city for street railway purposes for such term of years as they may agree upon. *Kirby's Dig.* §§ 5530, 5448. This power extends to all the streets within the city, and continues so long as they remain in the city, regardless of the time they have been in or may remain in the city. It is exclusively governmental. The streets in question in this case, together with the care, supervision, control, and power over the same, remained in the city of Little Rock until the 22d day of February, 1904, when they became a part of the city of North Little Rock, according to the act entitled "An act to amend the laws in relation to municipal corporations," approved March 16, 1903 (*Acts 1903*, p. 148). The ordinances in question were passed by the city council of Little Rock while the streets of which they were the subjects of legislation were in that city, and within its territorial jurisdiction; and, as an incident to that jurisdiction, it had the power to pass them. Appellant accepted them, and undertook, by the expenditure of considerable sums of money and labor, to construct a railway over the streets according to the terms thereof. The ordinance thereby became a valid contract, binding upon the public, the city of Little Rock and of North Little Rock. *State ex rel. v. Madison St. Ry.*, 72 Wis. 617, 619, 40 N. W. 487, 1 L. R. A. 771; *City Ry. v. Citizens' Ry.*, 166 U. S. 557, 563, 17 Sup. Ct. 563, 41 L. Ed. 1114; *Elliott on Roads & Streets*, §§ 741, 742; 27 Am. & Eng. Ency. of Law (2d Ed.) 15.

I think the ordinances should be sustained.

WOOD, J., concurs in this opinion.

PERRY et ux. v. SADLER et al.

(Supreme Court of Arkansas. June 17, 1905.)

1. REFORMATION OF INSTRUMENTS—MISTAKE.

Where defendant agreed to convey to plaintiff a certain tract of land by name, but the conveyance by mistake failed to include a small strip of land which the parties regarded as a part of the tract intended to be conveyed, and which was contained in the same inclosure, plaintiff was entitled to have the deed reformed so as to include this strip.

2. DEEDS — DESCRIPTION — BOUNDARY OF STREAM—ACCRETIONS.

Where defendant contracted to convey to plaintiff a certain named tract of land containing a certain number of acres, more or less, and bounded on one side by a river, and executed a deed describing the land as a part of a governmental subdivision, plaintiff took title to accretions.

3. SAME—DEED TO DEFINITE QUANTITY OF LAND.

Where a deed described the land conveyed as a certain number of acres off from one side of a government subdivision, the purchaser was not entitled to accretions lying between the land described and the river.

Cross-Appeals from Circuit Court, Yell County, Dardanelle District, in Chancery; William L. Moose, Judge.

Action by R. C. Sadler and another against James K. Perry and wife. From a judgment for plaintiffs, defendants appeal, and plaintiffs prosecute a cross-appeal. Affirmed.

J. M. Parker, for appellants. Bullock & Davis, for appellees.

HILL, C. J. Perry and Sadler entered into a written contract on November 11, 1890, containing, among many other clauses, this one: "Said Perry to deed unincumbered to said Sadler the Keywood place say about 68 acres more or less and 32 acres off lower side of Brown place along upper side of Keywood place." Pursuant to this contract, two deeds were executed, one to R. C. Sadler, and one to R. C. Sadler and Elizabeth C. Sadler, his mother, to different tracts. In the deed to R. C. Sadler "all of north half of the south east quarter except the 32 acres off the south side in sec. 15, T. 6, N. R. 20," etc., is conveyed. In the deed to Sadler and his mother the following description is found: "The south half of the south east fractional quarter containing sixty eight acres more or less and thirty two acres off of the south side of the north half of south east fractional quarter, all in sec. 15, township six, north of the base line and range 20 west 5th principal meridian," etc. The Keywood place was conveyed to Perry in 1883 as "the south half of the south east quarter of section fifteen in township 6 north and range 20 west containing 68 acres more or less." This action is brought by appellants, claiming a small tract of 62-100 of an acre, being described in the governmental surveys as southwest fractional quarter of section 14, township 6 north, range 20 west, and its accretions and the accretions to said 68-acre and 32-acre tracts.

It is undisputably shown that it was an unintentional oversight in the conveyances to Perry and from Perry to Sadler that said fractional quarter section of section 14 was not included. It was a small wedge-shaped tract running almost to the dwelling house on the Keywood place, including part of the yard and garden. This part of it was inclosed with other land, and all of it under control of the owner of the Keywood place. The parties did not know that this fraction did not pass under the deeds, as they supposed all of this land was in section 15, and it was clearly shown that it was intended to be conveyed. The chancellor held that it and its accretion passed to Sadler, and in this the decree is right. The Keywood place fronts the Arkansas river, and there is a large accretion there formed by alluvion. Appellants contend that the contract and conveyances were to convey to Sadler 100 acres, no more nor less, and that the 32 acres were to be conveyed from the Brown tract in order to add to the Keywood tract of 68 acres to constitute the 100 acres, and that the accretions did not go with the conveyances, as the 100 acres was conveyed without them. The contract to convey the Keywood place shows that the tract going under that name, containing approximately 68 acres, was to be conveyed, and the conveyance of it contained the words "more or less," indicating that the acreage was an approximation and not a fixed quantity. This court has adopted the rule of the Supreme Court of the United States in regard to conveyances affecting accretions. This is the principle which governs here: "Where a water line is the boundary of a named lot, that line remains the boundary, no matter how it shifts, and a deed describing the lot by number or name conveys the land up to that shifting line, exactly as it does up to the fixed side lines." *Towell v. Etter*, 69 Ark. 33, 59 S. W. 1096, 63 S. W. 53. The conveyance of the Keywood place by name in the contract, and the conveyance of what was supposed to be the Keywood place by the governmental survey numbers (and which was in fact all of it, except this small tract which the chancellor reformed the deed to convey), carried the line to the river, and included the accretions. The chancellor so held, and his holding is affirmed.

The chancellor held that the accretions fronting the 32-acre tract did not pass to Sadler and his mother, and, as the appellant Mrs. M. C. Perry (wife of the other appellant) had acquired title to all of that tract except the 32 acres conveyed to Sadler and his mother, that she was entitled to the accretions between it and the river. The appellees Sadler and mother cross-appeal from this part of the decree.

The contract and deed designated a certain number of acres to be taken from a certain part of the Brown place. It was

appropriately described, so that the lines could be, and they were, laid out in accordance therewith. When located, there was an accretion between the lines thus located and the river. This tract was not described by name or number, like the Keywood place, thereby carrying the boundary to the shifting water line, but this boundary was fixed, and the acreage determined by the contract and deed.

The chancellor was right, and the cross-appeal is not sustained, and the decree in all things affirmed.

ANGLIN et al. v. CRAVENS et al.

(Supreme Court of Arkansas. June 17, 1905.)

1. ABATEMENT AND REVIVAL—CAUSES PENDING ON APPEAL.

Kirby's Dig. §§ 6298-6300, 6314, 6315, relating to the revival of an action in the name of the representatives on the death of a party pending action, apply to causes pending in the Supreme Court on appeal, as well as to causes pending in the trial courts.

2. SAME—TIME FOR REVIVAL.

Under Kirby's Dig. §§ 6314, 6315, providing that an action shall not be revived without defendant's consent after one year from the time the order might have been first made, and that where it appears that either party to an action has been dead for so long a period that the action cannot be revived without the consent of both parties it shall be stricken from the records, where more than a year has elapsed since the order to revive might have first been made, a motion to dismiss the appeal must be sustained.

Appeal from Circuit Court, Marlon County, in Chancery; Elbridge G. Mitchell, Judge.

Suit by W. M. Anglin and another against A. G. Cravens and others. From a decree for plaintiffs, but denying their prayer for foreclosure of a mortgage, plaintiffs appeal. Appeal dismissed.

W. M. Anglin and H. H. Hilton brought this suit in chancery against appellees to foreclose a deed of trust on real estate executed by appellees to appellant Hilton, as trustee, to recover payment of an alleged debt to Anglin, and also to declare a lien for an amount paid by Anglin in redemption of the lands from tax sale. The lands were sold for taxes and purchased by one Layton, and Anglin bought and received a deed from Layton, paying him \$300 therefor, but only claimed it to be a redemption. The chancellor declared a lien in favor of the plaintiff Anglin for the taxes and interest found to have been paid on the lands, amounting to the sum of \$233.03, but denied the prayer of the complaint for a foreclosure of the mortgage, and the plaintiffs appealed to this court. Appellant Hilton was only a formal party by reason of being trustee in the deed, and he has no interest in the suit. Appellees file their motion to strike the case from the docket of this court, and for grounds show by affidavit that appellant W. M. An-

glin died on April 5, 1904, since the appeal was taken, and that the cause has not been revived. W. W. Taylor, as administrator of the estate of Anglin, responds to the motion, showing that letters of administration upon said estate were issued to him by the probate court of Marion county on August 2, 1904 (no administration upon said estate having been previously commenced), and he asks that the cause be now revived. The parties also file briefs upon the whole case, which is submitted with the motion.

Wood Bros. and J. C. Floyd, for appellants.
Horton & South, for appellees.

McCULLOCH, J. (after stating the facts). The question to be first considered is whether or not the case can now be revived. The statute provides that, where either of the parties to a pending action dies, the cause may, on motion of any party interested, be revived in the name of a special administrator, if there is no general administrator. Kirby's Dig. §§ 6298-6300. It is further provided that "an order to revive an action in the name of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made" (Kirby's Dig. § 6314); and that "when it appears to the court by affidavit that either party to an action has been dead, * * * for a period so long that the action cannot be revived in the names of his representatives or successors without the consent of both parties, it shall order the action to be stricken from the docket" (Id. § 6315). This statute applies to cases pending in this court on appeal, as well as to cases pending in trial courts. *State Fair Association v. Townsend*, 69 Ark. 215, 63 S. W. 65.

The statute is mandatory in its terms, and the revivor, to be effective, must be applied for within the time pointed out. An action, after the death of either of the parties, can proceed no further until it has been properly revived, and the object of the statute is to fix a time within which those interested in the suit may have it revived, and, if not revived within the time prescribed, to require an abatement. When the plaintiff dies during the pendency of the action, any person interested in the further prosecution thereof may have a revivor in the name of the administrator or executor, if there be such, and the right of action be one that survives in favor of the personal representative, and if there be no general administrator or executor, the revivor shall be in the name of a special administrator appointed by the court in which the action is pending. The order to revive may be made forthwith—as soon as the court in which the action is pending convenes after the death of the plaintiff—and must be made within one year after that time, except by consent of parties. The limitation of time in the statute applies equally

where there is no general administrator or executor as where there is one, because in such event the persons interested may have a revivor in the name of a special administrator. Appellant Anglin died on April 5, 1904, and more than one year has elapsed since the order to revive might have first been made, and it cannot be now made.

The motion to dismiss the appeal and strike the case from the docket of this court is sustained, leaving the decree appealed from in full force. It is so ordered.

STATE v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Arkansas. June 17, 1905.)

TELEGRAPHS — FAILURE TO TRANSMIT MESSAGES—PENAL STATUTES—CONSTRUCTION.

Kirby's Dig. § 7946, requiring telegraph companies, under the penalty of \$500 for each refusal, to transmit messages without discrimination, when construed with the act which it repealed (Mansf. Dig. § 6419), which prescribed a penalty of \$100 for "every neglect or refusal" to transmit a message, and with Kirby's Dig. § 7943, which requires messages to be correctly transmitted without unreasonable delay and section 7944, providing that any officer or agent who willfully violates the preceding section is guilty of a misdemeanor, and making the company liable for damages, applies only to a willful or intentional refusal to transmit a message, and not to a refusal resulting from negligence on the part of the agent in ascertaining whether or not the company has an office at the place to which the message is directed.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 79, 80.]

Appeal from Circuit Court, Miller County; Joel D. Conway, Judge.

Action brought by the state of Arkansas against the Western Union Telegraph Company to recover the statutory penalty of \$500 for refusal to transmit a message. The court, sitting as a jury, found for the defendant, and rendered judgment accordingly, and the plaintiff appealed. Affirmed.

Robt. L. Rogers, Atty. Gen., for the State.
William F. Kirby, for appellee.

McCULLOCH, J. (after stating the facts). The statute (Kirby's Dig. § 7946) provides that "every telegraph and telephone company doing business in the state must, under a penalty of five hundred dollars for each and every refusal so to do, transmit over its wires to locations on its lines, for any individual or corporation or other telegraph or telephone company, such messages, dispatches or correspondence as may be tendered to it, or to be transmitted to any individual or other telegraph or telephone companies, at the price customarily asked and obtained for the transmission of similar messages, dispatches or correspondence, without discrimination as to charge or promptness." The undisputed testimony shows that a message

was tendered to appellee's agent at Texarkana for transmission to Wayne, Ind. T., where appellee had established and was then maintaining an office, but that such agent negligently and erroneously examined an obsolete monthly tariff book or list of offices of appellee, instead of the current list, and, finding no such office on the list (the office having been recently established), declined to receive and transmit the message for the reason that the company had no office at the point to which the message was directed. The court declared the law to be "that even though the defendant did refuse to transmit the message to Wayne, Ind. T., a station and locality on its lines where it had a telegraph office, and even though it refused to do so after it was notified that the sender claimed to have been in its office at that place, and while its tariff sheet and ratebook in the office at Texarkana, Ark., showed that it had an office at said place, still plaintiff cannot recover because defendant's agents refused to transmit the message solely because an old ratebook and tariff sheet, inadvertently examined by them, failed to show that Wayne had a telegraph office, and they honestly believed there was none there; the statute not meaning to provide a penalty unless defendant willfully refused to transmit the message, knowing there was an office at the place of destination. And this is so even if the agents of defendant were negligent in not knowing or ascertaining that there was a telegraph office at the place to which the message was directed."

A decision of the case calls for a construction of the statute—whether only a willful refusal by a telegraph company to receive and transmit a message will authorize a recovery of the penalty, or whether the penalty may be recovered for a failure or refusal, as a result of negligence, to receive and transmit a message. This court, in *Brooks v. Western Union Tel. Co.*, 56 Ark. 224, 19 S. W. 572, in construing this statute, as to whether or not it inflicted a penalty for refusing to deliver a message, said (speaking through Chief Justice Cockrill): "The statute is penal, and its terms cannot be extended beyond their obvious meaning. Where there is a doubt, such an act ought not to be construed to inflict a penalty which the Legislature may not have intended." The former statute on this subject (Mansf. Dig. § 6419), which was expressly repealed by the statute now under consideration (act of March 31, 1885), prescribed a penalty of \$100 for "every neglect or refusal by a telegraph company to receive and to transmit a message." The omission of the word "neglect" from the new statute is noteworthy in discovering the legislative intent, and is clearly indicative of an intention not to provide

a penalty for mere negligent acts. It is also worthy of consideration that in section 7 of this statute (Kirby's Dig. § 7943) it is required that messages shall be correctly transmitted, without unreasonable delay, in the order of their delivery, and kept in strict confidence; and section 8 (Kirby's Dig. § 7944) provides that any officer or agent of the company who willfully violates the provisions of the preceding section is guilty of a misdemeanor, and that the company shall be liable for the damage incurred. In the case of *Frauenthal v. Western Union Tel. Co.*, 50 Ark. 78, 6 S. W. 236, this court held that where a message was received by the telegraph company for transmission from Conway, Ark., to Carthage, Mo., and was transmitted as far as Kansas City, but was lost between that place and Carthage by the negligence of the defendant, there could be no recovery of a penalty under this statute. The court then said: "Under the act of 1885, no penalty is recoverable for a mere negligent omission to transmit or deliver a message. For the redress of such injuries the party aggrieved is remitted to his remedy for damages." We think that the case at bar is controlled by the decision last above cited. It is clear that the Legislature meant to provide a penalty only for a willful or intentional refusal to transmit a message, not a refusal resulting from negligence on the part of the agent in ascertaining whether or not the company had an office at the place to which the message was directed. The manifest purpose was to prevent, by penalty, any discrimination against individuals, corporations, or competitive companies by willful or intentional refusal to receive and transmit without delay, and at the customary price, any message tendered. The Supreme Court of Indiana, in construing a statute in substantially the same language and form as our statute, said: "The statutory duty as respects telegraph companies is to transmit messages with impartiality and in good faith, and in the order of time in which they are received without discrimination. The statutory penalty is incurred when its acts or omissions are characterized by or result from partiality or bad faith, or when it postpones messages out of the order of time in which they are received, or when it discriminates in rates charged or in the manner and condition of service between patrons. Each and all of the acts which involve the company in penal consequences proceed from some aggressive violation of statutory duty imposed, and not from a merely negligent omission to act according to the obligation of its contract as a public carrier of messages." *W. U. Tel. Co. v. Swain*, 109 Ind. 405, 9 N. E. 927.

The finding and judgment of the circuit court is correct, and therefore affirmed.

SPRATLIN v. ST. LOUIS SOUTHWESTERN RY. CO.

(Supreme Court of Arkansas. June 17, 1905.)

1. STATE AND FEDERAL STATUTES — INCONSISTENCY.

Since Act Tex. Feb. 27, 1885 (Acts 1885, p. 35), and Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by Act March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3154], operate on the same subject, and are in conflict, the latter, being within the competency of Congress under the power to regulate commerce between the states, must control.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, § 5.]

2. COURTS — FEDERAL DECISIONS — CONCLUSIVENESS ON STATE COURT.

The decision of the Supreme Court of the United States construing a state statute as in conflict with the interstate commerce act is conclusive on the state courts.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 331, 333.]

Appeal from Circuit Court, Arkansas County; George M. Chapline, Judge.

Action by one Spratlin against the St. Louis Southwestern Railway Company. From a judgment, plaintiff appeals. Affirmed.

P. C. Dooley, for appellant. Saml. H. West and Bridges & Wooldridge, for appellee.

WOOD, J. The act of 1885 (Acts 1885, p. 35) upon which this suit is based is a copy of Laws Tex. Ex. Sess. 1882, p. 35, c. 26. The Supreme Court of the United States in *Gulf, C. & S. F. Ry. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910, held that the Texas statute was in conflict with Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by Act March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3154]. That court said: "The state statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the states. The state statute must therefore give way." The court shows how the state and national law conflict. It is only necessary to refer to that opinion as controlling this case. When this court passed upon the act of 1885 in *Ry. v. Hanniford*, 49 Ark. 291, 5 S. W. 294, and sustained it as a proper exercise of the police power, Congress had not passed the act of March 2, 1889, amending the interstate commerce law of February, 1887, in the particulars named therein, and the decision of the Supreme Court of the United States construing the effect of the two statutes had not been rendered. The decision of the Supreme Court of the United States, supra, construing the two statutes, is conclusive of the question here presented.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. REED.

(Supreme Court of Arkansas. June 17, 1905.)

CARRIERS—RIDING ON FREIGHT TRAIN—INJURIES—LIABILITY OF CARRIER.

Where a person of mature years boarded the caboose of a freight train, which was standing in the yards, with the intention of traveling as a passenger, and he made no investigation as to whether the train was intended for passengers, though members of the train crew were present, and it was against the rules of the company for such train to carry passengers, and he was injured in a collision due to carelessness, but not to wanton or willful negligence, the carrier was not liable.

Appeal from Circuit Court, Hot Spring County; Alexander M. Duffie, Judge.

Action by Levu Reed against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Levu Reed was a machinist in the employ of the Cotton Belt Railway Company at Texarkana, Ark. His home was at Malvern, Ark., where his family lived. On the 3d of March, 1902, Reed desired to visit his home, and, meeting Tom Gentry, a conductor on a through freight train of the defendant company, he asked him "when he would get out." Gentry replied, "I am going out now." Reed testified, that while he had known Gentry for several years, he did not know that he was a conductor, but supposed that he was a brakeman, and did not ask him if he could go with him. But after having this conversation with Gentry, Reed obtained a leave of absence from his company, and then went and boarded the caboose attached to the through freight train on which Gentry was conductor. This train was not at the depot, but was standing on what was called the caboose track, near the stock pens, and some distance away from the passenger depot. None of the employes of the company were at the caboose before Reed boarded it, but he saw some of them there before the train pulled out. He did not buy a ticket, and paid no fare. He understood that the train which he boarded was a through freight, but says he did not know that it did not carry passengers. The conductor testified that when Reed met him at Texarkana "he asked me when I was going out, and wanted to know if there would be any show for him to go up the road with me. I told him I supposed it would be all right; that the caboose was in the yard, and I did not think that anybody would see him or find out if he went up with me." He further testified that nothing was said about fare, that he did not collect any fare and did not intend to collect any. The train left Texarkana about 5 o'clock, and the night following, about 50 miles north of Texarkana, at Boughton, another train accidentally ran into the caboose, and Reed's leg was broken above the ankle, and he received other injur-

ies. He brought an action against the company to recover damages. The company set up that it was against its rules and regulations for conductors to carry passengers on through freight trains, and that the plaintiff was on the train without its permission and was a trespasser, and the company was not responsible for his accidental injury. There was a verdict and judgment against the company in favor of plaintiff for \$500, from which it appealed.

B. T. Johnson, for appellant. E. H. Vance, Jr., and Andrew I. Roland, for appellee.

RIDDICK, J. (after stating the facts). This is an action by the plaintiff to recover damages received while riding on one of the defendant's through freight trains. The rules and regulations of the company did not allow the conductors of such trains to carry passengers. The plaintiff in this case was an employé of another railroad company, but, being an acquaintance of the conductor who had charge of this train, he was permitted by him to ride in the caboose attached to it. The plaintiff testified that he did not know that it was against the rules of the company to carry passengers on such trains, but, leaving out the testimony of the witnesses for the defendant on this point, the question arises whether the undisputed facts do not show that he either had notice, or, what is the same thing, that he had notice of facts sufficient to put him upon inquiry, and that if he had made any inquiry he could easily have ascertained the fact that the employés of this train had no right to accept him as a passenger. Now, plaintiff did not find this train at the passenger depot. He boarded it in the yards of the company, near the stock pen. It had no passenger coach attached, and there was nothing about it to indicate that it was intended for the carriage of passengers. Plaintiff himself shows that, though he had time and opportunity to inquire and ascertain whether passengers were allowed to be carried on this train, he did not do so. When we consider that plaintiff was 53 years old, had worked for railroads about 15 years, and was then at work at Texarkana for the Cotton Belt Railway Company, while his family lived at Malvern, a town on defendant's railway, between which place and Texarkana several passenger trains were run each day, one of which trains was due to leave Texarkana only a few hours after plaintiff left on the freight, and by which plaintiff could have reached his home as soon as, or sooner than, he could have reached it by the freight train, even had there been no accident; when we consider that plaintiff took this freight, on which an acquaintance was conductor, when he could have taken a passenger train and made better speed, and that up to the time of the accident he had neither paid nor offered to pay, nor been asked to pay, any fare—it

seems not unreasonable to believe, as counsel for defendant contends, that he chose this train in preference to the passenger because he had grounds to hope that through the courtesy of his friend, the conductor, he would be given free transportation. But we need not discuss that feature, for it is quite immaterial. For, conceding that plaintiff acted in good faith in getting on this train, it is clear that he acted carelessly. One should not get on the caboose of a through freight train, standing away from the passenger depot, in the yards of the company, near a stock pen, with the intention to travel thereon as a passenger, without making some inquiry as to whether the train is intended for passengers. If, without inquiring, he does get on such a train, not intended for passengers, and is carried safely to his destination, he gains that much at the expense of the company. On the other hand, if an accident happens, and he is injured, there is no reason or justice in requiring the company to pay for his injuries, unless they have been wantonly or willfully inflicted. "When," said Chief Justice Cockrill, "there is a division of the freight and passenger business of a railroad, the common presumption is that a person found on a freight train is not legally a passenger; and, if he claims that he is, it devolves upon him to show a state of case that will rebut the presumption." *Hobbs v. Texas Pacific Ry. Co.*, 49 Ark. 360, 5 S. W. 586. The facts in this case do not rebut this presumption, but show conclusively that the circumstances under which plaintiff boarded this train were sufficient to give him notice that this train was not intended for the carriage of passengers. Whether in fact he believed it was intended for passengers is a matter of no moment, for, although members of the train crew were present, he made no inquiry, and cannot hold the company responsible for his ignorance. The law in such a case treats him as knowing those things which he could and should have ascertained by inquiry. This question has been fully discussed by a recent decision of the Court of Appeals, to which we refer. *Purple v. Union Pacific R. Co.*, 114 Fed. 123, 51 O. C. A. 564, 57 L. R. A. 700. Had plaintiff been a boy or person of immature years, there would be more reason to support the judgment, but the facts in this case show that plaintiff, and not the company, was to blame for his presence on this train. He was injured by a collision which the evidence shows was the result of carelessness, but was not the result of wanton or willful negligence. On the whole case, we are convinced that it would be unjust to compel the company to pay damages for the injury to plaintiff, which was caused by his getting on a train not intended for passengers, in violation of the rules of the company.

Judgment will therefore be reversed, and the action dismissed. It is so ordered.

BROWN et ux. v. PULLER.

(Supreme Court of Arkansas. June 10, 1905.)

LIMITATIONS — POSTPONEMENT OF STATUTE—PARTIAL PAYMENTS.

Where the last payment made on a note was made within five years after the note became due, a suit brought within five years after such payment was not barred by limitations.

Appeal from Clay Chancery Court; Edward D. Robertson, Chancellor.

Suit by Edwin S. Puller, as administrator of T. E. Tillotson, deceased, against Wallace J. Brown and wife. From a decree for plaintiff, defendants appeal. Affirmed.

J. L. Taylor and G. B. Oliver, for appellants. Douglas Hopson and Hawthorne & Hawthorne, for appellee.

BATTLE, J. Edwin S. Puller, as administrator of T. E. Tillotson, deceased, instituted this suit against Wallace J. Brown and his wife, Jennie Brown, to foreclose a mortgage given by the defendants to secure the payment of a promissory note executed by Wallace J. Brown. The note and mortgage were executed on the 11th day of March, 1893, and the note was due and payable on the 1st day of December, 1893, and bore interest at the rate of 8 per cent. per annum. The defense pleaded by the defendants was the statute of limitations. The court rendered a decree in favor of the plaintiff against Wallace J. Brown for the amount due on the note, and against the defendants for the foreclosure of the mortgage.

The evidence adduced in the hearing of the case showed that the following payments were made by Wallace J. Brown on the note:

March 23, 1893.....	\$ 20 00
May 10, 1893.....	80 00
May 20, 1893.....	200 00
June 8, 1898.....	43 53

The last payment was made within the five years after the note became due and payable, and the suit was brought April 1, 1901, within five years after the last payment. The suit was not barred.

Decree affirmed.

ALLEY v. BOWEN-MERRILL CO.

(Supreme Court of Arkansas. June 10, 1905.)

1. PARTNERSHIP — LAWYERS—AUTHORITY OF PARTNER.

A member of a firm of lawyers organized for the practice of law had implied authority to bind his partner by a written contract for the purchase of lawbooks.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 190-194, 208, 214.]

2. SAME—FOREIGN CORPORATIONS—ACTIONS—COMPLIANCE WITH STATE LAW.

The prosecution of an action by a foreign corporation to recover on a contract for the purchase of lawbooks did not constitute "doing business" in Arkansas, within Act Feb. 16, 1899, p. 18, c. 19, requiring a foreign corpora-

tion to file a copy of its articles with the Secretary of State as a prerequisite to its right to do business within the state.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2520-2527.]

Appeal from Circuit Court. Polk County: Joel D. Conway, Judge. —

Action by the Bowen-Merrill Company against Glitsch & Alley. From a judgment for plaintiff, defendant J. I. Alley appeals. Affirmed.

This is a suit begun in justice court on the 2d day of August, 1902, by the Bowen-Merrill Company, a corporation under the laws of Ohio, against Glitsch & Alley, a law firm. Omitting the caption, the complaint filed in justice court by said corporation sets forth the following allegations: "That the said Bowen-Merrill Company is a corporation organized under the laws of the state of Ohio, and doing business in Indianapolis, in the state of Indiana, with a branch house at Kansas City, Mo. That the said defendants, by their said contract in writing under their said firm name of Glitsch & Alley, promised to pay to the said plaintiff on the 15th day of June, 1898, the sum of \$25 for lawbooks, with interest from maturity at the rate of 10 per cent. per annum; that the said defendants, by their written contract, promised to pay to the said plaintiff on the 27th day of October, 1898, the sum of \$12 for lawbooks, with 10 per cent. interest from maturity—copies of which said contracts are filed herewith, as Exhibit A and B, respectively, and asked to be made and taken as a part of this complaint; and the said plaintiff also files herein a statement, duly verified, of the amount due and owing by the said defendant to the said plaintiff; and the said plaintiff says that the said defendants, nor either of them, have paid the said sums of money, nor the interest thereon, and that same is due, etc., and pray for judgment." At the trial in justice court, in answer to the above allegations of plaintiff, J. I. Alley, a member of the former law firm, filed his separate answer, which, aside from caption and prayer, reads as follows: "Admits that he was at some time a partner of H. Glitsch in the practice of law, but denies that he, as a member of the firm of Glitsch & Alley, made or signed the contract sued upon; denies that it was done with his knowledge or consent by Glitsch or any one else; denies that it was a part of the partnership business, or that if Glitsch signed said contract with the firm name, as alleged, that he had any right or authority to do so, and that same is not binding upon defendant J. I. Alley." Defendant denies that the contract was made as alleged by plaintiff. Defendant, further answering, says: "That the plaintiff corporation herein is a foreign corporation, and that, as such corporation, it has never complied with the laws of Arkansas, and especially with the act of the Legislature approved February 16, 1899, in the fil-

ing of a copy of its articles of incorporation with the Secretary of State, and for said reason cannot do business or maintain this suit in this state." Further answering, defendant says: "The claim and contract sued on herein is barred by the statute of limitations; the same, if made as alleged, was made for more than three years ago." Prayer for judgment.

The case was tried upon the issues as made by the complaint and answer in justice court, where judgment was in favor of defendant Alley, and the case was appealed to the Polk circuit court, where it was tried upon the same issues by the court sitting as a jury, and there upon the following agreed statement of facts:

"(1) It is agreed that during 1898 Henry Glitsch and J. I. Alley were partners in the practice of law in Mena, Arkansas, under the style of Glitsch & Alley, and that the partnership agreement was a verbal one. (2) It is further agreed that Henry Glitsch signed the firm name of Glitsch & Alley to a contract for lawbooks of the Bowen-Merrill Book Company, and that the order, contract, and agreement was made by Henry Glitsch in the firm name and committed to writing. (3) It is agreed that J. I. Alley never gave his consent to nor authorized Henry Glitsch to make this order for books, nor any other order, nor to sign the firm name to this order, nor any other order nor contract, other than the use of his and the firm name in pleadings in court. (4) It is agreed that this suit was begun in the justice court of S. H. Smith on August 9, 1902. (5) It is agreed that the following is a correct statement of the account:

1898.

July 15, Shearman & Redfield on Neg..	\$12 00
July 18, Sackett's Instructions to Juries	6 00
July 18, Underhill's Criminal Evidence	6 00
Oct. 27, Beach on Contracts.....	12 00

"(6) It is agreed that the plaintiff, the Bowen-Merrill Company, is a foreign corporation, and that it has not complied with the laws of the state of Arkansas by filing a certificate of articles, etc. (Act Feb. 16, 1899, p. 18, c. 19), with the Secretary of State of the state of Arkansas. (7) It is further agreed that the defendant J. I. Alley never acknowledged this indebtedness, or any liability whatever. (8) It is agreed that J. I. Alley has been a continuous resident of the state of Arkansas since the making of this contract. (9) That the defendant Henry Glitsch, in two letters written by him, one to the plaintiff and one to the plaintiff's attorney, admitted that said books were bought for the use of said firm, and that he, as one of the partners, signed the firm's name to the contract for the purchase thereof. (10) It is agreed that the contract for the purchase of said books was made outside of this state."

This trial resulted in a verdict in favor of plaintiff, and defendant appeals to this court.

Wright Prickett and J. I. Alley, for appellant. R. G. Shower, for appellee.

WOOD, J. (after stating the facts). Two questions are presented: First, is J. I. Alley, the appellant, liable on the contract made by Glitsch, his law partner, without his knowledge or consent? Second, can the Bowen-Merrill Company bring this suit and maintain it in this state, it being an Ohio corporation, without filing here its articles of incorporation and appointing an agent?

1. Upon the first question the trial court declared the law as follows over defendant's objection, which was declaration No. 4: "In a partnership for the practice of law, the act of one partner in the scope of business of said firm is the act of all, and every responsibility incident to other partnerships in general attaches to legal partnerships, as well as corresponding rights." Upon this point the defendant asked the following declarations, which were refused: (1) "That a firm of lawyers is a nontrading partnership, and one member of the firm cannot bind the other without express authority from the other." (2) "It is necessary in this case for the plaintiff to prove that Henry Glitsch had the right to contract for books in the firm name." (3) "It is the duty of persons or firms doing business with a nontrading partnership to know if one member is authorized to bind the other on contracts and commercial paper." (5) "That a firm of lawyers is a nontrading partnership, and that one partner cannot bind the other, either on commercial paper or on contracts, although the proceeds were used in the business, without express authority from the other partner." The court correctly declared the law that the act of one partner in a firm of lawyers in the scope of its business is the act of all. It is generally held that nontrading firms have no power to borrow money and sign negotiable paper, and that one member of such firm has no power to bind the other members by signing the firm name to such paper. *Worster v. Forbush*, 171 Mass. 423, 50 N. E. 936; *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757; 22 Am. & E. Ency. L. p. 154, note (Lawyers). This is because such transactions are not generally within the legitimate scope of the business of such firms. There is no reason why such firms should be bound by the acts of their members within the scope of their business. This would be true even in the case of negotiable paper, where it was shown that such paper was executed within the scope of the firm's business. 1 Bates, Part. § 343. Mr. Bates, after an exhaustive review of the authorities on the powers and liabilities of nontrading partnerships, says: "Each partnership must stand largely on the nature of its peculiar business, and no rule of universal application is possible." This is the correct doctrine, and there is no reason why a firm of lawyers should not be bound by the act of one of its members in

buying such lawbooks as may be reasonably necessary for carrying on the business. Such an act is certainly within the scope of the business of such a partnership. It is impossible to practice law successfully in these times without some lawbooks. As Mr. Bates says: "It is difficult to conceive of a partnership which does not require some purchases to be made in the usual course of its business." In nontrading firms this is certainly necessary. He instances the case of lawyers purchasing their lawbooks. *Miller v. Hines*, 15 Ga. 197. See, also, *Crosthwait v. Ross*, 1 Humph. 23, 34 Am. Dec. 613. The purchase of lawbooks reasonably necessary in the business is a responsibility and liability incident to a partnership for the practice of law, and when lawyers come together for that business they are presumed to repose in one another the trust and confidence necessary to attend to the duty of purchasing lawbooks for the firm, and to clothe each with authority to bind the other.

2. "The institution and prosecution of an action is not doing business within the meaning of the act of Feb. 16, 1899, and other statutes upon the subject." *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87; *Ry. v. Fire Ass'n*, 55 Ark. 174, 18 S. W. 43.

Affirm.

MALONE v. MALONE.

(Supreme Court of Arkansas. June 10, 1905.)

1. DIVORCE — GROUNDS — CRUELTY — EVIDENCE—SUFFICIENCY.

Evidence in a suit by a wife for divorce on the ground of cruelty examined, and held not to show cruel treatment sufficient to warrant a decree for divorce.

2. SAME — EVIDENCE — CORROBORATION—SUFFICIENCY.

A divorce on the ground of cruelty inflicted by the husband on the wife will not be granted on the wife's testimony, corroborated by a daughter nine years old at the time of the occurrences about which she testified, and one other witness relating an instance of harsh language used by the husband towards the wife.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 403-407.]

3. SAME—WRONGFUL CONDUCT OF BOTH PARTIES—EFFECT.

Where, in a suit by a wife for divorce, on the ground of cruelty, in which the husband filed a cross-complaint on the ground of desertion, the proof showed that both parties were at fault, both should be denied relief.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 190, 197.]

Appeal from Woodruff Chancery Court; Edward D. Robertson, Chancellor.

Suit for divorce by Mrs. Theo. Malone against J. E. Malone. From a decree for plaintiff, defendant appeals. Reversed.

J. F. Summers, for appellant. P. R. Andrews, for appellee.

McCULLOCH, J. Appellee filed her complaint against her husband, J. E. Malone, in

the chancery court of Woodruff county, for divorce, on the ground that he was guilty of such conduct toward her as rendered her condition intolerable. Appellant answered, denying the allegations of improper conduct toward his wife, and also filed his cross-complaint on the ground of willful desertion for a period of one year. The chancellor granted the prayer of the complaint, and decreed a divorce.

The case presents only a question of fact, and after a careful consideration of the testimony we are convinced it is insufficient to warrant a dissolution of the bonds of matrimony, and that the conclusion of the learned chancellor was erroneous. Appellant and appellee were married in June, 1898, he being then 21 years of age and she 32, and they lived together until some time in November, 1899, when she left him and returned to the house of her mother. Appellee testified that soon after their marriage appellant began a course of harsh and unkind treatment, frequently called her a fool, and upon one occasion, upon a trivial pretext, slapped her in the face, and upon another, when he was sick and irritable, threatened to throw a mug at her. Her description of the latter scene is as follows: "At another time he drew a mug on me. I was out of the room, and he was sick at the time, and called me several times, and I didn't hear, and when I went to the room he began to fuss, and I told him he was like a sore-headed bear, and he drew the mug, and told me if I didn't shut my mouth he would knock me in the head with it. I told him if he did hit me with it I would leave him then and there, and go home to my mother, and he said if he had a pistol he would shoot me." She further testified that she left appellant and went to her mother in November, 1899, because she learned that he intended to leave her in a few months. The testimony of appellee was corroborated in part by her daughter by a former marriage, who was 11 years of age, and testified to same instances related by appellee. Appellee called another witness, J. M. Daughtry, who testified that he knew the parties, lived in about 2½ miles from them, and visited at their home about every two weeks. He said he knew of only one instance of improper conduct of appellant towards his wife, which he described as follows: "I happened in when Mrs. Malone was taking up ashes. Mr. Malone made the remark, 'Why haven't you a fire? Hurry up, I am cold. I am in the notion of throwing this cup at you.' I spoke to him, and said, 'Mr. Malone, ain't you ashamed to talk to your wife that way?' and I stepped out." This was substantially all the evidence in support of appellee's alleged ground for divorce. Appellant testified, denying all the charges of improper conduct or harsh or unkind treatment towards his wife, except that he slapped her on account of an improper accusation which she made against him. He describes the occurrence as follows: "I became

vexed, and told her she was foolish for believing such, and in discussing the matter or trying to reason with her we both became angry, and had the worst 'spat' or quarrel we ever had. I told her if she was foolish enough to believe such she should have her jaws slapped. She dared me to slap her, and I did. After having realized what I was doing, I slackened the blow, and it could not have inflicted any pain whatever." He denied that he ever struck her or offered to strike her on any other occasion, or made a practice of calling her a fool. Appellant introduced two witnesses, who lived near them for several months before the separation occurred. One lived in about 50 yards, and the other, one Crenshaw and wife, lived in the house with appellant and appellee. Both of these witnesses testified that they saw no evidence of harsh or unkind treatment on the part of appellant. We think that the preponderance of the testimony is in favor of appellant, and that appellee has established no grounds for divorce. Even her own testimony and that of her two corroborating witnesses do not clearly establish the existence of a state of facts upon which a court of equity should interpose relief by a dissolution of the bonds of matrimony.

In the case of Kurtz v. Kurtz, 38 Ark. 119, Judge Eakin, speaking for the court, approving the rule laid down in Rose v. Rose, 9 Ark. 507, that the personal indignities contemplated by the statute as grounds for divorce included "rudeness, vulgarity, unmerited reproach, haughtiness, contempt, contumely, studied neglect, intentional incivility, injury, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate, alienation, and estrangement," said: "It must be confessed that this position goes to the very verge of safety, and should be pressed no further. In applying it the chancellor should act with great caution to avoid the gradual approach, by imperceptible steps, to the practice of holding all matrimonial bickerings, by which parties may render each other unhappy, to be valid ground of divorce. Where there are no fixed and well-defined barriers of principle, it is difficult to limit the encroachment of precedents setting in one direction. Each so nearly supports the next that, before one is aware, the bounds of reason are passed." In Cate v. Cate, 53 Ark. 484, 14 S. W. 675, Chief Justice Cockrill said that "courts are not quick to interfere in domestic quarrels, and, where the parties are equally at fault, it must be shown at least that there is something that makes cohabitation unsafe, to move the courts to interfere." We think that this court has gone to the limit in the case of Rose v. Rose, supra, and that it would be extending the rule entirely too far to hold that a divorce should be granted upon the testimony of appellee, corroborated only by the daughter who was but nine years old at the time of the occurrences about which she undertakes to testify, and by one other witness who re-

lates one instance of harsh language used by appellant to his wife. By her own admission, she was not always as considerate of her husband's feelings as her duty demanded. One of the instances she relates of his unkind treatment, when he threatened to throw a mug at her, was provoked by her own inconsiderate conduct and remark while appellant was sick. To our minds, the evidence shows that both parties were somewhat at fault, and that both, by failure to exercise that "mutual forbearance and mutual forgiveness" which the relation demanded, aggravated, rather than tended to ameliorate, their unhappy conjugal state. It may be that the opposition to the marriage shown to have been manifested by appellee's mother and other near kindred was continued, as claimed by appellant, after the marriage, and was responsible in some measure for the dissensions which led to the final separation; but at any rate it appears that neither party came up to the full conjugal duty to prevent the separation. Upon the proof introduced, both were at fault, and both should have been denied relief.

The decree for divorce must, therefore, be reversed, and the cause dismissed for want of equity either in the complaint or cross-complaint; and it is so ordered.

REESE v. STATE (three cases).

(Supreme Court of Arkansas. June 17, 1905.)
ARGUMENT OF COUNSEL—IMPROPER LANGUAGE
—REVERSIBLE ERROR.

Where, in prosecutions for unlawfully selling intoxicating liquor, the prosecuting attorney, in his closing argument in one case, said, in effect, that he would not believe any man on oath who would deliberately violate the law by running a blind tiger; that, if he would violate the law in that respect, he would not hesitate to swear a lie to get out of it; and in another of the cases said that "a blind-tiger man will swear a lie any time. This man [defendant] is not worthy of belief. Any man that will run a blind tiger will swear a lie to beat the law"—the language, while not commendable, was not reversible error.

Appeals from Circuit Court, Howard County; James S. Steele, Judge.

John F. Reese was convicted of unlawfully selling intoxicating liquors, and appeals (three cases). Judgments affirmed.

For former report, see 83 S. W. 918.

Feazel & Bishop, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

HILL, C. J. These three cases present but one question, and it is practically the same in each case. The prosecuting attorney in his closing argument said: "That, in considering the testimony of the defendant, the jury should take into consideration his interest in the result; should consider whether his statement was made in good faith, or merely to avoid conviction; that he [the prosecuting attorney] would not believe any man on oath who would deliberately violate the law by running a blind tiger; that, if he would vio-

late the law in that respect, he would not hesitate to swear a lie to get out of it." His closing argument in another of the cases contained this statement: "A blind-tiger man will swear a lie any time. This man, John F. Reese, is not worthy of belief. Any man that will run a blind tiger will swear a lie to beat the law." On objection made by the defendant, the court declined to interfere with the argument, and, preserving proper exceptions, the cases are brought here for review.

These statements of the prosecuting attorney are nothing but the expressions of his individual opinion stated in overforceful terms. The statements do not fall within that class of statements where the attorney makes a witness of himself in his argument and states facts without the record. Those cases may be found discussed in *Ins. Co. v. Harper & Wilson*, 70 Ark. 305, 67 S. W. 755; *Fort v. State* (Ark.) 85 S. W. 236; *English v. Anderson*, 88 S. W. 583. An attorney undoubtedly has a right, if his taste and judgment calls for it, to express his individual opinion freely in discussing the facts in evidence, so long as he couches his remarks in language befitting his high profession and the place of its utterance—a temple of justice. In this case the prosecuting attorney was at perfect liberty to express his opinion freely as to all matters in evidence attacking the credibility of the defendant as a witness, provided he framed his argument in proper language and manner. This addressed itself to him in the first place, to the trial judge in the second place, and, lastly, to this court, not to pass on its propriety, taste, or elegance, but merely to pass on whether the circuit judge abused his discretion in permitting it, and whether it worked a prejudice to the defendant not warranted by the law or facts of the case. Without approving the language used in expressing his opinion of the testimony of the defendant, the court is of opinion that there is no reversible error in it. The court hopes that attorneys, especially those representing the state of Arkansas who act in a quasi judicial rôle, will couch their expressions of opinion in language less intemperate and denunciatory, and that the circuit judges will require it of them. Instances may arise of excesses in this line calling for reversal, but this case is not such an instance.

The judgments are affirmed.

S. M. DUFFIE & CO. v. WALTER PRATT & CO.

(Supreme Court of Arkansas. June 17, 1905.)

1. SALES—BREACH OF WARRANTY—NOTICE—WAIVER.

A buyer in a contract requiring him, in case the goods fail to comply with the seller's warranty, to notify the seller thereof within a specified time, who fails to give notice of a breach of warranty within the time specified, waives the warranty, and is bound to pay the purchase price.

2. CONTRACTS—ENTIRE—SEVERABLE.

A contract for the sale of several articles of merchandise by sample, which fixes the price of each article, and which warrants each article to be in all respects as the sample, is a severable contract, though it contains a guaranty of profits for the buyer on the resale thereof.

Appeal from Circuit Court, Garland County; Charles D. Greaves, Special Judge.

Action by Walter Pratt & Co. against S. M. Duffie & Co. From a judgment for plaintiffs, defendants appeal. Affirmed.

Wood & Henderson, for appellants. Leslie & Huff, for appellees.

BATTLE, J. This action was instituted by Walter Pratt & Co. against S. M. Duffie & Co. upon the following written contract:

"Walter Pratt & Co. hereby guarantee that the purchaser's gross profit from the sale of the perfumery and toilet preparations bought under this order and hereafter purchased of said firm, will not be less than 33 1-3 per cent of the amount of this order each year for a period of three years from date of invoice, and the said Walter Pratt & Co. further agree and hold themselves bound, at the end of each year if the gross profits do not amount to 33 1-3 per cent of the amount of this order for that year, to pay to the purchaser a sufficient sum of money by New York or Chicago draft to make up the deficiency, if there be any, or to buy back at the purchase price at the expiration of this agreement all goods remaining on hand at that time. The foregoing is conditional on the purchaser keeping the goods tastefully displayed in his store in the show case furnished by us for that purpose, purchasing from us at least semi-annually sufficient goods to keep this department complete and up to the amount of this order, making settlement for all goods purchased of us as provided in order, sending us by registered mail at the end of each year a complete and accurate list of all goods sold, with a correct inventory of all goods on hand at that time, allowing no article to go for a less profit than is usually made on this class of goods, and using reasonable diligence in promoting the sale of these goods. Goods shipped to purchaser and not on hand or returned will be considered sold. Bond to be filed with Security Bank covering all agreements in the order.

"Exchange—Any goods contained in this order may be returned to us for exchange at any time. To protect us from unreasonable demands for exchange, we require that goods so returned must be accompanied by a new order for goods of an equal value. We pay freight to factory on goods returned for exchange.

"Warranty—All goods are warranted to be same in quality, material and in all other respects as samples shown by salesman. The purchaser agrees to examine and inspect the goods at once upon their arrival at destination, and if said goods fail to comply with said warranty he shall within five days

from date of arrival at destination give detailed written notice of such failure by registered letter to Walter Pratt & Co. Chicago, Ill., otherwise all warranty of said goods is waived. Goods cannot be returned for credit on account, except as herein provided.

"We deliver all goods to purchaser by delivering them to the transportation company herein specified, purchaser to pay all transportation charges.

"The following is the list of goods contained in this order:

	Per Dox.	Amt.	R't'l.
4 Doz. Handkerchief Extracts, assorted on Easel.....	\$.75	\$ 3.00	\$.10
2 " Handkerchief Extracts, assorted No. 745.....	2.00	4.00	.25
3 " Handkerchief Extracts, assorted No. 755.....	4.00	12.00	.50
4 " Sachet Powders.....	.75	3.00	.10
2 " Persian Violet Perfume....	.40	.80	.05
1 " Princess Toilet Water, No. 237.....	4.00	4.00	.50
1/2 " Princess Toilet Water, No. 247.....	4.00	2.00	.75
1 " Farina Cologne.....	4.00	4.00	.50
2 " Velvet Talcum Powder.....	.75	1.50	.10
1 " Roger's Hair Grower.....	6.00	6.00	.75
1 " Benzoe Hazel Cream.....	2.00	2.00	.25
2 " Mentholated Cream.....	4.00	8.00	.50
1 " Invisible Toilet Powder (white).....	2.00	2.00	.25
1 " Invisible Toilet Powder (flesh).....	2.00	2.00	.25
1 " Pratt's Vervette.....	6.00	6.00	.75
1 " Pratt's Dentifrice.....	2.00	2.00	.25
1 " Pratt's Tooth Powder.....	1.65	1.65	.25
3 " Rosalana.....	4.25	12.75	.50
1 " Princess Tissue Developer..	6.25	6.25	.75
2 " Pratt's Toilet Soap.....	.75	1.50	.10
2 " Quinine Hair Tonic.....	6.00	12.00	.75
1 " Foot Relief.....	2.00	2.00	.25
1 " Invisible Complexion Powder (white).....	4.00	4.00	.50
1 " Invisible Complexion Powder (flesh).....	4.00	4.00	.50
1 " Invisible Complexion Powder (Brunette).....	4.00	4.00	.50
1 " Cherry Lip Pomade.....	2.00	2.00	.25
2 " Pratt's Shampoo Powder....	2.00	4.00	.25
1/2 " Bulk Sachet Powder, Violet	3.00	1.50	
1/2 " " " Rosa.....	3.00	1.50	
1/2 " Bulk Sachet Powder, Heliotrope.....	3.00	1.50	
1/2 " Crushed Sachet Powder, Carnation.....	3.00	1.50	
1/2 " Crushed Violet Handk'f Extract, No. 923.....	4.00	2.00	.50
1/2 " Persian Rose Handk'f Extract, No. 933.....	4.00	2.00	.50
1/2 " Crushed Violet Handk'f Extract, No. 946.....	6.00	3.00	.75
1/2 " Persian Rose Handk'f Extract, No. 956.....	6.00	3.00	.75
1 " Pearl Toilet Powder.....	.75	.75	.10
1 Bottle Pink Bulk Perfume, White Rose.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, White Lilac.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Frangipanni.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Snow Lily.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Jockey Club.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Heliotrope.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Blue Gentian.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Jasmine.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Red Carnation.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Crab Apple Blossom.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Swiss Violet.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Wild Thorn Blossom.....	4.00	4.00	
1 Bottle Pink Bulk Perfume, Crushed Violets.....	6.00	6.00	
1 Bottle Pink Bulk Perfume, Persian Rose.....	6.00	6.00	

Total amount of this order..... \$194.20

- 1 Atomizer.
- 1500 Circulars advertising this line of goods.
- 1500 Circulars describing the pictures going with the Perpetual Advertising System.
- Name and address of purchaser printed on above circulars.
- 3 Bottles of perfumery, retail price, 50c each, to pay for distributing circulars.
- 1 Graduate.
- 6 Portfolio, No. 5607, containing 10 sample pictures belonging to the Advertising System.
- 100 Booklets, "Suggestions."
- 8 Sterling Silver Thimbles, assorted sizes.
- 97 Envelopes containing advertising and drafts good for one Sterling Silver Thimble each, mailed by Walter Pratt & Co. to a list of 97 names furnished by the purchaser.
- 1 Walter Pratt & Co. Regulation Oak Show Case; wood doors and wood shelves. Size 21 in. wide, 48 in. long, and 40 in. high.

"Terms:—5 per cent 15 days from date of invoice, or two, four and six and eight months net, divided into four equal payments, each for one fourth of the amount of this order. When long terms of credit are taken account must be closed by notes without interest, due in two, four, six and eight months from date of invoice. Accounts not closed as provided above, will be subject to sight draft without further notice. Separate verbal or written agreements with salesmen are not binding upon Walter Pratt & Co. All conditions of sale must be shown on this order.

"Positively no goods on commission or open account. This order not subject to countermand.

"Hot Springs, Ark. Feb. 27, 1902.

"Walter Pratt & Co., Chicago, Ill.—Gentlemen: Please ship us, care of Burlington, Cedar Rapids & Northern R'y. the assortment of goods listed above, like samples shown us by your salesman, at the prices specified and in accordance with all the terms above specified, which we have carefully read and find to be complete and satisfactory. We have no agreement or understanding with salesman except as printed or written on this order. Receipt of duplicates of this order from your salesman is hereby acknowledged.

"Name of purchaser S. M. Duffie & Co.

"Walter Pratt & Co.,

"By M. Sankey, Salesman."

In making the foregoing contract, plaintiffs were represented by a traveling salesman, who sold the goods referred to in the contract to the defendants by samples exhibited to them at the time the order was made. The goods were shipped, and were received by the defendants on the 9th of March, 1902. On the 17th of the same month they notified the plaintiffs of the receipt. Defendants tested the White Lilac perfume, which was sold to them at the price of \$4, and, on a day subsequent to the 17th of March, 1902, refused to accept the goods, because the lilac perfume did not correspond to the sample by which it was sold to them. They did not test any of the remainder of the goods by the samples by which the same were sold.

According to the terms of the contract, the defendants waived the warranty and accepted the goods, and thereby became bound to

pay for them, having failed to give notice of the failure of the goods to comply with the warranty within five days after they (defendants) received them. *Pratt v. Meyer* (MS. opinion) 87 S. W. 123.

But the defendants asked the court to instruct the jury as follows:

"(4) The contract between plaintiffs and defendants is an entire contract, and defendants were not required to accept any of said goods if any material part of the goods shipped under said contract were different and inferior in quality from the goods ordered."

The court refused to instruct the jury as asked, but instructed them as follows:

"The contract shows that several articles of goods were included in one and the same order, and that a price was fixed in said contract for each separate article. I therefore instruct you that said contract is not an entire but a severable contract, and, if any of said articles correspond with the samples, then defendants were bound to accept each of said articles as corresponded with samples, and are liable to plaintiffs for the value thereof, as the same are fixed in said contract.

"If you find from the evidence that the defendants, within a reasonable time after the receipt of the goods mentioned in said contract, examined a bottle of lilac mentioned in said contract as bulk perfume, and upon such examination it was found that said bottle of lilac did not correspond with the sample, then defendants had the right to refuse to accept said bottle of lilac.

"If defendants did not examine any of said goods except a bottle of lilac, then they are bound to have accepted all of said goods which they did not examine, and are liable to plaintiffs for the value thereof, as the same are fixed in said contract.

"If you find from the evidence that the bottle of lilac mentioned in said contract as bulk perfume did not correspond with the sample, then you will find that that is evidence tending to show that all the bulk perfume mentioned in said contract did not correspond with the samples; and if you find that the bulk perfume mentioned in said contract did not correspond with the samples, then defendants had the right to refuse to accept said bulk perfume, and, if they did refuse to accept the same, they are not liable to plaintiff therefor."

The jury returned a verdict for plaintiffs in the sum of \$134.20. They evidently deducted from the amount of the order \$60, the aggregate price for which the "bulk perfumes" sold. The defendants appealed.

Assuming that the question as to the nature of the contract was properly raised in the trial court, was the contract sued on entire or severable?

Mr. Parsons, in his work on the Law of Contracts, says: "Any contract may consist of many parts, and these may be considered as parts of one whole, or as so many distinct

contracts entered into at one time, and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." 2 *Parsons on Contracts* (9th Ed.) bottom p. 672. Judged by this citation, the contract in this case is several. The lists of goods embraced in the order sued upon consist of 50 items, with the price for which each sold placed opposite the same, amounting in the aggregate to \$194.20. The price of no single item exceeds \$12.75. Each item was sold by a sample, and was warranted to be the same in quality, material, and in all other respects as sample; the contract as to each article, in that respect, being different; and the purchaser was furnished with a sample to enable him to determine whether the goods shipped were such as he agreed to buy. The acceptance of each depended upon a distinct test, and the price to be paid for each was stipulated. According to the general rule in such cases, the contract is several. *Lucasco Oil Co. v. Brewer*, 66 Pa. 351; *Wooten v. Walters*, 110 N. C. 251, 256, 14 S. E. 734, 736; *Beach on Modern Law of Contracts*, § 731; *Clark on Contracts* (2d Ed.) p. 453.

The guaranty of profits set out in the paper sued on does not affect the severality of the contract of sale. It applied to all the goods purchased in the same year, and was to continue for three years. The sale was in no way dependent on it.

Appellants have no right to complain of the judgment against them.

Affirmed.

DANIELS v. STATE.

(Supreme Court of Arkansas. June 17, 1905.)

1. MURDER—INDICTMENT—SUFFICIENCY.

Where an indictment for murder alleged that defendant unlawfully, feloniously, and with malice aforethought, and after deliberation and premeditation, did kill and murder deceased, etc., it was not objectionable because the word "willingly" was used in the indictment instead of "willfully."

2. SAME—CHALLENGE OF JUROR — APPEAL—PRESUMPTION.

Where, on an appeal from a conviction for murder, the record showed that a certain juror was duly accepted by the state and the defendant, and that the state was permitted by peremptory challenge to excuse this juror after he had been accepted, it was presumable, in support of the regularity of the proceedings, that the challenge was exercised before the juror was sworn in chief.

3. SAME—EVIDENCE—SUFFICIENCY.

Evidence held to support a conviction for murder in the second degree.

Appeal from Circuit Court, Sevier County; James S. Steele, Judge.

Harry Daniels was convicted of murder, and he appeals. Affirmed.

Brizzolara & Fitzhugh, W. H. Collins, and Pole McPhetridge, for appellant. Robert L. Rogers, for appellee.

WOOD, J. At the September term, 1904, of the Polk circuit court, the grand jury returned an indictment against appellant charging him with murder in the first degree, and, having been granted a change of venue to the Sevier circuit court, he was at the January term thereof tried upon the plea of not guilty, convicted of murder in the second degree, and his punishment assessed at five years in the penitentiary. His motion for a new trial having been overruled, he appealed to this court, alleging numerous grounds for reversal of the judgment.

The indictment was sufficient. The word "willingly" in the indictment, instead of "willfully," which latter word was doubtless intended, does not render the indictment insufficient. The utmost that can be claimed is that the word "willfully" was omitted. But the indictment, with the word "willfully" omitted, still charges that the defendant "unlawfully, feloniously, and of his malice aforethought, and after deliberation and premeditation, did kill and murder," etc. These words include all the meaning that could be conveyed by the word "willfully."

The record shows that "T. B. Holman, who was a juror and a member of the regular panel of the jury, during the impaneling of the jury in this action, was duly accepted as a juror herein by the state and the defendant, and the state was permitted by the court, over the objection and exception of the defendant, to excuse said T. B. Holman by peremptory challenge, without stating or showing any cause therefor, after the said Holman had been accepted by the state and the defendant as a juror as aforesaid." This record does not show that the state was permitted to exercise this peremptory challenge "after the jury had been made up," as stated by counsel for appellant. As every presumption, in the absence of a showing to the contrary, must be indulged in favor of the regularity of the proceedings, we must presume that the state exercised this peremptory challenge before the juror was sworn in chief, as prescribed by section 2357, Kirby's Dig. These are the only grounds for a new trial which the verdict could not cure, and these are not well taken. All the others relate to alleged errors of the court during the progress of the trial which do not affect the integrity of the trial itself, and which, however egregious, the verdict of the jury upon the uncontradicted evidence has cured.

The undisputed facts show that appellant

was guilty, at least, of murder in the second degree, and the jury gave him the lowest punishment for that offense. Therefore no error in the introduction of the evidence complained of, the argument of counsel, or the instructions of the court could be prejudicial to the rights of appellant. His own evidence shows that he was an engineer on the Kansas City Southern Railroad, and on the night of August 18, 1904, he returned from a trip on the road to his home at Mena, Ark. He arrived at his home about 1:25 a. m., and found the deceased, Dr. Magness, in his house, under circumstances which indicated clearly that he was committing adultery with his wife. The appellant chased the doctor, who was partially disrobed, from his house, failing, however, to catch him. The doctor left behind in the house of appellant a shirt, collar, cuffs, necktie, and hat, which afforded undisputable evidence of his identification. Besides, the unfaithful wife, when called upon by appellant for an explanation, frankly confessed to appellant that Dr. Magness was the author of her ruin, and told her husband that Dr. Magness had first accomplished his purpose by administering to her on one occasion a narcotic when she had called him in on a professional visit. Dr. Magness was the family physician and intimate friend of appellant. The appellant proceeds to tell how the betrayal of confidence by his family physician and friend, and the disclosure of his wife's infidelity, so preyed upon his mind that he could neither eat nor sleep. He shows that during the remainder of the night of the awful discovery he could not sleep. In fact, he says he neither ate nor slept from the time he came home and caught the doctor in his house until he had killed him. He says his wife had told him that Dr. Magness had said that, if he (appellant) ever came home and found him (Magness) in their house, he, Magness, would kill him, appellant. "Knowing," he says, "that he had just threatened my life, and finding this murderous thing [pistol] in my house, I saw nothing but to go prepared, as I firmly believed that man would kill me. That is the reason I took the pistol and went to the hardware store and bought the cartridges." He further portrays his feelings and subsequent conduct as follows: "I could get no satisfaction from life, knowing that that man had robbed my home and taken from me everything that I had. I sought in some manner redress for the harm and disgrace that he brought upon me. I knew that he would kill me on sight. I looked for him on the street the next day, but failed to find him. I was on the streets most of the day, but I did not see him anywhere, and felt sure that he was hiding from me. That night I could not sleep, and the next morning I went downtown, and as I passed the drug store I saw his horse and buggy hitched there in front, but did not see him. I went into the drug store; passed the last opening

between the counters on the left-hand side. I went behind these counters in an upright manner, as straight as I could walk, and, as I got about halfway between the counters, Dr. Magness came out from behind the prescription case. He had a bottle of medicine in his hand, and from his appearance he was reading the directions on the label. I started toward him, and when I got in about 10 feet of him he saw me, and as he did so he went for his gun. Up to that time my right hand was by my side. When I saw him reach for his gun I knew the time had arrived, and that one of us was going to die. I pulled my gun, and while he was looking at me I shot him in the lip. I shot him twice more, while he was standing upright, over the heart. At that he fell over on his back, and while he was falling he stumbled over a chair, which turned his right side toward me while he was falling, and I shot him twice more. That man's back was never to me at any moment of the shooting. I did not make any step toward him, nor did I shoot him while on the floor. I shot him to protect my life. He had ruined my home and had threatened to kill me, and I believed that he would do it."

This testimony reveals the settled purpose of appellant, from the time he found Dr. Magness in his home, to seek and take his life. About two days intervened, the appellant not wavering one moment in his determination. All the eyewitnesses save appellant show that appellant shot the deceased in the back, and when he was apparently unaware of appellant's presence. The pathetic portrayal of the deplorable circumstances which destroyed appellant's home and happiness, and caused him to take the life of the wicked author of it all, can but elicit the profound sympathy of every man who loves virtue and appreciates conjugal fidelity and domestic peace. But nevertheless the law, in its wisdom, defines the taking of human life under the circumstances detailed by appellant as murder, and, so long as it is thus written, courts and jurors must obey its plain mandate.

Affirm.

HOT SPRINGS RY. CO. et al. v. McMILLAN.
(Supreme Court of Arkansas. June 17, 1905.)

1. APPEAL—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence on an issue of fraud in the execution of a release, submitted under proper instructions, will not be disturbed on appeal.

2. RELEASE—FRAUD—EVIDENCE OF CUSTOM.

Where a release was executed to a railroad company by an injured employé, proof that the recitals as to the consideration were false, by showing that the amounts named therein were already due according to the custom of the company in dealing with disabled employés, was admissible, as establishing that the release was fraudulent.

3. NEW TRIAL—REVIEW.

The refusal of a motion for a new trial setting up newly discovered evidence will not

be disturbed, in the absence of abuse by the trial court of its discretion.

4. APPEAL—NECESSITY FOR MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS.

A question as to rendering a personal judgment against a defendant, which was not made a ground for a new trial, cannot be considered on appeal.

Appeal from Circuit Court, Hot Spring County; Alexander M. Duffie, Judge.

Action by A. H. McMillan against the Hot Springs Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This suit was brought by McMillan against the Hot Springs Railway Company to recover damages for the crushing and mangleing of his left hand. McMillan was a brakeman of the Hot Springs Railway Company, and his injury was caused while he was coupling cars at Butterfield. He charged that the liability of the railway company grew out of negligence in failing to provide him with suitable and safe appliances with which to make the coupling, in this: that the holes in the drawhead of one of the cars were out of shape, and the pin furnished to make the coupling was too large to pass readily through said holes. Plaintiff charged that by reason of the imperfect, unsafe, and dangerous condition of these appliances his hand was caught between the drawheads while he was attempting to make the coupling, and badly crushed and mangled; that plaintiff was in the discharge of his duty as brakeman, and did not know of, and by the use of ordinary care could not have discovered, the dangerous condition of such appliances. Damages were laid at \$25,000.

The Choctaw, Oklahoma & Gulf Railway Company is made defendant because since the injury it had purchased the Hot Springs Railroad and was operating it when suit was brought. The Hot Springs Railway Company answered, setting up the following alleged release in accord and satisfaction, viz.:

"In consideration of the sum of Three Hundred Forty-six and 05-100 Dollars (\$346.05) paid to me by the Hot Springs Railroad Company, and the agreement of said Company to pay me Fifty Dollars (\$50.00) in addition to the above sum, and to employ me in such capacity as I may be able to work for a period of six months from the date hereof at a salary of not less than Fifty Dollars (\$50.00) per month, I hereby release said Company from any and all liability it may be under to me for and on account of an injury received by me while working as a brakeman on the Railroad of said Company on or about the 2nd of February, 1900.

"Witness my hand and seal October 1, 1900.

"[Signed]

A. H. McMillan."

It also denied all the material allegations of the complaint, and set up contributory negligence.

The Choctaw, Oklahoma & Gulf Railroad

Company filed a separate answer, denying in detail all of the allegations of the complaint, and admitting its purchase of the Hot Springs Railroad, and that it was at that time in the possession of and operating the same, but denying that, as purchaser or otherwise, it assumed all or any of the debts and liabilities of the Hot Springs Railroad Company, and denying that it was liable to the plaintiff for said alleged injury.

The plaintiff replied to that part of the answer of the Hot Springs Railroad Company setting up a release as follows: "Plaintiff alleges that he never at any time agreed to release the defendant Hot Springs Railroad Company from the damages resulting to him from the injury complained of herein; that it is true the said defendant Hot Springs Railroad Company presented the plaintiff a writing containing a full release to said company from such damages, but plaintiff refused to make or sign such release; that at the time said writing was presented to him another writing was also exhibited to him, which was simply a receipt for money which had been paid to him by said company during the time he was disabled from work on account of said injuries, as salary, that had accumulated to him during such time; that it was customary for said company to allow the time of its employes who were disabled from work by injuries received while in the discharge of their duty to continue, and to pay such employes for such lost time without any deduction, and that said company paid plaintiff said salary during the time he was unable to work, and in that way said sums of \$346.05 and \$50 were paid to plaintiff, and the writing that plaintiff signed or intended to sign was the receipt for said money, and plaintiff says that, if said company has any such paper with his name thereto as that a copy of which is exhibited with said answer, his signature thereto was obtained by and through the fraudulent acts of Fred A. Bill, the agent and employe of said company, at the office of John M. Moore, in the city of Little Rock, in substituting said writing which he had refused to sign for the receipt, which he had agreed to sign, and which he intended, and believed he was signing."

Motions to strike this reply were overruled.

Upon the issues thus formed the cause was presented to the jury, which, after hearing the evidence and the instructions of the court, returned a verdict in favor of McMillan for \$5,000. Judgment was entered accordingly, and this appeal taken.

W. B. Smith, for appellant Hot Springs R. Co. E. B. Peirce and T. S. Buzbee, for appellant Choctaw, O. & G. R. Co. Wood & Henderson, for appellee.

WOOD, J. (after stating the facts). 1. It is conceded by the learned counsel for appellants that the question of whether or not there was fraud in the execution of the re-

lease was submitted to the jury upon proper instructions; but it was ably contended in oral argument and in brief that the evidence on this issue was not legally sufficient to support the verdict. We have carefully examined the record on this question of fact, and have reached the conclusion that there was evidence to support the verdict. We do not hesitate to say that, were it the province of this court to pass upon the weight of the evidence and the credibility of witnesses, we would find in favor of appellants on the question of the execution of the release. But according to the rule long ago established by this court, since followed, and recently approved in many cases, it is the exclusive province of the jury to determine disputed questions of fact. 1 Crawford's Dig. p. 146; Ry. v. Byrne, Adm'r, etc., 73 Ark. —, 84 S. W. 469; Ry. v. Wilson, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74; Ry. v. Kilpatrick, 67 Ark. 47, 54 S. W. 971; Catlett v. Ry., 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254. The testimony of McMillan certainly tends to establish the allegations of his reply to the answer of the Hot Springs Railway Company on the subject of the release. While his testimony in regard to the preparation and execution of the release is contradicted in every material essential by the positive testimony of witnesses for appellants, and while the testimony of McMillan on this question appears to us to be inherently weak and contradictory, yet, unless we overturn a long line of decisions of this court, we must hold that all these were matters for the jury to settle, and, as they were properly instructed, their decision is final.

2. The court, over the objection of appellants, permitted the plaintiff to testify in regard to the custom of the Hot Springs Railway Company to continue the wages of its employes while they were disabled from work on account of injuries received in the service. This testimony was proper. Appellee was contending that the purported release was fraudulent. It recited a consideration of \$346.05 as paid, and \$50 in addition to be paid. These recitals conveyed the impression that the railway company had paid and were to pay the amounts named as part consideration for the execution of the release. Proof that these recitals were false by showing that these amounts were already due him, according to the custom of the company in dealing with its disabled employes, certainly tended to establish the contention of appellee that the alleged release was fraudulent, and that when he signed same he did so under the impression that he was signing a receipt for money due, and which the company had paid according to its custom, and not as a part consideration for a release. The testimony was germane to the contention of appellee as to the fraudulent execution of the release. Moreover, appellants have nowhere denied that such was the custom, and they do not now contend, as

we understand, that the \$346.05 and the \$50 were paid as part consideration for the execution of the release. Therefore we do not discover any possible prejudice to appellants by the introduction of the testimony.

3. The alleged negligence of the appellant Hot Springs Railway in failing to exercise ordinary care to provide McMillan safe appliances, and the alleged contributory negligence of McMillan in failing to exercise ordinary care in the use of the appliances furnished him, were questions of fact properly submitted to the jury, and their verdict is supported by legally sufficient evidence.

4. It was within the sound discretion of the trial court to refuse the motion for new trial setting up newly discovered evidence. *Anderson v. State*, 41 Ark. 229; *Armstrong v. State*, 54 Ark. 370, 15 S. W. 1036; *Ins. Co. v. Parrish*, 66 Ark. 612, 52 S. W. 438; *Ry. v. Byrne, Adm'r*, 73 Ark. —, 84 S. W. 469. We find no abuse of the court's discretion in this case. On the contrary, we think it was properly exercised.

5. The contention that the court erred in rendering a personal judgment against appellant Choctaw, Oklahoma & Gulf Railroad Company was not made a ground of the motion for new trial. Such question will not be considered here for the first time.

Affirmed.

BEAVERS v. SECURITY MUT. INS. CO.

(Supreme Court of Arkansas. June 24, 1905.)

1. APPEAL—ABSTRACT—DUTY OF APPELLANT.

Sup. Ct. rule 9, relative to abstracting the case, does not contemplate that each party abstract his own testimony, but imposes on appellant the duty of abstracting the entire case, so far as material to the issues raised on appeal; and in case of difference of opinion as to what is necessary for a determination of the issues, appellant may abstract what he deems necessary, referring to testimony which he considers immaterial by giving the facts which it tends to prove and the places in the record where it may be found, and leave it to appellee to abstract further matters if he sees proper.

2. SAME—REVIEW OF INSTRUCTIONS—MATERIALITY OF TESTIMONY.

In order to test the propriety of instructions, otherwise than as abstract propositions of law, the substance of the evidence is material, and must be incorporated in appellant's abstract.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2933.]

Appeal from Circuit Court, Yell County; William L. Morse, Judge.

Action by one Beavers against the Security Mutual Insurance Company. On motion to dismiss. Denied on condition of filing additional abstract.

R. C. Bullock, for appellant. Murphy & Mehaffy, for appellee.

HILL, C. J. This case is set for July 10th, and appellant filed abstract and brief in apt time, and the appellee, instead of filing its abstract and brief, has invoked the ruling of

the court on the sufficiency of the abstract of appellant in a motion to dismiss for noncompliance with rule 9. The court cannot take time to read the record and briefs in advance of submission to settle questions determinable in the trial, and confines its ruling to the matters appearing in the motion and response thereto. The appellee says that the five witnesses testified for appellant on material issues and nineteen testified on behalf of appellee, and that the testimony is material and bearing on the issues, and that brought out by appellee on cross-examination of appellant's witnesses goes to sustain the verdict and justify the instructions, and that appellant omits this testimony and all reference to it except an excerpt from appellant's testimony. The appellant responds that he has abstracted the pleadings and all other matters in the record necessary to a full understanding of all questions presented to the court. It appears that the instructions of the trial court are the matters here complained of, and appellant, having set them forth fully, says this testimony is immaterial, and most of it was brought out by appellee, and that it is its duty to abstract its own testimony under the rule. In this appellant is mistaken. He must abstract the entire case so far as it is material to the issues raised on appeal, and the rules do not contemplate that each side abstract its own version of the case, but that the appellant abstract all that is necessary. In case of difference of opinion as to what is necessary to a full determination of the issues presented, the appellee can abstract such further matters as he sees proper. The substance of the evidence is always material in testing the instructions, and, if it is not set out, then the only question on the instructions before the court is whether any facts would justify the instructions. It does not by any means follow that the appellant must set out all of a vast volume of testimony. On the contrary, the rules contemplate an abridgment of it, except when its sufficiency is raised; but it is necessary to set out the substance of all matters to which testimony was adduced in order to properly determine whether the instructions are correct. If counsel regards this testimony as immaterial, he can dispose of it in a very short way by stating that evidence was adduced tending to prove certain facts, and give appropriate references to the witnesses and the pages of the record where such testimony may be found. Then, if appellee conceives that this statement of the effect of the testimony is not full enough, or not accurate, it is his duty to abstract so much of it as he may deem necessary to present his view of it. Appellant offers, if in the opinion of the court his abstract is not sufficient, to file an additional one; and the court, believing appellant has in good faith tried to comply with the rule, will not dismiss the cause, but grant him one week in which to further abstract the case.

STEPHENS et al. v. HERRON.

(Court of Civil Appeals of Texas. July 1, 1905.)

EVIDENCE—HEARSAY.

It was error to permit a witness to testify that a certain certificate located on the land in controversy had been given to her husband, and so became his separate property, where it was clear that she was testifying to what her husband had told her.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1178.]

Appeal from District Court, Stonewall County; H. R. Jones, Judge.

Action between B. B. Herron and Norman H. Stephens and others. From the judgment the latter appeal. Reversed.

See 87 S. W. 326, 1144.

Fiset, Miller & McClendon, for appellants. W. J. Arrington, Crudgington & Penix, and Theodore Mock, for appellee.

STEPHENS, J. For a statement of the case see certificate quoted in opinion of Supreme Court. *Stephens v. Herron*, 87 S. W. 326, 12 Tex. Ct. Rep. 1007. The court erred in excluding the deed therein mentioned from Trumbull and wife, through E. Lucien Ritchie, to Jane Dunham, since the two objections made to it were clearly untenable. The court also erred in permitting appellee to prove by Mrs. Trumbull, over the objection that the testimony was hearsay and a conclusion of the witness, that the certificates located on the land in controversy had been given to her husband, and had thus become his separate property. It is clear from her deposition as a whole that she was testifying to what her husband had told her, although she claimed to know it herself.

The judgment is therefore reversed, and the cause remanded for a new trial.

OKLAHOMA CITY & T. R. CO. v. DUNHAM.*

(Court of Civil Appeals of Texas. May 27, 1905.)

1. DEDICATION DEED — PLATS—RESERVATION OF USE OF STREETS.

With a plat of land for a town site the owner also recorded a dedication deed, wherein, after reserving the right to grant to any railroad a right of way over a certain avenue, he dedicated to the public all portions of streets and alleys contiguous to or adjoining any lots or blocks theretofore or thereafter conveyed by him; all other streets and alleys, or portions of them, not contiguous to lots and blocks conveyed, to be and remain his private property, which he might replat, close up, or occupy at his option. A deed subsequently executed by him for a lot facing a street crossing the avenue referred to the recorded plat, as did a deed from the grantees to plaintiff. Later the town site owner conveyed to defendant railroad a strip from the west side of the avenue, for right of way purposes, over and

along the avenue. *Held*, in an action for damages to the market value of his lot resulting from the operation of cars on such tracks built by defendant on such strip, that plaintiff was charged with notice of the reservation in the dedication deed, and that the effect of such deed and of the deed to defendant was to confer on defendant the right to use its right of way for railway purposes, restricted only by the right of the public to the reasonable use of the avenue, and the right not to have a nuisance imposed.

2. SAME—CONSTRUCTION.

The legal effect of the deeds was a question for the court.

3. NUISANCE—WHAT CONSTITUTES.

The mere imposition of more railway tracks, or the increased use of the tracks beyond what may originally have been thought probable, resulting from the location of defendant's depot on land acquired by it adjoining the avenue, did not constitute a nuisance.

4. SAME—ACTION FOR DAMAGES.

In the absence of allegation and proof of such use of the avenue as constituted a nuisance, plaintiff could recover for such injury only as resulted to his property from the erection of a depot and the operation of defendant's railroad on land not embraced within the avenue.

Appeal from District Court, Hardeman County; S. P. Huff, Judge.

Action by R. D. Dunham against the Oklahoma City & Texas Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

C. H. Yoakum and D. E. Decker, for appellant. Muse & Allen and L. H. Mathis, for appellee.

CONNER, C. J. In July, 1887, Gen. G. M. Dodge was the owner of several hundred acres of land traversed by the Ft. Worth & Denver City Railway Company, and caused to be made a map or plat thereof for the proposed town of Quanah. The plat was recorded, showing the streets running east and west to be 60 feet in width, and parallel with the Denver Railway, and those running north and south to be 80 feet in width, with the exception of McClelland avenue, which was 100 feet. The plat also showed certain blocks of land to be reserved for public building purposes and parks, and at a point where McClelland avenue intersected the Denver Railway quite a body of land was reserved for railway purposes and for a tank. Gen. Dodge at the time the plat was recorded also recorded a dedication deed, of which the following is a copy:

"Know all men by these presents: That, whereas, I, G. M. Dodge, have heretofore, to wit, on the first day of August, A. D. 1887, filed a map of the town of Quanah, in the county of Hardeman and state of Texas, in the office of the Clerk of the county court of said county, to be recorded in the Record of Deeds of said county together with this deed of dedication, which is intended to be a part thereof. That said Town of Quanah is situated immediately upon the line of the Fort Worth & Denver City Railway upon Surveys 141, 142, 149 and 150, standing in name of

*Rehearing denied July 1, 1905.

Waco and Northwestern Railway Co. upon the official map of said Hardeman county on file in the General Land Office of the State of Texas. And I, after reserving the right to grant to any railway or railway companies the right of way over Browning and McClelland Avenues, do hereby grant, give and dedicate to the public a highway, such portion of each and all of the streets and alleys, designated on said map, as may be contiguous to or adjoining any lots or adjoining any lots or blocks of land so laid out on said map, which have been or may hereafter be conveyed by me to any other person, all other streets and alleys designated on said map, or portions of them, not contiguous to lots and blocks conveyed, are to be and remain my private property, and may be replatted or closed up or occupied by me at my option.

"Witness my hand this 2nd day of July, A. D. 1887. G. M. Dodge."

After the plat and the dedication deed were recorded, Dodge began to sell town lots, and among other sales was lot 9 in block 112, upon which plaintiff in 1899 erected a house; having purchased the lot from Offut, a vendee of Dodge. In the deed from Dodge to Offut, in describing the lot, after stating lot and block number, the deed stated, "according to the map of said town of Quanah recorded in book 3 pages 171 and 173 deed record Hardeman Co."; this being the place of record of said deed and plat. The deed from Offut to Dunham contained a like reference to the plat. On June 22, 1902, Dodge, by deed of that date conveyed to defendant, Oklahoma City & Texas Railroad Company, a strip 56 feet in width from the west side of said McClelland avenue, in the following language: "by the present do grant, bargain, sell, convey and relinquish, unto said railway, its successors and assigns (for railroad telegraph and telephone right of way purposes) the right of way upon, over and along said McClelland Avenue." The defendant railway company about the same time acquired by purchase from various parties the fee-simple title to 100 feet adjoining McClelland avenue on the west side. It also obtained from the city council of the city of Quanah permission to construct its tracks in and on McClelland avenue and the 100-foot purchase strip. About April 1, 1903, defendant railway company completed the construction of its tracks and depot, and began operating trains into Quanah. It constructed on McClelland avenue, on the west 56 feet allowed from Dodge, its main track and one side track, and near to appellee's residence, and between said avenue and said residence, on the 100 feet purchased, defendant erected its passenger and freight depot, and one side track, called the "house track"; the same being constructed between the depot and plaintiff's residence. There was on the 100 feet between plaintiff's lot on McClelland avenue a residence occupied by a family prior to the construction of the railway, which was moved out to make room

for the depot. Between plaintiff's residence and the house track there was about 40 feet of space, which has since the construction of the track been used as a passageway for the public. The passageway or street opens into the street running east and west in front of plaintiff's house.

The plaintiff filed a petition setting up ownership of the lot in controversy, and alleged that the defendant, by constructing its track and depot as stated, and by operating cars, engines, and trains on said railway, had diminished it in its market value in the sum of \$750. The defendant interposed as a defense that plaintiff purchased his lot and constructed his improvements with knowledge that McClelland avenue would probably be used for railroad right of way, and that Dodge, the common source of title, when he conveyed plaintiff's lot, reserved the right to grant to railway or railway companies a right of way on and in said McClelland avenue, and that Dodge had granted such right of way to defendant. The jury were instructed that appellee was affected with notice of the reservation in the Dodge deed of dedication, and that in his purchase of property adjacent to McClelland avenue he assumed the risk of whatever damages the same might sustain by reason of operating trains thereover in the "usual and customary way," and such damages as would result from the construction of a track on such right of way in the "usual and ordinary way." The court further charged that if the jury should "find the operations of the engines and railway on the main track along in McClelland avenue in proximity to plaintiff's property was not within manner contemplated in the grant of the right of way by Dodge, and that such operation contributed, as alleged by plaintiff to the damages charged, then you may, under the evidence, consider same in determining the damages sustained therefrom, if any." And in a modification of a special charge given at appellant's request, also, "that the defendant had the right to construct a main track through and along McClelland avenue, and operate its engines and general traffic business thereon, and would not be liable to plaintiff for damages in the depreciation of the value of his property thereby, and, should you find that switches at that point were reasonably necessary to the operation of said main track so constructed, defendant would not be liable for damages caused thereby; but if you find that defendant erected a depot and switchyards, if any, on said avenue, and in close proximity to plaintiff's property, and by reason thereof a greater burden was placed on said avenue than was contemplated in the grant by Dodge, and that by reason thereof the main line was used in a manner not contemplated in the original grant, and that there was additional use in running their engines and carrying on the traffic of said defendant on said main line, by reason of said depot and said switch-

es, and that but for such additional switches, etc., would not have been necessary, and you further find that such additional use of said main track, if any, damaged plaintiff's property, then you should find damages for plaintiff on such additional use occasioned, if any."

In so giving the charges quoted we think there was error as assigned. Thereby damages were authorized because of a mere extension in the use of the right of way beyond that originally contemplated, as determined by the jury. No evidence other than the deeds mentioned is cited as showing the limits of the use to be made of the right of way as originally contemplated. The deeds spoke for themselves. It was for the court, and not the jury, to determine and declare their legal effect, which was, otherwise than as indicated by the charge, to confer upon appellant the right to use its right of way for railway purposes, restricted only by the right of the public to the reasonable use of McClelland avenue, and the right of all persons not to have a nuisance imposed. See *Olive v. Sabine & E. T. Ry. Co.* (Tex. Civ. App.) 33 S. W. 142; *S. A. & A. P. Ry. Co. v. Faires* (Tex. Civ. App.) 26 S. W. 82; *Cane Belt Ry. Co. v. Ridgway* (Tex. Civ. App.) 85 S. W. 496; *Railway v. Grossman* (rehearing pending), 12 Tex. Ct. Rep. 743; *City of Houston v. G. C. & S. F. Ry. Co.* (Tex. Civ. App.) 35 S. W. 74; *Territory of New Mexico v. United States Trust Co.*, 172 U. S. 171, 19 Sup. Ct. 128, 43 L. Ed. 407; *Gulf, C. & S. F. Ry. Co. v. Oakes*, 94 Tex. 155, 58 S. W. 999, 52 L. R. A. 293, 86 Am. St. Rep. 835; *Railway Co. v. Pape*, 62 Tex. 313; *Texas & Sabine Ry. Co. v. Meadows*, 73 Tex. 32, 11 S. W. 145, 3 L. R. A. 565; *Railway v. Railway*, 71 Tex. 165, 9 S. W. 94; *Lewis on Eminent Domain*, §§ 565-567; 1 *Wood on Railway Law*, 654, note 1.

As submitted in the charge, the jury, in order to assess damages, were not required to find that the use of McClelland avenue had become so enlarged as to constitute a nuisance, but were permitted to assess damages for a mere increased use of the right of way that may have been occasioned by the location of the depot. The right to so locate and use the depot was lawfully acquired—it is not even disputed—and the mere fact that this was the occasion of the increased use of the right of way cannot alter the principle. Whatever may be the cause, the right to use is the same. The only limitation is that the use of the right of way must be reasonable, and not extend to the point of becoming a nuisance. The mere imposition of more railway tracks, however, or an increased use of tracks beyond what may have been originally thought to be probable, does not constitute a nuisance. *Rainey v. Red River, Texas & Southern Ry. Co.* (Tex. Civ. App.) 80 S. W. 95. The natural development of the locality and change in conditions may make such enlarged use necessary for the public good. Such changed

conditions are to be expected, and should be taken into contemplation.

Dodge, at the date of his deed of dedication, had full title to McClelland avenue, and of the land of which appellee's lot constitutes a part. He then had in such land every right or privilege that could be carved out of it. He could convey the whole absolutely, or such estate therein as he chose, upon any or no consideration, as he might desire. He in fact platted the land, and dedicated specified parts thereof to the public as passageways. The dedication of an easement or passageway over McClelland avenue, however, was not made absolute in the general public. Dodge reserved the right, which affected all lands then owned by him, to select one or more railway corporations to which he might also grant an easement or right of passage over this street. This reserved right, of course, should not be construed as giving Dodge power to thus enable railways to wholly occupy and use the avenue, to the entire exclusion of the general public, for to so construe the provision would constitute a repugnant clause, enabling Dodge to entirely defeat the dedication to the public, restricted though it was, and which therefore could not be upheld. In this case, however, the public right is not involved. It is not insisted that the use of the avenue as a passing way has been unnecessarily or unreasonably impeded. The question as presented by the record is one of private right merely. Appellee, a private person, complains that by the construction and operation of appellant's railway his property has been injured; and his right of recovery should be restricted, in the absence of allegation and proof of such use of McClelland avenue as constitutes a nuisance, to such injury, if any, as has been done appellee's property by the erection of a depot, and the use and operation of appellant's railway on land not embraced within said avenue.

Because of the error discussed, the judgment is reversed, and the cause remanded for a new trial.

ST. LOUIS, M. & S. E. RY. CO. v. SHANNON.

(Supreme Court of Arkansas. June 24, 1905.)

1. RAILROADS — KILLING CATTLE — NEGLIGENCE—EVIDENCE—COMPETENCY.

In an action against a railroad for the killing of cattle in the nighttime, testimony of a witness that he had never ridden on an engine, but that he knew how far a common headlight would light up a track, from standing by the side of engines in the nighttime, and that such light would light up for a specified distance, was competent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2203, 2268.]

2. SAME—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for the killing of cattle in the nighttime, evidence held sufficient to show negligence in using an inferior headlight.

Appeal from Circuit Court, Randolph County; John W. Meeks, Judge.

Action by A. K. Shannon against the St. Louis, Memphis & Southeastern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. F. Parker and Orr & Luster, for appellant. C. H. Henderson, for appellee.

RIDDICK, J. This was an action by A. K. Shannon against the railway company to recover damages for the loss of two cows and a calf killed by the train of the company. He recovered judgment for \$45. The accident happened on a dark and rainy night. The engineer testified that the train consisted of an engine, a baggage car, and passenger coach. He said that he was keeping a careful lookout, and discovered the cattle when they were about 90 or 100 feet ahead; that the headlight on the locomotive was a common oil headlight, and on such a night did not light up the track for more than 90 or 100 feet; and that he could not have discovered the cattle sooner than he did. He further testified that the train was running about 15 or 18 miles an hour, and that, though there were only two cars attached to the engine, he could not have stopped under about 200 yards. But a witness for plaintiff testified that, though he had never ridden on an engine, he knew how far a common headlight would light up a track; that he had stood by the side of engines on rainy nights, and in that position could see the track for 200 yards ahead. While this evidence was not very satisfactory, we think it was competent, and it tended to show that the headlight on the engine of defendant, which only gave light for 90 or 100 feet ahead, was of a very inferior kind, and that the company was guilty of negligence in using such a light. For this reason, we think it cannot be said that the verdict is without evidence to support it.

One of the instructions given by the court, if it stood alone, might be misleading; but, when the whole charge is considered, we are of the opinion that it was substantially correct.

Judgment affirmed.

WAGNER v. ARNOLD.

(Supreme Court of Arkansas. June 24, 1905.)
ISSUES—FAILURE TO DETERMINE—APPEAL—REVERSAL—JUDGMENT.

Where in a suit to quiet title the court did not pass on plaintiff's claim of title through an overdue tax decree pleaded in his complaint with reference to a portion of the property in controversy, and the record did not show that plaintiff had abandoned such claim, judgment on reversal will not be rendered dismissing the complaint, but the cause will be remanded for further proceedings.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4610-4614.]

Appeal from Little River Chancery Court; James D. Shaver, Chancellor.

Suit by one Arnold against one Wagner to quiet title. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. M. Carter, for appellant. E. F. Friedell and W. H. Arnold, for appellee.

WOOD, J. This is a suit by appellee against appellant to quiet title to the northwest quarter of Sec. 24, T. 13 S., R. 32 W., in Little River county. Appellee deraigned title through various parties from the United States to himself. He also deraigned title to the south half of the northwest quarter, supra, through John B. Jones, from the state of Arkansas. Under the overdue tax law the appellant claimed title by virtue of a donation deed executed June 21, 1871. The chancellor tried the issue upon facts precisely similar to those set forth in *Wagner v. Arnold*, 72 Ark. 371, 80 S. W. 577, and held that appellee's title was valid and superior to the title of appellant, and canceled appellant's donation deed and quieted the title of appellee to the land in controversy. For the reasons given in *Wagner v. Arnold*, supra, that was error, for which the judgment must be reversed. As to the north half of the northwest quarter of said section, the decree will be entered here for appellant, dismissing the complaint of appellee as to said tract. But as to the south half of the northwest quarter, supra, it appears that the court did not pass upon appellee's claim of title through the overdue tax decree set up in his complaint. Appellant claims in his brief that this claim was abandoned. Appellee claims that it was not abandoned. The record is silent upon the question. The chancellor found "that the plaintiff, John H. Arnold, claims said tract of land [the northwest quarter, supra] and deraigns his title in the following manner, to wit: The state of Arkansas to the heirs of George W. Underhill, deceased; Virginia Diamond, as sole surviving heir at law of George W. Underhill, deceased, to John B. Jones; John B. Jones to the Pulaski Land Company; and the Pulaski Land Company to John W. Arnold, the plaintiff." The chancellor, having found that this title to the whole tract was "valid, and superior to the title of defendant," deemed it unnecessary to presume to pass upon the claim of title also set up by plaintiff to the south half of the northwest quarter, above mentioned. But the record only shows that the court did not pass upon this claim. It does not show that plaintiff abandoned it. Inasmuch as it appears that the lower court did not pass upon and determine whether this claim of appellee to the south half was superior to the title of appellant, we will remand the cause as to that claim, with directions to the lower court to proceed, if the plaintiff so desires, to pass upon that issue.

McHUGH v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri. June 28, 1905.)

1. CARRIERS—NEGLIGENCE—INJURIES TO PASSENGER ALIGHTING—PLEADING — DIFFERENT CAUSES OF ACTION.

A petition in an action by a passenger against a street railway, alleging that defendant's conductor called out the street of plaintiff's destination, and, after stopping the car, negligently started the same while plaintiff was alighting, whereby she was injured, and that in violation of a city ordinance the conductor allowed plaintiff to leave the car while it was in motion, which violation directly contributed to plaintiff's injuries, states two causes of action—one at common law for negligence, the other for damages from violation of the ordinance.

2. ACTIONS—JOINDER OF CAUSES — STATING SEPARATELY.

Under Rev. St. 1899, § 593, requiring separate causes of action united in the same petition to each be separately stated, with the relief sought in each, so that they may be distinguished, an action for damages at common law for negligence cannot be joined in the same count with one for statutory negligence.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 410.]

3. SAME—IMPROPER JOINDER—MOTION TO REQUIRE ELECTION.

Where a petition improperly joins two different causes of action in the same count, the remedy is by motion to require plaintiff to elect on which count he will proceed to trial.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1199, 1200.]

4. CARRIERS—EVIDENCE — DECLARATIONS OF INJURED PARTY.

In an action against a street railway for injuries sustained while alighting from a car, a witness was properly permitted to testify that plaintiff "would bring her hand up to her side, and say that her side hurt her, and that she had such pains in the hollow of her neck and the back of her head," the evidence being clearly with reference to plaintiff's expressions of pain felt at the time, and not made after instituting the suit.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 377-382.]

5. SAME—SUBMISSION TO JURY—SUFFICIENCY OF EVIDENCE.

In an action against a street railway for injuries received by plaintiff, a passenger while alighting from a car, evidence held sufficient to authorize submission of the case to the jury.

6. SAME—ALLOWING PASSENGERS TO ALIGHT FROM MOVING CAR—CITY ORDINANCE.

A city ordinance providing that conductors shall not allow ladies or children to leave or enter cars while in motion, is not unreasonable or void in that it imposes on the carrier the duty of controlling the acts of passengers, when the passenger is at liberty to do as he pleases.

7. SAME—POLICE POWER.

The ordinance being in the nature of a police regulation for the safety of passengers is within the power and authority of the city to pass under its charter.

8. SAME — CONTRADICTIONARY INSTRUCTIONS—HARMLESS ERROR.

In an action against a street railway for injuries received by a passenger while alighting from a moving car, an instruction requiring in one part the exercise by those in charge of the car of "a very high degree of care," and in another part of "ordinary care" by the conductor, if erroneous, was in defendant's favor, and not reversible error.

9. SAME—ERROR.

An instruction that if the conductor, in addition to warning plaintiff not to step from the car before she alighted therefrom, "exercised reasonable care to prevent her from alighting therefrom," she could not recover, was not error.

In Banc. Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by Mary McHugh against the St. Louis Transit Company. Judgment for plaintiff, and defendant appeals. Reversed.

Boyle, Priest & Lehmann and Geo. W. Easley, for appellant. A. R. Taylor, for respondent.

BURGESS, J. This is an action for damages alleged to have been sustained by the plaintiff, resulting from injuries received in an accident which occurred at the intersection of Delmar and Euclid avenues, in the city of St. Louis, on the 1st day of April, 1901, by reason of one of the cars of the defendant, in which plaintiff was a passenger, being started forward with a jerk just as plaintiff was in the act of alighting therefrom. The petition alleges that as such car approached said Euclid avenue and Delmar avenue defendant's conductor in charge of said car called out "Euclid Avenue!" and said car was stopped at or near said crossing, plaintiff's destination, and plaintiff thereupon, at said invitation, proceeded to alight from said car whilst the same was so stopped, and whilst she was in the act of alighting, and before she had reasonable time or opportunity to do so, defendant's servants in charge of said car carelessly and negligently caused and suffered said car to be started, whereby the plaintiff was thrown from said car, and sustained great and permanent injuries upon her body and legs, and also great and permanent internal injuries, sustaining an injury to her knee and to her side, causing a compression to her side and chest and injury to her lungs, and causing her to have pleurisy, and also injuring her head, and causing a great and permanent injury to her nervous system. And the plaintiff avers that at the time of her said injury there was in force in the city of St. Louis an ordinance of said city by which it was provided that conductors of street cars should not allow women or children to enter or leave the car whilst the same was in motion, yet the plaintiff avers that defendant's conductor in charge of said car, in violation of said ordinance, caused said car to start in motion whilst plaintiff was leaving it, and allowed the plaintiff to leave said car whilst the same was in motion, which violation of said ordinance directly contributed to cause plaintiff's said injuries. The answer was a general denial and a plea of contributory negligence on the part of plaintiff in attempting to alight from a moving car 150 feet east of the eastern line of Euclid avenue.

The plaintiff's evidence tended to show

that she was at the time of the accident about 25 years of age, and receiving \$14 per month for her services as housewoman; that on the day of the accident to her she boarded defendant's west-bound car at Pendleton and Finney avenues, about 8 o'clock in the evening, and that her destination was Euclid avenue, or 4900 Delmar avenue; that on the same car with her there were five other passengers, four in the front part and one in the rear part of the car; that when the conductor called for plaintiff's fare she requested him to let her off at 4900 west, or Euclid avenue; that when the car reached said avenue or number it stopped, and the conductor from the platform spoke to plaintiff, saying "this is 4900," and told her to get off, whereupon the plaintiff arose in her seat and went towards and upon the rear platform of the car, and took one step, when the car was moved forward with a jerk, which threw her to the ground, and caused the injuries complained of; that after being thrown from the car plaintiff was taken to St. Joseph's Hospital, where she remained 10 days under the treatment of physicians then in the service of the St. Louis Transit Company; that upon leaving the hospital she returned to Mrs. Dunn's, where she had been employed at the time of the injury, and was thereafter under the treatment of Dr. Grant. Plaintiff stated in her testimony that she was injured on the back of her head and on her side, and that her knees and arms were bruised; that she was rendered unconscious by the fall, and did not regain consciousness until after she reached the hospital; that after the accident and up to the time of the trial she had a pain in her side, and had been subject to fainting spells, and had pains in her head constantly; that she was unable to discharge her duties as servant to Mrs. Dunn until May following her injury. Plaintiff proved that she paid \$30 for medical services.

Mrs. Dunn, witness for plaintiff, stated that before the injury plaintiff's health was good, but that when she returned after the injury she would complain of her side hurting her, and of pains in the back of her neck and head; that she would have fainting spells, and at those times would fall forward on the floor, dropping anything she might have in her hands; that these spells at first occurred once or twice a week, and sometimes would be 10 days apart, and then several weeks or a few months apart, and then come very close together again.

Plaintiff read in evidence article 6, entitled "Of Street Cars," and subdivision 5 of section 1246, of the Revised Ordinances of the city of St. Louis, as follows: "Conductors shall not allow ladies or children to leave or enter the cars while the same are in motion."

Adolphus Brown, witness for the defendant, testified that he was the conductor in charge of the car at the time plaintiff claims

she was injured. He testified, in substance, that there were at the time of the accident only three passengers on the car—the plaintiff, a Miss Walsh, and another lady, whose name he did not mention; that plaintiff asked him to let her off at Euclid avenue, and that as the car passed Bayard avenue he called out, "Euclid avenue, 4900!" that plaintiff came back in a rush, and stepped on the platform and down on the first step; that he then grabbed hold of her, saying, "Hold on, lady; don't jump off until it stops;" that as he said this she jumped off backwards; that the point at which she jumped off backwards was 150 feet east of Euclid avenue, and that at the time the car was moving at a speed of about 15 miles an hour; that after the plaintiff jumped and fell he got off immediately and ran to her assistance, and that plaintiff was then taken to the doctor's office. He stated that after the other passengers got off to help plaintiff the car did not stop, but continued on for eight blocks west; that he grabbed the plaintiff with both hands, and pulled her shawl off her. This statement was contradicted by the plaintiff, who stated that she did not have a shawl on, but a jacket, which was buttoned.

Miss Walsh's testimony tended to corroborate the testimony of the conductor.

Plaintiff recovered judgment for the sum of \$3,300, from which judgment, after unsuccessful motions for new trial and in arrest, defendant appeals.

This appeal was granted and the appeal perfected prior to the announcement of the decision of the court in banc in the case of Gabbert v. Chicago, Rock Island & Pacific Railway Company, 171 Mo. 84, 70 S. W. 891, and the point as to the adoption of the amendment providing for a verdict by less than 12 jurors was brought into question by instructions and the motion for new trial. At the opening of plaintiff's case, and again at the close of all the evidence, defendant moved the court to require plaintiff to elect upon which cause of action alleged in the petition she would proceed to trial. Defendant insists that the petition contains two separate and distinct causes of action, and that the court erred in overruling said motions. The argument is that the first cause of action is for the negligent acts of the conductor in calling out "Euclid Avenue," stopping the car at the plaintiff's destination, and while she, at his invitation, was proceeding to alight therefrom, while the car was standing, and before she had reasonable time or opportunity to do so, the car was negligently caused and suffered to be started, whereby the plaintiff was thrown and injured; while the other cause of action is for the negligent act of the conductor in allowing the plaintiff to leave the car while the same was in motion, in violation of an ordinance, which violation directly contributed to plaintiff's injury. That the petition states two causes of action is, we think, clear—the first an

action at common law for negligence; the other an action for damages alleged to have been sustained by plaintiff by reason of the alleged negligence of defendant's conductor in charge of the car in which plaintiff was a passenger in permitting her to leave said car whilst the same was in motion, in violation of the ordinances of the city of St. Louis. They are independent of each other, and upon either an action might be maintained, but they cannot, under the rules of good pleading, be embraced in the same count. If embraced in the same petition, they should be in separate counts, with a prayer for judgment at the conclusion of each count. When separate causes of action are united in the same petition, each must be distinctly and separately stated, with the relief sought to each cause of action in such manner that they may be intelligently distinguished. Section 593, Rev. St. 1899; *Childs v. Bank of Missouri*, 17 Mo. 213; *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576; *Doan v. Holly*, 25 Mo. 357; *Marsh v. Richards*, 29 Mo. 99; *St. Louis, etc., Co. v. City of St. Louis*, 86 Mo. 495; *Christal v. Craig*, 80 Mo. 367; *Henderson v. Dickey*, 50 Mo. 161; *Kendrick v. R. R. Co.*, 81 Mo. 521; *Linville v. Harrison*, 80 Mo. 228; *Jamison v. Copher*, 35 Mo. 483; *Ederlin v. Judge*, 36 Mo. 351; *Southworth Co. v. Lamb*, 82 Mo. 242. While there was but one injury, and there could be but one recovery for it, any number of negligent acts preceding the injury and leading up to and contributing to it might properly be set forth in the same count of the petition, if of the same character. An action for damages at common law for negligence cannot be joined in the same count with one for statutory negligence for the very obvious reason that they could have no possible connection with, or in any way be dependent upon, each other. *Kendrick v. Chicago & Alton R. R. Co.*, 81 Mo. 521; *Harris v. Wabash R. R. Co.*, 51 Mo. App. 125. *Hill v. Mo. Pac. Ry. Co.*, 49 Mo. App. 520, and same case in 121 Mo. 477, 26 S. W. 576, relied upon by plaintiff, does not announce a contrary rule. Upon the other hand, the acts of negligence preceding the injury in that case were all of the same character, and naturally led up to and contributed to the accident, while in the case at bar they were independent of, and had no connection with, each other. Each cause of action was founded on a different right, and each right separate from the other, because not derived from the same source or in the same manner. As the accident resulted from the same transaction, the causes of action could well be joined in the same petition, but in separate counts, with a prayer for judgment at the conclusion of each count. The court, at the instance of plaintiff, instructed the jury upon both causes of action, and authorized a recovery upon proof of either negligence or of a violation of the ordinance, and thus recognized the petition as stating two different causes of action. In

case a petition improperly joins two different causes of action in the same count, it has always been ruled by this court that the remedy is by timely motion to require the plaintiff to elect upon which count he will proceed to trial, as was done in this case. *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576; *Otis v. Merchants' Bank*, 35 Mo. 128; *Kern v. Pfaff*, 44 Mo. App. 32; *Liddell v. Fisher*, 48 Mo. App. 454; *Christal v. Craig*, 80 Mo. 367; *Childs v. R. R. Co.*, 117 Mo. 414, 23 S. W. 373. The case in hand is clearly distinguishable from *Bartley v. Trorlicht*, 49 Mo. App. 216, and that class of cases, where a number of defects in machinery, all existing at the time of the injury, might co-operate with each other in producing it; and under such circumstances it would be proper to unite them, because the ultimate effect of all the defects produced the injury, and because capable of and likely to co-operate with each other in the result. The motions should have been sustained.

Mrs. Dunn, a witness for plaintiff, was permitted to testify, over objection offered by defendant, that plaintiff "would bring her hand up to her side, and say that her side hurt her, and that she had such pains in the hollow of her neck and the back of her head." This evidence was clearly with reference to plaintiff's expressions of pain felt at the time, and not made after the institution of suit, as claimed by defendant. It therefore falls within the rule announced by Mr. Greenleaf in his work on Evidence, as follows: "So, also, the representation by a sick person of the nature of symptoms and effects of the malady under which he is laboring at the time are received as original evidence. If made to a medical attendant, they are of greater weight as evidence, but if made to any other person they are not on that account rejected." *Greenleaf on Evidence (Lewis' Ed.)* vol. 1, § 102.

It is next claimed that the demurrer which was interposed to plaintiff's evidence should have been sustained, but we are unable to concur in this contention. The evidence, although conflicting, was, we think, sufficient to entitle plaintiff to have her case go to the jury.

It is also contended that the third instruction given for plaintiff should have been refused, because there was no evidence upon which to base it; but this contention is, we think, untenable.

Another contention is that the court erred in admitting the ordinance in evidence, upon the ground that it is unreasonable and void, in that it imposes upon the carrier the duty of controlling the acts of passengers, when the passenger is at liberty to act as he pleases. This same ordinance was before the St. Louis Court of Appeals in the case of *Fortune v. Missouri Pacific Ry. Co.*, 10 Mo. App. 252, and it was then upheld upon the ground that it was for the safety of passengers traveling upon railways and steam cars within

the city limits. That case was cited with approval in the more recent case of *Fath v. Tower Grove & Lafayette Ry.*, 39 Mo. App. 447. The ordinance is not unreasonable or void, nor does it impose upon public carriers of passengers an unreasonable duty toward those under their care, and whom they undertake to carry safely.

Another objection urged against this ordinance is that it creates a new duty upon the part of carriers of passengers, and that the violation of that duty is negligence, and such negligence causing injury creates liability. This same question has been before this court on a number of occasions, and, while the decisions upon it are not uniform, in the recent case of *Sluder v. St. Louis Transit Company* (not yet officially reported) 88 S. W. 648, in an able and exhaustive opinion by Gantt, J., in which all the authorities are reviewed, it is held that such ordinances, being in the nature of police regulations for the safety of passengers upon street cars, were within the power and authority of the city to pass under its charter. This decision was by the court in banc, and must be considered as finally settling the question now under consideration.

Instruction numbered 4 given on behalf of plaintiff is complained of upon the ground that it is contradictory in its terms, in that it requires in one part that the persons in charge of said car should "use a very high degree of care," and in another, of the conductor, "ordinary care," thus allowing plaintiff to leave the said car whilst it was in motion, and must have been confusing to the jury. We are unable to agree in this contention, as it seems to us to be without merit, for, if the law required of those in charge of the car the exercise of a "very high degree of care"—which seems to be conceded by defendant—and the instruction only required of the conductor ordinary care, we are unable to perceive how the jury could have been misled, or the rights of the defendant prejudiced, thereby. If the first proposition be correct, then it was an error

in favor of the defendant to require of the conductor only ordinary care, and of which defendant cannot complain. Certainly the judgment should not be reversed on that ground.

Another insistence is that the court erred in refusing the first instruction asked by the defendant and in giving instruction No. 1 of its own motion. The only difference in these two instructions is that in defendant's instruction the jury was told that if plaintiff stepped from said car while in motion and the conductor of said car warned her not to step from it before she alighted therefrom, she could not recover, while the instruction given by the court of its motion was that if the conductor, in addition to warning plaintiff not to step from said car before she alighted therefrom, "exercised reasonable care to prevent her from alighting therefrom," she could not recover, and the verdict must be for defendant. In a word, the instruction given by the court of its own motion only required of the conductor the exercise of reasonable care to prevent plaintiff from alighting from the car while in motion, which was nothing more than his duty anyway, for it is common knowledge that it is dangerous for passengers to step from cars upon which they are traveling when such cars are in motion. No conductor who is regardful of his duties toward his passengers would neglect to exercise ordinary care to prevent injury to them while getting off or on the car of which he has control. There was therefore no error in refusing the one instruction and giving the other. A point is made with respect to the amount of the verdict, which is claimed to be excessive, but, as the case must be reversed and the cause remanded, it seems unnecessary to pass upon that question.

For these intimations the judgment is reversed, and the cause remanded.

BRACE, C. J., and GANTT and FOX, JJ., concur. MARSHALL, VALLIANT, and LAMM, JJ., concur in result.

CHICAGO, R. I. & M. RY. CO. v. HARTON.

(Court of Civil Appeals of Texas. July 1, 1906.)

1. MASTER AND SERVANT—NEGLIGENCE—PERSONAL INJURIES—EVIDENCE—EXPERT MEDICAL TESTIMONY.

In an action by an employé for injuries through negligence, plaintiff's expert witness testified that as a physician he attended plaintiff immediately after the injury, and found a fracture of the skull, as he then diagnosed it; that such an injury would materially affect one's physical condition; and that patients rarely recovered entirely therefrom. Witness also stated on cross-examination that he had examined plaintiff about 18 months before the trial, and that he then seemed to be an entirely well man, and at the trial presented that appearance, and that a fracture of the outer table of the skull only was not a dangerous or permanent injury. There was also other evidence that plaintiff's injuries were not serious, and that for a year or more he had been working as a farm laborer. *Held*, that defendant was entitled to show, if possible, by the witness, that his original diagnosis of the injury to the skull was incompatible with subsequent developments.

2. SAME—FORM OF QUESTIONS.

There was nothing objectionable in the form of the question asked the witness: "If a man was injured more than a year and a half ago, and he was for more than a year prior to the present time seen doing ordinary farmwork, and if he looked to be in the condition that [plaintiff] seems to be, what would be your opinion as to whether he had suffered from a fracture of the inner table of the skull?"

3. SAME—MEDICAL EXPERTS.

In an action by an employé for injuries, the opinion of a physician, based on the fact that plaintiff was doing farmwork for more than a year prior to the trial, and seemed to be in good health, as to whether or not plaintiff's brain was in any way affected by the injury, was competent.

Appeal from District Court; Dallam County; Ira Webster, Judge.

Action by J. W. Harton against the Chicago, Rock Island & Mexico Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

For prior report, see 81 S. W. 1236.

N. H. Lassiter and Robt. Harrison, for appellant. Del W. Harrington and Wallace & Lumpkin, for appellee.

CONNER, C. J. This suit was brought by appellee against the Chicago, Rock Island & Mexico Railway Company in the district court of Dallam county, Tex., on the 29th day of September, 1903, to recover damages for injuries alleged to have been sustained by him on the 3d day of April, 1903, while he was in the employ of the appellant in its shops at Dalhart, Dallam county, Tex., in the capacity of machinist helper. On the day appellee was injured he was assisting a machinist, under whom he had been assigned to work, in installing a compressed air jack. It was alleged that by reason of certain defects in its construction the piston or plunger would not work in the cylinder of said air jack and became fastened in said cylinder;

that in the effort to withdraw or eject said piston the agents, servants, and employes of the appellant in a careless, unskillful, and negligent manner turned a heavy pressure of steam into said air jack, which blew it to pieces; that by reason of said explosion a heavy substance struck appellee on the head, thereby fracturing his skull, breaking his cheek bone, breaking and crushing his nose, cutting a large gash across his chin, knocking out one of his teeth, and impairing his hearing. It was further alleged that appellee was not conversant with the construction of the appliances in use by appellant, that he was not warned of any danger, that he was in the discharge of his duties at the time, and that appellant was guilty of negligence in so applying the steam and in so failing to warn him of danger. The appellant denied generally the allegations in appellee's petition, and alleged that appellee was guilty of contributory negligence, and that he assumed the risk of the danger. The case was tried on the 22d day of November, 1904, and a verdict and judgment was rendered for appellee in the sum of \$7,500.

We think the second and third assignments of error must be sustained. Dr. J. A. Hedrick, appellee's principal expert witness, on cross-examination was asked the following question by appellant's counsel: "If a man was injured a year and a half ago, and he was for more than a year prior to the present time seen doing ordinary farmwork, and if he looked to be in a condition that Mr. Harton seems to be, what would be your opinion as to whether he had suffered from a fracture of the inner table of the skull?" The answer of the witness to this question was excluded by the court on appellee's objection that the question was not "in the proper form." The following further question was also propounded by the appellant: "If Mr. Harton, who was injured in this way, has gotten up, and has been doing farmwork for more than a year, and seems to be in good health, I will ask you whether or not, in your opinion, his brain was affected in any way by that injury in April a year ago?" The answer to this question was also excluded by the court on appellee's objection that the answer would be "an opinion as to the condition of the plaintiff, and that the witness' opinion as to his appearance would not be that of an expert." There was evidence tending to support the facts stated in the hypothetical questions quoted, and Dr. Hedrick had testified that he attended appellee as a physician immediately after his injury, and examined his injuries; that among others, as he then diagnosed it, he found a fracture of the skull at the base of the brain—this diagnosis being induced principally by flow of blood from one of appellee's ears; that such a fracture was very dangerous, and patients rarely recovered entirely therefrom; that an injury of that kind would materially affect the physical condi-

tion of one who had received it, shocking the nervous system, and rendering the injured party liable to epilepsy and kindred diseases. He had also stated on cross-examination that he had examined appellee about 18 months before the trial, and that he then seemed to be an entirely well man, and at the time of testifying presented that appearance; that the skull consisted of an outer and an inner table; that a fracture of the outer table only was not a dangerous or permanent injury. There was also evidence tending to show that appellee's other injuries were not serious, and that for a year or more appellee had been performing the ordinary duties of a farm laborer.

In this condition of the testimony, it seems to us that it was quite important to appellant to show by Dr. Hedrick, if it could be done, that his original diagnosis of the injury to the skull was incompatible with subsequent developments. Much of his testimony in chief tending to show permanent injury was in answer to hypothetical questions put to him in behalf of appellee. Appellant certainly had the right to cross-examine the witness as to matter drawn out on his examination in chief, and was not bound to accept as true the facts as hypothetically stated in appellee's behalf, and we see no reason, and particularly nothing in the form of the questions, why appellant should not be permitted to offer the opinion of Dr. Hedrick on the hypothetical case made by the proof, as appellant insisted it was. It was for the jury to finally determine the true state of the case as made by all of the competent evidence. It seems hardly necessary to notice the objection that the answer sought was but an opinion. The witness was, as stated, interrogated as an expert by appellee, and it is elementary that opinions of medical men are competent on subjects within the range of their profession. Rule 27, p. 107, and rule 30, p. 144, Lawson's Expert and Opinion Evidence, and illustrations given in the notes.

Other assignments need not be noticed, but because of the errors mentioned the judgment will be reversed, and the cause remanded.

BREWSTER et al. v. STATE.

(Court of Civil Appeals of Texas, June 3, 1905. On Rehearing, July 1, 1905.)

1. PROCESS — QUASHING — WAIVER OF DEFECTS.

An assignment of error that the court proceeded with the trial after having quashed the service of process is not sustained where the return was amended by permission before the conclusion of the trial, and the parties affected by the defective return answered prior to the motion.

2. CONTINUANCE—IMMATERIAL EVIDENCE.

In an action on a liquor dealer's bond, alleging a breach in permitting a minor to remain on the premises, where the evidence fixed his status as a minor at the date of the sales, an application for a continuance because of

the absence of witnesses to prove that the minor presented the appearance of a person of legal age was properly overruled; the desired evidence being immaterial.

3. APPEAL—EVIDENCE — EXCLUSION—HARMLESS ERROR.

Where a witness was permitted to explain his reasons for desiring "to see defendants get out of this suit," the exclusion of an additional explanation that he desired it because he knew prosecuting witness to be worthless was harmless.

4. TRIAL—EVIDENCE—REBUTTAL.

In an action on a liquor dealer's bond, alleging a breach in permitting a minor to remain on the premises, it was proper for the district attorney to state that the minor's mother was mentally unsound, as rebutting any unfair inference from the failure to put her on the stand.

5. APPEAL — ASSIGNMENT OF ERROR — DEFINITENESS.

An assignment of error that the court erred in refusing to grant defendants a new trial because the verdict was contrary to the law and the evidence, as complained of in the twenty-eighth ground for a new trial, is too general for consideration.

On Rehearing.

6. CERTIORARI—JURISDICTION.

Under Rev. St. 1895, art. 1239, permitting an officer to amend his return of service of citation so as to accord with the true facts at any time during the term, where there was no denial of proper service, and it was not asserted that the amendment was false or failed to show proper service, and its filing was during the term, before motion for new trial was acted on, the court was not without jurisdiction to proceed with the trial; and hence an application for certiorari to perfect the record so as to show the date on which the motion to quash the sheriff's return and the date on which the amended return was filed which, if allowed, would not change the result, must be denied.

7. APPEAL—HARMLESS ERROR.

The exclusion of an answer of a witness was not reversible error where the issue to which the testimony related was otherwise established.

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by the state against H. D. Brewster and others. From a judgment for plaintiff. defendants appeal. Affirmed.

Albert Stevenson and J. C. Houta, for appellants.

CONNER, O. J. The state, through her proper officer, instituted this suit against appellant H. D. Brewster and the sureties on his retail liquor dealer's bond, alleging four infractions thereof, viz., three separate sales of intoxicating liquors to Boley Langley, a minor, and by permitting said minor to enter and remain on the premises where the sales occurred on the dates specified in the petition. The prayer was for a recovery of \$500 for each breach of the bond charged, aggregating \$2,000. The trial resulted in a verdict and judgment for appellee in the sum of \$500 because of—using the language of the verdict—"one infraction" of the bond, "for permitting a minor to enter and remain." It is undisputed that the appellant

named was engaged in the business of a retail liquor dealer in Mineral Wells, Tex., as alleged, and as such gave the statutory bond declared upon, with the other appellants as sureties. It seems also quite conclusive that Boley Langley was a minor, as alleged, and the jury's verdict to the effect that he was permitted to enter and remain in appellant's house or place of business is amply sustained by the evidence, so that the material questions presented on this appeal relate to matters of procedure on the trial.

It is first complained that the court erred in proceeding with the trial after having sustained appellant's motion to quash the service of the citation upon the sureties sued. No statement follows this assignment, and we would be authorized to disregard it. Besides, an examination of the record fails to disclose any error in the action complained of. It is true, the court appears by proper order to have sustained a motion to quash the service mentioned, but the order likewise granted the state permission to have the sheriff's return amended. No bill of exception appears to have been taken at the time, and, for aught that appears to the contrary, the amendment was in fact made before the conclusion of the trial. The record also discloses the fact that the sureties affected by the defective sheriff's return appeared, together with appellant, by an original answer filed September 6, 1904, which on its face seems to have been presented prior to the motion. At least, we are unable to say that the motion to quash was presented before the answer in due order of pleading; the motion itself not appearing of record.

In the second assignment, appellants complain of the action of the court in overruling their application for continuance. The application to continue appears to have been made because of the absence of some 10 witnesses. As to some of these witnesses the diligence shown was insufficient, and the testimony of all of them, as set out in the bill of exceptions, appears to be immaterial, in the light of the evidence on the trial and of the verdict of the jury. By the greater number of the absent witnesses appellants desired to prove that Boley Langley, at the time of the alleged infraction of appellants' bond, presented the general appearance of a person over the age of 21 years. Numerous witnesses testified on the trial to this effect, and the jury evidently gave appellants the full benefit thereof, in that the verdict sustained appellant Brewster's plea, of the tenor that, if sales had been made to Boley Langley, as alleged in appellee's petition, they were made in good faith, believing him to be at the time over age. Hiram Langley (the father of Boley Langley), Joe Langley (a brother), and E. Medline all testified positively to the age of Boley Langley, and unmistakably fixed his status as that of a minor at the date of the sales established by the evidence. The fact, therefore, that Boley Lang-

ley presented the appearance of one of lawful age, was immaterial upon the issue found against appellants. See *Cox v. Thompson*, 73 S. W. 950, 7 Tex. Ct. Rep. 236.

The third assignment points out no error, and the fourth assignment is substantially disposed of in what we have said in disposing of the second.

The fifth, sixth, and seventh assignments present the question of collusion, which can not bind the state.

The action of the court in refusing to exclude the answer of Frank Langley, that he had been in jail on the charge of unlawfully carrying a pistol on or about his person, seems entirely nonprejudicial. Frank Langley testified for appellants to the effect that, in his "best judgment," Boley Langley was 21 or 22 years old. We think it evident from his whole statement that he had no accurate knowledge on the subject, and that he was but expressing his mere opinion of Boley Langley's age; and in the light of the unmistakable character of the testimony hereinbefore referred to, that fixes Boley Langley's age, we think the ruling complained of, if erroneous, is entirely immaterial.

The error complained of in the tenth assignment is likewise harmless. The witness Robbins in fact was permitted to give an explanation of his reason for desiring "to see the defendants get out this suit"; and the exclusion of the additional explanation that he so desired because he knew "the Langleys to be a worthless crowd, and believed these suits to be a put-up job," which was excluded by the court, could have had no effect beneficial to appellants. Such reason certainly constituted no defense to the suit. However "worthless" the Langleys may have been, on proof of the facts alleged in the state's petition it was the duty of the jury to render the verdict they did, and we fail to find even a contention that the proof failed to show that Boley Langley was not permitted to enter and remain in appellant's place of business, within the meaning of the law.

In the eleventh assignment, complaint is made that the district attorney was permitted to state his reason for failing to put Mrs. Hiram Langley, the mother of the minor, upon the stand. The proposition asserted is in effect that he (the district attorney) was not qualified as an expert, and did not state the facts upon which he predicated his opinion that she was "mentally unsound." While the mental state of Mrs. Langley was not in issue, the record suggests that this testimony was permitted to meet the real or possible contention in behalf of appellants that the mother best knew the age of Boley Langley. If so, it was competent for the state to rebut any possible unfavorable inference that might be drawn from the failure to put the mother upon the stand. At all events, the ruling seems harmless.

We think the court's charge not subject to the objections urged thereto, and that it suf-

ficiently presents the rule relating to the burden of proof.

The assignment that "the court erred in refusing to grant defendants a new trial because the verdict of the jury is contrary to the law and evidence, as complained of in the twenty-eighth ground of defendants' motion for a new trial," is too general for consideration, particularly in view of the fact that the twenty-eighth ground of the motion is not set out, and that in the statement in support of the assignment we are referred to the "statement of facts, Tr. pp. 9 to 63."

We conclude that no reversible error has been presented, that the evidence supports the verdict and judgment, and that the judgment should be affirmed.

Judgment affirmed.

On Rehearing.

In connection with the motion for rehearing appellants have filed an application for a writ of certiorari to perfect the record so as to show the date upon which their motion to quash the sheriff's return on the citation to two of appellants and the date upon which the amendment to said return was made and filed. The motion for certiorari, which is duly verified by affidavit of counsel, shows that appellants' motion to quash the return of the sheriff of Tarrant county upon the citation to appellants R. L. Crowdus and D. F. Eggleston was filed in the trial court upon the 6th day of September, 1904, and that the amendment to the return was not made until September 25, 1904, and not filed in the court until the next day. It is hence insisted that a perfected record will establish error in our conclusion on original hearing to the effect that it did not appear that the motion to quash had been filed prior to the filing of the answer of appellants, or that the amendment had not been made before the conclusion of the trial, which was on September 12, 1904.

The statute (article 1410, Rev. St. 1895) provides for the delivery of the transcript to the party so desiring, and it has more than once been held that it is the duty of an appellant to see that the transcript is correct before the case is submitted. *Ross v. McGowen*, 58 Tex. 603; *Railway Co. v. Scott*, 78 Tex. 360, 14 S. W. 791; *Hayslip v. Pomeroy* (Tex. Civ. App.) 32 S. W. 124. It may therefore be well doubted whether a motion to correct the record should be granted on motion for rehearing in cases where, as here, the omitted facts are at least apparently material in the consideration of the very assignment of error relied upon, and to which they naturally relate. It is doubtless within our power to do so, and under certain circumstances our duty as well. *Ry. Co. v. Cannon* (Tex. Sup.) 31 S. W. 498. But however this may be, we are of opinion that the present motion should be overruled for the reason, if for no other, that the desired facts would not authorize an alteration of our original conclusion on the

questions presented in the assignment of error, which assignment is to the effect that there was error in proceeding with the trial after having quashed the sheriff's return on the citation; the proposition under the assignment being substantially that the court had "no jurisdiction" to proceed to trial after the quashal of the return. Admitting that the motion to quash was filed on September 6th, as stated in the motion for certiorari, there is yet nothing in the record to show that such filing was prior to the filing of the answer. The opening paragraph of appellants' original answer, also filed September 6th, is as follows:

"Now comes H. D. Brewster, R. L. Crowdus, and D. F. Eggleston, defendants in the above entitled and numbered cause, subject to the right to file motion to quash citation and service in this case, and the court's action thereon, and answer as follows."

This certainly justifies the inference indulged on original hearing that at the time of the filing of the answer no motion to quash had been filed. The reservation in the answer goes to "the right to file motion to quash citation and service," and not to the right of insisting upon one already filed. Besides, while the action of the court was irregular, it appears from the record that it was the sheriff's return that was defective. It is the proper service of the citation that gave the court jurisdiction, and not the return. The return is but the evidence that service of the citation has been made, and, if defective, the court undoubtedly may permit the officer to amend it so as to accord with the true facts at any time during the term, which was the case here. *Rev. St. 1895, art. 1239; Kitchen v. Crawford*, 13 Tex. 519, 520. There is no denial of proper service, nor is it asserted that the amendment was false or failed to show proper service; and its filing was during the term, and before appellants' motion for a new trial was acted upon. We therefore conclude that the court was not without jurisdiction to proceed with the trial, as asserted in appellants' proposition.

Appellants, in their motion for rehearing, also very vigorously attack our conclusion; that no reversible error was committed by the court in excluding the answer of Frank Langley, to the effect that his confinement in jail (drawn out by appellee on cross-examination) was on the charge of unlawfully carrying a pistol on or about his person. It is insisted that confinement on such a charge is not proper matter of impeachment, and that the testimony of this witness was important on the issue of Boley Langley's age. It may be, as in effect conceded on original hearing, that the ruling was erroneous; but it confessedly went to the credibility of the witness only, and a re-examination of the record strengthens our conclusion that it should not cause a reversal. The only important issue to which his evidence related was that

of Boley Langley's age, and as to that he thus testified, in part: "I have known Boley Langley ever since we were children together. I could not say just how old he is, but my best judgment is he is 21 or 22 years old. I base that on my own age." Boley Langley testified: "I am seventeen years of age, and a little over; the date of my birth being May 26, 1887." Joe Langley, a brother, testified "Boley is seventeen years old the 26th of last May. He was born in 1887." Hiram Langley, the father, testified: "Boley Langley was 17 years old on the 26th of May, 1904." Emiline Medline, an aunt by marriage, testified that Boley Langley was a "little baby," "just crawling around"—"a sucking baby—in the spring of 1888." Mrs. Joe Langley, sister-in-law, testified: "He [Boley Langley] is now about 17 years old." A. J. Hughes testified that Boley Langley was about 16. Mrs. Hughes, to the same effect. The force of the testimony quoted was not materially weakened by cross-examination or otherwise, and we think it entirely improbable that any qualified juror would have been influenced to disregard it by the testimony of Frank Langley, which was very indefinite, and at best a matter of opinion, even though unimpeached. We therefore conclude, as before, that the error was harmless.

The statement in our original opinion that "we fail to find even a contention that the proof failed to show that Boley Langley was not permitted to enter and remain in appellants' place of business, within the meaning of the law," is also assailed. The contention now is that the evidence only shows that Boley Langley remained in appellants' saloon long enough to drink the beer sold to him. A careful re-examination of appellants' brief fails to disclose a single assignment of error that calls in question the sufficiency of the evidence to support the verdict or judgment, and, as the transcript presents the evidence, we think no such contention can be reasonably made. Boley Langley testified that he, with four other boys or young men, was in appellant's saloon twice—in the morning and evening—on the day charged. In the morning the party drank no beer, remained 10 or 15 minutes, had no business, but, in the tongue of the witness, "just sot there awhile," and went out. In the evening the party returned, bought two one-half gallon buckets of beer, and "just stood 'round there

and drank it." Was there on this occasion also some 10 or 15 minutes. On cross-examination he seemed inclined to deny the imputation of being drunk in the morning. His language is, "I don't think I was drunk when I was in there the first time that day." Joe Langley testified that he was passing in front of the saloon, saw the party named "in there," and went in and talked with them, "I guess, ten, or fifteen minutes," when he went out, leaving the "boys" in the saloon. He, further testifying, said: "I had no business in there, and just went in only because I saw the boys in there as I was passing along the street, and I went in there just to pass the time. I did not want to see them about anything in particular, and I do not remember what we talked about. I think I asked them what they were doing in there, and they said they were just having a time. I think they had been drinking some, and I thought I could smell it on their breath, and they acted like they were drinking. I sat down in there on a beer keg or on a plank there in the back room. I don't remember which. I think Jess Smith was sitting on a plank in there. Bob and Hez and Boley and Jess Smith were the only ones in there, and we were all talking—just gabbing like other people would—but I don't remember what we talked about. All I remember is that Jess wanted me to go in with them on the purchase of another bucket of beer, and I would not do it." Loftin Brewster, the barkeeper, testified that he was in charge during the entire day in question, and, "if I sold Boley Langley any beer on or about the 21st day of June, or at any time, I do not remember it. * * * Never saw these boys in the saloon at any time, to remember it now. * * * If he had come into the saloon, I would have taken him to be 21 years old. As to this particular transaction, I do not remember anything about it. * * * I do not say that Boley Langley was not in there." The appellant H. D. Brewster, the proprietor, testified: "I do not recollect of ever seeing Boley Langley in the saloon there. If he was in there, I do not remember it." We find no other witnesses testifying on the point under consideration, and think it is thus made perfectly apparent that the evidence not only supports the verdict and judgment, but justifies our original conclusion.

The motions for certiorari and rehearing are overruled.

CITY OF TEXARKANA v. EDWARDS,
County Judge, et al.

(Supreme Court of Arkansas. June 10, 1905.)

1. TAXATION—COUNTY ROAD TAX — CUSTODY OF FUND—EXPENDITURE.

The county road tax is, when collected, a fund belonging to the county, which should be paid into the county treasury, to be expended under the orders of the county court, which in improving a city street must act in conjunction with the city authorities.

2. SAME.

Amendment No. 5 to the Constitution authorizes the county court to levy a county road tax for the exclusive purpose of making and repairing public roads and bridges in the county, when authorized by a majority vote of the county. Kirby's Dig. § 7351, requires the road tax to be expended upon the roads of the district where it is collected. Section 7358 provides that at least one-fifth of the tax collected within the limits of first-class cities shall be expended on roads outside of such cities. *Held*, that while no part of the tax collected outside of first-class cities can be expended in such cities, yet four-fifths of that collected in a city can be expended on roads or streets in the city.

Appeal from Miller Chancery Court; James D. Shaver, Chancellor.

Suit by the city of Texarkana against John C. Edwards, county judge of Miller county, and others. From a decree dismissing the complaint, plaintiff appeals. *Affirmed*.

Pratt P. Bacon and Scott & Head, for appellant. John N. Cook and W. H. Arnold, for appellees.

RIDDICK, J. This is a suit in equity by the city of Texarkana against the collector of taxes for Miller county to restrain him from paying certain road taxes collected by him into the county treasury, and to compel him to pay four-fifths of the road tax collected on property within the limits of said city into the treasury of the city, to be expended by the city for the improvement of its streets, and further to enjoin the county judge of that county from expending such part of the tax on roads outside of the city limits. The defendants appeared, and filed a demurrer to the complaint, which was sustained by the chancellor, and the complaint dismissed.

The questions raised by the appeal from this judgment are, first, whether any portion of this road tax can be properly expended on the streets of a city, and, if it be lawful to do so, whether it should be expended by the county judge, or should be turned over by the collector to the city authorities to be expended by them. After due consideration of the matter we are of the opinion that, as the law now stands, the road tax, when collected, is a fund belonging to the county, and that it should be paid into the county treasury to be expended under the orders of the county judge. As the city has control of its streets, it is probably true that the county court could not carry out a system of street improvement against the wishes of the municipal authorities. To avoid conflict in juris-

dition between the county and city officers in such matters, further legislation may be required. As the law now stands, we think the expenditure of this fund is under the jurisdiction of the county court, which, so far as street improvement is concerned, must act in conjunction with the city authorities having control of the streets.

On the question as to whether the county judge had the right to expend any part of this road tax fund on the streets of the city there is more room for doubt. In some of the counties of the state a large portion of such tax is paid by residents of cities of the first class on property located in such cities. If the law did not allow any portion of the tax to be expended on roads within the city limits, it is not unlikely that the result would be that many of these taxpayers would refuse to vote for the tax, and the collection of the tax might in that way be defeated. Although the purpose of the tax is to improve the public roads and highways of the county, still a street is a public highway, and while, ordinarily, in speaking of public roads and highways, one does not include streets, yet such language may include streets as well as other highways. Now, as this tax is paid by owners of property in cities as well as by those who live outside of cities, the presumption should be that it was intended to be used for the benefit of all the property owners and citizens of the county, without regard to whether they live within or without the limits of a city, and that the discretion of the county judge in that regard is unfettered unless the law is plainly to the contrary. We see nothing in the amendment (No. 5) to the Constitution which permits the collection of a county road tax that prevents such an equitable distribution of the fund. The Legislature seems to have adopted this view of the amendment, for in the act of 1899 (section 7351, Kirby's Dig.) it requires this road tax to be expended upon the roads of the district where the tax was collected, though some of the towns and cities of the state have been constituted separate road districts. In a subsequent act (section 7358) it directs that at least one-fifth of such tax collected within the limits of cities of the first class shall be expended on roads outside of such cities, leaving the place or places in the county where it is to be expended to the discretion of the county judge, from which it may be clearly implied that the remaining four-fifths may be expended in the city.

Now, the facts in this case show that Garland township, of Miller county, is one of the road districts of that county, and that the city of Texarkana is situated in that district. Under the acts of the Legislature above referred to, we think that the county judge may expend the road fund collected in that district upon the roads of the district as in his discretion may seem best, except that one-fifth of that part of the tax collected in the city of Texarkana, a city of the

first class, must be expended on roads outside of the city, and such fifth may be expended in any portion of the county where the county judge may deem that it can be used to the best advantage. In other words, under these statutes the amount of the road fund collected in cities of the first class which can be expended within the city is limited to four-fifths of the tax collected in such city. No part of the tax collected outside of the city can be expended in the city, and but four-fifths of that collected in the city can be expended on the roads or streets in the city limits, for the Legislature, which has full control over public highways, has so enacted.

It results from what we have said that, in our opinion, the judgment of the court refusing to enjoin the collector from paying over the tax in question to the county treasurer was right, and the same is affirmed.

MCCULLOCH, J., concurred in the judgment, but was of the opinion that the city was entitled, under the law, to have four-fifths of the road tax collected on city property expended on its streets, the expenditure to be made by the county judge. In his opinion the county judge has no discretion to expend more than one-fifth of the tax collected in the city on roads outside of the city limits.

MARTIN v. BACON.

(Supreme Court of Arkansas. June 24, 1905.)

1. NONRESIDENT WITNESSES AND PARTIES—EXEMPTIONS FROM SERVICE OF PROCESS.

A party cannot be lawfully served with civil process while attending on a court in a state not that of his residence, either as a party or a witness, or while going thereto or returning therefrom.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, §§ 146, 148-150.]

2. SAME—BAIL BOND.

Where a nonresident was attending court in Arkansas to avoid forfeiture of his bail bond, service on him of process in a civil action was void.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, §§ 148, 149.]

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by W. H. Martin, administrator, against C. H. Bacon. From the judgment, plaintiff appeals. Affirmed in part, and reversed in part.

Greaves & Martin, for appellant. Wood & Henderson, for appellee.

BATTLE, J. James T. Grubb in his lifetime brought an action against C. H. Bacon for damages caused by an assault and battery made upon him by the defendant. The action was commenced on the 16th of November, 1901. The plaintiff died, and the action was revived in the name of W. H. Martin, as special administrator.

The defendant moved the court to quash the summons, setting out the grounds in his motion; and the plaintiff replied, stating facts. The court sustained the motion and dismissed the action, and the plaintiff appealed.

The motion was heard and sustained upon the following agreed statement of facts:

"The alleged assault for which this action was brought was made on the 6th day of May, 1901, in the city of Hot Springs, Garland county, Arkansas. Upon said date the defendant was a visitor to the city of Hot Springs, and was not present in said city under compulsion of any judicial process, but was here voluntarily.

"Said defendant, C. H. Bacon, is, and was on the said 6th day of May, 1901, a resident of the state of Tennessee.

"That upon a preliminary examination being made and held, in which said alleged assault was investigated, the defendant was held to await the action of the grand jury of Garland county, and was permitted to, and did, give bond in the sum of one thousand dollars for his appearance on the 1st day of October, 1901, term of the circuit court of Garland county, next ensuing.

"That afterwards, to wit, on the 19th day of October, 1901, said grand jury returned a bill of indictment charging the said Bacon with assault with intent to kill, committed upon the person of the said J. T. Grubb, and on the — day of —, 1901, an order was made by the circuit court of Garland county permitting the said Bacon to remain upon the bond already given by him until the further order of the court; and the case was set for trial on the 19th day of November, 1901, the same being also a day of said October term of said court.

"That the defendant left his home, in Tennessee, and came to the city of Hot Springs, arriving here on the 15th day of November, 1901—coming here for the purpose of being present at said trial, and of making his arrangements for said trial—and was served with summons herein on the 16th day of November, 1901, and came here in obedience to his said bail bond, requiring him to be present at said trial, and for the purpose of being tried under said indictment, and that said defendant was in this county for no other purpose than to be present and submit himself to the orders and judgment of this court in said cause."

It is well settled by the great weight of authority that a party cannot be lawfully served with civil process while he is in attendance on a court in a state other than that of his residence, either as a party or a witness, or while going to and returning therefrom. *Murray v. Wilcox* (Iowa) 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263; *Powers v. Arkadelphia Lumber Company*, 42 Cent. Law J. 397, and note; note to *Mullen v. Sanborn*, 25 L. R. A. 721. In this state a party, in civil actions and criminal prosecu-

tions, can testify as a witness, and may be exempt from service of civil process in both capacities. Judge Elliott, in *Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, 3 L. R. A. 266, 10 Am. St. Rep. 48, gives the reason for the exemption as follows: "If citizens of other states are allowed to come into our jurisdiction to attend court as parties or witnesses, and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal presence is often essential to enable his counsel to justly conduct his defense. The principle of state comity, too, demands that a citizen of another state who submits to the jurisdiction of our courts, and here wages his forensic contest, should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions. It is an evidence of respect for our laws and confidence in our courts that he comes here to litigate, and the laws he respects should give him protection. If he can come only under the penalty of yielding to our jurisdiction in every action that may be brought against him, he is deprived of a substantial right because he is willing to trust our courts and our laws without removing his case to the federal courts, or refusing to put himself in a position where a personal judgment may be rendered against him. High consideration of public policy requires that the law should encourage him to fully enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him with the obligation to submit to the writs of our courts if he comes within our borders."

Judge Trent, in *Small v. Montgomery* (O. C.) 23 Fed. 707, said: "All the United States circuit judges who have passed upon the question of late, as well as dicta by the Supreme Court of the United States in respect thereto, reach this result, viz., that where a party in good faith is brought within the ju-

risdiction of the state, or detained therein, being a nonresident, either as party to the suit, or as witness in another suit, he is not subject to service. And the reason—the main reason—is very potential, so far as our country is concerned. There are many states, stretching from Maine to Oregon, and a man who is required to go from one to the other, either as a witness or as a party to a suit, should not be pursued by writ while abroad, instead of being sued at his nonresidence; otherwise every one, as is stated in many of these opinions, would avoid as far as possible being subjected thousands of miles away to suits of this character." *Atchison v. Morris* (C. C.) 11 Fed. 582.

Upon the same principle of justice, good faith, and comity, and to subserve the due administration of justice, it has been held that "a person who has been brought within the jurisdiction of a court from another state upon a requisition, as a fugitive from justice, and has been tried for or discharged as to the offense against him, is not subject to arrest on a civil process until a reasonable time and opportunity have been given him to return to the state from which he was taken." *Moletor v. Sinnen* (Wis.) 44 N. W. 1099, 7 L. R. A. 817, 20 Am. St. Rep. 71; *Blair v. Turtle*, 1 McCrary, 372, 5 Fed. 394; *Compton v. Wilder*, 40 Ohio St. 130; *People v. Judge*, 40 Mich. 630; *Cannon's Case*, 47 Mich. 482, 11 N. W. 280.

The appellee comes within the spirit of the rule which exempts persons from service of civil process, and is entitled to its benefit. He is a nonresident of this state—a resident of the state of Tennessee—and was bound to attend the Garland circuit court, in this state, to avoid the forfeiture of his bond. He was also entitled to attend as a witness in his own behalf. His attendance was compulsory. While in attendance in obedience to his bond, process in this case was served upon him. The service, on his motion, should be set aside. *Murray v. Wilcox* (Iowa) 97 N. W. 1087, 101 Am. St. Rep. 263, 64 L. R. A. 534.

Judgment as to the service of process is affirmed, and in other respects is reversed.

RAPP v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri. June 28, 1905.)

1. STREET RAILROADS—NEGLIGENCE — QUESTION FOR JURY.

In an action against a street railroad company for injuries to plaintiff in a collision between his vehicle and a car, *held*, that the question of defendant's negligence was one for the jury.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 251, 253.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a street railroad company for injuries to plaintiff in a collision between his vehicle and a car, *held*, that the question of plaintiff's contributory negligence was one for the jury.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 255-257.]

3. MUNICIPAL CORPORATIONS — ORDINANCE—REGULATIONS OF STREET RAILROAD—ACTION FOR INJURIES—PLEADING.

In an action for injuries to plaintiff in a collision between his vehicle and a street car, the petition alleged negligent operation of the car, and also alleged negligence of defendant's motorman in failing to keep such "vigilant watch" for vehicles and persons as was required by a certain ordinance. *Held*, that it was proper to refuse to require plaintiff to elect whether he would stand on the allegations as to general negligence, or on the allegations as to the ordinance.

4. SAME—UNITING ACTIONS EX CONTRACTU AND EX DELICTO.

The petition was not open to the objection that it combined in one count a cause of action *ex contractu* and one *ex delicto*.

5. STREET RAILROADS — NEGLIGENCE—INJURIES—ACTION—INSTRUCTIONS.

In an action against a street railroad company for injuries to plaintiff in a collision between his vehicle and a car, plaintiff's evidence tended to show that, while his horses were on defendant's track, defendant's servants negligently caused the collision; and the defense was that plaintiff negligently assumed such position when a collision could not have been avoided by ordinary care. The court instructed for plaintiff that though plaintiff, while trying to get his wagon out of a hole in the street, got it on the track, yet if defendant's motorman saw the danger, and could, by the exercise of ordinary care, have prevented the collision, but failed to do so, plaintiff was entitled to recover, even if he did not exercise ordinary care in pulling his horses on the track. An instruction for defendant was that if the motorman saw the horses near the track, but so far away as not to be in danger, the motorman had the right to assume that they would remain there, but that if thereafter plaintiff's horses changed their position, and got in front of the car, and thereby directly contributed to the injuries, and the motorman could not have stopped the car and avoided the accident, plaintiff could not recover. *Held*, that the instructions, taken together, properly presented the issues.

6. SAME—NEGLIGENCE — DISCOVERED PERIL.

Though one may have been guilty of contributory negligence in being on a street car track, the company is liable for any injury it could have prevented by ordinary care after the discovery of the danger.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 219.]

7. NEGLIGENCE—INJURIES—DAMAGES.

In an action for injuries owing to the alleged negligence of defendant, it appeared that plaintiff was rendered unconscious, and his body bruised; that one of his feet was so

crushed that it was necessary to amputate one of his toes and a part of another one; that he would always be crippled more or less; that he suffered great pain, was confined to his bed for five months, and obliged to use crutches for about six weeks, and that his surgeon's bill was between four and five hundred dollars. *Held*, that a verdict for \$3,000 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 384.]

In Banc. Appeal from Circuit Court, St. Charles County; E. M. Hughes, Judge.

Action by George Rapp against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehmann and Geo. W. Easley, for appellant. A. R. Taylor, for respondent.

BRACE, C. J. This is an appeal by the defendant from a judgment in favor of the plaintiff for the sum of \$6,000 in an action for personal injuries. The cause of action stated in the petition is as follows: "That on the 1st day of February, 1901, the plaintiff was lawfully driving a team of horses attached to a loaded wagon northward on Broadway at its intersection with Buchanan street, when the wheels of the wagon he was so driving went into a hole in said streets at their intersection, and said team were unable to pull the wagon further, and became stalled, and, in endeavoring to get said wagon pulled out of said hole, said team were upon the track of the defendant, St. Louis Transit Company, and whilst said team were so on the track of said St. Louis Transit Company on said streets at said place, and whilst said wagon and the wheels thereof were at and near said defendant's track, the defendant St. Louis Transit Company's motorman and conductor in charge of its south-bound car carelessly and negligently, and without using ordinary care to control or stop said car, caused and suffered said car to collide with said team and a part of said wagon, whereby plaintiff was thrown from said wagon to the street, and one of the horses of said team was thrown and fell upon the plaintiff, greatly and permanently injuring plaintiff upon his body, legs, and feet, causing a concussion of the brain, which rendered him unconscious. His foot was thereby crushed, bruised, and injured, and the bones thereof, and the ligaments, tendons, muscles, and flesh thereof, were fractured, ruptured, displaced, and torn, and plaintiff was permanently injured thereby. And for another and further assignment of negligence of defendant, St. Louis Transit Company, the plaintiff avers that at the time of his said injuries there was in force in the city of St. Louis an ordinance of said city, whereby it was provided that motormen and conductors of street cars should keep a vigilant watch for vehicles and persons either on its track or moving towards it, and, upon the first appearance of danger to such vehicle

or person, the car should be stopped within the shortest time and space possible; and plaintiff avers that, at the time of said collision and his injuries, defendant's motorman and conductor in charge of its said car failed to keep such vigilant watch, and failed to stop said car within the shortest time and space possible upon the first appearance of danger to said vehicle and plaintiff, which violation of said ordinance directly contributed to cause said collision and plaintiff's said injuries." The answer was a general denial and the following plea: "For another and further defense to said petition, defendant avers that whatever injuries the plaintiff sustained were occasioned by his own carelessness and negligence in driving in front of defendant's moving car while the same was in close proximity to him." The facts in the case disclosed by the evidence are substantially as follows: The plaintiff, a young man aged about 24 years, in the employ of one Merten as driver of a coal wagon at \$10.50 per week, was on the 1st day of February, 1901, driving a two-horse team and wagon loaded with coal on Broadway, in the city of St. Louis, on which street the defendant operates its street cars upon two tracks; north-bound cars going on the east track, and south-bound cars on the west track. The plaintiff was driving north on the west side of Broadway, parallel with and distant from the west track about three feet. When near the intersection of Broadway with Buchanan street, the front wheels of his wagon went into a hole in the street, and his team stalled. He succeeded in getting the front wheels out, but, when the hind wheels went into the hole, in order to extricate them he had to swing his horses towards the east across the west track, which brought the fore wheels against or very near the west rail of that track; and when he had done so, and the wagon and team were in this position, the plaintiff, standing on the doubletrees, urging his horses to the pull, the team was struck by one of defendant's south-bound cars, the wagon turned around, the plaintiff thrown under one of the horses, rendered unconscious, one of his feet mashed, and his body otherwise bruised. From the injury to his foot he suffered great pain, was confined to his bed for five months, afterwards used crutches for about six weeks, and then a cane for about two weeks, and since has been able to walk without either; but, when the foot touches anything hard, it hurts. He was under surgical treatment eight months. The surgeon who attended him testified that the foot had been crushed and laid open; that there was a cut extending from the tip of the large toe to the upper part of the foot; that blood poisoning set in, the tissues sloughed off, and amputation of the big toe became necessary; that in cutting off the toe it became necessary to clip one of the phalanges or end bones that pro-

truded, and that he will always be crippled more or less; that the charges for his services are between four and five hundred dollars; and that they are reasonable. It was daylight when the accident happened. The track was level. The view north for three or four blocks was unobstructed. The evidence for the plaintiff tended to prove that the defendant's car was going at the rate of 20 miles an hour; that no effort was made to stop the car or check its speed before the team was struck, and that it went 30 or 40 feet after the team was struck before it was stopped; that the team was on the track some time before it was struck—plaintiff says, four or five minutes. Three other witnesses testify that the plaintiff's team was on the track when they saw the defendant's car approaching at a distance of from 250 to 300 feet, that no effort was made to stop the car, and that its speed was not checked until after the collision. The plaintiff's evidence further tended to prove that the car, going at the rate of 20 miles an hour, could have been stopped with the brakes in about 130 feet, and with the reverse in about 100 feet, and when going at the rate of 15 miles an hour could have been stopped with the brake in 90 or 100 feet, and with the reverse in about 75 feet. The only witness called for the defendant was the motorman, who testified that he first saw the plaintiff and his team when he was one block north of where the team stood; that the horses were not then on the track, but standing still beside it; that his car was going about 10 miles an hour; and that when the car was about 50 or 60 feet from the horses they swung across the west rail, were struck, and the car ran about 30 feet further.

1. At the inception of the trial the defendant moved the court to require the plaintiff to elect on which one of the causes of action stated in the petition he will stand, upon the grounds: "First, that said petition attempts to combine in one count both alleged common-law negligence and the alleged violation of an ordinance commonly called the 'Vigilant Watch Ordinance'; second, said petition attempts to combine in one count a cause of action ex contractu and a cause of action ex delicto." And in the course of the trial the plaintiff was permitted to introduce said ordinance in evidence over the objections of the defendant. The overruling of the motion to elect and the admission of the ordinance in evidence are assigned as error. These assignments of error were argued and considered in the case of *Sluder v. Transit Company*, 88 S. W. 648, in which the whole question is exhaustively treated in the opinions in that case, delivered at the last sitting of the court in banc, on the 1st of June, 1906, and in which the ruling was adverse to the contention of the defendant. Hence we hold in this as we did in that case, which is on all fours with this on these points, and for the reasons stated

in the majority opinion therein, that the court committed no error in overruling the motion to elect, nor in admitting the ordinance in evidence.

2. At the close of plaintiff's evidence and at the close of all the evidence the defendants interposed a demurrer thereto, and the overruling of these demurrers is assigned as error.

On the main issue the case was submitted to the jury upon the following instructions:

For plaintiff:

"(1) Although the jury should believe and find from the evidence that the plaintiff, whilst trying to get his wagon out of a hole in the street (if the jury find that the wagon was so in a hole) and that, in driving his horses attached to the wagon, got them upon defendant's track in Broadway, yet if the jury find from the evidence that after said horses were so upon said track they were in danger of being struck by defendant's south-bound car, and that defendant's motorman saw said team on said track, and in danger of being struck by said car, and that, after said motorman saw said team on said track and in such danger, he could, by the exercise of ordinary care, have stopped said car and prevented said car from striking said team, and neglected to do so, and caused said car to strike said team and injure the plaintiff, then plaintiff is entitled to recover, even if the jury should believe that he did not exercise ordinary care in pulling his horses on said track.

"(2) If the jury find from the evidence in this case that on the 1st day of February, 1901, the defendant was operating the railway and car mentioned in the evidence for the purpose of transporting persons for hire from one point to another in the city of St. Louis; and if the jury find from the evidence that at said time Broadway and Buchanan streets at the places mentioned in the evidence were open public streets within the city of St. Louis; and if the jury find from the evidence that on said day the plaintiff was driving a team attached to a wagon northward on Broadway, at its intersection with Buchanan street, in the city of St. Louis, and that whilst doing so the wagon was stalled, and, in attempting to get his wagon away from the place where stalled, the plaintiff pulled the horses on the track of the defendant in said street; and if the jury find from the evidence in this case that, whilst said horses were on defendant's track, defendant's motorman in charge of its car saw said horses on said track and in danger of being struck by said car as it moved along defendant's track; and if the jury further find from the evidence that said motorman, after he saw said horses on said track and in danger of being struck and injured by said car, could by the exercise of ordinary care have stopped said car and averted striking said team, and neglected to do so; and if the jury find from the evidence in this case that, whilst said team was so upon defend-

ant's track and in such danger, defendant's motorman in charge of its south-bound car caused or suffered said car to strike one of said horses, throw him down upon plaintiff, and injure the plaintiff; and if the jury find from the evidence that defendant's said motorman did not exercise ordinary care in thus causing said car to strike said horse and injure the plaintiff—then the plaintiff is entitled to recover, if he was exercising ordinary care at the time of his injury."

For defendant:

"(2) It was the duty of the plaintiff, while approaching defendant's track in the street, to look and listen for the purpose of ascertaining whether a car was coming or not; and if you find from the evidence that plaintiff could have known of the approach of the car on the track, by either looking or listening, in time to have avoided a collision with the car, and that he either failed to look or listen, or, if he looked or listened, to heed what he saw, or to take any precaution to avoid a collision with the car, when he might have done so by the exercise of ordinary care, then he was guilty of such negligence as defeats his recovery in this action, and your verdict must be for the defendant, *provided you further find that the defendant, by the exercise of ordinary care and prudence, could not have avoided the collision after it discovered the plaintiff's perilous position.*

"(3) You are further instructed that while the rights of plaintiff and defendant to the use of the street were equal, mutual, and reciprocal, yet if you find from the evidence that defendant's car moved upon a fixed track, and was propelled by a power less easily controlled than a driver's control of his team, and was under such a momentum as to render it more difficult to stop than for the team to have stopped, then it became the duty of the plaintiff not to attempt to cross in close proximity to the approaching car, but to stop temporarily and let the car pass; and if you find from the evidence that by so doing the plaintiff could have avoided the collision, and that he failed so to do, then you should find that the plaintiff was guilty of negligence, which defeats the plaintiff's right to recovery in this action, and your verdict must be for the defendant, *provided you further find the defendant, by the exercise of ordinary care and prudence, could not have avoided the collision after it discovered the perilous position of the plaintiff.*

"(4) The court instructs the jury that if they believe from the evidence that plaintiff saw said car coming, or in the exercise of ordinary care could have seen said car coming, and that he was then standing on the doubletree of his wagon, and that he could have avoided said accident by jumping from said wagon, and that in the exercise of ordinary care he would have jumped, and that he failed to do so, and thereby directly contributed to his injuries, he cannot recover, and your verdict must be for the defendant, *provided you further find that the defendant,*

in the exercise of ordinary care and prudence, could not have avoided the collision.

"(5) The court instructs the jury that if from the evidence the jury believe that defendant's motorman operating the said car saw plaintiff's wagon and horses resting near defendant's track, but so far away from said track as not to be in danger of being struck by said moving car, defendant's motorman had the right to assume that plaintiff's horses would remain in said position, and had the right to move his car forward; and if the jury further believe from the evidence that thereafter plaintiff's horses changed their position, and got in front of said car, and thereby caused or directly contributed to plaintiff's alleged injuries, and that the motorman in charge thereof could not then stop his car and avoid said accident, plaintiff cannot recover, and your verdict must be for the defendant."

Instructions Nos. 2, 3, and 4, as asked for by the defendant, were modified by the court by adding the proviso in each in italics. The modification of these instructions and the giving of the two instructions aforesaid for the plaintiff are assigned as error.

3. It is contended for the defendant that the demurrer to the evidence ought to have been sustained because the plaintiff turned his horses directly across the track, without looking or listening for an approaching car, and continued in that position, when there was nothing to prevent his swinging his horses to their original position, where they would have been out of danger from the approaching car, which he might have seen if he had looked. This contention is not well grounded. Plaintiff testified that when he swung the horses across the track he looked, and there was no coming car in view; that he did not look again because he was busy getting out of the hole; that the horses were on the track, slipping, and one of them was shying; that he was holding himself on the wagon with one hand, and holding the horses up with the other; that he was on the doubletree, urging and watching both his horses and the hind wheels of the wagon, to see if he was making any headway, and the horses were just stretched out to make the pull that would have drawn him out when they were struck by the car. He also says that he did not look again because he thought that if a car was coming the man would have sense enough not to run him down. His evidence and the evidence of three other witnesses who saw the collision tend strongly to prove that when he swung his horses across the track it was necessary for him to do so in order to extricate his wagon from the hole in the street in which he was stalled, and that when he did so the car was not in such close proximity as to render the movement apparently dangerous, and that thereafter he made every reasonable exertion to clear the track and go his way, as he had a right to do, either over the track or beside it. In order that he might do so, it was necessary that

his attention should be directed to the management and movement of his team and wagon, and he cannot be charged with negligence because while doing so he did not keep continuous watch for an approaching car. He could not be reasonably expected to do so, considering his situation and the nature of his engagements; and as the view of the track was unobstructed for a distance of at least a block, and his situation was plainly observable for that distance, he had a right to expect that he would not be run down by an approaching car. The only evidence in the case tending to prove negligence on the part of the plaintiff, contributing to his injury, was that of the defendant's motorman, who testified that he saw the plaintiff and his team when he was a block north of where the team stood; that at that time the team was standing beside the track, a sufficient distance therefrom to be in a place of safety; and that it remained in that position until the car was about 50 or 60 feet from the horses, when they were turned across the track in front of the car. This evidence of the motorman was flatly contradicted not only by the plaintiff himself, whose evidence tended to prove that his horses were on the track when the car was one block distant, and when the motorman says he first saw them, but by three other witnesses, who saw the car coming, and who testified that they saw the horses on the track when the car was distant from 250 to 300 feet—a distance affording him ample time and space in which to have stopped or checked the car and avoided the injury—and yet, as all the evidence tended to prove, he did nothing either to stop the car or check its speed; thereby showing, if the evidence for the plaintiff is to be taken as true, as upon demurrer it must, such a reckless disregard of human life as to authorize a recovery, even though the plaintiff may have been negligent, in some respect, in being on the track at the time. The evidence for the plaintiff tended to prove the cause of action set up in the petition; and that of the defendant, the defense set up in the answer; and there never was a clearer case for a jury; and the court committed no error in overruling the demurrers to the evidence.

4. The instructions given for the plaintiff, the modification of the defendant's instructions as asked, and the refusal of the court to give three other instructions asked by the defendant are attacked upon the ground that the effect thereof was to eliminate from the consideration of the jury any contributory negligence of the defendant; and the argument in support thereof is on the same line with that made in support of the demurrer to the evidence. The issues to be submitted to the jury under the pleadings and on the evidence in this case were plain and simple. The charge in the petition is that while the plaintiff's horses were on the defendant's track, and his wagon at or near it, the defendant's servants carelessly and negligently

caused the defendant's car to collide therewith, without using ordinary care to prevent the collision. Plaintiff's evidence tended to prove the cause of action stated in the petition. The defense was that the plaintiff negligently assumed this position with his wagon and team when defendant's car was in such close proximity thereto as that the collision could not have been avoided by the exercise of ordinary care, and the evidence for the defendant tended to prove this defense. These issues were submitted to the jury by instruction No. 1 for the plaintiff and instruction No. 5 for the defendant, and, when read together, these instructions presented the main issues of the whole case so fairly and squarely to the jury as to point the way to a correct verdict upon the weight of the evidence. While the other instructions given were not inconsistent with these two, the case would have been better and more clearly presented, had the additional instructions been omitted, which, while they did not change, may have to some extent obscured, the meaning of the instructions as a whole; but, when these instructions are read as a whole, it will be seen that the only negligence of the plaintiff pleaded in the answer, of which there was proof, and which could avail as a defense to his action, was duly presented to the jury as sufficient ground to defeat a recovery and authorize a verdict for the defendant, and that no negligence of the plaintiff of which there was any proof, and which could have been of any service as a defense to the plaintiff's action, was withdrawn from the consideration of the jury, unless we are prepared to hold that a traveler upon the street must at all times, when he happens to be on a railroad track therein, keep a continuous watch for an approaching car, at the peril of his life or limb, and that a failure to do so will exempt the railroad company from any liability for failure to use ordinary care to prevent injury to him, and, as a necessary corollary, that such traveler has no right to assume that the servants of a street railway company will not, so far as they can by the exercise of ordinary care, refrain from injuring him—a duty imposed upon them not only by ordinance, but by the ordinary instincts of humanity. We are not willing to so hold, and such is not the law in this state, in which the doctrine is well established that, although an injured party may have been guilty of negligence contributory to his injury in being on a railroad track, the company is still liable for the injury if it could have been prevented by the exercise of ordinary care on the part of the company after the discovery of the danger in which the injured party stood. *Isabel v. Railroad*, 60 Mo. 475; *Harlan v. Railroad*, 65 Mo. 22; *Zimmerman v. Railroad*, 71 Mo. 476; *Kelley v. Railroad*, 75 Mo. 138; *Werner v. Railroad*, 81 Mo. 368; *Scoville v. Railroad*, 81 Mo. 435; *Dunkman v. Railroad*, 95 Mo. 233, 4 S. W. 670; *Guenther v. Railroad*, 95 Mo. 286, 8 S. W. 371; *Id.*, 108 Mo. 18, 18 S. W. 846; *Kelley v.*

Railroad, 101 Mo. 67, 18 S. W. 806, 8 L. R. A. 783; *Hanlon v. Railroad*, 104 Mo. 381, 16 S. W. 233; *Fiedler v. Railroad*, 107 Mo. 645, 18 S. W. 847; *Sullivan v. Railroad*, 117 Mo. 214, 23 S. W. 149; *Sinclair v. Railroad*, 133 Mo. 233, 34 S. W. 76; *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195; *Klockenbrink v. Railroad*, 172 Mo. 678, 72 S. W. 900; *Roefeldt v. Railroad*, 180 Mo. 554, 79 S. W. 706; *Scullin v. Railroad*, 184 Mo. 695, 83 S. W. 760.

Plaintiff had as much right on the street as did defendant, and in pursuing his way, to be on that part of the street over which the defendant's track was laid. It was his duty to pursue his way with due care for his own safety and the safety of others, and if, negligent of the former, he went in the way of defendant's car, in such close proximity thereto that the servants of the defendant could not by the exercise of ordinary care prevent injury to him, he has himself only to blame for his injuries, and he ought not to recover; and so the court, in effect, instructed the jury. On the other hand, it was the duty of the servants of the defendant to pursue their way on defendant's track in the street with due care for the safety of all persons that might be on the track, and not to injure them, if within their power to prevent it by the use of ordinary care, and if, disregarding this duty, they did thereby injure the plaintiff, he ought to recover for those injuries; and the court, in effect, so instructed the jury, and this is all there was to the case. The verdict was the legitimate fruit of such instructions and of the weight of the evidence, which, as a whole, tended to prove that, after defendant's motorman discovered plaintiff's team upon the track at a distance within which he could easily have stopped his car or checked its speed so as to have prevented the collision, he took no steps whatever to do so, but recklessly pursued his way at a high rate of speed; thereby causing his car to collide with the team and wagon, and to inflict the injuries of which the plaintiff complains. The verdict was for the right party, and we find no error in the action of the court on the instructions either given or refused that calls for a reversal.

5. No error is assigned upon the instructions on the measure of damages, but it is contended that the verdict is so excessive as to evince passion and prejudice on the part of the jury. We do not think so, in view of the plaintiff's serious injuries, which have been fully set out. While the verdict is a liberal one, it does not shock our sense of justice, or furnish any reasonable ground for the assumption that it was the product of partiality or prejudice on the part of the jury.

On the whole record, finding no substantial error in the trial, affecting the merits of the case, the judgment of the circuit court will be affirmed. All concur, except that MARSHALL, J., does not concur in the rulings in the *Sluder Case*, referred to in the opinion.

CHOCTAW, O. & G. RY. CO. v. ROLFE.
(Supreme Court of Arkansas. July 1, 1905.)

1. CARRIERS—FAILURE TO FURNISH CARS—COMPLAINT—SUFFICIENCY.

An allegation in the complaint in an action against a railway company for failure to furnish cars that plaintiff had demanded of the company, through its agent at a designated station, that cars be furnished there, and that he had demanded of its agent at another designated station, who acted as agent for another station, that cars be furnished at the latter station, sufficiently shows demands of proper authority, and sufficiently apprises the company of the agents on whom the demands were made.

2. SAME.

A complaint in an action against a railway company for failure to furnish cars which alleges that plaintiff placed for shipment at stations named certain quantities of lumber, and that he offered the same for shipment, sufficiently shows that the tender was to the respective station agents.

3. SAME.

A complaint in an action against a railway company for failure to furnish cars which alleges that property was tendered for shipment and that cars were demanded in a certain month is sufficiently definite as to the time when the demands were made, where the stations were small, so that the company might ascertain whether such was the fact.

4. PLEADINGS—UNNECESSARY ALLEGATIONS—MOTION TO MAKE DEFINITE.

An unnecessary allegation in a pleading should not be made more definite and certain.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1176.]

5. AGENCY—EVIDENCE—STATEMENTS OF AGENTS.

Where, in an action against a railway company for failure to furnish cars, it was shown that the agent at a station brought about a meeting between the shipper and an officer of the company designated as the "general manager," and an audience was secured with a person in the company's general offices with reference to securing cars, and such person was recommended as the "general traffic manager," and was in the office, doing business, the statements of the persons known as "general manager" and "general traffic manager" were admissible in evidence.

6. CARRIERS—FAILURE TO FURNISH CARS—SPECIAL DAMAGES—WHEN RECOVERABLE.

A shipper cannot recover special damages arising from a railroad company's failure to furnish cars as agreed unless the facts leading to the special damages are made known to the company.

7. SAME.

A shipper desirous of shipping logs showed them to the general manager of a railroad company, and explained the method and expense of loading them. The manager agreed to furnish cars. *Held*, that the shipper had a right to keep his teams necessary for loading on expense while waiting for the company's performance of the agreement, and on its failure to furnish cars he was entitled to recover the expense as special damages.

Appeal from Circuit Court, St. Francis County; Allen Hughes, Judge.

Action by E. A. Rolfe against the Choctaw, Oklahoma & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Peirce and T. S. Buzbee, for appellant. N. W. Norton, for appellee.

HILL, C. J. Rolfe was engaged in cutting and shipping logs, and had a quantity of them at Widener and Proctor Stations, on appellant's line of railroad. Darnall wanted to purchase them delivered on board the cars at these stations, and Rolfe was not willing to enter into the contract until he had assurances that he could get the cars for the shipments. Ward, representing Darnall, went to see the traffic manager of the appellant at Little Rock about the matter, and explained the situation; and he told Ward to make the contract, and the cars would be furnished. Rolfe saw the agent at Forrest City, and he arranged a meeting between Rolfe and the general manager of the road, who was coming over the line in a special car. Rolfe saw the manager, showed him the logs, and explained the situation to him; told him he would have gotten out the logs before if he had had cars, and about the expenses incident to loading them with teams. The general manager promised he would get the cars, and Rolfe proceeded to get out the logs for shipment to Darnall. Very shortly after the conversation with the general manager, in August, he received three cars at Proctor, and then did not receive any more cars till October, when he commenced receiving them again, and received 27 cars from October 11th to some time in January, when his logs were finally shipped. He kept teams for loading at Proctor during the interval from August to October, and was daily making demands of the various agents and officers of the road, from the agent at Edmondson, where orders for Proctor were taken, to the principal officers of the company. Rolfe sued for damages to the logs by reason of depreciation while loading them for shipment, and for expenses of his teams at Proctor from August to October; alleging it was necessary to keep them there, in order to load the logs when the cars arrived. The uncontroverted evidence placed the damages for depreciation at \$264, and the jury gave him that sum, and \$200 special damages on account of the expenses of his teams.

1. The first point made is that a demurrer to the complaint should have been sustained. The allegation of the complaint assailed by the demurrer is: "The plaintiff had a great number of times demanded of defendant, through its agents at Forrest City and at Widener, and at Edmondson for Proctor, and at other times by letters addressed to the defendant's principal offices at Little Rock, that cars be placed on the side tracks at said stations of Proctor and Widener, that plaintiff might load said logs." The objection is that there was no allegation that these agents had authority to furnish cars, and that it is not stated to what principal offices the letters were addressed. The allegation that he demanded of the agent at Widener for that place shows demand of the proper authority. 1 Elliott on Railroads, § 363. The allegation that Edmondson was the place to

demand for Proctor, there being no agent at Proctor, is sufficient, and apprised the company of the agent upon whom demand was made; and, if he was not the agent in control of Proctor, that was a fact peculiarly within the company's knowledge. The demurrer was properly overruled.

2. The appellant asked that the amended complaint be made more specific by setting out (1) to which of defendant's agents or servants plaintiff tendered the timber; (2) from which of said agents or servants he requested cars, and the exact times and places of said requests; (3) the exact number of times he requested cars from defendant's agent at Forrest City; and (4) the dates of the letters and the offices of defendant to which said letters were addressed. The complaint alleged that the plaintiff placed for shipment at the stations named certain quantities of logs, "and that he offered and tendered for shipment said timber." This allegation shows with reasonable certainty that the tender was to the respective station agents. The allegation is that the tender and demands were made in August, and the company certainly could ascertain from these small stations whether such was a fact. This is not analogous to the duty to furnish names or numbers of trains causing injury, for there are so many trains operated by different crews that it is only fair to definitely designate the train, in order that the company may properly learn the facts. The allegation about demand of the principal officers at Little Rock was unnecessary, and, of course, an unnecessary allegation should not be made more definite and certain.

3. Objection is made that incompetent evidence was introduced in the statements of Mr. Wood and Mr. Holden, who were described as "General Manager" and "General Traffic Manager," respectively, without proof of their official positions. The station agent at Forrest City brought about a meeting between Mr. Wood and Rolfe, and Mr. Wood took Rolfe into his special car and carried him to Memphis; and Rolfe understood from his relations to the company, the statement of the agent, and his actions that he was general manager or "president of the concern." Mr. Ward found Mr. Holden in the general offices of the company at Little Rock, and secured an audience with him there on the subject of securing cars if he entered into the contract to purchase the logs. "He was recommended to witness as the general traffic manager. He was in the office, doing business." The testimony was not incompetent.

4. The elements of damage are assailed. The depreciation in the logs during the time of the negligent failure to ship them is too plain for discussion. See *Sutherland on Damages* (3d Ed.) § 37. The damage arising from expenses of keeping the teams rests on a different proposition. These constitute special damages, were sued for as such, and spe-

cially found as such by the jury. For a breach of an implied contract of carriage; or the breach of any contract, before special damages are recoverable, the facts and circumstances leading to the special damages must be made known to the party to be charged, in order that he may properly avoid them. When thus made known, and the natural consequences flowing from the special circumstance brought home to the contracting party, he is liable for the special damages. This rule and its application to implied contracts of carriage and delivery may be found discussed in *Ry. v. Ragsdale*, 46 Miss. 458; *Ligon v. Ry.*, 3 Willson, Civ. Cas. Ct. App. § 1; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Crutcher v. C., O. & G. Ry.* (Ark.) 85 S. W. 770; *Hutchinson on Carriers*, § 776. Applying the principles to the facts: The uncontroverted evidence shows that the general traffic manager had notice of the intended contract between Rolfe and his vendee, and that it was dependent on securing the cars, and that he told the parties to make the contract, and the cars would be furnished. Rolfe personally showed the logs to the general manager of the road, and explained the method and expense of loading them, and was assured that he would receive the cars, and did receive three cars shortly thereafter. He had a right to rely upon these assurances for a reasonable time, and keep his teams on expense, expecting the fulfillment of the duty to furnish the cars. The evidence shows he was very assiduous in his efforts to get the cars in the time of this delay. The jury gave him much less than his evidence showed his expenses were, and the court is of opinion that there is sufficient evidence of notice to the company of the special circumstances to render it responsible for special damages in keeping the teams for a reasonable time.

The judgment is affirmed.

CARPENTER et al. v. JONES et al.

(Supreme Court of Arkansas. June 24, 1905.)

1. EJECTMENT—TITLE—BURDEN OF PROOF.

In ejectment plaintiff must, in order to recover, rely on the strength of his own title, and not on the weakness of the title of the defendant.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 18.]

2. SAME—EVIDENCE—LOST DEED.

The best evidence of title by conveyance is the original deed; the next best evidence is a certified copy of the record; but when the original deed is lost, and was not put of record, oral testimony is admissible to show that a deed was made and the title conveyed.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 518.]

3. APPEAL — REFUSAL OF INSTRUCTIONS — HARMLESS ERROR.

When the questions at issue were properly presented to the jury, error cannot be predicated on the refusal of instructions requested.

4. SAME.

Complaint cannot be made in the Supreme Court of the failure to give instructions on the burden of proof and credibility of witnesses, when no request was made for such instructions.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1809-1814.]

Appeal from Circuit Court, Arkansas County; Geo. M. Chapline, Judge.

This is an action in ejectment, brought by C. B. and J. W. Jones against Wm. N. Carpenter et al. for the possession of the east half of the southeast quarter and the northwest quarter of the southeast quarter of section 27, township 2 south, range 3 west, in Arkansas county, Ark. Judgment for plaintiffs. Defendants appeal. Affirmed.

H. A. & J. R. Parker, for appellants.
Thomas & Lee, for appellees.

WOOD, J. The abstract of the evidence and the instructions shows that the only questions presented and determined by the court below were whether or not Matilda Heigh, through whom both parties claim title, has deeded the land in controversy to John W. Jones, the ancestor of appellees, and, if so, could appellees, upon the deed being lost, prove its execution and contents by parol evidence. The lower court gave the following instructions: "No. 1. The plaintiff in this suit, in order to recover the land in controversy, must rely upon the strength of his own title, and not on the weakness of the title of the defendant; and before you can find for the plaintiff in this suit you must find the legal title to said land to have been vested in the plaintiff at the commencement of this suit. No. 2. The plaintiff in this suit claims that a conveyance of the lands in controversy from Matilda Heigh to John W. Jones was made; that a deed duly executed was delivered to John W. Jones, and that said deed was not recorded, and that the original was lost. The court instructs you that the best evidence of a title is the original deed of conveyance, and the next best evidence is a certified copy of the record. When the original deed was lost, and not put of record, the plaintiff may show by oral testimony that a deed was made and the title was conveyed to said Jones by Matilda Heigh, and in determining whether or no such a conveyance was made may take into consideration oral evidence that such a deed was made; and in connection with said oral evidence you may consider who claims

to be the owner of said land, how long such claim has been set up, whether the said land was held adversely to said claim, if wild and uncultivated, who paid the taxes on said land, and whether or not said land has been recognized and known as the Jones land since the time it is claimed said land was conveyed from Matilda Heigh to said Jones. And if you find from all the evidence in this case the title to said land never passed from Matilda Heigh to John W. Jones, then the plaintiff is not entitled to recover in this suit, and the form of your verdict will be, 'We the jury find for the defendant.' If you find the title to the land in controversy to be in the plaintiff, the form of your verdict will be 'We, the jury, find for the plaintiff.'" The court refused the following instructions which were asked for the defendant: "(3) The court instructs the jury that, in order to prove a lost deed, its existence must be proven with great clearness; that the signatures by the parties signing it must be proven to have been legal; that the consideration in said deed must be proven; that the lands conveyed in said deed must be proven; that the approximate date of said deed must be proven; that the granting clause in said deed must be proven. (4) The court instructs the jury that all the facts and details of a lost deed must be so clearly proven that the proof will supply the place of the instrument itself, in order that the defendant may except to any legal defects therein; and unless plaintiff so makes said proof, you will find for defendant."

There was no error in the giving or refusing of instructions. The questions at issue in the court below were properly presented. The questions of law involved here are ruled by the principles announced in *Calloway v. Cossat*, 45 Ark. 81, and *Stewart v. Scott*, 51 Ark. 187, 15 S. W. 463. Appellants cannot complain here of the failure of the court to give instructions on the burden of proof and credibility of witnesses, when no request was made by them of the court below for such instructions. Had appellants asked such instructions, they would have doubtless been given. No question of that kind was raised in the court below, and cannot be raised here for the first time.

We find no prejudicial error in the rulings of the court upon the admissibility of evidence. Upon the questions of fact there was evidence sufficient here to support the verdict.

The judgment is therefore affirmed.

GARVEY v. STATE.

(Court of Civil Appeals of Texas. June 24, 1905.)

1. ABSENTEES—PROCESS—SUBSTITUTED SERVICE—FAILURE TO APPOINT ATTORNEY AD LITEM—STATEMENT OF EVIDENCE.

In an action against a nonresident, cited by publication, failure to comply with Sayles' Ann. Civ. St. 1897, art. 1846, providing that where service of process has been made by publication, and no answer has been filed, etc., the court shall appoint an attorney to defend the suit, and judgment shall be rendered as in other cases, but in every such case a statement of the evidence, approved by the judge, shall be filed with the papers of the cause as part of the record thereof, is reversible error.

2. TAX SALES—CITATION—SUFFICIENCY—STATUTORY REQUIREMENTS—FAILURE TO OBSERVE—JUDGMENT.

Under Gen. Laws 1897, p. 138, c. 103, § 15, prescribing the form of the citation or notice in tax cases where the owner of lands charged to be delinquent is a nonresident, which prescribed form, among other things, directs that the party sued shall be cited and made party defendant by notice "in the name of the state and county, directed to all persons owning or claiming any interest" in the land to be affected, a notice not complying with such form is insufficient to support a judgment for taxes, with foreclosure of tax lien.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1338.]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by the state against E. A. Garvey. Judgment for plaintiff, and defendant appeals. Reversed.

H. E. Bradford, for appellant.

CONNER, C. J. On September 3, 1898, defendant in error, at the instance of her county attorney, instituted this suit in the district court of Palo Pinto county to recover from plaintiff in error certain state and county taxes alleged to be delinquent for the years 1891 to 1897, inclusive, with interest, penalty, and costs, and to foreclose the tax lien on certain lots in the town of Brazos, said county. The defendant was alleged in plaintiff's petition to be a citizen of the state of Missouri, and was cited by publication; the notice being published in a newspaper published in Palo Pinto county, once each week, for three consecutive weeks. There being no appearance nor answer by defendant, judgment was rendered as by default on March 23, 1904, for the amount sued for, with foreclosure of the tax lien on the lots described in plaintiff's petition (except as to one lot, which was dismissed from the suit), and personal judgment, with award of execution, was also rendered against defendant for the amount sued for. No attorney ad litem was appointed by the court to represent the nonresident defendant, nor was any statement of the evidence made out and filed with the papers in the case. From said judgment the defendant, E. A. Garvey, has prosecuted this writ of error.

Error is assigned to the failure of the court

to appoint an attorney ad litem, and to have filed a statement of the evidence, approved and signed by the judge, as provided by article 1846, Sayles' Ann. Civ. St. 1897. We had occasion to consider the precise question thus presented in the case of Schaefer v. Coffman, decided on the 3d inst. (memorandum decision); and we there held, upon writ of error, in an unpublished opinion by Justice Stephens, that a failure to observe the statute cited would require a reversal of the judgment, citing Byrnes v. Sampson, 74 Tex. 79, 11 S. W. 1073. We find no reason for a change of conclusion, and hence must reverse the judgment and remand the cause on the authority given.

We think the same direction must be given for yet another reason, which, though not assigned as error, is apparent of record. This suit was instituted and maintained under and by virtue of the act of 1897, generally known as the "Colquitt Act." See Gen. Laws 1897, p. 138, c. 103. Section 15 of that act prescribes the form of the citation or notice in cases where, as is here alleged, the owner of lands charged to be delinquent is a nonresident. The prescribed form, among other things, directs that the party sued shall be cited and made party defendant by notice in "the name of the state and county directed to all persons owning or claiming any interest" in the land to be affected. These requisites were not observed in the case before us. On the contrary, the citation found in the record is, with variation in name, place, and amounts, in all substantial particulars the same in form as that quoted by us in the case of Babcock v. Wolffarth, 60 S. W. 642, and which we there held to be insufficient to support a judgment for taxes, with foreclosure of tax lien.

Judgment reversed, and cause remanded.

MANN-TANKERSLY DRUG CO. v. CHEAIRS & SON.

(Supreme Court of Arkansas. June 10, 1905.)

1. SALES—REPRESENTATIONS—BUYER'S RELIANCE—EVIDENCE—SUFFICIENCY.

Evidence in an action against a seller of drugs to be administered to animals, for the death of the animals from the effects thereof, examined, and held to support a finding that the buyer relied on the representations of the seller, believed to be competent to give advice, that the drugs could be administered with safety, warranting a judgment against the seller for the loss sustained.

2. SAME—LIABILITY FOR DAMAGES.

Where plaintiffs ordered vaccine virus to prevent their stock from contracting anthrax, and the order was sent to defendant to fill, and defendant, not having it in stock, instructed a druggist to ship the same to plaintiffs, and instead a virus for the prevention of blackleg was shipped to plaintiffs, and charged by defendant to plaintiffs, and they informed defendant of its receipt, and inquired why the anthrax virus was not shipped, and defendant represented that the two medicines were the same, and plaintiffs, relying thereon, vaccinated their mules and horses with the blackleg

virus, which is dangerous to horses and mules, and by reason thereof the horses and mules died, defendant was liable for their value.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 25.]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by J. T. Cheairs & Son against the Mann-Tankersly Drug Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Bridges & Wooldridge, for appellant. Austin & Danaher, for appellees.

BATTLE, J. The complaint in this action was filed on April 24, 1902, and states, among other things:

"The plaintiffs, J. T. Cheairs, Sr., and J. T. Cheairs, Jr., were doing business at Winchester, Arkansas, as partners under the firm name of J. T. Cheairs & Son, and that the defendant, Mann-Tankersly Drug Company, a corporation engaged in the drug business at Pine Bluff, Arkansas, sold and delivered to plaintiffs, at Winchester, on the _____ day of _____, 1902, five cases of vaccine virus, known as 'blackleg virus,' which is made and prepared for vaccinating cattle (commonly cows) to prevent and avoid a certain disease peculiar to cattle, called 'blackleg.' That instead plaintiffs had ordered and desired shipped to them certain vaccine virus, with which to inoculate or vaccinate their mules and horses so as to prevent a certain disease known and called 'charbon' or 'anthrax.'

"That upon receipt of same they inquired of defendant to learn why blackleg virus was sent to them, stating that they were not troubled with blackleg, and that they had ordered charbon or anthrax virus; and to this inquiry defendant negligently replied that the disease known as 'blackleg' and anthrax and charbon vaccine are the same, and, relying upon this statement, plaintiffs vaccinated six horses and two mules with said blackleg virus, and that the mules and horses died from the effects of the vaccination; and plaintiffs set forth descriptions and values of the horses and mules. Plaintiffs further state that the statement made by defendant that blackleg and charbon and anthrax are the same, and that blackleg vaccine or virus and charbon anthrax vaccine or virus are the same, was and is untrue, which was unknown to plaintiffs. Plaintiffs pray for judgment against defendant for \$850."

The defendant answered and denied the allegations in the complaint, and alleged as follows:

"But on the contrary avers that plaintiffs were fully warned and advised that the goods they had purchased or ordered, and which had been delivered to them by other parties than the defendants, but which were the same goods used by the plaintiffs, were intended to be used upon cattle only, and that the plaintiffs, without regard to their

said knowledge and information, carelessly and negligently used blackleg virus upon their stock, and, by reason of the further fact that plaintiffs carelessly and negligently and unskillfully inoculated their mules and horses with said blackleg virus, their stock died.

"Wherefore defendant pleads the negligence of the plaintiffs in bar of this action.

"Defendant, for further answer, states that the plaintiffs were advised and fully aware of the fact that the goods received by them was intended for use upon cattle only, and plaintiffs negligently failed to advise defendant of such fact, and also failed to advise defendant that they intended to use blackleg virus upon any stock other than their cattle, but, on the contrary, in conversation with representatives of the defendant who afterwards conducted the correspondence with plaintiffs, stated and represented to the defendant that they were possessed of a large number of cattle, and desired to vaccinate them, as defendant supposed, for some disease common to cattle, whereby defendant was misled by plaintiffs, who carelessly and negligently made such representation to the defendant. So defendant pleads the carelessness and negligence of the plaintiffs in this regard in bar of this suit."

In the trial of the action, evidence was adduced tending to prove substantially the following facts:

J. T. Cheairs & Son were engaged in farming and mercantile business. A Mr. Lawrence, a traveling salesman of Parke, Davis & Co., of Detroit, Mich., called at their place of business. Plaintiffs say they ordered him to send them anthrax or charbon vaccine, but Lawrence says they ordered five cases of blackleg virus. The order was sent to the defendant, at Pine Bluff, Ark., to be filled; and, not having the medicine, it sent the order to Parke, Davis & Co., with directions to send the medicine directly to the plaintiffs, which they did. On receiving it they discovered that it was blackleg virus, with the following label on it, which they read:

"Blackleg Vaccine Improved

"For cattle only. (double)

"Ten doses each of Nos. 1 and 2

"Dangerous.

"Physiologically tested.

"We would recommend that this parcel be returned after Jan. 9-03 to be replaced with fresh product. This Vaccine will, however, retain its potency for a much longer period, if kept under proper conditions. 845614

"Note directions enclosed before using the vaccine.

"Keep in a cool, dark place.

"Prepared in the Biological Laboratories of Parke, Davis & Co. Detroit, Mich., U. S. A."

Thereupon they wrote to the defendant the following letter:

"Winchester, Ark. 4-3-02. Mann-Tankersly Drug Co., Pine Bluff, Ark.—Dear Sirs:

We see that Parke, Davis & Co. shipped us 5 cases blackleg virus at \$2.00—\$10.00.

"We ordered charbon or anthrax virus. Please ask why they didn't send us the anthrax virus. We are not troubled with blackleg."

"Yours truly, J. T. Cheairs & Son."

And received from it the following reply:

"April 4, 1902. Messrs. J. T. Cheairs & Son, Winchester, Ark.—Dear Sirs: Replying to yours of the 8rd inst. regarding the Blackleg vaccine. We desire to state that Blackleg and Symptomatic Anthrax or Charbonne are the same, and Parke, Davis & Co., as do several other of the manufacturers, call their preparation Blackleg Vaccine, instead of Anthrax Vaccine, it being all the same.

"Trusting that this explanation is all that is necessary, We are,

"Yours truly,

"Mann-Tankersly Drug Co."

Plaintiffs, having dealt extensively with the defendant, and considering it "perfectly competent," relied upon its reply, and, having successfully and with good results vaccinated "hundreds of head of cattle and horses and other animals with anthrax vaccine," did not hesitate to use the medicine in the vaccination of horses and mules, and eight of the horses and mules so vaccinated died from the effects thereof. They were estimated to be worth as much as \$865. Horses and mules do not have blackleg, and blackleg vaccine administered to them frequently kills. The invoice of the medicine sent to the plaintiffs was in the name of the defendant, and not of Parke, Davis & Co.

The court instructed the jury, over the objections of the defendant, in part, as follows:

"If the jury believe that the plaintiff ordered from Parke, Davis & Co. vaccine virus to prevent their live stock from contracting a disease called 'charbon' or 'anthrax'; that said order was sent by the agent of Parke, Davis & Co. to defendant to be filled and charged by defendant to plaintiffs' account with it; the defendant, not having in stock the goods ordered, instructed Parke, Davis & Co. to ship the same to plaintiffs direct, and that instead a vaccine virus, for the prevention of a disease peculiar to cattle, called 'blackleg,' was shipped to plaintiffs, and invoiced and charged by the defendant to plaintiffs; and that upon the receipt of the blackleg virus by plaintiffs they informed the defendant of its receipt, and inquired to know of defendant why anthrax virus had not been shipped them, and notified the defendant that they were not troubled with blackleg; and if the jury further believe that defendant then represented to plaintiffs that blackleg virus and anthrax virus were the same, and that plaintiffs, relying upon said assurance and representations of the defendant, vaccinated their mules and horses with said blackleg virus; and if the jury further believes from the evidence that anthrax

virus and blackleg virus are not the same, but different poisons, and that blackleg virus is dangerous to the life of horses or mules, and should be used only in vaccinating cattle; and if they further believe from the evidence that, by reason of plaintiffs' vaccinating their mules and horses with said blackleg virus, they died—then defendant is liable to pay plaintiffs the reasonable value of all of said horses or mules which died because of such vaccination, and the jury will find for plaintiffs for the value of said horses and mules, with six per cent. interest thereon from the date of the institution of this suit, although the jury may also believe from the evidence that the said blackleg virus was labeled, 'For Cattle Only.'"

And the defendant requested and the court refused to give the following among other instructions:

"The court instructs the jury that should they find that the defendant represented to the plaintiffs that anthrax vaccine was the same as blackleg vaccine, and in so doing did not exercise ordinary care, and was therefore guilty of negligence; and the jury further find that the plaintiffs vaccinated their horses with blackleg vaccine, and did so, as is admitted by plaintiffs, after full knowledge and warning that blackleg vaccine was for cattle only, and that the blackleg vaccine was a dangerous preparation; and the jury finds from the evidence that the horses of plaintiffs died because of the use upon them of the blackleg vaccine described by the witness—then the plaintiffs were guilty of what the law calls contributory negligence, and the jury will find for the defendant."

But did give the following at its request:

"The court instructs the jury that it is a rule of law which must govern you in this case that when a party, such as the plaintiffs, Cheairs & Son, in this case, complain that they have been damaged or sustained loss by some act which they claim was one of negligence or want of care on the part of the defendant, that if it appears from the evidence that the plaintiffs, or either of them, by their own imprudence or neglect to take such care as an ordinarily prudent man would have taken under similar circumstances, or disregarded such precautions as an ordinarily prudent person would have taken, and if observed would have avoided the damage, loss, or injury complained of, and such negligent acts or omissions contributed directly to produce the result complained of, then plaintiffs cannot recover, and the jury will find for the defendant, although the jury finds from the evidence that the defendant was negligent as charged in the complaint."

The jury returned a verdict for plaintiffs in the sum of \$512.50. Judgment for that amount was rendered in their favor against the defendant, and it appealed.

The main question for the jury to decide, and upon which their verdict depended, was,

did the appellees rely upon the statement made by appellant in its letter to them of date April 4, 1902? That question was fairly submitted to them by the instructions of the court, they found that they did, and the evidence was sufficient to sustain their verdict. They purchased the medicine from the appellant, and, thinking it was not such as they wanted or ordered, took the precaution to consult them about it before using it, and, being informed that blackleg vaccine and anthrax vaccine are the same, and having used the latter successfully in vaccinating horses and mules, used the medicine sent, with fatal effect. They informed the defendant, in their letter to it, that they were not troubled with blackleg, and gave it to understand that medicine for that disease was not needed. They undoubtedly relied upon its statement, and were led to do so by extensive dealings with it, and by the belief that it was competent to advise them.

Judgment affirmed.

MERRITT v. WALLACE.

(Supreme Court of Arkansas. July 1, 1905.)

1. APPEAL—FAILURE TO BRING UP EVIDENCE—PRESUMPTIONS.

Where appellant did not bring the evidence into his abstract, the court on appeal will presume that the trial court's finding was sustained by the evidence.

2. GUARDIAN AND WARD—ACCOUNTING—CREDITS—EVIDENCE.

A guardian must introduce evidence to sustain the challenged items of his final account, or they will be rejected.

3. SAME—CARE OF WARD'S ESTATE—LOANS—FAILURE TO MAKE—LIABILITY FOR INTEREST.

Kirby's Dig. § 3804, requires guardians to loan the money of their wards under the direction of the court. Section 3805 makes a guardian failing to make a loan accountable for interest. Section 3808 declares that, if a guardian be unable to loan out his ward's money, the court shall order an investment in government bonds. A guardian was authorized to loan his ward's money on real estate security. He gave the statutory notice, and rejected the only application received on account of the insufficiency of the security. He made no report to the court until cited 10 years later. *Held*, that he failed to use reasonable diligence to make a loan, making him liable for interest.

Appeal from Circuit Court, Desha County, Arkansas City District; Antonio B. Grace, Judge.

Petition by Lena R. Wallace against B. F. Merritt for the settlement of his accounts as guardian. From a judgment settling the accounts, the guardian appeals. Affirmed.

B. F. Merritt, pro se. J. W. Dickinson, for appellee.

HILL, C. J. In 1888 appellant, Merritt, was appointed by the probate court guardian of Lena Crane, a minor—now Lena Wallace, the appellee herein. In 1889 the guardian received from life insurance policies \$4,-

900. January 13, 1890, he filed his first annual settlement, showing a balance on hand of \$4,555.49. To this settlement was appended a petition of the guardian for an order to loan \$4,000 of the ward's money, and at the April term, 1891, the court made an order directing the guardian to loan said sum on real estate security. There was no proceeding in the guardianship after the April term, 1891, until the January term, 1901, when a petition was filed by Mrs. Wallace, praying that her guardian be required to make a final settlement. On April 5, 1901, the guardian filed his second and final account, charging himself with \$1,281.26. The appellee filed numerous exceptions to the account, and made out an account as she contended it should be made, in which the guardian was charged with interest on the funds in his hands, and other matters differently stated. The probate court sustained some of the exceptions, and charged the guardian with interest since the ward's majority, and rendered judgment against him for \$1,861.25. The guardian appealed to the circuit court, and the issues were tried anew before the circuit judge. The only evidence was the affidavit of the guardian (treated as a deposition by consent) on the question of interest, and the deposition of Mrs. Wallace. The latter was practically a repetition of her exceptions to the account, and statement of the account as it should be. The appellant has failed to bring into his abstract the evidence, and therefore the presumption is that the evidence sustained the finding by the circuit judge. *Shorter University v. Franklin Bros.*, 88 South. 587, and authorities there cited. Aside from this presumption, however, the guardian did not introduce evidence to sustain his account, where challenged, and he would fail on that score. Mr. Woerner says: "The onus probandi rests upon the executor or administrator to establish the validity of any item of credit in the account which is challenged, and, for want of sufficient prima facie proof, such credit will be rejected." 2 Woerner on Administration, § 540. See, also, Schouler on Dom. Rel. § 372.

The circuit judge went through the accounts painstakingly, rejected some credits, and allowed others excepted to, and there is no ground to set aside his finding as to the amount due on the account. The principal question in the case is charging the guardian interest on the funds in his hands. The guardian testified: "I gave the statutory notice, and received from H. H. Halley an application to borrow said funds. That in my opinion, as such guardian, the security offered by said Halley was grossly inadequate. That, as such guardian, I received no other application for the loan of said fund." The trial court said: "He was entitled to a reasonable time to make investments or report his failure to do so to the court. Some authorities say three months is all that could be called reasonable; some say six months;

and in others even a year is hinted at as not too long under peculiar circumstances. It is extremely liberal to the defendant here to allow him the time from April term, 1891, when the order to lend was made, until the 1st of July, 1893, in which to take decisive action." The court charged him with 6 per cent. interest from the latter date, amounting to \$2,061.10. Section 3804, Kirby's Dig. requires guardians to loan idle money of their wards, under the direction of the court. Section 3805 provides: "If any guardian fail to loan the money of his ward on hand, as aforesaid, under the provisions of this act, he shall be accountable for the interest thereon." The general rule is that the guardian must exercise reasonable skill and diligence to loan the money, and if he fail to do so he is liable therefor at legal rate of interest, and if the ward can show it could have been loaned at a higher rate, he is chargeable with what he could have obtained. Rodgers on Domestic Relations, § 869; 2 Woerner on Administration, § 511; Price v. Peterson, 38 Ark. 494. The guardian rejected one application on account of the insufficiency of the security, and says he had no further applications. Section 3808, Kirby's Dig., contemplates, when money of the ward cannot be safely loaned, to have it invested in United States bonds. The guardian utterly fails to show reasonable diligence to secure a safe loan, and, had he exercised such diligence and failed, then he should have reported it to the court, to the end that the money be invested in bonds. Instead of doing that, he made no report for 10 years, and only then when cited into court.

The appellant has no cause of complaint against the judgment, and it is affirmed.

TOWN OF DEWITT v. LA COTTS.

(Supreme Court of Arkansas. July 1, 1905.)

1. DRUNKENNESS—NUISANCE AND DISORDERLY CONDUCT.

Drunkenness in a public place is a nuisance and disorderly conduct, within Kirby's Dig. §§ 5438, 5461, authorizing municipal corporations by ordinance to prevent nuisances and disorderly conduct.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Drunkards, § 10.]

2. SAME — CONFLICT BETWEEN ORDINANCE AND STATUTE.

An ordinance declaring drunkenness in a public place a nuisance does not conflict with Kirby's Dig. §§ 2550, 2552, 2553, authorizing the arrest by a peace officer of the state of a drunken person found in a public place.

Appeal from Circuit Court, Arkansas County; Geo. M. Chapline, Judge.

La Cotts was convicted of violating an ordinance, and on appeal to the circuit court judgment was rendered for defendant, and the town appeals. Reversed.

H. Coleman, Town Atty., and John F. Park, for appellant. L. C. Smith, for appellee.

McCULLOCH, J. Appellee was tried and convicted by the mayor of the incorporated town of Dewitt upon a warrant of arrest charging him with violation of an ordinance of the town providing that "it shall be unlawful and it is hereby declared a public nuisance for any person to appear or be found on any street, alley or on the public square of Dewitt in a state of intoxication or drunkenness." He appealed to the circuit court of Arkansas county, where the case was tried before a jury upon an agreed statement of facts to the effect that he was drunk on the streets of the town on the day named and as charged in the warrant of arrest. The court held that the ordinance was void, and directed the jury to return a verdict of not guilty, which was done, and the town appealed to this court.

We are not favored with a brief or argument in behalf of appellee in support of the decision of the court, but it is disclosed in the bill of exceptions that the ordinance was adjudged to be void on the grounds that it is in conflict with sections 2550, 2552, and 2553 of Kirby's Digest. Those sections of the statutes provide that "it shall be the duty of all peace officers to arrest any drunken person whom they may find at large and not in the care of some discreet person, and take him before some magistrate of the county, city or town, in which the arrest is made," who may "order him to be confined until he becomes sober." The next section provides that the magistrate may require of such person "security for his good behavior, and for keeping the peace for a period of not exceeding one year." Municipal corporations are by statute given the power to prevent by ordinances "injury or annoyance within the limits of the corporation from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated within the jurisdiction given to the board of health." Kirby's Dig. § 5438. In the case of *Ex parte Foote*, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63, this court said that "these statutes endow municipal corporations with power to prevent and abate nuisances, but they do not authorize the declaration of anything to be a nuisance which is not so in fact." But the court in that case upheld an ordinance declaring the keeping of a stallion or jack within the limits of the corporation to be a nuisance, and punishable by fine. Section 5461, Kirby's Dig., is as follows: "It is made the duty of the municipal corporation to publish such by-laws and ordinances as shall be necessary to secure such corporations and their inhabitants against injuries by fire, thieves, robbers, burglars and other persons violating the public peace; for the suppression of riots, and gambling, and indecent and disorderly conduct; for the punishment of all lewd and lascivious behavior in the streets and other public places; and they shall have power to make and publish such by-laws and ordinances not inconsistent

with the laws of this state, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof." These statutes undoubtedly authorize the ordinance in question. A municipality may, by ordinance, declare drunkenness in a public place to be either a nuisance or disorderly conduct, and punish it as such. It is a matter of common knowledge that drunkenness in a public place is offensive to all who come in contact with the person in that condition. It is a nuisance and disorderly conduct within the meaning of the statute, and may be declared to be such. Nor is the ordinance in any wise conflicting with the statute authorizing the arrest by a peace officer of the state of a drunken person found in a public place. *Brizzolari v. State*, 37 Ark. 364.

The judgment is reversed, and remanded for a new trial.

ARKANSAS CENT. R. CO. v. CRAIG.

(Supreme Court of Arkansas. July 1, 1905.)

WITNESSES—EXAMINATION BY JUDGE.

A trial judge may, in a reasonable and impartial way, so as not to indicate his opinion of the facts, propound questions to witnesses, to elicit pertinent facts, that the truth may be established.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 852-857.]

Appeal from Circuit Court, Logan County, Northern District; Jephtha H. Evans, Judge.

Action by John Craig against the Arkansas Central Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Oscar L. Miles and Lovick P. Miles, for appellant. Robt. J. White, for appellee.

RIDDICK, J. This is an appeal from a judgment against a railroad company in favor of the plaintiff for damages for killing his horse. We do not find any error in the admission of evidence or in the instructions, and are of the opinion that the evidence is sufficient to support the judgment.

Counsel for appellant contend with much force that the judgment should be reversed because the presiding judge during the trial propounded questions to the witnesses for plaintiff and defendant. The contention is not that these questions were improper, had they been propounded by counsel for plaintiff, but the contention is made that by propounding a number of questions the judge thereby assumed the role of attorney, and in that way indicated to the jury his opinion of the evidence, and prejudiced the rights of the defendant. It is true that a judge, under our law, should neither directly nor indirectly indicate to the jury his opinion of the facts in the case when the same are in dispute, and when the jury are to determine

what the facts are. Our Constitution forbids this, and such conduct on the part of a trial judge would be ground for reversal; but we cannot concur in the contention that it is impossible for a judge to propound questions, when counsel objects, without indicating his opinion of the facts to the jury. In a recent and very able work on the Law of Evidence, the author says: "One of the natural parts of the judicial function, in its orthodox and sound recognition, is the judge's power and duty to put to the witnesses such additional questions as seem to him desirable, to elicit the truth more fully. This just exercise of his function was never doubted at common law. The judge could even call a new witness of his own motion, and could seek evidence to inform himself judicially. Much more could he ask additional questions of a witness already called, but imperfectly examined. Fortunately," he says, "the tradition of the common law has never been lost. The right of the judge to interrogate as he thinks best has always been preserved in theory. It has, however, been necessary more frequently to maintain and vindicate it, and to resist incroachment upon it." 1 Wigmore on Evidence, § 784. "A circuit judge presiding at a trial," said the Supreme Court of Indiana, "is not a mere moderator between contending parties. He is a sworn officer, charged with grave public duties. In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice." The court held that there was nothing wrong in the judge "asking the witness any question, the answer to which would likely throw any light upon the testimony." *Huffman v. Cable*, 86 Ind. 596. It seems to be the general rule, well supported by the decided cases, that the trial judge has the right to propound such questions to witnesses as may be necessary in order to elicit pertinent facts, in order that the truth may be established. Of course, this must be done in a reasonable and impartial way, so as not to indicate his opinion of the facts, and thereby prejudice the rights of the parties. Counsel say that it is "impossible for a lawyer worthy of the name" to propound questions to witnesses in a case without indicating an interest in the result of the trial, and they contend that therefore a judge cannot do so. But a lawyer is usually in fact interested in the success of his client. If he were not, he would indeed be hardly worthy of the name. Men who have strong feelings in favor of one side are apt to manifest such feelings by their conduct, but a judge worthy of the name should be only interested in establishing the truth. His questions should be propounded not to support the case of either litigant, but with the sole desire to elicit and bring out the truth, that justice may prevail. Having in fact no feeling for or against either party, it should not be difficult for him to refrain from exhibiting such feeling. It is the pr-

mary duty of the parties to bring out their own evidence. It is not usually necessary that the judge should propound many questions to witnesses, and for the judge to take the case out of the hands of counsel and take the lead in the examination of witnesses might at times be improper and prejudicial. But it would be a reproach to the law if he were required to sit still in either a civil or criminal trial and see justice defeated through the failure of counsel to ask a witness a question. *Sharp v. State*, 51 Ark. 154, 10 S. W. 228, 14 Am. St. Rep. 27; *South Covington & Cinn. St. Ry. Co. v. Stroh* (Ky.) 57 L. R. A. 875, and note. We have carefully read the bill of exceptions in this case, and see nothing in the questions propounded by the judge calculated to prejudice the rights of the defendant.

Judgment affirmed.

WATERS et ux. v. MERRIT PANTS CO.

(Supreme Court of Arkansas. July 1, 1905.)

1. FRAUDULENT CONVEYANCE—HUSBAND AND WIFE—PROOF OF INDEBTEDNESS.

Where a wife asserts, as consideration for a conveyance to her by her insolvent husband, fraudulent as to his creditors in the absence of consideration, a debt for money loaned him by her many years before, no written agreement to repay which was taken, her bare statement is not sufficient proof thereof.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 900.]

2. APPEAL—EQUITY—ADMISSION OF IMPROPER EVIDENCE.

A chancery case will not be reversed for admission of improper evidence, where without it the decree is supported by a preponderance of the legal evidence.

Appeal from Obancery Court, Howard County; James D. Shaver, Chancellor.

Action by the Merrit Pants Company against H. M. Waters and another. Decree for plaintiff. Defendants appeal. Affirmed.

W. C. Rodgers, for appellants. W. D. Lee, for appellee.

McCULLOCH, J. This is an action brought by appellee, Merrit Pants Company, against appellants, H. M. Waters and wife, in which appellee seeks to subject certain lands to the payment of a debt in the sum of \$380.75 due appellee by said H. M. Waters. It is alleged that H. M. Waters, being insolvent and indebted to appellee, purchased the land in controversy from one McClure, and, with intent to defraud his creditors, caused the title to be conveyed to his wife. The proof in the case consisted only of the testimony of McClure and Mrs. Waters, and it appears therefrom that McClure sold the land to H. M. Waters at a fixed price of \$300, which was paid by delivery to McClure of a lot of cattle and a small stock of merchandise—a remnant of the stock carried by Waters as a merchant—and that, at the request of H. M. Waters, McClure made the

deed to his wife. McClure testified that the cattle were taken at a valuation of either \$64 or \$67. Mrs. Waters testified the value of the cattle was fixed at \$80, and that they were her separate property. She also testified that her husband owed her about \$1,000 for a lot of cattle and horses which she had sold him when they were married, 20 years previously, and for proceeds of sale of her farm 13 years previously; that no note or other evidence of the indebtedness was executed by the husband; and that she had given him credit on the debt for \$220, the estimated value of the stock of merchandise used in payment of this tract of land. The chancellor found that the conveyance to Mrs. Waters was fraudulent, but that her property, the cattle, of the value of \$80, had been used in the purchase, and decreed a lien in favor of appellee for \$220, the value of the stock of merchandise. The defendants appealed.

It is settled by the decisions of this court that an insolvent husband, when justly indebted to his wife, may, without fraud, prefer her claim to that of other creditors, and make valid appropriation of his property to pay it, even though the result be to deprive other creditors of the means to satisfy their claims. But such transactions between husband and wife are viewed by the court with suspicion, and the perfect good faith of the transaction must be established by proof. Where the wife asserts as a consideration for conveyance of his property to her a claim of debt against her insolvent husband for money loaned to him many years previous—no note or other written evidence of an agreement to repay being shown to have been executed, and the alleged debt having become stale by long lapse of time, as in this case—her bare statement should be corroborated by some other evidence of the existence of a valid debt, before the courts can accept it in support of the conveyance. For a discussion of the law on this subject, reference is made to the recent case of *Davis v. Yonge* (Ark.) 85 S. W. 90, and nothing need be added here on the subject. See, also, *Godfrey v. Herring* (Ark.) 85 S. W. 232; *Driggs v. Norwood*, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78. We think the evidence in this case is far from satisfactory as to the existence of a valid debt, and that the chancellor was right in his conclusion.

Appellants complain that the court erred in allowing witness McClure to testify that, of the merchandise received from Waters, about \$125 worth bore the marks and name of appellee; thus tending to show that these goods were bought by Waters from appellee. The witness was allowed to examine the itemized account sued on, and, after examination, state that he recognized the number of suits of clothes, and the prices thereof, on the account, as the same he purchased from Waters. The decree was not dependent on this testimony for sufficient evidence to

support it, and, if it be held to be incompetent, the presumption must be indulged that the chancellor was not controlled by it in reaching his conclusion. A chancery case will not be reversed for the failure to exclude improper testimony where without it the decree is supported by a preponderance of the legal testimony. *Niagara Fire Ins. Co. v. Boon*, 88 S. W. 915; *Allen v. Ozark Land Co.*, 55 Ark. 549, 18 S. W. 1042.

Counsel for appellants also contends that the proof of insolvency is not sufficient, but we think that fact is satisfactorily established by the proof on the subject, in connection with the undenied allegation of insolvency at the time of the commencement of this suit.

Decree affirmed.

CHANCELLOR et al. v. STATE.

(Supreme Court of Arkansas. July 1, 1906.)

HOMICIDE—ACCOMPLICE — CORROBORATION — SUFFICIENCY.

On a prosecution for murder, evidence considered, and held sufficient to corroborate the testimony of an accomplice.

Appeal from Circuit Court, Lafayette County; Charles W. Smith, Judge.

Berry Chancellor and another were convicted of murder in the second degree, and they appeal. Affirmed.

J. M. & R. L. Montgomery, for appellants.
Robt. L. Rogers, Atty. Gen., for the State.

HILL, C. J. The appellants were indicted by the grand jury of Lafayette county charged with the murder of Henry Evans. They were convicted of murder in the second degree, and given seven years each in the penitentiary, and have appealed to this court.

Henry Evans, Cleveland Jones, these appellants, and several other negroes, were at Marryman's store, and Evans and Jones left together, and within less than a half hour appellants went in the same direction along the same path taken by Jones and Evans. Evans was never seen alive by any other persons after he left Marryman's store, and about three weeks afterwards a decomposed body, with the skull crushed, found in the woods about a quarter of a mile from the path pursued by these parties, was identified as his. On the day before he was killed his employer paid him \$18.55, consisting of \$13.55 in silver and a \$5 bill. Cleveland Jones was suspected of the murder, and was arrested, and the appellants sent for as witnesses, and their conduct excited suspicion, and later Jones made a statement to the effect that he and Evans stopped on the roadside, and appellants overtook them, and one of them, with a wagon spoke, struck Evans on the head, and afterwards robbed his body, taking therefrom ten silver dollars and two half dollars. He further said that while at the store one of the appellants asked him to take Evans out and they would hold him

up and rob him of his money, and offered him \$2.50 if he would do this. It is shown that Evans was not as intelligent as the average darkey. Jones says he got scared when he saw them robbing the body and ran away, and afterwards appellants came to him and insisted on him taking \$2.50, and told him to say nothing, and that Evans had gone on home. He obeyed this injunction until he was arrested himself charged with the murder after the discovery of Evans' body. No money was found on Evans' body. Jones' testimony on the trial was to the same effect as his statement to the deputy sheriff when arrested, as above outlined. This was the chief testimony against the appellants, and the main point argued on this appeal is that there is not sufficient corroboration of the accomplice to sustain the conviction. Conceding, without deciding, that he was an accomplice, requiring corroboration, the court is of opinion that the evidence was sufficient. The appellants' suspicious conduct before arrest and contradictory statements and efforts to manufacture testimony were shown. One of them, in the presence of the other, told the sheriff where to find the spoke with which the blow was dealt, and when the blood-stained spoke was brought to the group of men where these appellants were Chancellor broke down and cried. The proximity to the scene of the crime, the circumstance referred to, and others in evidence, were sufficient testimony to afford the corroboration required by law. *Kent v. State*, 64 Ark. 247, 41 S. W. 849. The defendants gave plausible testimony as to their whereabouts, and were corroborated by some witnesses locating their presence at other places in accordance with their testimony; but a reasonable latitude for the approximation of time would not throw this testimony in conflict with Jones'. The defendants also proved good character for themselves. The jury doubtless had some doubts as to the truth of Jones' story, for a belief in it called for the death penalty, not seven years in the penitentiary; but those matters are solely in the province of the jury, and they have accepted Jones' testimony, corroborated as it is by the incriminating conduct of appellants, and these matters are not for review here.

It is insisted that, notwithstanding there was no demurrer to the indictment nor motion in arrest of judgment, its sufficiency can be raised here; but as the indictment is good, and the point made against it decided otherwise than contended for by appellants in *Powell v. State* (Ark.) 85 S. W. 781, it is not worth while to pursue the subject further. The instructions were correct, and the appellants' fate settled by the jury. If Jones told the truth, their punishment is far too light; if he did not, it is their misfortune that a jury of their county would not credit their testimony.

The judgment is affirmed.

STATE ex rel. ATTORNEY GENERAL v. MOORE, Auditor.

(Supreme Court of Arkansas. June 24, 1905.)

1. STATUTES — CONSTITUTIONALITY — DECLARATION OF INVALIDITY.

The courts should exercise their power of declaring an act of the Legislature void because in conflict with the Constitution with great caution, and only when the terms of the Constitution have been plainly violated.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 53-56.]

2. SAME — PRESUMPTIONS — OBSERVANCE OF CONSTITUTIONAL PROVISIONS.

The same presumption in favor of the validity of a legislative enactment is indulged with reference to its form and the observance of the constitutional prerequisites and conditions as in case of the subject-matter of the legislation.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 56, 382.]

3. STATES — APPROPRIATIONS FOR GOVERNMENT—NECESSITY OF EXPENSES—CONCLUSIVENESS OF LEGISLATIVE DETERMINATION.

Under Const. art. 5, §§ 30, 31, requiring the general appropriation bill to embrace nothing but appropriations for the "ordinary" expenses of government, and prohibiting the appropriation of money except in specified cases, among which is included defraying the "necessary" expenses of government, unless by a two-thirds vote of the Legislature, extraordinary expenses may be "necessary," and may be authorized by a majority vote, and the legislative determination that expenses are necessary is conclusive on the courts so long as the expense is one which may fall within the classification of necessary expenses.

4. SAME — ORDINARY EXPENSES — MAINTENANCE OF STATE GUARD.

Under Const. art. 11, defining the militia, and requiring the same to be organized, officered and equipped as may be provided by law, and authorizing the Governor to call out the volunteers or militia or both, to execute the laws, repel invasions, repress insurrections, and preserve the peace, an appropriation "to promote the efficiency of the state guard," although it also recites that the same is made necessary "to carry out the provisions of the act of Congress approved January 21, 1903," is an appropriation to meet "the necessary expenses of government," within the meaning of Const. art. 5, § 31, permitting the appropriation of money to meet such expenses by a majority vote.

5. SAME—DOUBLE APPROPRIATIONS—CONSTITUTIONAL PROHIBITION.

An appropriation to promote the efficiency of the state guard is not, because a part thereof appropriates money for the use of the Adjutant General, whereas Kirby's Dig. § 5295, provides that the duties of the Adjutant General shall be performed without compensation, repugnant to Const. art. 5, § 30, requiring appropriations other than for the ordinary expenses of government to be made by separate bills each embracing but one subject.

Hill, C. J., dissents.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Suit by the state, on the relation of the Attorney General, against Avery E. Moore, Auditor of State. From a decree of dismissal, relator appeals. Affirmed.

Robert L. Rogers and Jas. H. Stevenson, for appellant. Charles Jacobson, for respondent.

88 S.W.—56

MCCULLOCH, J. The Attorney General brought this suit in the Pulaski chancery court to restrain the Auditor of State from drawing his warrant upon funds appropriated by an act of the General Assembly approved March 17, 1905, the title and preamble of which read as follows: "An act to promote the efficiency of the Arkansas State Guard, and for other purposes. Whereas, the strength of the Arkansas State Guard, shown by official roster, active force, aggregates 2,141 officers and men; and whereas, said organization has heretofore been recognized by the national government, receiving therefrom all allotments, under section 1661, Revised Statutes, as amended or other laws; and whereas, it is essentially required of the organized militia, if same shall have further support of the national government, that certain duties be actually performed according to the laws of Congress relating thereto; and whereas, in order to carry out the provisions of the act of Congress approved January 21st, 1903, it is necessary that the state render financial aid to its citizens soldiery: Therefore, be it enacted by the General Assembly of the State of Arkansas," etc. The act then proceeds to appropriate the sum of \$25,000, or so much thereof as may be necessary, for the purposes provided for, specifying the items for which the same shall be expended, viz., salaries and contingent expenses of officers of the state guard, for expenses of military encampments, practice, etc., rent of armories and storage rooms, and for other expenses in maintaining the organization of the state guard and handling and preserving the military equipments. The validity of the act is called in question on the ground that in neither branch of the Legislature, on the vote for final passage, did the bill receive in its favor the votes of two-thirds of the members of each house, as required by section 31 of article 5 of the Constitution of the state. That section of the Constitution and the preceding section read as follows:

"Sec. 30. The general appropriation bill shall embrace nothing but appropriations for the ordinary expense of the executive, legislative and judicial departments of the state. All other appropriations shall be made by separate bills, each embracing but one subject.

"Sec. 31. No state tax shall be allowed, or appropriation of money made, except to raise means for the payment of the just debts of the state, for defraying the necessary expenses of government, to sustain common schools, to repel invasion and suppress insurrection, except by a majority of two thirds of both houses of the General Assembly."

It is conceded that the bill received in its favor the votes of a majority, but not two-thirds, of the members of each house. The Attorney General contends that the subject-matter of the appropriation does not fall within either of the exceptions expressed in

section 31, and required for its passage the affirmative vote of two-thirds of both houses of the General Assembly. We are therefore asked to declare that on account of the failure to receive the necessary affirmative vote the bill never became a law. On the other hand, it is contended for appellee that the appropriation was for the "necessary expenses of government."

The duty and power of courts to declare an act of the legislative body void because in conflict with the Constitution either from want of constitutional power to enact it or from lack of observance of some of the forms or conditions imposed by the Constitution is so plain and well established that we indulge in no discussion of that question at this time. It is equally well established, however, that such power should be exercised by the courts with great caution, and only when the terms of the Constitution have been plainly violated. Chief Justice Marshall, who first authoritatively announced the doctrine that courts possess such power, subsequently said: "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162. A similar expression is given by the same learned court in the case of *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606, where Mr. Justice Washington said: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory indication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." Judge Cooley, in treating the same subject, says: "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protec-

tion against unwise and oppressive legislation, within constitutional bounds, is by appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but the courts cannot assume their rights. The judiciary can only arrest the execution of a statute when in conflict with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power." *Cooley's Const. Lim.* (7th Ed.) p. 236. The same learned author at another place (page 255) says: "The duty of the court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the Legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. For as a conflict between the statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the court, if possible, must give the statute such a construction as will enable it to have effect." The same presumption is indulged in favor of the legislative enactment with reference to the form of the statute and the constitutional prerequisites and conditions as to the subject-matter of the legislation. *Waterman v. Hawkins*, 86 S. W. 844; *Cooley Const. Lim.* p. 195. This court, in the case of *State v. Sloan*, 66 Ark. 575, 53 S. W. 47, in upholding the validity of an act providing for the building of a new state capitol, the bill for which had not received the votes of two-thirds of both houses of the Legislature, said: "There is nothing in the Constitution of this state defining what is a necessary expense of government, or charging or limiting the right of the Legislature to determine the question. On the contrary, the right is impliedly delegated to it, for the power to appropriate money to defray the necessary expenses of government carries with it the right to determine what is a necessary expense. Upon this principle local and special laws have been upheld by this court notwithstanding the Constitution denies to the Legislature the power to pass a special or local law in any case where a general law, which would afford the same relief, could be enacted, holding that the power to pass a special or local act under given circumstances empowered it to determine when the circumstances existed"—citing *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Boyd v. Bryant*, 35 Ark. 73, 37 Am. Rep. 6; *Carson v. Levee District*, 59 Ark. 513, 27 S. W. 590; *Powell v. Durden*, 61 Ark. 21, 31 S. W. 740. To the same effect, see *Railway v. Grayson*, 72 Ark. 119, 78 S. W. 777. The court in the *Sloan* Case did not mean to lay down the doctrine, nor do we now, that the power of the Legislature to determine what is a neces-

sary expense of government is arbitrary, bounded by no limitations, and absolutely beyond control by the judicial department. We can readily call to mind subjects for appropriation so obviously beyond the scope of what may be deemed necessary expenses of government that the courts could, and in duty should, ignore a legislative determination, and declare as a matter of law that the same do not fall within that class. The words "necessary expense of government," as employed in the Constitution, do not refer to the necessity, expediency, or propriety for the amount of the appropriation, but are intended as a classification of a character of expenses which may be provided for by appropriations without the concurrence of more than a majority of both houses of the Legislature; and when the expense is such as may fall within that classification, and the Legislature has made appropriation to defray the same, the courts must accept as final the legislative determination that they are necessary expenses of government. The preceding section of the Constitution regulating appropriations to defray the ordinary expenses of government, when read with the section now under consideration, makes a distinction between the "ordinary expenses of government" and other necessary expenses, and is a distinct recognition by the framers of the Constitution of the fact that there may be necessary expenses of government which are not ordinary expenses, and that the Legislature may, by a bare majority vote, make appropriations to defray the same. If they be necessary expenses of government—that is to say, proper and necessary expenses incurred in the administration of government—appropriations therefor may be made by a majority vote only, though they be extraordinary, and not incurred as ordinary expenses in the administration of government. The Supreme Court of Indiana, in dealing with a kindred subject relating to the power of the courts in passing upon the constitutionality of a statute, said: "While the power to act does not exist until the contingency arises, the Legislature must of necessity be left with large discretion in determining whether or not the contingency has arisen which calls forth the exercise of the power. When it has in fact arisen, or when, in the exercise of its sound discretion, the Legislature, without any apparent purpose to evade the Constitution, determine that it has, and authorizes a debt to be contracted, unless it is apparent at first blush that the condition did not exist which justified the exercise of the power the action of that body is not subject to review, or liable to be controlled by the judicial department." *Hovey v. Foster*, 118 Ind. 502, 21 N. E. 39. The Supreme Court of California, in speaking of the conclusive presumption to be indulged in favor of a statute, said: "In the exercise of their [the Legislature's] rightful authority, they have decided that the exigency has arisen demanding

the exercise of the power, and they have directly declared that the object of the law and the debt created by it is to aid in repelling invasion, suppressing insurrection, enforcing the law, and preserving and protecting the public property; and this decision cannot be reviewed or set aside by the court." *Franklin v. State Board*, 23 Cal. 173.

The question, then, arises: Is the appropriation in question for the purpose of "defraying the necessary expenses of government" within the meaning of the Constitution, or is it obviously not what may be deemed a necessary expense of government? Since an early day the establishment, organization, and maintenance of the state militia as a citizen soldiery, instead of a large standing army maintained by the national government, has been the object of governmental solicitude and encouragement, both state and national. No useful purpose can be served by a discussion of that policy at length, as it is a part of the history of the republic. Suffice it to say that in each Constitution adopted by the people of this state an organized militia is provided for, and is distinctly recognized as a part of the executive branch of the state government. Article 11 of the present Constitution, which is similar to the provision on that subject in the former Constitutions of the state, declares what shall constitute the militia, and contains a mandatory provision that the same "shall be organized, officered, armed and equipped and trained in such manner as may be provided by law"; and that "the Governor shall, when the General Assembly is not in session, have the power to call out the volunteers or militia, or both, to execute the laws, repel invasions, repress insurrections and preserve the public peace in such manner as may be authorized by law." Pursuant to the several Constitutions of the state laws have at all times been written upon the statute books of the state providing for the organization of the militia and volunteer companies, and for the equipment and maintenance of the same as a part of the executive branch of the state government in the enforcement of the law and preservation of the public peace. We think it is therefore plain that the framers of the Constitution, in providing how appropriations should be voted "to defray necessary expenses of government," did not mean to exclude from that term the organization and maintenance of the militia, which was by that instrument, and which had ever been by the organic law of the state, recognized as an arm of the executive department of the state government. The legislative determination that the expense of maintenance of the organization was a "necessary expense of government" is conclusive, and cannot be reviewed by this court.

It is conceded by the Attorney General that the militia is a necessary part of the government; that the designation of the mili-

tia as "all able-bodied male persons, residents of the state, between the ages of 18 and 45 years," etc., constitutes the militia branch of government, but that the state guard as a volunteer organization forms no part of the militia, nor of the state government. It will be observed, however, that the Constitution in the same article provides for the organization of volunteer companies, and provides that the Governor may call out either the volunteer or militia, or both, to execute the laws, etc., thus manifesting an intention to treat them both alike as a part of government. Stress is laid in the argument on the part of the state that the preamble of the act recites that, "in order to carry out the provisions of the act of Congress approved January 21, 1903, it is necessary that the state render financial aid to its citizen soldiery," and that this language negatives any intention on the part of the lawmakers to provide for the appropriation as a necessary expense of government. It is manifest, however, that the primary object of the Legislature was, as the title of the act plainly states, "to promote the efficiency of the Arkansas State Guard" by supplementing the funds offered for that purpose by the national government with an appropriation of the state's funds. Regardless of the forms and recitals of the act, it was an appropriation to maintain the state guard, and, as we hold that that is a part of the necessary expenses of government, the act must be sustained. We cannot look to the motives which influenced the members of the Legislature to determine the object and validity of a statute, nor can we review the legislation as to its propriety or expediency.

It is further urged against the validity of the act that it violates the provision of the Constitution (section 30, art. 5) to the effect that bills for appropriations other than the ordinary expense of the executive, legislative, and judicial departments of the state shall be made by separate bills, each embracing but one subject. It is argued that the part of the act making an appropriation for the use of the Adjutant General, in effect, repeals section 5295, Kirby's Dig., providing that the duties of Adjutant General shall be performed, without compensation, by the private secretary of the Governor and that it is foreign to the main object of the bill. It is sufficient to use the language of Judge Cooley, which has been quoted with approval by this court, as follows: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable, but would render legislation impossible." Cooley's Const. Lim. (7th Ed.) p. 206. In *State v. Sloan*, supra, this court said: "The unity of the subject

of an appropriation is not broken by appropriating several sums for several specific objects, which are necessary or convenient or tend to the accomplishment of one general design, notwithstanding other purposes than the main design may be thereby subserved."

The chancellor concluded that the statute in question was legally passed, and dismissed the complaint for want of equity. The decree is affirmed.

HILL, C. J. (dissenting). Blackstone says: "An act of Parliament * * * is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging, nay, even the King himself, if particularly named therein." 1 Black. Com. c. 2, p. 121. The "long train of abuses and usurpations" causing the Declaration of Independence impelled the signers thereof to declare that "it is their [the people's] duty to throw off such government and to provide new guards for their future security." In the formation of the national government and in the governments of the several states written constitutions were evolved as new guards for future safety, and in them were placed limitations on the paramount power of the legislative department of government. A system of co-ordinate powers, each supreme in itself, and each fettered by the Constitution, was created. "The courts of law, state and federal, held a place in our system unparalleled in the political system of other countries," says Thorpe in his Constitutional History. The same learned author points out that in the early days of American independence the idea prevailed that the Legislature, succeeding to the power of Parliament, was supreme; and that in 1787 the Court of Conference of North Carolina declared an act void for taking away the right of trial by jury, and its decision was vigorously assailed. It was, however, followed by other courts, and the principle was imbedded in the Constitutions of the United States and the several states. 2 Thorpe, Con. History U. S. pp. 462-465. In 1803 the question came before the Supreme Court of the United States in *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, and was forever put at rest by the decision of Chief Justice Marshall. On this point the opinion is obiter dictum, but its reasoning ended all controversy on the subject, and made it clear that it was not only the right, but the solemn duty, of the judiciary, to declare void any legislation violative of the Constitution. The chief justice asked: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limitations may at any time be passed by those intended to be restrained?" The answer was obvious. This subject was reviewed by the Supreme Court of the United States in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273.

31 L. Ed. 205, and it was again reiterated, that "the courts must obey the Constitution, rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, those limits have been passed." It is uncontroversially true that it is the duty of this court to determine whether the constitutional limitation that "no state tax shall be allowed, or appropriation of money made, except to raise means for the payment of the just debts of the state, for defraying the necessary expenses of government, to sustain common schools, to repel invasion and suppress insurrection, except by a majority of two-thirds of both houses of the General Assembly," has been overridden by the act in question. The act is sought to be sustained as one "for defraying the necessary expenses of government." The argument is twofold: (1) That the determination of what constitutes the necessary expenses of government is a matter exclusively for the General Assembly, and not the courts, and (2) that this is a necessary expense of government within the meaning of the above quoted clause.

1. Is the Legislature the final arbiter of what is a "necessary expense of government"? The same question in different form has often been before the courts, and a few of the cases may be selected to show the trend of decision. The Constitution of South Carolina provided: "For the purpose of defraying extraordinary expenditures, the state may contract public debts, but such debts shall be authorized by law for some single object to be distinctly stated." The Legislature passed an act authorizing a public debt to be created "for the relief of the treasury." The court said: "The position taken by one of the counsel for appellants that the question whether a debt proposed to be contracted is for the purpose of defraying an ordinary or extraordinary expenditure is one exclusively for the determination of the Legislature, and the fact that they authorized the loan must be regarded as sufficient evidence that its object was to meet an extraordinary expenditure, would, it seems to us, render the constitutional provision wholly nugatory. Such a provision was undoubtedly inserted as a check upon the power of the Legislature to contract public debts, and it follows necessarily that it cannot determine conclusively the limits of its powers in this respect, for otherwise there would be no check upon its powers except its own will." *Whaley v. Gaillard*, 21 S. C. 560. This is equally true in this case. If this appropriation is not one "for defraying the necessary expenses of government," then the check upon the Legislature inserted in the Constitution from passing such bills without a "majority of two-thirds of both houses of the General Assembly" is wholly nugatory, for, if a majority of the Legislature is the sole judge of its power, it could declare any ap-

propriation to be one for "defraying the necessary expenses of government," and leave its own will the sole check upon the treasury. In Georgia the Constitution forbids the Legislature from delegating to any county the right to levy a tax except for purposes therein mentioned, among others, "expenses of the courts." The Legislature passed an act requiring the county commissioner of Fulton county to levy a tax to pay fees claimed by former city solicitors. The court said: "It may be argued, however, that the Legislature has the power to determine and define, under this paragraph, what are expenses of courts, and the courts would be bound by its definition. This may or may not be true. It is unnecessary for us to determine in this case whether the Legislature can enlarge the common and usual meaning of these words or not. It is sufficient for us to say that the Legislature did not say that the claims of the defendants in error were expenses of court." *Adair v. Ellis*, 83 Ga. 404, 10 S. E. 117. In Indiana the Constitution says: "No law shall authorize any debt to be contracted on behalf of the state, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the state debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense." An act was passed authorizing a loan for the purpose of carrying on the state government, and making provisions for funding an outstanding temporary loan. The court said: "Governments cannot be conducted without lodging power somewhere. Wherever it may be lodged it is liable to be abused, or to be imprudently exercised. But while we assert the power of the courts to decide on the constitutionality of every law that may be passed, we nevertheless recognize the rule is well settled which declares that when an act is passed in the exercise of a power or duty expressly committed to the Legislature, or when the validity of an act depends upon the ascertainment of facts which must have existed antecedent to the law, all that the courts can do is to inspect the act, and determine from its scope and tenor and the concurrent history, of which they take judicial notice, whether or not it is apparently within the power conferred, assuming that the requisite facts were ascertained. * * * It by no means follows that the power of the Legislature is without limit or control in respect to creating or contracting debt against the state. As before remarked, courts are supposed to take cognizance of the current public history of affairs, and to construe enactments of the General Assembly in the light of concurrent history. If, under pretense that an invasion was threatened, or that insurrection was imminent, the Legislature should authorize a loan when it was a known fact to every intelligent person that the assumption was a mere pretense, courts would not hesitate to

declare the act void." Other illustrations are given of legislating for one purpose under the guise of another, which the courts must arrest. *Hovey, Governor, v. Foster*, 118 Ind. 502, 21 N. E. 39.

This case plainly marks the limits of the Legislature, and designates the class of cases where the discretion of the Legislature must control; for instance, in determining whether a general law could be made applicable to a matter covered by a special one. The Indiana court, like this court in *Davis v. Gaines*, 48 Ark. 370, 8 S. W. 184, holds that no issue can be made on such discretionary matters, which are addressed solely to the discretion of the Legislature. As illustrating the finality of facts determinable by the Legislature may be found cases where the Constitution requires evidence of publication of notice of local bills. This class of cases was recently discussed and the authorities reviewed in *Waterman v. Hawkins* (Ark.) 86 S. W. 844. The appellee urges *State v. Sloan*, 66 Ark. 575, 53 S. W. 47, as an authority conclusive on this court that the Legislature is the sole judge of what is necessary expense of government. In that case the then Attorney General called in question an act providing for the erection of a new capitol, and appropriating money therefor, on the ground that it was not a necessary expense of government, and consequently required two-thirds vote in each house. The court held that the Legislature was the proper forum in which the necessity for a new capitol was to be tried, and, when it passed a bill in effect so declaring, then such finding was conclusive. Manifestly this decision is right, for there was a question of fact and of legislative judgment on the necessity for such a public building, and, as aptly said in the Indiana case heretofore quoted from, "courts cannot make an issue of fact, or review the facts as such, upon which the Legislature must be presumed to have passed, in order to determine the validity of an act of the Legislature." Had the General Assembly declared new carpets necessary for the legislative halls, no question could be raised on that fact. The determination of it is solely with the Legislature. And in no lesser degree the housing of the state government is a matter addressing itself solely to the Legislature and its determination of the necessity final. But it could not be questioned that if a succeeding Legislature, or several succeeding ones, should appropriate each \$1,000,000 for a new capitol, these multitudinous capitols would be a pretext. The language of Mr. Justice Harlan in *Mugler v. Kansas*, supra, would be applicable to such legislation: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority."

Other instances are supposed in *Hovey v. Foster*, where, even in face of legislative declarations bringing the act within a certain class, if the concurrent history proved it to be an evasion of the Constitution the courts must annul it. Therefore it is plain that even in that class of legislation essentially in the discretion of the Legislature, like capitols and public buildings, and works and other matters of that class, the legislative authority is not beyond the power of the judiciary when it palpably invades the Constitution, and its own declarations are not conclusive on the subject. In view of these authorities, it cannot be said that the Legislature was, in the class of legislation now before the court, the final arbiter of whether the appropriation was a necessary expense of government.

2. This view brings the act itself for consideration. Read in the light of "concurrent history," it cannot, in these days of profound peace, be sustained as necessary in order to "repel invasion and suppress insurrection." It is gratifying to know that civil process is served and obeyed in the remotest hamlet in the state. The question recurs under the clause that this appropriation must be to defray "the necessary expenses of government," or it is invalid. In the first place, the act bears its death wound on its face. It declares: "Whereas, in order to carry out the provisions of the act of Congress, approved January 21, 1903, it is necessary that the state render financial aid to its citizen soldiery; therefore, be it enacted," etc. This is foreign to a declaration that the appropriation is a necessary expense of government for the necessity for this legislation is declared to be to render financial aid to the citizen soldiery in order to obtain the benefit of an act of Congress which apportions funds to the state guards in proportion to the representation when the state guards hold practice marches for at least five days in each year, and assemble for drill, instruction, and practice at least 24 times a year, and other details. Hence the reason for this bill, as declared on its face, is to provide funds for practice marches, drills, instructions, etc., in order to fulfill the requirement of the acts of Congress in bringing the militia to a standard required in order to obtain more funds to be used for like purposes. The members of the General Assembly could well vote for this bill, deeming it a very proper subject for an appropriation, without ever having their attention drawn to whether it was a necessary expense of government, or merely a proper expense. In fact, the bill negatives the idea that it is a necessary expense of government, and shows on its face a very proper subject for favorable consideration on other grounds; and, if two-thirds of both houses had so regarded it, then no question could be raised, but two-thirds did not regard it either proper or necessary. In the next place, aside

from the declaration referred to, it cannot be said of this appropriation that it is a necessary expense of government. It is argued that the Constitution recognizes the militia, and provides for its organization, equipment, and training by the General Assembly, and therefore this appropriation made under its express sanction renders it valid as a necessary expense of government. The conclusion does not follow the premise, because the provision for this organization, equipment, and training carries no intimation or inference that the same is necessary to the government, but merely that it is a proper subject for legislative action. There are many similar provisions in the Constitution. For illustration, it provides that the General Assembly shall pass such laws as will foster and aid the agricultural, mining, and manufacturing interests of the state. Article 10, § 1. If the Legislature passed a law for the agriculturists to hold county meetings at least 24 times a year, and a state meeting for five days each year, where they were trained and instructed in agriculture, no one would deny that an appropriation to meet the expenses incident to these gatherings would be a proper field for legislation; and yet bold would he be who asserted, as a legal proposition, that such an appropriation was a "necessary expense of government." It has equal constitutional encouragement, and a more mandatory duty is laid on the Legislature to foster agriculture than there is to arm, equip, and train the militia. Again, the Constitution provides: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the state shall ever maintain a general, suitable and efficient system of free schools, whereby all persons in the state between the ages of six and twenty-one may receive gratuitous instruction." "The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly." Const. art. 14, §§ 1, 4. Certainly article 11, providing for the organization, equipment, and training of the militia under laws to be passed by the General Assembly, is not as mandatory for such legislation as these provisions requiring the organization and maintenance of free schools under officers to be provided by the Legislature.

It is significant that, when the framers came to provide what appropriations could be made by majority vote, they classed support of the common schools on equal terms, not a part of the necessary expenses of government, and provided that these two objects and expenses to repel invasion or suppress insurrection should be the only three purposes for which money could be voted out of the treasury without a two-thirds vote. A stronger argument could be made on the constitutionality of expenses for the maintenance of free schools as a necessary expense

of state government than in favor of the militia, and yet the Constitution makes themselves recognized that it was not within that clause, and expressly put them on equal footing. But it is argued that the militia is part of the executive branch of government, and subject to service as such. In time of invasion and insurrection it is a necessary arm of government, and the Constitution expressly provides that in such times only a majority is required to take money from the treasury to defray the expenses of militia, as well as other expenses incident to such commotions. The Constitution makes the militia of the state consist of all able-bodied male residents between the ages of 18 and 45 years (with a few exceptions), and renders them subject to the call of the General Assembly, or, in its vacation, the Governor, to execute the laws, repel invasion, suppress insurrection, and to preserve the peace. The sheriff, in the execution of the law, the preservation of peace, and the suppression of riots and insurrection, has like power over the militia, and also over all the male inhabitants of his county. Subdivision 24, c. 49, Kirby's Dig. The reasoning which leads to the conclusion that the training and drilling of the militia is a necessary expense of government would lead to the conclusion that the training of every male inhabitant in the science of war is a necessary expense of government, for every one is subject to the same duty to the state to execute its laws and preserve its peace. The government of Germany considers such training of all its male subjects necessary for its preservation, and the result is that the empire of Germany is one great armed camp, and every citizen a trained soldier, and taxes rest heavily on the people. In consequence of this policy the flower of German youth turn to this country, where experience has taught that this burden is not necessary to government. President Washington, in his sixth annual message to Congress, said: "The devising and establishing of a well-regulated militia would be a genuine source of legislative honor and a perfect title to public gratitude. I therefore entertain a hope that the present session will not pass without carrying to its full energy the power of organizing, arming, and disciplining the militia, and thus providing, in the language of the Constitution, for calling them forth to execute the laws of the Union, suppress insurrections, and repel invasions."

1 Richardson, Messages & Papers of the Presidents, p. 167. Mr. Jefferson, in his first inaugural, in the enumeration of essential principles of government which ought to shape its administration, mentioned these: "A well-regulated militia, our best reliance in peace and for the first moments of war, till regulars may relieve them; the supremacy of the civil over the military authority; economy in the public expense, that labor may be lightly burthened." Id. p. 323. In presenting the cause of militia organization

for favorable legislation, these greatest of the Presidents fail to present it as a necessary expense of the government, but present it as one well worthy the favorable consideration of the lawmakers. If the case could not be stronger presented when the government was just emerging from the Revolution, and when civil disorders were prevalent and Indian warfare a menace on the border, what can be said in its favor as a necessary expense of government in these "piping times of peace?"

The time-honored theory of a free government is that its safety depends on its citizens, not its standing army; and, to that end, militia organizations have always found encouragement in legislation which has heretofore been generous in titles and sparing in appropriations. Part of the laws now found in Kirby's Digest on militia organization date back to 1845. The first appearance, however, of salaries in time of peace to militia officers, and appropriations for military training and practice, are found in this act and its prototype of 1903. These favorable considerations of militia organization and training, however, find reflection in the statutes of many of the states of the Union, in acts appropriating money for purposes, in some respects, similar to the act in question. This state in 1903 appropriated \$6,220 "to promote the efficiency of the state guard," of which \$4,000 was for military encampments and practice marches. There was no showing on the face of the bill that it was for any other purposes than to promote the efficiency of the militia, and this bill contains the same title, and adds in a preamble the necessity of the appropriation in order to obtain the government aid presumably to further promote the efficiency of the militia. This is the sole declared purpose of this legislation, and to treat it as necessary expenses of government, when the General Assembly has not so declared, and no one so declared except perchance the presiding officers of the houses in declaring the bill passed on majority votes, would be straining an act belonging to one class into another. The courts always hesitate in differing with a co-ordinate branch of the government, but in this case the hesitation should not be so pronounced, because there is no evidence that the General Assembly has ever considered and determined that this act was a necessary expense of government. The presiding officers of both houses must have so classed it, or else it would not have been declared carried on majority votes. It may be that their attention was not called to this section of the Constitution, or in the hurry of legislative proceedings they did not have time to consider or investigate it. In fact, if they had each ruled it required two-thirds votes, a majority could have overruled their decisions, and, without the courts determining it, a bare majority could withdraw money from the treasury,

and overrule the Speaker and President, and thus set at defiance the constitutional limitations imposed upon them. The Constitution is committed to the judiciary to preserve, and, in the exercise of that duty, this act ought to be declared void.

BUNCH v. TIPTON et al.

(Supreme Court of Arkansas, June 24, 1905.)

SPECIFIC PERFORMANCE—UNAUTHORIZED CONTRACT OF BOARD.

A contract of the board of trustees of the state charitable institutions for purchase of coal for four months in advance is unauthorized, and therefore will not be specifically enforced, the statute requiring the board to advertise monthly for such supplies, the contract therefore to be awarded on the first Monday of each month for the succeeding month.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Action by one Bunch against H. C. Tipton and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Morris M. Cohn, for appellant. Bradshaw & Helm, for appellees.

RIDDICK, J. This is an action to compel H. C. Tipton and others, comprising the board of trustees of the state charitable institutions, to specifically perform and carry out a contract for the purchase of coal from the plaintiff for such institutions during the months of December, 1902, and January, February, and March, 1903. Plaintiff alleged that, after having made such contract with him, and after he had given bond and prepared to fully carry out the contract on his part, the board, in January, 1903, arbitrarily, and without cause, rescinded the contract, and refused to accept or pay for coal from the plaintiff. The defendant demurred to the complaint, and the demurrer was sustained, and the complaint dismissed.

We are of the opinion that this judgment must be affirmed for the reason that under the statute the board had no right to contract for coal for a longer period than one month. The statute requires that the board, through its purchasing agent, shall advertise monthly for such supplies "for ten days before the first Monday in each month, upon which day the contract for the succeeding month shall be awarded to the lowest and best bidder for the furnishing of said supplies." This statute is mandatory, and shows that the board had no right to make the contract which it made with plaintiff. The action of the board in making the contract and then refusing to comply with it no doubt caused inconvenience and loss to plaintiff, but, as the contract was contrary to the statute, the courts cannot enforce it.

Judgment affirmed.

GROESBECK v. EVANS.

(Court of Civil Appeals of Texas. June 28, 1905.)

1. LANDLORD AND TENANT — LANDLORD'S LIEN—CROPS—POSSESSION.

A landlord, by virtue of his lien, has such possessory rights in the crop of his tenant as entitles him to prevent its removal from the premises by a creditor of the tenant under an execution, and to maintain an action for the trial of the right of property in order to have the property, if so removed, returned to the premises.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 492, 1010, 1027.]

2. SAME.

A landlord, by virtue of his lien, has no right of possession as against the tenant, and a levy on a tenant's interest in a crop, where the crop is not removed from the premises, is valid.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 60; vol. 32, Cent. Dig. Landlord and Tenant, §§ 492, 1010.]

3. SAME—GARNISHMENT.

Where a tenant had placed the crop levied on by his creditor, which had been previously gathered, in the possession of his landlord as security for indebtedness due the landlord, the creditor could reach the tenant's interest in the crop by garnishment proceedings.

Supplemental opinion.

For former opinion, see 88 S. W. 430.

PLEASANTS, J. In our opinion in this case filed at a former day of this term (83 S. W. 430), in discussing the right of a creditor of a tenant to levy upon and take from the rented premises crops grown thereon by the tenant, we make the following statement: "We know of no case in which the question has been expressly decided, but we are of opinion that the crop of a tenant who is indebted to his landlord for rents, supplies, or advances must be considered in possession of the landlord so long as it remains upon the rented premises." This language is too broad, and, if taken literally, is an erroneous statement of the law. All that we intended to hold, as is shown by the opinion when read as a whole and applied to the facts of the case, was that the landlord had such possessory rights in the crop as would entitle him to prevent its removal from the premises by a creditor of the tenant under a writ of execution, and to maintain an action for the trial of the right of property in order to have the property, if so removed, returned to the premises. The landlord has no right of possession as against the tenant, and a levy upon the tenant's interest where the crop is not removed from the premises would be valid.

The further expression in the opinion that the creditor could reach the tenant's interest in the crop by garnishment proceedings is correct only as applied to the facts alleged in the petition that the tenant had placed the crop levied on, and which had been previously gathered, in the possession of the

88 S.W.—567½

landlord as security for indebtedness due him. We deem it proper to thus modify the expressions in the opinion above referred to in order that our holding may not be misunderstood.

TEXAS & N. O. RY. CO. v. FARRINGTON.

(Court of Civil Appeals of Texas. June 26, 1905.)

1. CARRIERS—LIVE STOCK—INJURIES—APPEAL—ACTIONS—PLEADING—SPECIFICATIONS OF DAMAGE.

Where, in a suit against a carrier for delay and injuries to live stock, plaintiff claimed that he was damaged by a fall in the market by reason of delay in transportation, and by depreciation in value of the animals caused by defendant's alleged negligence in keeping them in a muddy pen, it was error for the court to refuse to require plaintiff to separately state what amount of damages he claimed by reason of the decline in price, and also for depreciation in value.

2. SAME—EVIDENCE.

Where, in an action for delay in the shipment of cattle, plaintiff testified that he knew the time ordinarily consumed in such a shipment, he was properly permitted to state the time, though he also testified that he never accompanied but one shipment.

3. SAME—LIMITED LIABILITY — CONSTRUCTION.

A clause in a contract for the shipment of live stock, by which the shipper agreed to release the carrier from liability for delay after delivery to its agent and for delay in receiving the shipment after it should be tendered to its agent, did not release the defendant from liability for delay caused by the negligence of its own employé.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 941.]

4. SAME.

The word "agent," as used in such clause, referred to the connecting line to which the initial carrier contracted to deliver the shipment.

Appeal from Lavaca County Court; C. J. Gray, Judge.

Action by A. G. Farrington against the Texas & New Orleans Railway Company and another. From a judgment in favor of plaintiff against the Texas and New Orleans Railway Company alone, it appeals. Reversed.

Patton & Schwartz, for appellant.

PLEASANTS, J. This suit was brought by appellee, Farrington, against the appellant and the San Antonio & Aransas Pass Railway Company, to recover damages alleged to have been caused by the breach by the defendants of a contract with him for the shipment of two car loads of calves from Hallettsville, Lavaca county, Tex., to New Orleans, La. The petition alleges, in substance, that the San Antonio & Aransas Pass Railway Company accepted the two cars at Hallettsville, Tex., and agreed to safely and securely transport them over its road and its next connecting line of railway, to wit, the Texas & New Orleans Railway, from Hallettsville to New Orleans; that the defendants did not

deliver them with ordinary care and diligence, nor did defendants handle them with ordinary care and diligence, but they "so negligently conducted themselves" that they were delayed an unusual and unnecessarily long time between point of shipment and destination, and the time in making the delivery was a long time beyond the time ordinarily required, thereby causing great damage to plaintiff by reason of the fall in market price of the cattle. Plaintiff further alleged that the cattle were improperly handled in transit, and negligently unloaded at Alexandria, a station on line of Texas & New Orleans Railway Company, in pens too small to accommodate said cattle and give them feed and rest; that they were kept standing in said pens in a crowded condition, and belly deep in mud, for a longer time than necessary, causing them to deteriorate in value, by reason of their muddy condition and shrinkage in weight; that one calf was killed in transit on account of negligent handling. Plaintiff asked for damages in the sum of \$5 per head on those actually delivered and \$10 for the one killed in transit. Then plaintiff prayed for total sum of \$355 damages, and that said sum be apportioned between defendants as their liabilities may be shown on the trial, and for all costs of suit.

The defendants each filed separate answers on September 14, 1904, in which they demurred specially on the grounds: (1) That plaintiff alleged a contract for delivering two cars of calves over the lines of the said defendants to the city of New Orleans, La., and breach of same by killing one calf by negligent handling and injuring the others \$5 per head by detaining them in a muddy pen, and prays for apportionment of damages between defendants, and failed to give any basis for said apportionment, and did not allege where and in which defendant's possession or on which line of road the calves were detained in a muddy pen, or where or by which company their injuries were caused. (2) That plaintiff failed to allege the length of time the calves were in transit, what was a reasonable time for transportation between points of shipment and destination, how much the calves were damaged by being detained in a muddy pen, or how much plaintiff was damaged by a fall in prices, or to lay any definite basis by which his damages, if any, could be determined. Defendants then answered by a general denial, and then specially pleaded the contract of shipment, releasing defendants from any and all liability for delay in shipping after delivery thereof to their respective agents; that plaintiff would assume all risk of loss or damage not resulting from the proven negligence of defendants or their agents; that defendants should not be liable, in case of feeding or watering the stock, for the imperfect discharge thereof; that the liability of each defendant was limited to damages occurring on its line of railway, and that they should not be responsible for carriage

beyond; that they each transported said calves with expedition and safety and due diligence, and that the stock suffered no injury; and each prayed that plaintiff take nothing, and for costs.

The trial in the court below without a jury resulted in a judgment in favor of plaintiff against the appellant for the sum of \$200, and in favor of the San Antonio & Aransas Pass Railway Company, that plaintiff take nothing as against it. The evidence shows that the plaintiff on August 19, 1903, delivered to the Aransas Pass Railway Company at Hallettsville 139 calves for shipment to New Orleans. The contract of shipment limited the liability of both the initial and connecting carriers to loss or damage occurring on their respective lines. Under this contract the calves were taken by the Aransas Pass Railway Company to Houston and there delivered to appellant. The calves were promptly carried by the Aransas Pass Company to Houston, and were delivered to the appellant in good condition. There is evidence to support the finding of the trial court that there was an unreasonable delay in the transportation of the shipment from Houston to New Orleans, and that the market price of the calves at New Orleans on the day they reached that market was \$200 less than their market value on the day they should have reached said market, if they had been transported with reasonable promptness.

We are of opinion that the special exceptions to the petition, on the ground that it fails to state what amount of damages was claimed on account of the alleged fall in the market price, and what amount by reason of the depreciation in value caused by the alleged negligence of appellant in keeping the calves in a muddy pen, were well taken, and the assignments of error complaining of the ruling of the trial court in refusing to sustain said exceptions should be upheld. Whenever the nature of the cause of action asserted is such that a plaintiff can state with certainty the several items which go to make up the damages claimed, the defendant is entitled to have such itemized statement, and special exceptions pointing out such defect in a petition should be sustained. The plaintiff in this case could have alleged specifically what amount of damages he claimed by reason of the difference in the market value of the calves on the day they reached their destination, and their market value on the day they should have reached the market, caused by the fall in the market price of calves of the kind and class which composed this shipment. The defendant was entitled to this information under the elementary rule which requires that pleadings shall be as specific and certain as the nature of the case will permit. From the allegations of this petition the defendant could not even guess what amount plaintiff was claiming on account of the alleged fall in the calf market, or what amount because of the injury to the calves alleged to have been caused by the negligence

of the defendant. This information was necessary to enable defendant to properly prepare its defense, and, having been called for by special exceptions and refused by the plaintiff, defendant was not required to offer any proof to meet the indefinite and uncertain allegations of the petition, but could stand upon its right to have the plaintiff state specifically what amount he was claiming under each of his allegations of damage.

We think the remaining assignments of error are without merit. The testimony of the plaintiff as to the time which it ordinarily took to transport a car of calves from Hallettsville to New Orleans does not show that he was speaking from hearsay. He testified that he knew the time, and his further statement that he never accompanied but one shipment does not contradict his statement that he had personal knowledge from which he could testify as to what was the length of time ordinarily required to make the shipment. He might have gained his knowledge from statements of defendant's agents, or in other ways than by actually accompanying shipments. The clause in the contract of shipment by which the shipper agrees to release the carrier from all liability for delay after delivery to its agent, or for delay in receiving the shipment after it should be tendered to its agent, does not release the defendant from liability for delay caused by the negligence of its own employés; and the word "agent," as used in this clause, clearly refers to the connecting line to which the initial carrier contracted to deliver the shipment.

Because of the error of the trial court in refusing to sustain the exception to the petition before discussed, the judgment is reversed, and the cause remanded for a new trial as between the plaintiff and the appellant. The judgment in favor of the San Antonio & Aransas Pass Railway Company is not complained of, and is therefore undisturbed.

Reversed and remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. NESBIT.

(Court of Civil Appeals of Texas. June 27, 1905.)

1. RAILROADS—INJURY TO CHILD AT CROSSING—PROXIMATE CAUSE.

In the case of a child four years old, who having run along a path parallel with a railroad, where he could have been seen by the engineer, as a train was approaching a station at a speed of four or five miles per hour, undertook to go over the track at a crossing just before the engine reached it, fell and was run over—a charge that though the engineer was negligent in failing to discover the approach of the child or to get his train under control after seeing he intended to cross, yet if the child would have crossed safely had he not fallen, and a reasonably prudent person would not have foreseen his probable fall, the railroad company was not liable—was properly refused; such issue, in view of the age of the child, the fact that he was running, and the close proximity of the engine, not being in the case.

2. SAME—NEGLIGENCE—EVIDENCE.

In the case of injury to a child at a railroad crossing, the only negligence charged being failure of the persons in charge of the engine to keep a proper lookout, and the employment by the company of incompetent men, a charge that evidence of failure to give crossing signals should not be considered for any purpose should be given.

3. PERSONAL INJURIES—FUTURE SUFFERING—EVIDENCE.

The nature of the injuries presents the issue of probable future physical suffering, it being shown that by the accident plaintiff lost one leg, nearly to the knee, the great toe on the other foot, and sustained a deep scalp wound, though at the trial all the hurts were entirely healed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 236.]

4. SAME—INSTRUCTIONS—ASSUMPTION.

The charge in an action for personal injuries that in case of a finding for plaintiff, the jury may consider the physical or mental suffering he has suffered or may suffer, does not assume that plaintiff will inevitably have future physical suffering from the injury.

5. SAME—DOUBLE DAMAGES.

Inability to pursue the course in life which plaintiff might have pursued but for his injuries falls within the category of diminished capacity to labor and earn money, so that an instruction authorizing damages for both allows the giving of double damages.

6. SAME—ARGUMENT OF COUNSEL—AMOUNT OF VERDICT.

Remarks of counsel in a personal injury case that if the jury give a verdict too small it will not be raised, but that if they give one too large the appellate court will correct it by cutting it down, so that if they err they should err on the side that can be corrected by the appellate court, are improper.

Appeal from District Court, Trinity County; J. M. Smither, Judge.

Action by Marvin A. Nesbit, by next friend, against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed.

T. S. Miller, Bean & Nelms, and Thomas & Rhea, for appellant. Lovejoy & Malevinsky, H. L. Robb, and Andrews, Ball & Streetman, for appellee.

GILL, J. On May 28, 1903, at Willard, in Trinity Co., Tex., Marvin A. Nesbit, a boy about four years of age, was struck and injured by an engine of appellant pulling a passenger train, at a public road crossing, and to recover damages therefor this suit was instituted in his behalf by his father, as next friend. The negligence alleged against the defendant was, first, a failure of its employés in charge of the engine to keep proper lookout and discover plaintiff in time to avoid the accident; and, second, that the plaintiff had in its employ in charge of said engine an engineer and fireman who were incapacitated to keep a proper lookout and hear signals or warnings given, in that the fireman was partially deaf and the engineer partially blind. The defendant pleaded the general issue. A trial was had and verdict and judgment rendered in favor of plaintiff in the sum of \$15,000. From this judgment the railway company has appealed.

In view of the disposition we have made of the cause and of the nature of the assignments we shall consider it is unnecessary to set out the facts at length. The minor, a child about four years old, was running along a much used path parallel with the railway track just as appellant's passenger train was approaching one of its stations. The speed of the train was four or five miles an hour. Just before the engine reached a road crossing the child undertook to cross the track at the crossing, fell, and was run over by the engine. The child could have been seen by the engineer for some distance before it reached the crossing, and the evidence presents the issue whether a reasonably prudent person would not have foreseen that the child would undertake to cross the track. Without stating the facts more fully, we express the opinion that the evidence presents the issue of liability upon the grounds alleged. We therefore overrule the assignments addressed to the refusal of the trial court to instruct a verdict for defendant.

Under the eighth assignment appellant complains of the refusal of the trial court to charge on the issue of proximate cause, and to instruct the jury that even though the engineer was negligent in failing to discover the approach of the child, or to get his train under control, after seeing that he intended to cross, yet if the child would have crossed safely, and without injury had he not fallen, and that a reasonably prudent person would not have foreseen his probable fall, to find for defendant. The charge was properly refused. Taking into consideration the age of the child, the fact that he was running and the close proximity to the moving engine, we think there was no such issue in the case. There was evidence admitted without objection that the whistle was not blown, nor the bell rung, in approaching the crossing. This was not complained of as a ground of recovery, nor so submitted in the charge. The failure in these respects had no causal connection with the accident. The court in general terms excluded every ground of recovery except those specifically submitted, but refused a requested charge advising the jury that they should not consider for any purpose the failure to ring the bell or sound the whistle. Of this appellant complains. We would not reverse upon the point because we believe the main charge precluded all danger to appellant from the immaterial evidence, and that the jury were not misled. We are inclined to think, however, the special charge should have been given. Appellant complains of the following charge on the measure of damages: "You are instructed that in the event you find in favor of the plaintiff in estimating the actual compensatory damages to which he is entitled, you may take into consideration, and award him such a sum of money as will fairly compensate him for, the physical and mental suffering which he has suffered, or may suffer in

the future, and the diminished capacity, if any, to earn money and pursue the course of life which he might otherwise have done after he shall have arrived at the age of 21 years. You must not allow him anything for diminished earning capacity during the period of his minority, for that would belong to his father, if to any one, awarding him as a whole only such a sum of money as the present cash value of which would be actual compensation for the injuries, if any, sustained."

Two objections are urged against the charge: First. That it is upon the weight of the evidence in assuming that the plaintiff will suffer pain in the future; and second, its terms are misleading and tended to induce the jury to allow double damages.

As a result of the accident the minor lost his right leg about four inches below the knee, lost the great toe from his left foot, and in addition to other slight wounds and bruises, sustained a deep scalp wound. At the date of the trial all his hurts were entirely healed. His growth had not been retarded and mentally he was bright and uninjured. There is no evidence that his injuries were of such a nature as to entail further physical pain. We are inclined to think the nature of his injuries presented the issue of probable future physical suffering. We think, however, it would have been error to assume it as an inevitable consequence. But the charge is not open to this construction, hence the objection cannot be sustained.

The second objection is practically the same as that sustained in *Railway v. Butcher*, 84 S. W. 1052, 12 Tex. Ct. Rep. 115. In that case it was held in effect that the inability to pursue the course in life which the injured party might have pursued but for his injuries fell within the category of diminished capacity to labor and earn money, and that it was misleading to mention it in the charge as an element of damage additional to and distinct from that. The charge held error in the case cited, and the paragraph now before us cannot be distinguished in principle. We therefore hold on the authority of *Butcher's Case*, supra, that it is such error as requires a reversal of the judgment. Counsel for appellee have filed a supplemental argument which is an able review of the authorities bearing upon the question, especially of the Texas decision containing expressions apparently inconsistent with the holding in *Butcher's Case*, supra. We do not follow counsel in the review of these cases because, if it be conceded that they uphold counsel's contention, it would amount only to an assault on the soundness of the last expression of our Supreme Court on the question. Whether the charge in question would mislead a sensible jury may be gravely doubted. That it is not an accurate instruction on the measure of damages we have no doubt.

In the opening argument before the jury one of the counsel for appellee used the following language: "You may give this child a

verdict for \$5,000 or for \$25,000, and in my opinion as a lawyer our appellate court would sustain either verdict. If you should give a verdict that is too small it would not be raised up, but if you should give a verdict that is too large the appellate court will correct it by cutting it down. Therefore if you err you should err on the side that can be corrected by the appellate court." On objection of appellant, the court interrupted the speaker, and stated that exception had been taken, whereupon counsel continued as follows: "I am not going to make any mistake, and I will state that it is primarily your duty to assess the damages in this case in accordance with the charge of the court and the evidence, but, while this is true, if you make a mistake and allow him too much the appellate court will correct it." This occurred in the forenoon and the court made no further effort at that time to correct it. In the afternoon another of appellee's counsel used the following language: "We do not want any measly verdict, and, as stated by my associate this morning, you can't make a mistake by giving too large a verdict, for if you do the appellate court will correct it." The court, upon objection, rebuked counsel and instructed the jury orally not to consider it. He thereafter gave a requested instruction to the same effect.

One of the assignments of error is addressed to these arguments, but counsel for appellee here insist, with evident sincerity, that they were not improper. Whether, in view of the action of the trial court in undertaking to withdraw it from the jury, we would reverse the judgment upon this ground alone, we need not determine, because the appeal has been disposed of upon other grounds. For a like reason we might ordinarily allow the matter to pass without comment. We would probably have ignored it had counsel for appellee conceded its impropriety. But that the error may be repeated hereafter is evident from the earnest insistence of counsel, both here and in the lower court, that the language used was both lawful and appropriate. For this reason we take this opportunity to stamp it once for all with our unqualified disapproval. In cases of this sort involving elements of damage incapable of accurate measurement in dollars and cents, the field of the jury's discretion is broad indeed, and a verdict can be disturbed by this

court as excessive only when, by its size compared with the injury suffered, it is manifestly the result not of a sound discretion temperately exercised, but of passion and prejudice. Appellate courts may exercise the power to require a remitter only in those cases where, in the absence of the statute conferring the power, the judgment would have been reversed and remanded as excessive. It is therefore plain that the power of this court to require a remitter in such cases is not to be considered in the trial courts for any purpose. The parties plaintiff and defendant had the right to the untrammelled judgment of the jury on the question of the amount of damages. The task of revising jury verdicts in matters of amount is both difficult and delicate, and it ought not to be rendered more so by an invitation to the jury to resolve all doubts in favor of a large verdict, thus passing up to the trial judge and to this court a duty which is not only primarily but finally theirs.

The court has rarely disturbed a verdict in amount except over the bitter protest of the winning party, and an eloquent warning against the danger of encroaching upon the province of the jury as the final arbiter of the facts. What could counsel say in this case, if after the matter has by their own invitation been thus passed by the jury to us, should we substitute for the verdict our own judgment as to the proper amount, and it should happen to be much less than the jury has found? Would they not still contend that the jury had not departed from their legitimate field of discretion which we are forbidden to invade? And this, though the language complained of may have induced the jury to render a verdict for \$15,000 instead of \$5,000 or \$10,000.

But the conclusive reason for holding such argument reprehensible is that it is impossible to determine the extent to which a verdict may be affected thereby, and the evil cannot therefore be cured by requiring a remitter. Such language is a most insidious temptation to a jury, and it is doubtful if its effect can be withdrawn by any action on the part of the trial court. Whether, therefore, in any case we would hold the error harmless we do not decide.

For the reasons given, the judgment is reversed and the cause remanded.

Reversed and remanded.

LYNCH v. MCGOWN.

(Court of Civil Appeals of Texas. June 21, 1905.)

HOMESTEAD—ABANDONMENT — EXECUTION — INJUNCTION—INSTRUCTIONS.

In a suit to restrain the levy of an execution on certain land which complainant claimed as his homestead, defendant pleaded an abandonment, and complainant's evidence with reference to his intention to return to make his permanent home on the land after he had established his home elsewhere was indefinite and somewhat contradictory. The court charged that, where a homestead is once acquired, purchase and removal to another tract will not of itself deprive the purchaser of his homestead rights in the first tract, provided he intended, in such removal, to occupy the second place only temporarily, and intended to return to the first place. *Held*, that the charge was erroneous, as a charge on the weight of the evidence, and prejudicial, in making the question of abandonment depend alone on plaintiff's intention at the time of his removal, instead of on whether his intention to return to the first tract existed at the time of such removal, at the date of the levy, and at all times intervening.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 315.]

Appeal from District Court, Sabine County; Tom C. Davis, Judge.

Action by J. H. McGown against John Lynch. From a decree in favor of plaintiff, defendant appeals. Reversed.

Goodrich & Synnott, for appellant.

PLEASANTS, J. This is a suit for injunction brought by appellee to restrain the sale of a tract of 60 acres of land, a part of J. I. Piferro grant, in Sabine county, claimed by him to be his homestead. The land was levied on by the sheriff of Sabine county under an execution issued upon a judgment in favor of appellant against the appellee, rendered in a justice court of San Augustine county, and to restrain the sale under this levy this suit was instituted. Plaintiff's amended petition alleges, in substance, that he is the head of a family, and that long prior to October 27, 1903, the date of the levy of the execution, he had established his homestead on the land in controversy; that for many years he resided on said land, and that it has continued to be his homestead to the present time, and has at no time been abandoned as such, but, on the contrary, he has for the past 10 years continuously asserted homestead rights in the premises, and has never claimed such rights in any other land; that prior to October 27, 1903, he, together with his said family, for business purposes, and with the intention to return and occupy said 60 acres of land as their homestead, and with no intention whatever to abandon it or to relinquish the homestead rights therein, did temporarily remove therefrom, and did temporarily occupy another and different residence, and since that time and up to the present time have so continued to reside at another and different place, but in-

tending to return to said tract and reoccupy the same, in the meantime using said 60 acres of land for the benefit of the family, and at no time ceasing to claim said tract of land as a homestead; that notwithstanding these facts the defendant, John Lynch, has caused said property to be levied upon and advertised for sale under an execution issued upon a judgment in favor of said defendant against plaintiff, rendered in a justice court of San Augustine county. The prayer of the petition is for an injunction restraining the sale of the property. In reply to plaintiff's first amended original petition, defendant filed his first supplemental answer, in which, *inter alia*, he excepted specially to plaintiff's first amended original petition, in that it did not allege sufficient facts to prove the land in controversy plaintiff's homestead at the date of the levy; that it did not deny that since his removal from the tract of land in controversy he had acquired another homestead, and acquired title to another tract of land, and established his homestead thereon; that it did not allege that since his removal from said land he had continued to use the same for a home. Defendant answered further, among other things, that at the date of the levy plaintiff had acquired a homestead in the town of Hemphill on lands owned by him, to which he had acquired a title before he did to the land in controversy, and that he never resided on the land in controversy after acquiring title thereto. Upon the trial of the case in the court below, defendant's exceptions to the petition were sustained, and plaintiff was granted leave to file a trial amendment; and, on his verbal statement of what said amendment would contain, the court allowed the trial to proceed, with the understanding that the written amendment would be filed thereafter. This amendment was not filed until after the trial had been concluded. The trial resulted in a verdict and judgment in favor of plaintiff.

The only evidence adduced upon the issue of homestead was the testimony of plaintiff, which is as follows: "I was born and have always lived in Sabine county, Texas. I am a married man, and have a family. I have been married three times. I was married first in 18—, and had our child by my first wife. My first wife died in 18—. I married my second wife in 18—. She died about 1898. I have several children by her still living. During my first wife's lifetime my father gave me the sixty acres of land in controversy in this suit. I moved on it and made it my home until after my second wife's death, and until my oldest daughter married, in 18—. After my second wife died I continued to live on the sixty acres with my children until my oldest daughter married, after which I broke up housekeeping and sent some of my children to live with my parents, and one—the baby—was taken by Mr. Coussons. I then went away from the place and taught school.

Part of the time I taught school in Angelina county, and part of the time in Sabine county. I boarded while I taught school. In the spring of 1899 I returned to the land in controversy and made a crop on it. In the fall of 1899 I taught school again, and boarded while I taught school. In the spring of 1900 I went to Hemphill to study law, and later was admitted to the bar, and have been a practicing attorney ever since. While I was studying law, and for a while after I began practicing up to the time of my marriage with my present wife, I boarded in the town of Hemphill. After the death of my second wife and the marriage of my oldest daughter I have rented the land in controversy, except the one year I cultivated it myself in 1899. In 1901 I married my present wife, and in September, 1901, I purchased a place in Hemphill—being block No. 26—on which there was a residence and other outhouses, from Dr. Harrison, and I immediately moved into the residence with my family. I resided on block No. 26 in the town of Hemphill, with my family, continuously from the time I moved on it, in 1901, until I sold it, in 1904. I was living on this place when the execution was levied upon the sixty acres of land in controversy in this suit. I bought the place from Dr. Harrison, and paid him \$10 cash, and gave vendor's lien notes for the balance. I paid something on the notes. There was a balance due on one of the notes when I sold this place. I sold the place to L. Low, I think, in January, 1904. The notes were not fully paid when the execution was levied on the sixty acres of land in controversy in this suit. Low paid me some money for the place, and assumed the payment of the balance due on the note I gave for it when I bought it. I lived on this place at the date of the levy of the execution on the land in controversy in this suit, and I sold the place (block No. 26 in Hemphill) to L. Low after the levy of the execution on the sixty acres of land in controversy. I occupied the place in Hemphill (block No. 26) as a home, and called it my home, but I always asserted homestead rights in the land in controversy, and not in block No. 26. When I moved away from the sixty acres in controversy I did not intend to abandon it as my homestead, but intended to return to it, and have never intended to abandon it as such; but I have never lived on it as a home since the marriage of my oldest daughter, except the one year I cultivated it, in 1899, but I have kept it rented out. I have never asserted homestead rights in any other tract of land. When the levy of the execution was made on the sixty acres of land I was just recovering from a spell of typhoid fever, and I then intended to return to the land in controversy, and I then claimed it as my homestead. I think it is my intention now to return to it. I have always considered

it as my homestead. When my father gave me this land he did not deed it to me, but he made me a deed later. I have been living in Hemphill ever since I sold my place to L. Low. I have not lived on the land in controversy since the levy of the execution on it."

Appellant's first assignment of error is as follows: "The court erred in its charge to the jury, in charging in words as follows: 'Where a homestead is once acquired upon land, a removal therefrom to another tract of land in a town, and purchase of such other tract, will not of itself deprive him of his homestead rights in the first tract, provided he intended, in such removal, to occupy the second place only temporarily, and intended to return to the first place.' Said charge being upon the weight of the evidence, in that it singles out important facts introduced in evidence, and tells the jury that they do not constitute abandonment, and also because it makes the question of abandonment depend alone upon plaintiff's intention at the very time of his removal, instead of making it depend upon whether or not his intention to return to the first tract of land in controversy existed at the time of such removal, at the date of the levy of the execution, and at all times intervening." We think the assignment should be sustained. The charge is misleading in that the jury might have understood therefrom that, if the plaintiff did not intend when he moved upon the place in Hemphill to abandon his homestead upon the property in controversy, it continued to be his homestead notwithstanding the fact that he had lived with his family for a number of years upon the property which he purchased in the town of Hemphill, and may not have had at all times a fixed intention to return to the property in controversy. The indefinite and somewhat contradictory testimony of the plaintiff as to his continuing intention of returning to and making his permanent home upon the land in controversy after he established his home in Hemphill rendered this inaccuracy in the charge specially harmful to the defendant, and requires a reversal of the judgment. *Schwartzman v. Cabell* (Tex. Civ. App.) 49 S. W. 115; *White v. Epperson* (Tex. Civ. App.) 73 S. W. 852.

It is unnecessary for us to pass upon the other assignments of error presented by appellant. Other portions of the charge complained of under appropriate assignments contain the same error above pointed out, and to that extent said assignments are sustained. If any further error is shown by any of the remaining assignments, it is not such as is likely to occur upon another trial of the case.

Because of the errors in the charge, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

LUSTER v. ROBINSON.

(Supreme Court of Arkansas. July 1, 1905.)

1. NOTES—PAYEE — DESCRIPTION — INDIVIDUAL RIGHT.

The fact that a note bears after the name of the payee letters shown to indicate the title of the payee's office in a beneficial association does not render the note payable to the payee, other than in his own right.

2. APPEAL—TRIAL TO THE COURT—QUESTIONS FOR REVIEW.

Where a cause was tried by the court without a jury, and the court was not asked to make any declarations of law, the only question on appeal was whether the evidence supported the finding and judgment.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by D. A. Robinson against Bryant Luster. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

In 1893 D. A. Robinson was a member of an incorporated society known as the United Brothers of Friendship and Sisters of the Mysterious Ten. He held the office of grand master for Arkansas in that society. While he held this office, J. T. Thompson, Bryant Luster, and John Veverly executed to him a promissory note in words and figures as follows: "Ninety days after date we promise to pay to the order of D. A. Robinson, G. M. U. B. F. & S. M. T., fifty dollars for value received, negotiable and payable without defalcation or discount at the office of the Citizens' Bank of Little Rock, Ark., with interest from date at the rate of ten per cent. per annum from date until paid." Robinson brought suit on this note against the defendants, who were duly summoned, and judgment by default was rendered against them by T. W. Wilson, justice of the peace, for the amount of the note and interest. The judgment commences by reciting that "on April 20, 1894, the plaintiff, D. A. Robinson, as G. M. U. B. F. S. M. T., heretofore filed his complaint against the defendants," etc. It then recites that the defendants came not, but made default, and that the action was founded on a promissory note, which is set out in full in the judgment. The judgment then proceeds as follows: "Whereupon it is considered, ordered, and adjudged by the court that the plaintiff have and recover of and from the defendants the sum of fifty dollars for the principal debt, and the further sum of two dollars interest to this debt, and all costs herein expended, and have execution therefor; this judgment to bear interest at the rate of ten per cent. per annum until paid." In March, 1903, Robinson brought suit on this judgment against Bryant Luster.

On the trial the defendant set up that the note upon which this judgment was based was executed to Robinson, as grand master of the United Brothers of Friendship and Sisters of the Mysterious Ten, in payment of a debt which J. T. Thompson owed to that society, and that Robinson had no personal interest in the note, or in the judgment based thereon; that afterwards the defendant compromised and paid off the judgment to the successor of Robinson in the office of grand master. Robinson claimed that the note was executed for an individual debt, in which the society had no interest. The justice found in favor of plaintiff, and in a trial de novo in the circuit court the same judgment was rendered, from which the defendant appealed.

L. J. Brown, for appellant. Marshall & Coffman, for appellees.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment of the circuit court in a case tried before the judge of that court without a jury. The court was not asked to make any declarations of law, and the only question presented by the appeal is whether the evidence is sufficient to support the finding and judgment of the court in favor of plaintiff. The note upon which the judgment sued on was based was made payable to "D. A. Robinson, G. M. U. B. F. & S. M. T." The evidence shows that these letters stand for "Grand Master United Brothers of Friendship and Sisters of the Mysterious Ten." But this title following the name of the payee in the note was only a designation of the person to whom it was to be paid, and shows that the note was to Robinson in his own right. The suit in which the first judgment on this note was rendered was brought before a justice of the peace, and no complaint was filed except the note itself. The note shows on its face that it was due to Robinson in his own right, and not as the representative of the society, and was set out in full in the judgment. Where the judgment, as a whole, is considered, we do not think that it shows that it was rendered in favor of Robinson in his representative capacity. The evidence as to whether the plaintiff or the society was the real owner of this judgment was conflicting, and the finding of the court that he was the owner has evidence to support it.

Though the case is a close one on the evidence, the finding of the circuit court settles the case so far as the facts are concerned, and, as no error of law appears, the judgment must be affirmed. It is so ordered.

**MOUNTAIN PARK TERMINAL RY. CO. v.
FIELD et al.**

(Supreme Court of Arkansas. July 1, 1905.)
EMINENT DOMAIN—RIGHT TO EXERCISE POWER—JURISDICTION OF COURT.

Since Kirby's Dig. §§ 2947, 2952, 2954, 2955, providing for the condemnation of land by a railroad company for its right of way, and for the impaneling of a jury to ascertain the compensation by proceedings as in civil cases, etc., assume that a railroad company filing a petition is entitled to the right of way on making compensation, the court, on the hearing of such a petition, cannot try issues raised by an answer alleging that petitioner was not organized to build a railroad, but to carry out the private enterprise of an individual, and that the purpose was merely to construct a switch to reach the individual's business establishment, but should permit the owner to amend by praying for equitable relief, and then transfer the cause to the chancery court.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Condemnation proceedings by the Mountain Park Terminal Railway Company against W. H. Field and others. From a judgment dismissing the petition, petitioner appeals. Reversed.

H. M. Armistead and John McClure, for appellant. Rose, Hemingway & Rose, and J. W. & M. House, for appellees.

BATTLE, J. On the 20th of April, 1904, the Mountain Park Terminal Railway Company filed a petition for condemnation of a right of way through certain lands of W. H. Field and others. "The petition, in the usual form, alleges the incorporation of the railroad company; the route of said railroad; that its road is surveyed and located in Pulaski county; that the defendants are the owners of certain lands which are described; that said lands are unimproved; that it has failed to obtain the right of way over the said land by agreement with the owners thereof; that it is desirous of beginning work on its railroad; asks the court to designate a sum of money to be deposited by plaintiff for the purpose of making compensation, etc., and that a jury be impaneled to ascertain the amount of compensation to which the owners of said land may be entitled; and that an appropriate order and judgment be entered, vesting the petitioner with a right of way one hundred feet in width through said land, etc.

"Notice was duly served on the defendants, notifying them that on a certain date the plaintiff would apply to the judge of the second division of the Pulaski circuit court for an order fixing the amount of the possible damages that would result from the construction of said railroad over the land of the defendants."

On the 7th day of May, 1904, the defendants filed an answer as follows:

"The defendants deny the right of the plaintiff to maintain this condemnation proceeding, and say that the plaintiff was not

organized in good faith for the purpose of building a railroad, nor for any public purpose, but is organized solely to carry out the private enterprise of one Charles M. Newton, who has subscribed for substantially all of the stock of said company. The fact is that on the south side of the Choctaw, Oklahoma & Gulf Railroad, along where the line of plaintiff is sought to be constructed, there is a high hill, composed entirely of stone, that is valuable for crushing into small fragments of stone, suitable for ballasting railroads, making macadam highways. the construction of concrete, and other like purposes. The front of these hills cannot be utilized, because any rock blasted from them would fall upon the track of the Choctaw, Oklahoma & Gulf Railroad; but at a point where the plaintiff seeks to condemn there is a narrow gorge, penetrating said hill, up which a railroad track can be built for a short distance. But the part of said hill adjacent to the right of way of said railroad belongs to defendants, who contemplate the erection of a crushing plant in said gorge. A part more remote, and further up said gorge, belongs to said Newton, who also desires to put in a crusher; but said gorge is so narrow that, if a railroad track is constructed up said gorge so as to reach the property of said Newton, it will preclude these defendants from the erection of any crusher for their own use, and will also destroy the value of the great rock deposits which they may possess in that vicinity. The sole purpose of said Newton in seeking to condemn a right of way is merely to traverse the defendant's land in order to get to a crusher of his own at the sacrifice of the property of these defendants. It is impossible to build said railroad as laid out, because the grade up to the said property, known as 'Mountain Park,' is so steep that no railroad train could be run upon any railroad that might be built. The said Newton has caused a railroad to be surveyed only for a distance of about 1,700 feet—just far enough to bring it to the site of his proposed crusher—and at this point the railroad survey sinks to a depth of twelve feet into the hill, and further progress is impossible. Defendants deny that said plaintiff ever contemplates building any further, or doing more than to construct a switch to reach a crusher of said Newton, and they deny that any public purpose will be subserved by the building of the proposed railroad. The railroad of the plaintiff is laid out to run from the city of Little Rock to said Mountain Park, but these defendants say this is merely a pretense, and a scheme to perpetrate a fraud upon the law and upon this honorable court, and that the plaintiff has taken no steps to acquire the right of way, save the few feet that are necessary to reach from the Choctaw, Oklahoma & Gulf Railroad to the site of the proposed crusher of the said Newton."

Plaintiff filed a motion to strike the answer from the files of the court, and on the 21st of May, 1904, the court overruled the same. After hearing the evidence the court found that the proposed construction is for private purposes, and the right of eminent domain does not exist in this case, and dismissed the petition.

Did the court err in overruling the motion to strike the answer from the files?

The proceeding prescribed by statute for the condemnation of land for right of way for a railroad is special. Section 2947 of Kirby's Digest provides: "Any railroad company organized under the laws of this state, after having surveyed and located its lines of railroad, shall in all cases where such company fails to obtain, by agreement, with the owner of the property, through which said lines of railroad may be located the right of way over the same, apply to the circuit court of the county, in which said property is situated, to have the damages for such right of way assessed, giving the owner of such property at least two days' notice, in writing, of the time and place where such petition will be heard." Section 2952 provides: "It shall be the duty of the court, to empanel a jury of twelve men, as in civil cases, to ascertain the amount of compensation which such company shall pay, and the matter shall proceed and be determined, as in other civil causes." Section 2955 provides: "When the determination of the question in controversy in such proceeding is likely to retard the progress of the work on, or the business of such railroad company, the court, or judge, in vacation, shall designate an amount of money to be deposited by the company." Section 2954 provides: "In all cases where damages for the right of way for the use of any railroad company have been assessed in the manner hereinbefore provided, it shall be the duty of such railroad company to deposit with the court or to pay to the owners the amount so assessed, and pay such costs as may, in the discretion of the court, be adjudged against it, within thirty days after such assessment; whereupon it shall, and may be lawful for such railroad company to enter upon, use and have the right of way over such lands forever." From these statutes it appears that the sole object of the proceedings provided for by them is to ascertain the damages that the railroad company shall pay for right of way. They seem to assume that the railroad company is entitled to the right of way upon making compensation for same.

In *Niemeyer & Darragh v. Little Rock Junction Railway et al.*, 43 Ark. 111, the appellants sought to enjoin the railroad company from building its road along a certain alley and taking certain lots; alleging in their complaint "that the organization of the company was a fraud upon the state, in this: that it was not a bona fide company organ-

ized to build and operate a railroad company as pretended, but in effect a bridge company, taking the guise and semblance of a railroad company for the purpose of building, using, and deriving service from the bridge, with the exemption from taxation accorded by statutes to the bridges of railroads," etc. One of the questions in that case was, were not the appellants barred from maintaining their suit by the proceedings instituted by the railroad company for right of way? The court said: "Nor is it at all clear to our minds that the appellants have a full, complete remedy at law, to be obtained by way of defense to the special proceedings in the circuit court for condemnation. The junction company, in all purely legal aspects, is a proper corporation, clothed with franchise of eminent domain to the extent of its necessities. The proceeding under our statutes is a special one, directed solely to the object of determining the compensation to be paid the owner of property proposed to be taken. No provision is made for any issue upon the right to condemn. It could not there be proved that the junction company was not a corporation. To attack its existence collaterally is not permissible. A plea in the nature of *nul tiel* corporation would not be safe, in the face of complete articles of association. Besides, it is plain that the Legislature never contemplated any such defense as a want of right to condemn in the corporation. For, where the proceedings are liable to delay, it is made the duty of the court to fix a sum to be deposited by the company, and to allow the property to be taken and used in anticipation of the settlement of damages." See, also, *Bentonville Railroad v. Stroud*, 45 Ark. 280.

It follows, then, that the court erred in overruling plaintiff's motion and trying the issue presented by the defendants' answer.

But are the defendants without a remedy? Property cannot be taken from its owner without his consent, even under an act of the Legislature, and appropriated solely and exclusively to the private use of another person or corporation. Courts have the power to determine whether a particular use for which private property is authorized by the Legislature to be taken is in fact a public use. *Shoemaker v. United States*, 147 U. S. 298, 13 Sup. Ct. 361, 37 L. Ed. 170; *Moore v. Sanford*, 151 Mass. 255, 258, 24 N. E. 323, 7 L. R. A. 151; *Welton v. Dickson* (Neb.) 57 N. W. 559, 22 L. R. A. 496, 500, 501, 41 Am. St. Rep. 771; *Chicago & Eastern Illinois Railroad Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Cooley's Constitutional Limitations* (7th Ed.) 774; 1 *Lewis, Eminent Domain* (2d Ed.) 158; 3 *Elliott on Railroads*, 962. As an incident to this power, in the absence of a statutory remedy, a court of equity has the power to restrain a railroad corporation from taking property for a private use.

In *Niemeyer & Darragh v. Little Rock Junction Railway*, 43 Ark. 120, the court

said: "Farther, with regard to corporations not acting under special charters of legislative grant, but voluntarily organized under general laws, although their existence as corporations cannot be questioned collaterally, yet if they have resulted from fraudulent combinations of individuals to procure powers under circumstances and for purposes not within the scope and purpose of legislative intent, and the corporators, under shelter of their articles, are about to exercise powers oppressive to the individual, they may be restrained by private suit of those injured, or about to be. Fraud has no immunity anywhere, in any guise.

"This is the course that in this case has been pursued. We think the chancery court properly entertained the bill, and had jurisdiction to enjoin the company, if the merits of the case required that relief."

So individuals cannot combine as a railroad corporation and convert property of individuals solely and exclusively to their private use. That would be an abuse of the power to form such corporations under the statutes, and contrary to their spirit and intent, and "may be restrained by private suit by those injured, or about to be."

The judgment of the circuit court is reversed, and the cause is remanded, with leave to appellees to amend their answer so as to invoke equitable relief, and with directions to the court, when so amended, to transfer the cause to the proper chancery court.

GRAHAM et al. v. REMMEL

(Supreme Court of Arkansas. June 24, 1905.)

ACTION ON NOTE—PAROL EVIDENCE — ADMISSIBILITY.

Where an application for insurance was accompanied by a note for the premium, both of which were delivered in due form to the agent of the insurer, parol evidence was admissible in an action by the agent on the note to show that the plaintiff requested that defendants execute the note as evidence of their good faith, but not to be binding on them unless the policy, when it arrived, was satisfactory, and they accepted it.

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Action by H. L. Rummel against H. C. Graham and others, doing business as Graham Bros. From a judgment in favor of plaintiff, defendants appeal. Reversed.

The following is a copy of the note referred to in the opinion: "Tuckerman, Ark., Feb. 27, 1902. On the delivery or thirty days thereafter, of a joint life policy in the sum of thirty-five thousand dollars (\$35,000) on the ten year distribution plan in the Mutual Life Insurance Company of New York, on the lives of Henry C. Graham, J. R. Graham, T. J. Graham, Nimrod Graham, Nathan Graham, Josephus S. Graham and James Graham, known as the Graham Bros., we promise to pay to the order of H. L. Rummel the

sum of four thousand seven hundred and fifty-three and seventy-hundredths dollars (\$4,753.70). Should the policy not be issued then this obligation to be null and void."

Jno. W. & Jos. M. Stayton and Morris M. Cohn, for appellants. Rose, Hemingway & Rose and S. D. Campbell, for appellee.

HILL, C. J. In Jackson county there were seven brothers named Graham, engaged in mercantile pursuits and farming, and all in prosperous condition; and it developed in argument of the case at bar that they were each over six feet tall—fine specimens of Arkansas manhood. Mr. H. L. Rummel, the general manager of the state of one of the large insurance companies, knowing them, and recognizing the advantage to his company of securing a policy on the joint lives of these gentlemen, undertook personally to secure such a policy, and, to that end, visited them. The result was, an application was signed for a \$35,000 policy on the lives of the seven Grahams, and a note for \$4,753.71, payable to Mr. Rummel, was executed and delivered to him. Later a 10-year distribution plan policy for \$35,000 was sent to the Grahams. It was not accepted, and negotiations were had between Mr. Rummel and some of them, looking to the securing of a different policy than the one sent. Mr. Rummel tried to get the one desired, and failed, and tendered a policy according to what he claims was the contract when the note was executed; and, on the refusal of the Grahams to accept it, he brought suit on the note. The testimony of Mr. Rummel is to the effect that an absolute agreement was reached when the application was signed and the note executed, and the policy tendered as in full and complete fulfillment of the contract as called for in the note, which will be set out in the statement of facts by the reporter. Mr. Rummel was supported in his statements by a letter written to him during the negotiations for the different policy, in which Graham Bros. stated: "Will say we are pleased with contract and have no objection whatever, but would like to have it changed to the five year distribution plan, as we have changed our minds on taking it on the plan applied for." They explain this letter by saying that it was dictated by Mr. Rummel himself to their attorney. This is admitted. And they further say it was written merely to facilitate Mr. Rummel in his effort to obtain from his company the policy they desired. The court excluded evidence offered by the appellants contradictory of Mr. Rummel's as to the execution of the note. The record reads as follows: "The defendants thereupon offered to prove by Thos. Graham that the plaintiff requested that they execute the note; that it might be necessary to attach the note to the application to show their good faith, but would not be binding upon them, except that if the policy, when it arrived, was satisfactory, and they accepted it,

the note would be binding, otherwise it would be void. This was a condition which went with its execution. The evidence so offered having been ruled out, defendants excepted." Several other *Grahams* were offered on the same point. The court directed a verdict for Mr. Rummel on the note sued upon, judgment was rendered accordingly, and the *Grahams* have appealed.

The appellee relies upon *Findley v. Means*, 71 Ark. 289, 73 S. W. 101, and the authorities therein cited, to sustain the action of the circuit court in excluding this testimony. The syllabus of that case is as follows: "A deed, note, or other instrument of writing delivered to the grantee or obligee, to take effect when certain conditions are performed, becomes operative and binding from the time of delivery, though the conditions be not fulfilled." The authorities cited are *Pope v. Latham*, 1 Ark. 66; *English v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Scott v. State Bank*, 9 Ark. 36; *Chandler v. Chandler*, 21 Ark. 95; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783. With the exception of *Chandler v. Chandler*, all these cases were cases of escrow, where the point decided was that there could be no delivery in escrow to the obligee of a bond, note, or other written instrument. *Chandler v. Chandler* holds that, where a bond or other writing is delivered conditionally to the obligee himself, it is operative and binding from the time of the delivery, though the conditions be never performed; and to the same effect is the ruling in *Findley v. Means*. The technical character of an escrow is not mentioned in these two cases. Where conditions subsequent are to be performed in order to render the note or bond operative, and when operative the written instrument is expressive of the entire contract, then it must be delivered to a third person, or the delivery to the obligee in escrow will be a good delivery, and the instrument cannot be contradicted by parol varying its terms. It is a completed contract, subject to conditions subsequent not in writing. But where the delivery would defeat the real contract between the parties, then it is competent to prove by parol (1) the whole contract, and that the writing was only part of the contract; or (2) to explain the consideration; or (3) to show that it was part of the contract that the writing was delivered, but not to become operative until another part of the contract—condition precedent—was fulfilled. Of the first class is *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706, where a deed did not evidence the entire contract, and parol evidence was admitted to show the entire contract; of the second class is the recent case of *St. L. & N. A. Ry. v. Crandall* (Ark.) 86 S. W. 855, where the authorities in this state are cited to show that the consideration is, under certain circumstances, open to parol proof, not to defeat, but effectuate, the real contract; and of the third class is *State v. Wallis*,

57 Ark. 64, 20 S. W. 811, and *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563, which is approved in *State v. Wallis*. In *State v. Wallis*, Mr. Justice Hemingway, speaking for the court, said: "Proof that such of the defendants as subscribed the bond did so upon the condition that other persons named in it as sureties would sign it was not incompetent. It was not designed to vary the terms of a written instrument, but to show that there never was a complete execution of such instrument. For this purpose it was competent. *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563." In *Ware v. Allen* the Supreme Court of the United States held: "Parol evidence is admissible in an action between the parties to show that a written instrument executed and delivered by the party obligor to the party obligee, absolute on its face, was conditional, and was not intended to take effect until another event should take place." Following *Ware v. Allen*, the Supreme Court of the United States, in *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698, carried the application of the dictum into a case identical in principle and analogous in fact with the one at bar. Mr. Justice Harlan, for the court, said: "And the evidence offered by the appellant and excluded by the court did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never in fact delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument upon which this suit is based was not—except in a named contingency—to become a contract or promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract, entitling the party who claimed the benefit of it to enforce its stipulations. The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is undoubtedly—prima facie, indeed, should be deemed—strong evidence that the instrument came to the hands of the payee as an obligation of the maker, enforceable according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there

never was any complete, final delivery of the writing as the promissory note of the maker, payable at all events and according to its terms. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract." After citing many authorities supporting these views, the court concluded: "For the reasons stated, and without considering the case in other aspects, we are of the opinion that it was error to exclude the evidence offered by the defendant tending to show that the writing sued on was not delivered to or received by Dulaney as the promissory note of the defendant, binding upon him as a present obligation, enforceable according to its terms, but was delivered to become an obligation of that character when, but not before, the defendant examined, and by working them tested, the mining properties purchased by the plaintiff, and elected to take the stipulated interest in them. According to the evidence so offered and excluded, the writing in question never became, as between Burke and Dulaney, the absolute obligation of the former, but was delivered and accepted only as a memorandum of what Burke was to pay in the event of his electing to become interested in the property; and from the time he so elected, or could be deemed to have so elected, it was to take effect as his promissory note, payable according to its terms. His election within a reasonable time to take such interest was made a condition precedent to his liability to pay the stipulated price. The minds of the parties never met upon any other basis, and a refusal to give effect to their oral agreement would make for them a contract which they did not choose to make for themselves."

Following these authorities, and approving the reasoning in *Burke v. Dulaney* above quoted, the court is of opinion that the circuit court erred in excluding the evidence offered and directing a verdict. The evidence raised an issue of fact determinable by the jury.

The judgment is reversed, and the cause remanded.

DYER et al. v. JACOWAY et al.

(Supreme Court of Arkansas. June 24, 1905.)

1. PRINCIPAL AND SURETY — INDEMNITY MORTGAGES—RIGHTS OF CREDITOR—SUBROGATION—RELEASE BY SURETY.

Where a conveyance is made by the principal debtor to the surety to secure the payment of the debt, the creditor has an interest therein in which the surety cannot destroy, but, where the conveyance is merely to indemnify the surety, the creditor acquires no interest until the insolvency of the principal, until which time, and even afterwards, if he acts in good faith and before claim is made upon him, the sure-

ty may, both in equity and at law, release the security.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Principal and Surety, §§ 402-412.]

2. SAME—INTEREST OF SURETY.

Neither a surety nor his heirs take any legal interest in land mortgaged to him for purposes of indemnity.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 270.]

3. SAME—PROCEEDINGS BY CREDITOR—PARTIES.

Creditors cannot obtain subrogation to a deceased surety's right in an indemnity mortgage by a proceeding against the other sureties, to which none of the heirs or legal representatives of the deceased surety are parties.

4. SAME—LACHES.

Creditors cannot, because of laches, procure subrogation to the rights of sureties in an indemnity mortgage by a proceeding brought 30 years after the execution of a release by the sureties.

Appeal from Circuit Court, Yell County, Dardanelle District; William L. Moose, Judge.

Suit by A. J. Dyer and another against W. D. Jacoway and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. D. Jacoway was on the 16th of March, 1867, appointed administrator of the estate of Samuel Dickens, who had died in Yell county on the 2d day of the same month. Jacoway gave bond as administrator, and entered upon the discharge of his duties as administrator of that estate. Afterwards, in 1875, the estate still being in his charge as administrator, he executed to the sureties of his administrator's bond a mortgage on certain lands owned by him. The conditions of this mortgage are as follows, to wit: "Provided nevertheless, that whereas the said R. P. Parks, Jacob Graves, Hiram Dacus, Joseph Gault, J. M. Cole, and L. T. Brown, did on the 16th day of March, A. D. 1867, become the sureties of the said W. D. Jacoway on his bond as administrator of the estate of Samuel Dickens, deceased; and, whereas, said securities did on the same day, sign, seal and deliver said administration bond; and, whereas, said bond was filed and recorded on the 16th day of March, A. D. 1867, and the same is now of record in letters of administration, Record A, pp. 227, 228; and, whereas, the administration of said estate is unsettled, and the said W. D. Jacoway is desirous that his said securities shall entertain no reasonable fears or sustain any loss in the premises: Now, know ye, if the said W. D. Jacoway shall make full, complete and perfect settlement of said estate, and shall them, his said securities, save harmless from any and all judgments and decrees of any court which may be rendered against them as such securities on said administration bond, then in that case the foregoing deed of mortgage shall be void, otherwise to be and remain in full force and effect." Afterwards, on the 15th day of April, 1875, Jacoway filed in the pro-

bate court his fifth account current and final settlement showing a balance of \$7,216.64 in his hands. This account was confirmed by the court in July, 1875, and on the 15th day of July, 1875, the court entered an order directing Jacoway, as administrator, to distribute this sum pro rata on all the fourth-class claims probated against the estate, and pay to the owners of such claims 39 cents and 8 mills on each dollar of their respective claims. Jacoway, in pursuance of this order, subsequently distributed the same around to all of the fourth-class creditors except A. J. Dyer and Isabella Johnston. He tendered to each of them also the sum required, but did so on condition that they execute to him a receipt in full of all demands against the estate. They declined to give a receipt in full, and no part of their claims was paid. In 1876, A. J. Dyer and Isabella Johnston filed a suit against Jacoway and his bondsmen to surcharge and falsify his fifth account current and final settlement. This suit was brought in the wrong district of the county, and was in 1877 dismissed for want of jurisdiction. In 1878 the same parties brought a similar action in the other district of the county against Jacoway and his sureties. On the 19th of July, 1878, Jacoway executed another mortgage to his securities to protect them against liability on his bond, the conditions therein being substantially the same as the mortgage to them executed in 1875. One of the sureties was dead at the time the first mortgage was executed, and two were dead when the last mortgage was executed. The suit in equity was dismissed for want of equity, and this judgment was recovered on appeal. See *Dyer v. Jacoway*, 42 Ark. 186. Although a decree was rendered against Jacoway and his bondsmen in that action, and this judgment was again revoiced by the Supreme Court, and the cause remanded for further proceedings. See *Dyer v. Jacoway*, 50 Ark. 217, 6 S. W. 902. A final decree in said case was entered in the Yell circuit court in chancery under the directions of said mandate at the August term, 1893, thereof, surcharging and falsifying the account of the administrator in accordance with the aforesaid opinion of the court. Said decree further provided as follows: "And it is further ordered that the administration of the estate of the said Samuel Dickens be remanded back to the probate court, to be administered in due course of law, and that this decree be certified by the clerk under the seal of this court to the probate court of Yell county in and for the Danville district, and the proceedings in the due course of administration of said estate be continued there upon the basis of the said Jacoway's fifth annual settlement as the same is corrected and reformed by this decree." Afterwards the probate court asked an order making a final settlement in the case, from which judgment on appeal was taken to the circuit

court. That court made some changes in the judgment of the probate court, and both parties appealed from the judgment of the circuit court to the Supreme Court. The judgment of the circuit court was voiced, and the clerk of the Supreme Court was ordered to relate the account in accordance with the opinion. See *Jacoway v. Hall*, 67 Ark. 340, 55 S. W. 12. In pursuance to the mandate of the Supreme Court, the circuit court of Yell county for the Danville district, at its August term, 1900, found that Jacoway was due the estate of Dickens the sum of \$2,350.32. But this indebtedness of Jacoway to the estate is made up almost entirely of amounts which had been found due from Jacoway by probate court in 1875, and which he had been ordered to pay over to the fourth-class claimants in that year, and the interest on such amounts as of the date of April 15, 1895, with interest at 6 per cent. until paid, and judgment was entered against Jacoway in favor of plaintiff A. J. Dyer for \$120.90 and in favor of the estate of Isabella A. Johnston for something over \$2,000. After the recovery of this judgment, A. J. Dyer and the administrator of the estate of Isabella A. Johnston brought this suit to be subrogated to the rights of the sureties in the mortgage of April, 1875, and to foreclose the same. The complaint alleged that Brooks, Neely & Co. were in possession of the lands mortgaged, and they were made defendants to the action. The complaint further alleged that W. D. Jacoway had conveyed certain lands to his children in fraud of his creditors, and that such conveyances be set aside, and the lands subjected to the payment of the claims of plaintiff. The defendants Brooks, Neely & Co., who now claim the land mortgaged to the sureties, filed an answer showing that the sureties to whom the mortgage was executed had executed a written release of this mortgage to Jacoway in 1882; that afterward Jacoway had, in 1882, conveyed a part of this land to one Atwood, who in turn conveyed it to James K. Perry, and that the remainder of the land had been sold and conveyed by Jacoway to said Perry in 1886, and that Brooks, Neely & Co. hold under Perry. Defendants alleged that Atwood and his grantor, by virtue of said release and conveyance, acquired title to the property free from the lien of the mortgage, and they further set up the statute of limitations and laches in bar of the action. Jacoway and his children filed an answer in which they deny that the conveyance to his children referred to in the complaint was made to defraud creditors, or that Jacoway is the owner of such land. Upon the hearing the chancellor found that Jacoway, at the time he conveyed the lands to his children referred to in the complaint, was perfectly solvent, and owned much more property than was required to pay his debts, and that no right of subrogation was shown, and that on the whole case

there was no equity in the complaint, and dismissed the same. From this judgment plaintiff appealed.

L. C. Hall and Ratcliffe & Fletcher, for appellants. John M. Parker, J. M. Moore, and W. B. Smith, for appellees Brooks, Neely & Co.

RIDDICK, J. (after stating the facts). This is a suit in equity by certain creditors of the estate of Samuel Dickens to be subrogated to the rights of the sureties on the bond of the administrator of that estate in a mortgage executed by the administrator to them to indemnify and protect them from liability on such bond. The complaint also set up that certain conveyances made by the administrator to his children were fraudulent, and asked that they be set aside. The chancellor found against the plaintiffs on both issues, and in the brief and argument in this court counsel for plaintiffs do not ask us to review the finding of the chancellor as to the conveyances made by the administrator to his children many years ago. But they insist that under the facts they are entitled to be subrogated to the rights of the sureties in the mortgage executed to them by the administrator.

Now, there seems to be a distinction between those conveyances made by a principal to a surety both for the purpose of protecting him and to secure the payment of the debt and those executed merely to indemnify the sureties against liability. If the conveyances are made to the surety for the purpose of securing the payment of the debt, the creditor has an interest therein which the surety cannot destroy. But if the conveyance to the surety is only to indemnify him, then such security does not, in the first instance, attach to the debt, and whatever equity may arise in favor of the creditor with regard to the security arises afterwards, and in consequence of the insolvency of the parties principally liable for the debt. Until this equity arises the surety has a right in equity as well as at law to release the security. Even after such insolvency the mortgagee may surrender the security if he does it in good faith and before any claim is made upon him for it. The application of it for the benefit of third persons can only be accomplished by the interposition of a court of equity, and in case the mortgagee still claims the security, or when he has conveyed it under circumstances tending to show bad faith or collusion between him and the mortgagee. *Jones v. Quinnpiack Bank*, 29 Conn. 25; *Daniel v. Hunt*, 77 Ala. 587; *Fertig v. Henne*, 197 Pa. 580, 47 Atl. 840; *Pool v. Doster*, 59 Miss. 258; *Stewart v. Welch*, 84 Me. 308, 24 Atl. 860; *Jones on Mortg.* (6th Ed.) § 387; *Harris on Subrogation*, §§ 591, 594. But in this case the mortgage was executed in 1875 to the six sureties on the bond of Jacoway.

At the time the mortgage was executed, J. M. Cole, one of the sureties named therein as a grantee, had been dead three years, and neither he nor his heirs took any legal interest by virtue of the mortgage. Brown, another one of the sureties, died in 1876. Afterwards, in 1882, the four remaining sureties executed a release to Jacoway, in order that he might sell the land. The facts show that this release was executed in good faith, and that afterwards the land mortgaged passed into the hands of parties who paid a valuable consideration therefor, and came through mesne conveyances into the possession of the defendants Brooks, Neely & Co., who are bona fide holders for value. The only surety who took any interest by such mortgage that did not join in the execution of the release was Brown, who had been dead six years before the release was executed. But plaintiffs can secure no rights through him in this proceeding for the reason that none of his heirs or legal representatives were made parties to this action. *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119; *Harris v. Watson*, 56 Ark. 574, 20 S. W. 529. The release of the other sureties was executed in 1882, and it was 20 years afterwards before it was questioned and before the creditors brought this action to be subrogated to the rights of their sureties. Even if, in case the creditors originally had the right to enforce this mortgage for the payment of these debts, we think that it is too late to do so now 20 years after the execution of such release. The recent case of *Wallace v. Sweptson* (Ark.) 86 S. W. 398, is conclusive on that point on the doctrine of laches, and we refer to the opinion in that case for a full discussion of the question.

Finding no error on the points presented, the judgment is affirmed.

STATE v. SONGER.

(Supreme Court of Arkansas. June 24, 1905.)

1. INTOXICATING LIQUORS—LOCAL OPTION—ISSUANCE OF LICENSE—PRESUMPTION.

Under Kirby's Dig. § 5119, requiring the returns of elections to be forwarded to the county election commissioners, to be by them laid before the county court at the next term thereof, the county court, before granting a license for the sale of intoxicating liquors, must determine whether a majority of the votes of the county have been cast in favor of license, or not; and the issuance of a license by it raises a presumption that the judge found that the majority of the votes were cast in favor of license.

2. SAME—LOCAL OPTION VOTE—EVIDENCE—COMMISSIONER'S ABSTRACT—CERTIFICATE.

While the finding of the county court that a majority of votes cast were in favor of license is not conclusive, yet it cannot be overturned by an abstract of the vote filed by the election commissioners, the certificate to which does not cover the vote on the question of license, but merely certifies to the votes cast for candidates for office.

3. SAME — TESTIMONY OF COMMISSIONERS— FOUNDATION.

Testimony of election commissioners that a majority of the votes cast on the question of license were in the negative is incompetent, in the absence of a showing that the original returns of the election had been destroyed or could not be procured.

Appeal from Circuit Court, Sharp County, Northern District; John W. Meeks, Judge.

Will Songer was acquitted of selling liquor without a license, and the state appeals. Affirmed.

The grand jury of Sharp county, for the Northern District, indicted Will Songer for keeping a saloon and dramshop and selling intoxicating liquor without license. On the trial the sale was admitted, and the defendant, to show his right to sell, introduced a license issued by the county court authorizing him to keep a saloon for the sale of intoxicating liquors in the town of Hardy, in that county. To show that the county court had no authority to issue this license, and that it was void, the state then offered to introduce a certificate of the result of the election filed in the office of the county clerk by the county election commissioners. This certificate purports to be an "Abstract of All Votes Cast for All Executive, Legislative, and Judicial Officers at the Election Held in Sharp County on the 1st day of September, 1902." Following this heading are the names of the different voting precincts, and the number of votes cast in each for the different candidates voted for at that election, and also the number of votes cast for and against license, the total of which votes figured up 523 for license and 575 against license. To this abstract was attached the certificate of the commissioners, in which, after reciting that they had opened and compared the returns of the election from the different precincts of the county, they certify "that it appears from the returns aforesaid that each person named in the foregoing abstract received at said election the number of votes in each precinct set down opposite his name for the office stated therein." But they do not certify or refer to the vote on the question of license either in the caption or in the certificate attached to such abstract of the votes. The circuit judge sustained the objection made by the defendant to this evidence, and refused to allow it to be read in evidence. The state then introduced G. B. Ferguson, one of the election commissioners, and who acted as such at the general election held in September, 1902, and offered to prove by him that he opened and canvassed the returns of said election, and that a majority of the votes cast on the question of license

at that election, as shown by the returns, were against license. The presiding judge sustained an objection made by defendant to the introduction of this testimony, and the state excepted. The state introduced no further evidence, and the court directed a verdict for the defendant, and entered judgment accordingly, from which the state appealed.

Robt. L. Rogers, Atty. Gen., for the State.
Sam H. Davidson, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment acquitting the defendant of the charge of selling liquors without license. The defendant proved that he sold under a license issued by the county court, and the state undertook to show that at the previous general election the majority of the votes cast in that county were against license, and that the county court had no authority to issue the license. Now, under the law, the returns of the elections from the different voting precincts are required to be forwarded to the election commissioners of the county, and they are required to lay such returns before the county court at the next term thereafter. Kirby's Dig. § 5119. From these returns the county court must, before granting a license for the sale of intoxicating liquors, determine whether a majority of the votes of the county have been cast in favor of license or not. *Freeman v. Lazarus*, 61 Ark. 252, 32 S. W. 680.

The license introduced in this case raises the presumption that the county judge, before issuing this license, found that the majority of the votes on the question of license were cast in favor of license, for otherwise the court had no authority to grant the license. Now, while this finding of the county court is not conclusive, still it cannot be overturned by the abstract of the vote filed by the election commissioners, to which no certificate covering the vote on the question of license is attached. The certificate offered in evidence purports to certify the votes cast for the different candidates for office, and the number of votes received by such persons, but makes no reference to the vote on the question of license. The court, therefore, in our opinion, did not err in excluding it. The testimony of the election commissioner offered by the state was also clearly incompetent, for there was no showing that the original returns of the election from the different election precincts of the county had been destroyed, or that they could not be procured; and, in the absence of such proof, parol evidence of their contents was not admissible.

Finding no error, the judgment is affirmed.

WM. FAIT CO. v. ANDERSON et al.

(Supreme Court of Arkansas. July 1, 1905.)

STATUTE OF FRAUDS—MEMORANDUM—SUFFICIENCY.

A telegram ordering assorted goods and promising to send specifications later, and a letter accepting the order, did not, until the specifications were furnished, constitute a sufficient memorandum of a contract to satisfy the statute of frauds. Kirby's Dig. § 3656.

Appeal from Circuit Court, Pulaski County, Second Division; Edward W. Winfield, Judge.

Action by D. W. and A. G. Anderson against the Wm. Fait Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Marshall & Coffman, for appellant. Cantrell & Loughborough, for appellees.

BATTLE, J. D. W. and A. G. Anderson sued the Wm. Fait Company for breach of contract. They alleged that on the 29th of May, 1902, they entered into a contract with the defendant, by which the defendant agreed to ship to them a car load of groceries and produce in cases, according to specifications to be furnished by plaintiffs in a reasonable time; that the goods were to be paid for according to their market prices at the time of the agreement; that they furnished the defendant in a reasonable time with a list of the goods to be shipped; and that it wholly failed to ship the same to their damage of \$400.

The defendant denied these allegations and that it made any contract with the plaintiffs, and pleaded the statute of frauds. They recovered a judgment for \$151, and the defendant appealed.

The appellees were merchants doing business in the town of Newport, in this state. Appellant was a corporation engaged in selling produce in the city of Baltimore, in the state of Maryland. Dunn & Powell were merchandise brokers doing business in Little Rock, Ark. On the 29th of May, 1902, Dunn & Powell sent the following telegram to appellant: "Book Anderson Newport assorted car future goods same price as others," and wrote to it the same day by mail: "We will send you specifications on the Newport car in a few days." Dunn & Powell received from appellant, dated May 29, 1902, a letter, as follows: "We have your telegram which read as follows: 'Book Anderson Newport assorted car futures, same price as others.' To this we wired you this afternoon that we have entered this order which we now confirm [meaning corroborate]. We accordingly have entered this order and await your letter confirming [corroborating] with specifications." All such orders were subject to the approval of the appellant. On June 9, 1902, Dunn & Powell received a letter from Wm. Fait Company, dated June 7, 1902, as follows: "Referring to your tele-

gram of May 29, which read, 'Book Anderson Newport assorted car future goods, same price as others,' we beg to say that up to this present time we have no mail confirmation to this order, nor have we any assortment, and the order is therefore canceled. We cannot have these things remain open indefinitely." On June 10, 1902, appellees, through Dunn & Powell, sent specifications, and on the 13th of the same month appellant declined to ship the goods.

The statute of frauds is in part as follows: "No contract for the sale of goods, wares and merchandise, for the price of thirty dollars or upward, shall be binding on the parties unless, first, there be some note or memorandum, signed by the party to be charged; or second, the purchaser shall accept a part of the goods ordered, and actually receive the same; or, third, shall give something in earnest to bind the bargain, or in part payment thereof." Kirby's Dig. § 3656. There was no compliance with this statute. The only written evidence of a contract was the telegrams and letters set out above. The goods to be sold were not specified. There was no acceptance by appellant of any antecedent definite order. The goods to be purchased were to be selected out of a list of about 162 articles, and the quantity purchased of each was to be designated. Until such specifications were made, there could have been no definite agreement. There was no direct and unequivocal acceptance of any proposal which by acceptance could have become a complete contract. On the incomplete stipulations nothing could have been recovered at law. There was never an agreement as to the most essential part of contract of sale, the appellant having declined to treat further with appellees before the specifications were furnished. *Wheeling Steel & Iron Co. v. Evans (Md.) 55 Atl. 373.*

The judgment of the circuit court is reversed, and a judgment upon the merits will be entered here in favor of appellant, and for \$10 damages by reason of the attachment, which is dissolved.

JOHNSON v. STATE.

(Supreme Court of Arkansas, May 27, 1905.
On Rehearing, June 17, 1905.)

1. LARCENY—GAMING—CONSPIRACY TO CHEAT UNDER COLOR OF A BET—FOOT RACES—EVIDENCE.

In a prosecution for larceny, evidence that prosecutor was induced by defendant to bet money on a runner as against the runner of a club to which defendant belonged by representations that the club runner, though a favorite, would lose the race, thereby enabling defendant to win large sums from other club members, the understanding being that prosecutor's money was to be returned to him, and not really bet, prosecutor to get a share of the winnings as compensation for aiding the defendant and his confederates, and that, on the club runner winning, defendant refused to return prosecutor's money, brought the case

within the rule that when persons conspire to cheat a man under color of a bet, and he simply deposits with one of them money as a stake, not intending thereby to part with his ownership thereof, by taking the money such persons commit larceny, though afterwards they are by fraud made to appear to win.

2. SAME—INSTRUCTIONS.

An instruction that if prosecutor bet his money to win or lose, and intending to part with its title and possession, even though pursuant to a conspiracy inducing him to do so by false representations, the taking of it would not be larceny, fully protected defendant's rights.

3. SAME.

A further instruction to the effect that if the crime was consummated under the law as laid down in such instructions, before an arrangement whereby prosecutor consented to the stakeholder's keeping the money until the race was run over, the consent would not change it; but if such consent was procured before the consummation, if it was a matter of false inducement up to that point, then the consent would prevent it being larceny—was all defendant was entitled to on that point.

4. SAME—EVIDENCE—SIMILAR CRIMES.

Evidence of similar acts by defendant and his co-conspirators was admissible to show criminal intent.

5. SAME—SUBSEQUENT CONDUCT.

Evidence of a similar race, run after the one involved, was admissible, for, since admissible alone as reflecting light on the intent, it is immaterial what part of the series the one in question happened to be.

On Rehearing.

6. APPEAL—OBJECTIONS—CONSIDERATION OF DISCARDED EVIDENCE.

Where, on defendant's objection to certain evidence, the jury are instructed that it is incompetent, it will not be considered on appeal.

7. SAME—REPUTATION—REBUTTAL—ERROR.

Where, in a prosecution for larceny, prosecutor was permitted, in response to questions by the state, to state that he had never killed a man at a certain place, as testified to by a witness, nor had he robbed his sister, and the record merely showed the introduction by defendant of depositions to the effect that prosecutor's reputation for truth and morality was bad, it not appearing whether defendant or the state brought out these specific charges, or the connection in which they were made, error in permitting the evidence in rebuttal would not be presumed.

8. SAME—PRESUMPTIONS—SHOWING OF ERROR REQUIRED.

All presumptions are in favor of the trial court's rulings, and, to call for reversal, an affirmative showing of error is required, not a mere showing that under some circumstances there might have been error.

Appeal from Circuit Court, Saline County; Alexander M. Duffie, Judge.

I. E. Johnson was convicted of larceny, and appeals. Affirmed.

Wood & Henderson, for appellant. Robert L. Rogers, Atty. Gen., for the State.

HILL, C. J. The appellant was indicted by the grand jury of Garland county for the crime of larceny, and on change of venue was convicted in Saline county, and sentenced to four years in the penitentiary, and has appealed.

About 1902 a party of men, known by various names, among others, the "Buckfoot Gang," were operating in various parts of

the country. Their scheme was to have a foot race between two well-advertised runners. One of them was to be the favorite runner of a club of millionaires who were given to sports of all kinds. The other was comparatively unknown, but very swift, and known to the club racer to be swifter than him. The club racer and the club manager, privately learning the situation and the impending fate of the club favorite, were anxious to make money out of such race, and would approach some one who had ready cash and good credit at home, who would be willing to aid them, and incidentally himself, in making money out of the "sure thing." In this light it was presented to the intended victim. The party inveigled was not to bet his own money. He was merely to back the runner against the club runner with money furnished by the schemers, and bet the money the schemers furnished him. He was expected to have plenty of money in sight, and good references as to his credit at home to satisfy the millionaires that he was in their class. In varying details these plans were worked at Webb City, Mo., Salt Lake City, Utah, Aurora, Mo., and Hot Springs, Ark. In some cases it was known to the inveigled party that the club runner was going to lose the race, irrespective of speed; and in others he rested on his certain information that his man was the fastest. The inveigled party was always induced in some way to put up his own money, with an understanding that it was to be returned, and not really bet. Probably this was not difficult in the closing hours before the race, when the stakes were high and the excitement growing, and his belief that the result was a "sure thing." The "sure winner" had an unfortunate way of falling, while well in the lead, and the club runner would first reach the goal. To appease the disappointed and chagrined victim, and seemingly his friends who bet on the loser, an opportunity would be given to run the race over, giving the fallen runner's friends time to go home and repair their fortunes and increase the purse, which was to be held intact until the race was run over. In this case Johnson decoyed one Doucette, a lumberman from Texas, into the scheme for a race at Hot Springs. Doucette had formerly been proprietor of four or five saloons in different Texas towns, and over each of his saloons had been run a public gambling hall; not in connection with the saloon, he says, but incidentally located there. Notwithstanding Doucette's intimacy with gamblers, he was unsophisticated in the hands of the "Buckfoot Gang." It was represented to him that Eddie Morris was swifter than Harry Price—the latter the runner of the millionaire's club; that Harry knew it; and that a race could be arranged, and all that was needed was a man of his credit and cash to follow directions. He was assured by both Morris and Price, before he left Texas, that Morris was the

fastest. He arranged his affairs, and came to Hot Springs with \$8,300, ready to impress the millionaires, and extolled the swiftness of the runner, who came, he said, from his lumber camps. The arrangements were carried out. He met the millionaire clubmen, whose castles were evidently in Spain, and they put up \$2,500 as forfeit for Price, and he, with money furnished, put up the like amount for Morris. The stakes were to be \$5,000 on a side, making the purse \$10,000, which was finally arranged substantially as agreed. He was furnished with large sums to bet by Price and one Thompson, the manager of the club, and, what was more important in this transaction, the stakeholder. These sums were equally divided between appellant and Doucette, and they laid the bets with the millionaires. Many thousands of dollars were bet in this way. Doucette bet \$100 of his own, and the stakeholder privately returned it to him, and gave color to the theory that the bets on his side were feigned for the purpose of inducing the millionaires to put up their money. In the last hour of the betting Doucette parted with his \$8,300. The witnesses for appellant claim he bet to win or lose, but he gives a different version of it. The material parts of his testimony here given are taken from appellant's abstract: "Johnson and I then went to the bank and drew \$8,000 in one package. * * * I put my money in my pocket, and Johnson and I started back to the clubroom, and I said to Johnson, 'I don't believe I will go any further with this,' and he said 'everything is all right, come on;' and so went on to the clubroom, and they wanted to bet right away. I went into the back room and Eddie Morris and Johnson followed me, and Eddie Morris opened his coat, and said, 'There is your money. You bet that money you got out of the bank so as to show these people it is good money, got out of the bank in blocks, and you will get your money back.' So I went in and bet the \$8,000. Mr. Johnson had a very fine diamond stud, and he bet that. I also bet two \$100 bills that I still had. By that time the hacks were ready to start to the race." He says further: "I did not understand that I was to put up my \$8,000, because Eddie Morris said he would give it back; that he had it in his coat pocket, and wanted me to bet my money because it was new money that came out of the bank in blocks, and the money he had in his pocket was supposed to be the referee's money. It was not my intention to put up my own money. I supposed I was to get about 25 per cent. of the winnings to pay me for my trip." Again, he says, after reiterating the substance of the above: "I considered that the money he had was mine, and I was betting his money. I never intended that any of my money should be staked on the race. I did not intend to part with my money." Doucette found "that the race is not to the swift, nor the battle to the strong," for his

runner, while nobly leading, fell. He says that he denounced the scheme, and demanded his money, but was laughed at, and the attitude of one of the party with a pistol, as he thought, convinced him that his wisest course was to say no more about it then. The appellant's witnesses say that he agreed to let the money stay with the stakeholder until he and Johnson went home to raise more money to add to the purse and have the race run over again within 30 days. The state introduced witnesses who attended similar performances at Webb City, Mo., Salt Lake City, Utah, and Aurora, Mo., and who were the several victims of those races. The same general plan and scheme was worked as in this one, and some of the participants, while varying at the different races, were the same parties as those at Hot Springs; the appellant always present and participating. The schemers appeared in different rôles in the cast, and frequent changes of names occurred, probably to fit the new rôle. The last race in evidence was at Aurora, Mo., the week following the one at Hot Springs. This seems to have been the "run off" of the Utah race, for Mr. Cobb's benefit; Mr. Cobb being the Doucette of that transaction. Three questions arise:

1. Does the state's evidence prove larceny? One of this party has been introduced to this court before, and he obtained a reversal of a conviction of larceny, and the law controlling such cases was then announced, and this laid down as the rule: "When persons conspire to cheat a man under color of a bet, and he simply deposits as a stake with one of them, not meaning thereby to part with the ownership therein, they, by taking the money, commit larceny, and not the less so though afterwards they are by fraud made to appear to win"—citing authority. *Hindman v. State*, 72 Ark. 516, 81 S. W. 838. The court carefully limited a conviction upon finding the facts within this rule. Doucette's testimony, if true, brings the case within the rule and the instructions. The appellant's witnesses claimed Doucette bet his money on the result of the race, and the court instructed that, if Doucette bet his money to win or lose, even though pursuant to a conspiracy inducing him to do so by false representations, yet that would not be larceny, and they must acquit. The jury were fully instructed that, no matter how fraudulent or dishonest the inducements may have been, yet if Doucette bet his money intending to part with its title and possession, the taking of it so fraudulently acquired would not constitute larceny. The appellant's rights were fully protected in these instructions.

2. It is insisted that Doucette consented after the race to the stakeholder keeping the money awaiting the race to be run over. The court instructed the jury that, unless they found defendant guilty under other instructions, such arrangement would prevent

the taking of the money being larceny. In other words, if the crime was consummated under the law as above explained before such arrangement, then the consent would not change it; but if such consent was procured before the consummation of the crime, if it was a matter of false inducement up to that point, then the consent would prevent it being larceny. This is all that appellant could ask on this score, and that question has gone to the jury on conflicting evidence, and is at rest.

3. Was the evidence of similar acts by these conspirators admissible? The general rule, of course, is that one crime cannot be proved as tending to prove another; but when the question of intention in the performance of acts becomes material, then similar acts which tend to show whether an innocent or criminal intent is present becomes admissible. This is frequent in cases of uttering forged instruments, passing counterfeit coins, receiving stolen property, and is applied in larceny as well as other crimes. 1 Wigmore on Evidence, § 346. The question was recently considered in this court, and this rule announced: "When there is a question as to whether or not the crime charged was by accident or mistake, or intentional and with bad motive, the fact that such act was one of a series of similar acts committed by the defendant is admissible, because it tends to prove system and show design." Howard v. State, 72 Ark. 586, 82 S. W. 201. This case illustrates the wisdom of rule.

One of these races was run just after the one now before the court, and objection is made to it also on the ground that it was of subsequent conduct. This class of evidence is admissible alone as reflecting light on the intent, and it matters not what part of the series the one in question happens to be. The authorities seem uniform that when the system is admitted part of the occurrences may be subsequent to the one charged. 1 Wigmore on Evl. §§ 346, 316; Wharton's Crim. Ev. § 35.

The court is of opinion that every right of the appellant has been carefully guarded, and that he has had a fair and impartial trial.

Judgment affirmed.

On Rehearing.

The appellant files a motion for rehearing, and again calls attention to two alleged errors assigned in his original brief which were not mentioned in the opinion of the court.

1. Just before Doucette put up his money, Johnson bet his diamonds, and this was brought out in evidence. While Harry Price was on the stand, the prosecuting attorney in cross-examining him asked him where Johnson got the diamonds. He proved by him that Johnson bought the diamond ring from Ryan, and Ryan bought it from Boatright (two other members of the "Buckfoot Gang"), and that it had been won from one Willard,

whom Johnson had brought to another foot race. This is the objectionable testimony, but counsel overlook the fact that on their objection to it the court instructed the jury that it was incompetent.

2. The next point is that the state was permitted in rebuttal to call Doucette and elicit the following testimony: "Q. One of the witnesses, in testifying about your reputation, has testified about your killing a man. Did you ever kill anybody down there? Ans. No, sir." A similar question and answer about robbing a sister was permitted. Appellant asserts this testimony is contrary to the rule in Hollingsworth v. State, 53 Ark. 387, 14 S. W. 41. The record does not show the testimony of these impeaching witnesses. It merely shows that the defendant introduced depositions of witnesses to the effect that the reputation of Doucette (also of Cobb) for truth and morality was bad. There is nothing to show whether the defendant or the state brought out these specific charges, or the connection in which they were made. If the defendant had brought out these charges clearly, he could not complain that they were rebutted, and this might have been elicited by the state under circumstances rendering rebuttal proper, or the state might have been precluded from rebutting its own testimony. In the state of the record the court cannot presume error. On the contrary, all presumptions are in favor of the court's ruling, and it requires an affirmative showing of error to call for reversal, not a mere showing that under some circumstances this might have been error.

The motion for rehearing is denied.

ST. LOUIS, I. M. & S. RY. CO. v. HITT et al.

(Supreme Court of Arkansas. July 1, 1905.)

1. RAILROADS—NEGLIGENCE—COLLISION AT CROSSING—EVIDENCE.

In an action against a railroad for wrongful death, through negligently running a train into the vehicle decedent was driving over a crossing, evidence held not to show that, as a matter of law, it was negligence per se for decedent to attempt to cross the track.

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Where, in an action for injuries through negligence, fair-minded men may draw from the facts different conclusions as to whether the care exercised by the injured party was proportioned to the danger, and such as the situation called for from men of prudence and caution, the question of contributory negligence is for the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 290, 299.]

3. SAME—INSTRUCTIONS—ERROR.

In an action against a railroad for wrongful death, through negligently running a train into the vehicle decedent was driving over a crossing, an instruction, if the deceased or his son stopped, looked, and listened before driving upon the track, and by reason of the obstructions on the side track—the arc light main-

tained by the town and the headlight of the freight engine—could not see the headlight of the passenger train in time to have avoided the injury, and no signals were given, and the deceased and his son took such precautions as would have enabled them to have seen or heard the train if such signals had been given, to find for the plaintiff on the issue of contributory negligence, was not erroneous, as singling out certain parts of the evidence in favor of plaintiff.

4. SAME—OPINION ON WEIGHT OF EVIDENCE.

An instruction that if the death of deceased was caused by the negligence of the defendant company, a recovery cannot be defeated on the ground of contributory negligence, unless it appears from the evidence that the deceased failed in the exercise of ordinary prudence, and such failure so contributed to the injury that it would not have otherwise occurred, and that contributory negligence will not be presumed, but must be proven, was not erroneous, as an expression of the court's opinion on the weight of the evidence.

5. SAME.

In an action against a railroad for death at a crossing at which a freight train was standing on a track parallel to the main track, on which was the approaching train, so that decedent's mules were on the main track before the wagon could have cleared the freight train, the refusal of an instruction making it the duty of decedent, after passing the freight train, to look and listen before attempting to cross the main track, was not error.

6. WRONGFUL DEATH—EXPECTANCY OF LIFE—ANNUITY—MORTALITY TABLES—ADMISSIBILITY.

In an action for wrongful death, testimony of a life insurance agent as to the expectancy of life, as shown by the mortality tables, of a man of decedent's age, and an estimate of the amount required to purchase an annuity equal to his income, was admissible.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 86.]

7. SAME—EXCESSIVE VERDICT.

In an action against a railroad for wrongful death, a verdict for \$10,000, which was less by \$1,054 than the sum representing the present value of decedent's income, was not excessive, where, though his personal expenses, to be deducted, were probably more than such difference, the loss of his care and attention to his minor children was another element proper to enter into the verdict.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 125–130.]

Battle and Riddick, JJ., dissenting.

Appeal from Circuit Court, Clark County; Joel D. Conway, Judge.

Action by Robert W. Hitt and others against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

These facts are deducible from the evidence most favorable to sustain the verdict: On Sunday night, in January, 1902, the Hitts drove from their home, near the central part of Nevada county, into Prescott, a town of more than 3,000 inhabitants. They were in a covered wagon, and arrived at the crossing at Elm street after dark. The covering extended two feet over them, and on either side, leaving only the view in front unobstructed. This crossing was in the center of the town. It was a cold, windy day, and had been sleeting. The ground was covered

with sleet and ice. When they reached the crossing, they found it blocked by a freight train on the side track, 1,200 feet long, standing a few feet from the main line. A brakeman was standing at the crossing, and they asked him when they could cross. The crossing remained blocked about 10 minutes, when the freight train "cut the crossing." Then they discussed whether it was safe to cross. Luther E. Hitt got up and looked up and down the track; extending his head beyond the wagon cover, thereby enabling him to see both ways. His father called his attention to some cars on the track, and after discussing it they concluded it was safe to cross. In driving across they continued to look forward, but did not extend their heads beyond the covering to see on either side. The town maintained an arc light almost immediately over the crossing, and the headlight of the freight engine was burning, shedding its rays over the crossing. There were cars on both sides of the crossing. The train which struck them came from the southwest, and was about an hour late. Looking from where they were standing, in the middle of Elm street, the view was obstructed by cars on the spur track; a freight train was standing on the passing track; and down the railroad were two large warehouses and a coal-house, which completely cut off their view from the direction which the train came. The passenger engine was lighted with an electric headlight, whose beams could be seen a half a mile; but the reflection of this may not have been seen on the crossing in front of them, on account of the light thrown by the arc light and the headlight of the engine. Luther Hitt testifies he did not detect it, although looking ahead. The sleet and ice on the ground deadened the sound of the train, until, as the witnesses stated, it was running rather soft, and did not make as much noise as usual. The train ran in past the crossing at a speed of from 18 to 20 miles an hour, and without ringing the bell or sounding the whistle, struck the wagon in which the Hitts were sitting, killed the father, and injured the son. The point at which they stopped and looked out from under the wagon sheet was 82 feet from the track where they were struck. The center of the side track was 14 feet and 6 inches from the center of the main track, and the spur track was still between the wagon and the side track. They started to drive across slowly. The brakeman at the pilot of the freight engine was standing on the ground, and they passed in front of him, not more than 25 feet away. No watchman was kept at the crossing. The brakeman made no effort to stop the wagon, and he knew the passenger train was coming.

Among other instructions given were the third and fourth, which are as follows:

"(3) You are further instructed that if you find from the evidence that the deceased or his son stopped, looked, and listened be-

fore driving upon the track, and further believe that by reason of the obstructions on the side track—the arc light maintained by the town and the headlight of the freight engine, if you believe these lights were burning—could not see the headlight of the passenger train, or the reflection thereof, in time to have avoided the injury, and that no signals were given as defined in these instructions, and that the deceased and his son took such precautions as would have enabled them to have seen or heard the train if such signals had been given, you may find for the plaintiff as to the issue of contributory negligence.

“(4) If you believe from the evidence that the death of the deceased was caused by the negligence of the defendant company, a recovery cannot be defeated on the ground of contributory negligence unless it appears from the evidence that the deceased himself failed in the exercise of ordinary prudence, and that such failure so contributed to the injury that it would not have occurred if he had been without fault. Contributory negligence will not be presumed, but must be proven by a preponderance of the evidence.”

The court refused to give the sixth instruction requested by appellant, which is as follows:

“(6) The court instructs the jury that if they find from the testimony in this case that at the time in question a freight train was standing on a track parallel to the track on which the approaching train was, and that such freight train was between plaintiffs, on the highway, and the approaching train, so that the approaching train could not be seen or heard readily, then the plaintiffs had no right to drive on the track without taking precautions after they passed beyond the freight train, where they could see and hear the approaching train, and there looking and listening before attempting to cross the track in front of the approaching train; and if they failed to do this, and in consequence of such failure were injured, your verdict should be for the defendant.”

The appellees received a judgment for \$10,000. Hitt was 56 years of age; was making \$1,000 per annum, derived from farming, trading, and the mercantile business. He left a wife and nine children, of whom six were minors at the time of his death—the youngest about five years old. He was a stout, healthy man, and shrewd in business affairs. A witness was asked, “What was his character, with reference to attention to and care of his family?” and answered, “It was very good.” Again he was asked, “You say he was a man who took good care of his family? A. Yes, sir; as good as any man, I should think.”

J. E. Williams and B. S. Johnson, for appellant. McRae & Tompkins, for appellees.

HILL, C. J. (after stating the facts). 1. The negligence of the company in failing to

give the signals required by law was abundantly established, and the conflict in the evidence on this point has been settled by the jury. The next question, and the one most earnestly presented here, is that the evidence showed that Hitt was guilty of contributory negligence in driving on the track under the circumstances set out in the statement. Mr. Justice Brewer, speaking for the Supreme Court of the United States, said: “It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. [Citing authorities.]” *Ry. v. Powers*. 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642. The authorities sustaining this doctrine are collected in *Ry. v. Martin*, 61 Ark. 549, 33 S. W. 1070. Testing the evidence upon this principle, it cannot be said that the facts disclose a situation rendering it negligence for Hitt to drive onto the track. At a distance of 82 feet from the track he took the precautions required by law and common sense, and, neither seeing nor hearing anything to indicate a train was coming on the main track, and the way being made clear, and employes standing near, with better opportunity of seeing or hearing than he had, who would doubtless warn him, for humanity's sake alone, if no duty rested on them, not to cross in front of a rapidly approaching train, and after consulting with his son, the fatal drive began. While it is true the sheet of the wagon obstructed the vision on either side, and in a measure the hearing, yet they believed from their investigation the way was clear, and they continued to look ahead and listen. The electric arc light and the headlight of the freight engine, casting their rays on the crossing, might well tend to prevent the discovery of the light from the headlight of the approaching train. The situation confronting Mr. Hitt was not such as requires the court to say, as a matter of law, that it was per se negligence, under the circumstances, to attempt to cross the track. The ringing bell or sounding whistle would doubtless have given the warning of the approaching train, which was not otherwise apparent to Mr. Hitt or his son. These are facts from which fair-minded men may draw different conclusions as to whether the care exercised was proportional to the danger to be avoided, and such as the situation called for, from men of prudence and caution. When such are the facts of a case, then the question must be settled by a jury, under proper instructions.

2. The next matter assigned as error is the giving of the third and fourth instructions, which are set out in the statement of facts. The point urged against these instructions is that they displayed to the jury an expression

of opinion upon the part of the court upon the weight of the evidence. It is further urged against the third that it has singled out certain parts of the evidence in favor of the plaintiff, and disregarded every item of contributory negligence, and, without referring to the same, in a counter statement, has said the weight of this specific evidence is sufficient to set aside all the evidence establishing contributory negligence. If there is evidence to sustain a particular theory of a case, the court should properly instruct the jury as to such theory. *Smith v. State*, 50 Ark. 545, 8 S. W. 941. Instructions should declare the law as applicable to any view of the facts which upon the evidence may be taken by either of the parties to the cause on trial. *Luckinbill v. State*, 52 Ark. 45, 11 S. W. 963. Every instruction should be hypothetical, i. e., predicated upon the supposition that, if certain evidence be true, then the legal consequence resulting therefrom is one way or the other. *State Bank v. McGuire*, 14 Ark. 530; *Collins v. Mack*, 31 Ark. 684. It is error to refuse to give a specific instruction correctly and clearly applying the law to the facts in the case, even though the law, in a general way, is covered by the charge given. *Ry. v. Crabtree*, 69 Ark. 134, 62 S. W. 64. Applying these settled principles to the instruction in question, it cannot be said they are open to the objections urged. Each side prayed and was granted many specific instructions, covering phases of the case which they desired drawn sharply to the attention of the jury. The court fails to find error in them, and, taken together, they consistently present the whole case, generally and specifically.

3. Error is assigned to the refusal of the court to give the sixth instruction. The distance from the center of the side track upon which the freight train stood to the center of the main track, upon which the train was approaching, was 14 feet. It was therefore an impossibility to have avoided the accident at that late moment. The mules drawing the wagon were on the main track before the wagon could have cleared the freight train, and the freight train behind them was whistling at that moment. The care is to be measured by the act of going into this danger, not when it is too imminent for avoidance, and when excitement and danger dethrone judgment. The case was properly submitted under instructions fully explaining the care required, and it was not error to refuse to give this one.

4. Objection is made to admission of testimony of a life insurance agent as to the expectancy of life, as shown by the mortality tables, of a man of Hitt's age, and an estimate of the amount required to purchase an annuity equal to Hitt's income. These tables were held admissible, and their uses explained, in *Ry. v. Griffith*, 63 Ark. 491, 39 S. W. 550. The record fails to show the calculation complained of, but it could not be er-

ror, as it was but relieving the jury of the labor involved in it. The court gave the following instruction on the subject: "If your verdict should be for the plaintiffs, you will assess the damage at such sum as will compensate them for their pecuniary loss resulting from the death of the husband and father. In estimating this loss, it is proper for you to take into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or decrease of that ability with the lapse of time; his earning capacity; the care and attention, the instruction and training, one of his disposition and character may be expected to give to his family—and thus determine the value of the life. From this amount deduct the personal expenses of deceased, and the balance, reduced to its present value, would be the present amount of your verdict, provided such of the deceased children as were minors at his death or at this time would not be entitled to any compensation on account of death of deceased for a period beyond the time of their attaining their majority." It is seen, therefore, that the court properly gave the elements to consider in arriving at the compensatory amount. If the calculation was made, it was useful only to reach the probable amount required to purchase the annuity to represent his income, and from such amount personal expenses were directed to be deducted.

5. The verdict is assailed as excessive. It is less, by the sum by \$1,054, than the sum representing the present value of his income. Of course, his personal expenses should be deducted—likely much more than said \$1,054; but, on the other hand, there was another element proper to enter into the verdict, and that was the loss of his care and attention to his minor children. *Railway v. Mathis, Adm'r.*¹ and cases there cited. The verdict is not excessive.

The judgment is affirmed.

BATTLE and RIDDICK, JJ., dissent.

ST. LOUIS, I. M. & S. RY. CO. v. HITT.
(Supreme Court of Arkansas. July 1, 1905.)

1. RAILROADS — NEGLIGENCE — COLLISION WITH VEHICLE AT CROSSING—ACTION FOR INJURIES — CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK AND LISTEN—INSTRUCTIONS—ERROR.

In an action for injuries at a crossing, an instruction that mere proof that plaintiff looked and listened on starting to drive on the track, but did not look again, did not alone establish contributory negligence, but that all the circumstances should be considered, and if from these the jury believed that plaintiff acted as a reasonable man, he was not guilty of contributory negligence, was erroneous, as acquitting plaintiff of negligence in failing to look and listen till danger was past, instead of

¹ Rehearing pending.

charging him with such negligence, and then leaving it to the jury to determine whether there were sufficient facts and circumstances to relieve a reasonably prudent person of such essential precaution.

2. SAME—CURING ERROR—OTHER INSTRUCTIONS.

The rule of reading instructions together to see if the issues there are correctly presented is inapplicable where an instruction given was erroneous, and a correct instruction given was conflicting therewith, and the error was not cured by such other instructions.

Appeal from Circuit Court, Nevada County; Joel D. Conway, Judge.

Action by Luther A. Hitt against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

B. S. Johnson, for appellant.

HILL, C. J. This case presents the same questions as to the liability of the appellant which are presented in No. 5,506, St. Louis, Iron Mountain & Southern Ry. Co. v. Robert W. Hitt (decided this day) 88 S. W. 908. This case was tried first, and in Nevada county, and that case in Clark county, and brought here on separate records, but have been argued together. They arose from the same occurrence. The facts will be found stated in the Robert Hitt Case. In this case the court gave on behalf of the appellee the following instruction: "(5) You are instructed that mere proof that the plaintiff looked and listened as he started to drive upon the track, and that he did not look again, does not alone establish the contributory negligence. You should take into consideration all the facts and circumstances in evidence, and if from these you believe that the plaintiff acted as a reasonable, prudent man, then he would not be deemed to have been guilty of contributory negligence." In *Railway v. Crabtree*, 69 Ark. 138, 62 S. W. 64, the court said: "If he is struck and injured by a train at the crossing, which he might have seen had he continued on his guard, it would not be sufficient on a trial for the injury for the judge to say generally that it is the duty of one about to cross a railroad to look and listen for trains, but he should go further, and explain that this means that a traveler should continue to use his eyes and ears until the track and danger are passed." In *Railway v. Cullen*, 54 Ark. 431, 16 S. W. 169, Chief Justice Cockrill, for the court, said: "A failure to look and listen is therefore evidence of negligence on his part; and if the injury is the consequent result, and his want of precaution is unexplained by circumstances which might mislead an ordinarily prudent man to throw him off his guard, he cannot have reparation for the injury, be-

cause his own want of care is the author of his misfortune." In *Martin v. Railway*, 62 Ark. 156, 34 S. W. 545, the court said: "We do not hold that in every case where a traveler fails to look and listen and is injured by a train while crossing a railway track, the case should be taken from the jury. It is only when it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that his failure to look and listen will necessarily constitute negligence." Applying these principles to the instruction in question, the instruction tells the jury that failure to continue to look and listen does not alone establish contributory negligence. It is held in the *Crabtree* Case that the court must tell the jury that continuing to use the senses is an essential part of the duty of looking and listening, and in the *Cullen* Case that failure to look and listen is evidence of negligence. Therefore the instruction conflicts with these cases. But, as explained in the *Martin* Case, the failure to look and listen is not always negligence. There may be circumstances, as there instanced, or where there is an invitation by the railroad, express or implied, which might relieve a prudent person from this duty. But all those matters are exculpatory, and the duty to continue to look and listen should be definitely put upon the plaintiff, and, if there is sufficient evidence of exculpatory circumstances, then the whole question should go to the jury, and no part of it be determined by the court. This instruction acquits the appellee of negligence in failing to continue to look and listen till danger is past, instead of charging him with such negligence, and then leaving it to the jury to determine whether there are sufficient facts and circumstances in evidence to relieve a reasonably prudent person of this essential precaution for his own safety.

It is insisted that, if this instruction is erroneous, it is cured by other instructions given on behalf of the appellant. None of the other instructions reach to this exact point, while they do state the law, in the main, correctly, on the duty of looking and listening; and if they were construed as correctly covering this important point of the case then they would be in conflict with this instruction, and leave the jury at large which to follow. In such case the rule that reading the instructions together in order to see if the issues are presented correctly cannot apply. *Fletcher v. Eagle* (Ark.) 86 S. W. 810; *St. L. & N. Ry. v. Midkiff* (Ark.) 87 S. W. 446.

For the error in giving the fifth instruction the judgment is reversed, and the case remanded for a new trial.

COWLING et al. v. NELSON et al.

(Supreme Court of Arkansas. June 24, 1905.)

1. PARTITION — JURISDICTION — STATUTES — CONSTRUCTION.

Under Kirby's Dig. § 6060, providing that an action to partition land shall be brought where the land, or some part of it, is situated, the circuit court of a county in which land of a decedent partly lies has jurisdiction of a suit to partition it, when the administration of the decedent's estate has been wound up and the administrator discharged, notwithstanding section 6063, providing that an action to settle the estate of a deceased person must be brought in the county in which the personal representative qualified, and section 6064, providing that an action for the distribution of the estate of a deceased person, or its partition, must be brought in the county where his personal representative qualified, and that the estate of the deceased was administered in another county.

2. SAME — DESCRIPTION — INSUFFICIENCY — CURE.

Insufficiency of the description of land partitioned is cured by the parties having sold their interests in the land, and the purchaser having been put into possession and made a party to the partition suit.

3. SAME — SALE — CONFIRMATION — SUFFICIENCY.

It is not necessary that confirmation of the sale of land on partition shall appear of record by a formal order, to sustain the validity of the sale, where it can be gathered from the whole record.

4. SAME — LIMITATION — VOID SALE.

When a sale of real estate on partition has been confirmed by a court having jurisdiction, the five-year statute of limitations runs in favor of the purchaser at the sale against the parties thereto, although the sale is void.

5. SAME — SALE — JURISDICTION.

Since at common law there was no right to obtain in partition proceedings a sale of the property, Kirby's Dig. §§ 5783, 5786, 5797, 5793, authorizing such sales when commissioners report that partition cannot be made without great prejudice, and providing for report and confirmation thereof, and contribution of the proceeds, confer the only jurisdiction which the court has to order the sale of real estate in partition proceedings, and a sale without a report of commissioners showing necessity therefor is void.

6. SAME — SALE FOR COSTS — VALIDITY.

The sale of land for costs is not an issuable fact in partition suits, and, when the court entertains it, it is going beyond its jurisdiction.

7. SAME — GUARDIAN AND WARD — POWER OF GUARDIAN.

The action of the guardian of an insane person in bringing a partition suit as to the ward's interest in real estate binds the ward to everything which the partition suit could validly accomplish.

8. BETTERMENTS — COMPENSATION — STATUTE — CONSTRUCTION.

Under Kirby's Dig. § 2754, providing that if any person, believing himself to be the owner, either in law or equity, under color of title, has peaceably improved any land which on judicial investigation shall be decided to belong to another, the value of the improvements shall be paid by the successful party before the court shall cause possession to be delivered, improvements made by a purchaser at a void partition sale prior to the confirmation of the sale cannot be allowed for, even though the improvements were made subsequent to the date of the deed.

9. SAME — VOID SALE — COLOR OF TITLE.

A purchaser at a void partition sale does not have color of title until the deed is delivered to him.

Cross-Appeals from Hempstead Chancery Court; James D. Shaver, Chancellor.

Action by S. C. Cowling, as guardian of Bettie Jones, an insane person, and others, against J. J. Nelson and another. From the decree, plaintiffs appeal, and defendants bring a cross-appeal. Reversed in part.

Feazel & Bishop, for appellants. D. B. Sain and W. C. Rogers, for appellees.

HILL, C. J. In 1895 Bettie Jones owned an undivided half interest, and her nephew and niece Willie and Ola Jones owned the other half, of a tract of land containing about 330 acres, lying partly in Hempstead county and partly in Howard county. They inherited the land. Bettie Jones was then and is now an insane person, and confined in the State Asylum. Ola Jones was born August 3, 1875, and Willie Jones was born July 15, 1882. On the 19th of August, 1895, the then guardian of Bettie Jones filed a partition suit in the Hempstead circuit court against Ola Jones and Willie Jones, alleging the latter to be a minor, and set forth the respective interests of the parties, and prayed a partition of the land, and, in the event it was not found susceptible of partition, a sale thereof, and a division of the proceeds. Constructive service was had against the defendants therein, and decree rendered finding the respective interests of the parties, and ordering partition, and appointing commissioners to make partition. The commissioners made partition, and reported their proceedings partitioning all the land, except a 48-acre tract, which was afterwards sold to appellee J. L. Reed. The report was confirmed. Before dismissing the principal contention, which is over the 48-acre tract, the other questions presented, attacking the whole proceeding, will be disposed of.

It is contended that under section 6064, Kirby's Dig., providing that an action for the distribution of the estate of a deceased person, or its partition among his heirs, etc., must be brought in the county where his personal representative qualified, as there was an administration of the estate of the ancestor in Howard county, the suit should have been brought there, and the Hempstead court was without jurisdiction. The section just preceding this (6063) provides that an action to settle the estate of a deceased person must be brought in the county in which the personal representative qualified. These sections were taken from the Civil Code, which was adopted when the Constitution of 1868 was in force, and under it the probate jurisdiction was exercised in the circuit courts, and there were no separate probate courts. These sections, therefore, were intended to bring into the forum where the

administration was pending actions settling, distributing, and partitioning estates. Under the changed jurisdiction, the excellent reasons for the enactment of these statutes ceases, and, if given force, must not be extended. The evidence shows that the administration on the estate of the ancestor was wound up and the administrator discharged before the partition suit was brought, and the reason, even under the former law, for applying this statute, would not be applicable, and a fortiori it is not applicable under the present system. Section 6060, Kirby's Dig., provides that actions to partition lands shall be brought where the land, or some part of it, is situated. The Hempstead circuit court had jurisdiction of the partition suit.

The next objection is to the insufficiency of the description of the land partitioned. The tracts (other than the 48-acre tract) are described obscurely, to say the least of it; but the parties have sold their interests in them, and the purchaser is in possession, and it was made a party to this suit. Whatever difficulties there may have been in locating the tracts from the description is removed by putting the purchaser into possession. The question is not open here.

That leaves only for consideration the 48-acre tract. The commissioners, in their report partitioning the land, after reporting that the parties had no other property, suggested that a certain tract described therein, and containing 48 acres, be set aside and sold to defray the expenses of the proceedings, which they understood would be about \$150. They reported that they had an offer of \$150 for this tract, which they considered a fair price. The court confirmed their proceedings in setting aside the various tracts, and approved their suggestion, and ordered this tract sold to Reed for \$150, to pay costs and expenses, including an attorney's fee of \$75 for the attorneys for the plaintiff in the suit. The commissioners then sold the tract to Reed for said sum, and executed him a deed therefor in December, 1895; and he went into possession and placed improvements on the lands, and has held it since. At the April term, 1896, of the Hempstead circuit court, this deed was presented to the court, and an order was made in the case reciting that the commissioners produce to the court their deed to J. L. Reed for the land, and described it, and concluded, "which it in all things approved and confirmed by the court." While this related to the deed, yet it identified the prior transaction where-in the sale to Reed at this price was ordered, and must be treated as a confirmation of the sale. It is irregular and improper, because formal confirmation should always be entered of record, yet the court has said that it was not necessary that confirmation appear by a formal order to that effect, if it can be gathered from the whole record. *Ousler v. Robinson*, 72 Ark. 339, 80 S. W.

227. Taking the whole record, the sale must be treated as confirmed. This precludes *Ola Murphy* from maintaining this action to set aside the sale on the ground of the want of jurisdiction to render the judgment ordering this land sold to pay costs and attorney's fees. The court had jurisdiction of the parties, and the other parts of the decree were valid, and the exceptions to the application of the five-year statutes of limitations on the part of purchasers at judicial sales do not apply. She was of full age when the decree was rendered, and this action was brought more than five years thereafter. While proceedings based on void judgments cannot be validated, yet it is competent to control actions to set them aside by shorter statutes of limitations than the general statutes. *Freeman on Void Judicial Sales*, §§ 58, 58a. This court has held that the five-year statute does not apply to judicial sales unless they are confirmed, because there is no sale until that act. *Lumpkins v. Johnson*, 61 Ark. 80, 32 S. W. 85; *Morrow v. James*, 69 Ark. 539, 64 S. W. 269. When confirmed, and the court has jurisdiction over the parties the five-year statute runs in favor of the purchaser at such sale against the parties thereto, although the sale is void. It is a statute of repose, and if valid the purchaser needs no limitation to ripen his title, and the manifest purpose of the Legislature was to apply it to void sales within the limitations mentioned.

The lower court allowed until June to redeem on account of his minority, but refused to allow *Bettie Jones*, the insane person, to maintain the action. On the theory of a redemption from the sale, that decree may be right, but the case goes farther. Was the sale of the 48 acres void? If so, then the insane party and the minors both ought to be permitted to recover the land, not redeem it, subject only to Reed's right to betterments under section 2754, Kirby's Dig.

At common law there was no right in a tenant in common or other tenant to obtain in partition proceedings a sale of the property. The courts had no jurisdiction to order a sale, but partition could be had as of right, even if partition was ruinous and inconvenient to and undesired by all the other parties. *Freeman on Co-tenancy & Partition*, §§ 536, 539. To obviate hard cases the various states have passed statutes permitting sales when partition would be prejudicial to the rights of the parties. Kirby's Dig. § 5785, provides that, when commissioners report that partition cannot be made without great prejudice, the court may, if satisfied that such report is true, order the land sold to the highest bidder at public auction. Such sales are made on terms prescribed by the court, and have to be reported to and confirmed by the court, and deed is then ordered made. Sections 5786, 5792. The proceeds, after deducting costs and expenses, are distributed according to the respective

interests. Section 5793. These statutes confer the only jurisdiction which the court has to order the sale of real estate in partition proceedings, as it is not an inherent right of the parties to have it, and no jurisdiction existed to order it prior to these statutes, and hence the jurisdiction must be exercised conformably to the statutes. In this case the tract in question was not sold because the land was incapable of partition without great prejudice, but, on the contrary, for the sole purpose, appearing on the face of the record, to pay the costs of the proceedings and the fees of the plaintiffs' attorneys, taxed as part of the costs. The utmost that can be said of the attorneys' fees are that they were part of the costs, and as to whether the court has, in amicable suits, any right to tax them as costs, is a question that the courts are divided upon, but all agree that in adversary proceedings they cannot be so taxed. 21 Am. & Eng. Ency. (2d Ed.) p. 1177, 1178. Costs are debts, and do not constitute liens, other than general judgment liens, when they enter into a judgment. They are not enforceable by sale of property, other than other debts are enforceable by execution after proper proceedings. The statutes prescribe methods to collect debts from minors and insane persons, but as to any person they are no more than other debts, and exemption and homestead and bankruptcy proceedings may avoid their collection. The officers have full protection from performing any service until their fees are paid in advance. It is clear that in partition suits the land cannot be sold to pay costs, and the only question of moment is the effect of the judgment, on collateral attack, ordering it done. In *Collins v. Paepcke-Leicht Lumber Co.*, 78 Ark. —, 84 S. W. 1044, in referring to an order of probate court selling lands to pay costs of administration, the court said: "But where its judgment shows affirmatively on the face that the court was proceeding in a matter over which it had no jurisdiction, or acting beyond its jurisdictional limits, such judgment is void. * * * The confirmation cures all irregularities in the sale or the order therefor, but not jurisdictional defects. The order of sale here shows affirmatively that it was made to pay expenses of administration, and not debts of the decedent, and is therefore void." The analogy between the cases is strong. In *Falls v. Wright*, 55 Ark. 562, 13 S. W. 1044, 29 Am. St. Rep. 74, dower was assigned in lands of an estate not presented to the court in the petition for assignment of dower, and the action of the commissioners was confirmed. This court held, so far as the land outside the petition was concerned, that it was aside from the issue, confirmation did not cure it, and the sale was void. The court approved this definition of jurisdiction: "First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties

must be present; third, the point decided must be, in substance and effect, within the issue." The sale for costs is not an issuable fact in partition suits, and, when the court entertains it, it is going beyond its jurisdictional limits. In a case in Indiana the court ascertained an amount as attorney's fees, and decreed it a lien on the lands, and sale was had thereunder. It was held the sale was void, as courts have no power to adjudicate matters not in issue and which could not be brought in issue. *Hutts v. Martin*, 184 Ind. 587, 83 N. E. 676.

It is insisted that the guardian of Bettie Jones had authority to bring the suit, and his action within the limits of his express authority would bind her. This is true, and his action bound her to everything which the partition suit could validly accomplish—a partition of the lands, and, where it is found incapable of partition without great prejudice, then a sale. These are the only issuable matters to be presented. On them she is bound. Beyond them she is not. The Indiana court in the case *supra* said: "Litigants do not place themselves for all purposes under the control of the court, and it is only the interests involved in the particular suit that can be affected by the adjudication. Over other matters the court has no jurisdiction, and any decree or judgment relating to them is void."

The court, in finding the amount for Willie Jones to pay for improvements, seemed to have allowed for improvements made in 1895. Reed's deed, while dated December 9, 1895, was not approved and the sale was not confirmed till April 6, 1896. As the commissioners procured its approval and presented it to the court, it is evident that it was not intended to deliver the deed till it was approved by the court, and he had no color of title until the deed was delivered to him. He had color of title after the deed was approved and delivered to him, and he is entitled to improvements as prescribed by the betterment act.

The decree as to Ola Murphy (née Jones) is affirmed, because she is barred. As to Willie Jones it is reversed as to the amount he is chargeable with, and as to Bettie Jones is reversed. The cause is remanded, with directions to enter judgment in favor of Bettie and Willie Jones for their respective interests, subject to proper allowance for betterments.

NIAGARA FIRE INS. CO. v. BOON et al.
(Supreme Court of Arkansas. June 24, 1905.)

1. APPEAL—TRIAL BY COURT—INCOMPETENT EVIDENCE—REVIEW.

As on trial de novo of a case heard before the chancellor, who is presumed to have disregarded all incompetent testimony, the case is weighed solely on the competent testimony, questions relating to alleged incompetent evidence will not be discussed on appeal.

2. FIRE INSURANCE POLICY—APPRAISAL AND AWARD—VACATION—GROUNDS FOR — PRESUMPTIONS.

Every reasonable intendment and presumption is in favor of an award made by appraisers pursuant to the terms of a fire policy, and it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers.

3. SAME—WITHDRAWAL OF APPRAISER DURING INVESTIGATION—EFFECT.

An arbitration cannot, after it is properly submitted, be defeated by the withdrawal of one of the appraisers during the investigation.

4. SAME — INACCURATE VALUATION — IMPEACHMENT OF AWARD.

Where there is sufficient evidence to sustain an award as to value, it is not open to attack, though the valuation be inaccurate, unless so grossly erroneous as to indicate bad faith or other grounds to set the award aside.

Appeal from Circuit Court, Lee County; S. H. Mann, Special Judge.

Action by R. M. Boon and another against the Niagara Fire Insurance Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Terry & Terry, for appellant. P. D. McCulloch, for appellees.

HILL, C. J. Boon had a policy of insurance in appellant company on his store building and the adjoining building burned, injuring the intervening brick wall, the roof and front of his building. The adjuster of the insurance company and Boon failed to agree on the amount of damage, and the company invoked the arbitration clause of the policy. The clause was in the usual form of such clauses in standard fire insurance policies, providing that each party select a competent and disinterested appraiser, and the appraisers to select a competent and disinterested umpire. The appraisers were required to estimate the loss, stating separately the sound value and damage, and, failing to agree, to submit their differences to the umpire, and the award of any two in writing should be binding. The appraisers were selected, and they selected an umpire. The preponderance of the evidence establishes the facts to be that the appraisers radically disagreed, one demanding an estimate based on a new wall and the other based on a slight damage to the wall. The appraiser selected by the insurance company then called in the umpire, and it seems that he and the appraiser for the company differed more radically than he and the other appraiser. Then the appraiser for the insurance company withdrew, and the umpire and other appraiser made the award in conformity to the policy. This suit was brought on the award, and the company had it transferred to chancery on allegations impeaching the award and seeking to set it aside. The case was tried by the chancellor, and there is much conflict in the evidence, but, as stated, a preponderance sustains the facts

briefly outlined above, and which version comes accredited by the chancellor.

1. Objections are made to such testimony; some because elicited by leading questions, others because opinion evidence from witnesses not properly qualified as experts, and for other reasons. The case was heard before the chancellor, and he is presumed to have disregarded all incompetent testimony, and on trial de novo the case is weighed solely on the competent testimony; hence there is no profit in discussing these objections.

2. It is insisted that the appraisers selected by the insured did not estimate on the basis required by the policy, and thereby departed from the terms of the submission. The point turned on whether the old wall was to be treated as worthless or an estimate made on its damaged condition. There is much evidence to sustain the appraiser in his opinion that it would have to be taken down, and the value of it would not compensate the expense of tearing it down. Even if wrong in his opinion on that subject, there is not sufficient evidence against it to set aside the award as founded in mistake. Judge Sanborn thus stated the rule: "An agreement of appraisal is a contract. Appraisers who make an award under such an agreement are presumed to have acted in accordance with the law and the terms of the contract, and the burden of proof is on those who attack their award to establish the contrary by convincing evidence. Every reasonable intendment and presumption is in favor of the award, and it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers." *Barnard v. Lancashire Ins. Co.*, 41 C. C. A. 170, 101 Fed. 36. The evidence satisfies the court, as it did the chancellor, that the award was fairly made. Certainly it cannot be said that it clearly appears that it was the result of fraud, mistake, misfeasance, or malfeasance of the appraiser or the umpire. The evidence against it on material questions is that of the appraiser selected by the company and adjuster, and they are contradicted by the other appraiser and umpire and the other testimony strongly sustaining the latter.

3. There is much said about the bias and partisanship of the appraisers, but no evidence is apparent to sustain a disqualification of them on this account within the rule on that subject recently announced by this court in *National Fire Ins. Co. v. O'Bryan*, 87 S. W. 120.

4. It is contended that the arbitration was dissolved by the appraisers, and the award made by the umpire and one appraiser acting as appraisers after the appraisers had agreed to dissolve, and that this was contrary to the terms of submission, which provided for the umpire to only act when the appraisers submit their differences to him.

The evidence satisfies the court that the appraiser selected by the insurance company called upon the umpire to settle the differences, and, finding him more difficult to agree with them, the appraiser then withdrew. There is some evidence that the withdrawal was under the direction of the adjuster, who learned of the situation of affairs. That is not important here, for it is thoroughly settled that an arbitration cannot be defeated, after it is properly submitted, by the withdrawal of one of the appraisers during the investigation. *Ostrander on Fire Ins.* § 291; *Bradshaw v. Ins. Co.*, 137 N. Y. 137, 32 N. E. 1055.

Other questions are discussed as to the revocation of the arbitration by the withdrawal of the appraiser on account of the arbitrary action of the other appraiser, and other questions based on the theory of appellant that the appraiser acted without the scope of the submission and improperly. But the court is satisfied from the evidence that the appraiser's conduct was not within any of the grounds for impeaching the award; hence it is unnecessary to pursue the subject further. There was sufficient evidence to sustain the award as to the value, even if it was not an accurate valuation, it would not be open to attack unless so grossly erroneous as to indicate bad faith or other grounds to set aside the award.

The judgment is affirmed.

PHENIX INS. CO. v. STATE, to Use of SALINE RIVER SHINGLE & LUMBER CO.

(Supreme Court of Arkansas. June 24, 1905.)

1. INSURANCE—POLICY—REFORMATION.

An insurance policy, which, because of mistake in its execution, does not conform to the real agreement of the parties, may be reformed in a court of equity.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 268-270; vol. 42, Cent. Dig. Reformation of Instruments, § 69.]

2. SAME—EVIDENCE—SUFFICIENCY.

In a suit to reform a policy of fire insurance, evidence *held* to warrant a reformation thereof as to the name of the insured and the location of the subject-matter of the risk on the ground of mistake.

3. SAME—CANCELLATION—NOTICE.

The stipulation in a policy of fire insurance for cancellation on five days' notice to the assured is for the benefit of, and may be waived by, the assured.

4. SAME—AGENT—DUAL CAPACITY.

In a suit on a policy of fire insurance the proof showed that a previous agreement existed between the president of the insured corporation and an insurance agent that the corporation's property should be kept insured. No particular insurance company or companies were mentioned, and the corporation's president gave no concern to that matter. He made the insurance agent his agent for the purpose of selecting the company or companies, and, pursuant to the arrangement, the agent, without notice to the president, canceled a policy in one company and substituted therefor a policy in the defendant, and mailed it to the pres-

ident of insured before the fire occurred. *Held*, that the agent, though the agent of the insurance companies, was made the agent of the insured for the purposes of procuring and canceling policies, and defendant's policy was in force.

Appeal from Cleveland Chancery Court; John M. Elliott, Chancellor.

Suit by the state, to the use of the Saline River Shingle & Lumber Company, against the Phoenix Insurance Company of Brooklyn. From a decree in favor of plaintiff, defendant appeals. Affirmed.

This is a suit brought in the chancery court by the state of Arkansas, for the use of the Saline River Shingle & Lumber Company, a domestic corporation, against the Phoenix Insurance Company of Brooklyn, a foreign insurance corporation doing business in the state, and, the sureties on its bond, to reform a policy and to recover the amount thereof \$2,000 and interest on account of loss by fire. Reformation of the policy is sought in two respects, viz.: First, that it was by mistake written to and in the name of W. S. Amis, the president of the Saline River Shingle & Lumber Company, and manager of its business, when it should have been written to and in the name of said corporation; second, that it was by mistake written "on a stock of lumber on his premises," when it should have been written "on a stock of lumber situated at and in plaintiff's loading shed." The undisputed facts of the case are as follows: The Saline River Shingle & Lumber Company was the owner of a mill and lot of lumber at a switch sometimes called "Poole," on the St. Louis Southwestern Railroad. W. S. Amis was the president of the company, and the manager of its business. A. B. Banks, an insurance agent at Fordyce, Ark., and agent of appellant and other insurance companies, had previously insured the property of the lumber company at the instance of Mr. Amis, the manager. On or about April 10, 1902, Amis applied to Banks for insurance on the property of the lumber company—\$2,500 on the mill and \$2,000 on lumber in the shed—which Banks agreed to do, and in a day or two wrote the policies by mistake in the name of Amis, and, instead of writing the lumber policy on lumber in loading shed, wrote it "on a stock of lumber on the premises." This policy was written in the Greenwich Insurance Company, and both policies were mailed to Amis at Rison, Ark., where he resided. On April 21, 1902, Banks received instructions from the Greenwich Insurance Company to cancel the policy or increase the rate of premium to 10 per cent., and on that date he wrote and mailed a letter to Amis, informing him of the requirement of the Greenwich Company, and saying: "I am canceling the lumber policy and rewriting same in the Phoenix of Brooklyn, and shall send you policy at once." He wrote the policy on April 23, 1902, which is the one in controversy, carrying into it

the same mistakes hereinbefore set forth as to name of assured and description of property, and mailed it to Amis at Rison on that day. The lumber in the loading shed, shown to be of the value of \$2,047, was destroyed by fire on the evening of April 23, 1902, at 7:30 or 8 o'clock. Mr. Amis testified that he received the policies of April 10th by mail, but did not discover the mistake therein until he received on April 22d, Mr. Banks' letter concerning cancellation of the Greenwich policy, and that he intended to go to Fordyce the next day (April 23d) to have the policies rewritten so as to correct the mistakes, but was unavoidably detained by other engagements; and that he received the Phoenix policy by mail on April 24th, the same having arrived at the postoffice at Rison the afternoon preceding. The defendant answered, denying all the allegations of the complaint, and pleading that the policy sued on was issued by the agent, Banks, without authority from the insured, and was not accepted by the insured until after the fire. The chancellor decreed a reformation of the policy and recovery of the amount thereof with interest, and the defendant appealed.

Alexander & Thompson, for appellant. W. S. Amis, Crawford & Gantt, and Taylor & Jones, for appellee.

MCCULLOCH, J. (after stating the facts). An insurance policy, like any other contract, which by reason of mistake in its execution does not conform to the real agreement of the parties, may be reformed in a court of equity. *Thompson v. Insurance Co.*, 136 U. S. 237, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52; *Jamison v. State Insurance Co.*, 85 Iowa, 229, 52 N. W. 185. The proof fully warranted the decree of the court reforming the policy in the particulars specified. The testimony is undisputed that a mistake was made in writing the policy to and in the name of Amis instead of the lumber company, and in writing it on all the lumber instead of on the lumber in the loading shed. This disposes of the contention of appellant as to the co-insurance clause in the policy. Treating it as reformed so as to insure only the lumber in the shed, the insurance thereon was more than the percentage of value required in the policy, and the terms of this clause were complied with.

It is contended on behalf of appellant that because of the stipulation in the Greenwich

policy requiring five days to the assured before cancellation, that policy was not legally canceled, and that the substitution by the agent of the Phoenix policy was unauthorized. We cannot sanction this view. The stipulation for five days' notice of cancellation was made for the benefit of the assured, and could be waived by the assured. *Southern Ins. Co. v. Williams*, 62 Ark. 382, 35 S. W. 1101; *Kirby v. Ins. Co.*, 13 Lea, 340; *Bulck v. Mechanic's Ins. Co.*, 103 Mich. 73, 61 N. W. 337. The policy was in fact canceled by the agent, and his act in so doing was ratified as soon as brought to the attention of the assured. The stipulation was a part of the Greenwich policy, and appellant had no interest therein or concern therewith. Appellant's agent issued a policy on the property in question, which was in force at the time of the fire. The agent wrote the assured: "I am canceling the lumber policy and rewriting same in the Phoenix of Brooklyn, and shall send you policy at once. * * * Please return the lumber policy in Greenwich at once." He mailed the policy to the assured before the fire, and same reached the post office at Rison, the home of Mr. Amis, before the fire, but was not taken from the office until the next day. Meanwhile the fire occurred. The proof shows that a previous agreement existed between Amis and Banks, the agent, that the property of the lumber company should be kept insured. No particular insurance company or companies were mentioned, and Amis gave no concern to that matter. He constituted Banks his agent for the purpose of selecting the company or companies, and, pursuant to this arrangement Banks, without notice to Amis, canceled the Greenwich policy and substituted therefor the Phoenix policy, and mailed it to Amis before the fire occurred. Banks, though the agent of the insurance companies, could be and was made the agent of the insured for those purposes. *Ostrander on Insurance* (2d Ed.) §§ 41, 42; *Schauer v. Queen Ins. Co.*, 88 Wis. 561, 60 N. W. 994; *Mich. Pipe Co. v. Mich., etc., Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Dibble v. Northern Ins. Co.*, 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470; *Arnfeld v. Guardian Ins. Co.*, 172 Pa. 605, 34 Atl. 580; *Huggins Croker & Cowdy Co. v. People's Ins. Co.*, 41 Mo. App. 530. We see no escape from the conclusion that the Phoenix policy was in force when the fire occurred, and that that company is liable for the loss.

Decree affirmed.

BANK OF FAYETTEVILLE v. LORWEIN
et al.

(Supreme Court of Arkansas. July 1, 1905.)

SUBROGATION—RIGHTS OF INDORSER — PARTIAL PAYMENT OF DEBT.

An indorser of five vendor's lien notes paid three of them, on which judgment had been rendered against him and another indorser, and then pledged the notes to intervener as security for a loan. *Held*, that the intervener was not subrogated to the right to participate in the proceeds of the sale of the land for the payment of the other two notes, the indorser not having paid the whole debt.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Subrogation, §§ 52, 54.]

Appeal from Washington Chancery Court; T. H. Humphreys, Chancellor.

Action by George Lorwein against one Jones and others, in which the Bank of Fayetteville intervened. From a judgment denying intervener the relief demanded it appeals. Affirmed.

On January 19, 1895, Nugent sold and conveyed to Jones a tract of land in Washington county for \$500, payable in five equal annual installments, evidenced by five promissory notes, bearing interest. The vendor's lien was expressly reserved in the face of the deed. Nugent sold, indorsed, and delivered the notes before maturity to Hauptman, who in turn sold, indorsed, and delivered them before maturity to appellee Lorwein. Lorwein brought suit in the Washington circuit court in chancery, at the fall term, 1898, against Jones, Nugent, and Hauptman, to recover on the notes and subject the land to sale under the lien; and at that term, having failed to get service on Jones, he (Lorwein) recovered a personal decree against Nugent and Hauptman, as indorsers, for the amount of the first three of the notes, which were then due, and interest, and the cause was continued, as to the other two notes, not then due. Nugent and Hauptman stayed the decree, and the same was subsequently paid, and the record satisfied. The payment was made for Hauptman by the surety on the stay bond, and the three notes were surrendered to Hauptman, who delivered them to appellant Bank of Fayetteville as collateral security for a debt owing by him to the bank. After the maturity of the two last notes, Lorwein caused summons to be served on Jones, Nugent, and Hauptman (whether in the suit which had been continued, or a new suit brought in the same court, the record does not clearly disclose); and at the April term, 1900, of that court, on May 25, 1900, a decree was rendered in favor of Lorwein against Jones, Nugent, and Hauptman for \$246.90, the amount of the two last notes and interest, a lien was declared on the land and the commissioner of the court ordered to sell the land to satisfy the decree. On July 31, 1900, during the same term, a decree, upon the intervention of appellant, was entered,

without reference to the former decree, in favor of Lorwein for the two notes and interest, and appellant for \$326.25, the amount of the first three notes and interest, which had been embraced in the satisfied decree of 1898, and the commissioner was ordered to sell the land to pay both debts; no preference being provided for in the decree. The land was in 1901 duly advertised and sold by the commissioner under the decree of May 25, 1900, rendered in favor of Lorwein alone, and was purchased by Lorwein for \$250, who gave his note for the amount, in accordance with the terms of sale, with one Brown as surety. At a subsequent term the sale was by the commissioner reported to the court and confirmed, and a deed to Lorwein duly executed and delivered, and the note surrendered to Brown, the surety. Lorwein subsequently sold and conveyed the land to appellee Hall. Appellant commenced the present suit against Lorwein, Brown, and Hall, asserting a right, under the decree of July 31, 1900, to participate pro rata in the distribution of the proceeds of sale of the land, and asking a decree in its favor to that effect, and a lien on the land. It is shown by testimony that appellant's attorney had no information of the decree of May 25, 1900, and the sale thereunder, until after the confirmation of the sale to Lorwein, and that neither Lorwein nor his attorney had any information of the decree of July 31, 1900, until after the confirmation. This peculiar situation was brought about in the following manner, as explained in the testimony: Lorwein was originally represented in the suit commenced in 1898 by Messrs. J. V. & J. W. Walker, a firm of attorneys. The partnership existing between these gentlemen was dissolved while the Lorwein suit was pending, and in the division of the firm's business this case fell to Mr. J. W. Walker, and the other member thereafter had no connection with it. The decree of May 25, 1900, was procured by J. W. Walker, who was absent from the county during the remainder of the term of the court. Mr. Gregg, the attorney for appellant, had no information of the decree of May 25, 1900, and, believing that Mr. J. V. Walker was still acting for Lorwein, submitted the draft of the decree of July 31, 1900, to him for approval; and Mr. Walker, as an act of courtesy to Mr. Gregg and his former partner, assumed the authority of approving a decree about which, so far as the record shows, he had no information as to any controversy. The chancellor dismissed the complaint in this suit for want of equity, and the plaintiff appealed.

L. W. Gregg, for appellant. J. Wythe Walker, for appellees.

McCULLOCH, J. (after stating the facts). There is no equity in the complaint, and the same was properly dismissed. Appellant's

contention is that the decree of July 31, 1900, during the same term of court, operated as a vacation of the former decree, and that, as no preference was given in that decree, the bank must be permitted to share in the proceeds of sale. Conceding that such was the effect of the last decree, it does not follow that appellant is entitled to the relief asked. It has come into a court of equity, asking the exercise of the peculiar powers of that court to grant affirmative relief, and it must do equity. In other words, it must stand, not upon the letter of the decree in its favor which was entered through a mistake, but upon the merit or lack of merit in the cause of action upon which the decree was entered. Was appellant entitled, upon its intervention in the original suit, to a decree declaring a lien in its favor, sharing equally with Lorwein in the sale of the land? That is the question presented. Learned counsel for appellant contends that the bank was entitled to so share under the ruling of this court in *Penzel v. Brookmire*, 51 Ark. 105, 10 S. W. 15, 14 Am. St. Rep. 23, where, in a controversy between the several holders of separate notes secured by the same mortgage, whether the notes be transferred before or after maturity, and regardless of the order of maturity, they "stand *æquali jure*, and consequently are entitled to participate ratably in the fund derived from the security, if there be not enough to pay all." The facts are essentially different here, however, and a different rule must prevail. The three notes now held by appellant were merged in the decree of 1898 in favor of Lorwein against Nugent and Haupman, and the latter, though by payment of the decree he became subrogated, as against the maker and prior indorsers of the notes, to the rights of Lorwein, cannot assert those rights against Lorwein's lien for the other two notes, because he is liable to Lorwein, as indorser, for payment of all the notes. So long as the other two notes and the lien on the land for payment thereof remain unsatisfied, and his liability to Lorwein continues, he is postponed in the assertion of a lien on the land, and cannot claim the right to participate in the proceeds of sale. A surety or indorser on a note, who has paid only a part of the debt for which he is liable, leaving the balance unpaid, cannot claim by subrogation the right to participate in the securities held for the payment of the debt. He must first pay the whole debt. *McConnell v. Beattie*, 34 Ark. 113; *Schoonover v. Allen*, 40 Ark. 132; *Sheldon on Subrogation*, § 127; *Columbia Finance Co. v. Kentucky Union Ry. Co.*, 60 Fed. 794, 9 C. A. 264; *Magee v. Leggett*, 48 Miss. 139; *Gannett v. Blodgett*, 39 N. H. 150; *Child v. New York, etc., Ry. Co.*, 129 Mass. 170; *Bartholomew v. Salina First Nat. Bank*, 57 Kan. 594, 47 Pac. 519; *New Jersey Midland Ry. Co. v. Wortendyke*, 27 N. J. Eq. 658.

The New Jersey court in the case last cited said: "The right of subrogation cannot be enforced until the whole debt is paid, and until the creditor be wholly satisfied there ought and can be no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim." Appellant received the notes from Haupman after maturity, and charged with notice of the decree rendered upon them. It succeeded only to the rights of Haupman, and can assert no greater rights. It appears that the land was fairly sold by the commissioner, and the sale was confirmed by the court, and it brought no more than enough to satisfy Lorwein's decree for the amount of the two notes held by him, interest, and costs of suit. Therefore appellant shows no right to any of the fund.

Decree affirmed.

DAVIS et al. v. TRIMBLE et al.*

(Supreme Court of Arkansas. June 17, 1905.)

ATTORNEYS—IMPLIED AGREEMENT TO PAY FOR SERVICES.

Where attorneys were employed by W., the principal stockholder and manager of a railroad, to defend a suit brought against it and him, contract for payment of their services by directors of the road and trustees of an estate holding a large amount of the bonds of the road cannot be implied from their taking an interest in the suit attending the trial, claiming exemption as parties in interest from the rule excluding witnesses from the courtroom, paying the fees of the stenographer for services, and assuring the attorneys after the trial that they would be paid.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 323, 324.]

Hill, C. J., and Wood, J., dissenting.

Appeal from Circuit Court, Faulkner County; Sam Frauenthal, Special Judge.

Action by Thomas C. Trimble and others against R. W. Worthen and others. Judgment for plaintiffs, and certain defendants appeal. Reversed.

Ratcliffe & Fletcher, for appellants. Trimble & Robinson, for appellees.

McOULLOCH, J. Appellees, Thos. C. Trimble, J. M. McClintock, and Eugene Lankford, brought this suit against R. W. Worthen, Oscar Davis, Zeb Ward, Jr., Geo. R. Brown, and W. B. Worthen to recover \$2,500 alleged to be owing them by the defendants for services as attorneys at law rendered for the defendants in an action in the Prairie circuit court wherein S. L. Harr was plaintiff and said R. W. Worthen and the Mississippi & Little Rock Railroad Company were defendants. R. W. Worthen failed to answer, and judgment was rendered by de-

*Rehearing denied July 15, 1905.

fault against him. The cause was dismissed before trial as to W. B. Worthen and Geo. R. Brown. Appellants Davis and Ward answered, denying specifically each allegation of the complaint. A trial by jury was had upon the issues raised by their answer, which resulted in a verdict in favor of the plaintiffs for \$2,000, and they appealed to this court.

Appellants asked a peremptory instruction to the jury to return a verdict in their favor, and they now urge that the verdict against them is without testimony to support it. In testing the sufficiency of the evidence we must give it the strongest probative force of which it is susceptible in favor of the verdict of the jury.

The suit in which the services of appellees were performed was against a railroad corporation and R. W. Worthen, its principal stockholder and manager. He employed appellees as attorneys to defend the suit, and it is not claimed that either of appellants had anything to do with the employment of attorneys, or that any mention was ever made to them, until after the termination of the suit, that they would be expected to pay any part of the fee. Appellants each owned stock of the face value of \$100 in the railroad corporation, but which was of no value at the time of the pendency of the suit in question, as the corporation was then insolvent. They were directors in the corporation, and this stock was given to them by R. W. Worthen, who owned substantially all the stock, to qualify them as directors. They were also trustees of the estate of Zeb Ward, deceased, which estate held a large amount of bonds issued by the railroad company. Appellant Zeb Ward, Jr., and the wife of appellant Davis were two of the five heirs of Zeb Ward, deceased. Col. Trimble and Mr. Lankford, of appellees, both testified that they were employed by R. W. Worthen in 1893 to defend the suit, and that some time between that time and the trial of the case in 1896 they consulted with Davis, in Little Rock, concerning the suit; that Davis manifested considerable interest in the suit, and attended the trial. They say that he was sworn as a witness in the case, and claimed the privilege, as a party in interest, of exemption from the rule of the court excluding the witnesses from the courtroom during the trial. Neither of them testify, however, that he employed them in the suit, or agreed, before the trial, to pay the fee, or that anything was said about the fee or employment. Col. Trimble testified that some time after the trial he approached Davis about payment of the fee, and the latter declined to pay it, but said that the attorneys ought to have something, and that he (Davis) was going to get together Worthen and others, who were interested, and consult about it. Mr. Lankford testified that a short while after the trial he called to see appellant Da-

vis in Little Rock about the fee, and he relates the substance of the interview with Davis as follows: "I remember when I saw Mr. Davis he put me off by saying he would have to see Mr. Worthen; that they had some matters to fix up; and said for me to see Worthen. I told him I needed the money. He said, 'Well, you will get your fee; you need not be uneasy about it.' He said: 'We have got to have a little straightening up—the Wards and Worthen—and I don't know whether we ought to pay it or he. Wait and see him.'" It is further shown that after the trial of the Harr suit a bill of exceptions was filed preparatory to appeal to this court, but the appeal was not perfected, and Davis and the other trustees of the Zeb Ward estate paid the fees of the stenographer—something over \$200—for services in the trial and in making a transcript of the testimony. Some time during the period mentioned—the precise date not appearing—the railroad company was, in a suit instituted by the bondholders in the federal court, placed in the hands of receivers, and Davis and W. B. Worthen were appointed receivers. This is all the evidence throwing any light upon the connection of appellants with the Harr suit or the employment of appellees as attorneys. Is there sufficient to warrant a finding that either of the appellants expressly or impliedly undertook to pay any part of the fee due appellees for services? We think not. It is admitted that neither of appellants made any contract with appellees, and that appellees had been employed by Mr. Worthen, the manager of the railroad corporation, before the pendency of the suit was brought to the attention of appellants. It is not contended that they ever did more than to manifest such interest as was consistent with their duties as directors in the railroad corporation and as trustees of the Zeb Ward estate. They had a right to display that much concern in the suit without impliedly making themselves personally liable for the fees of the attorneys who had already been employed by one in authority to conduct the defense of the suit for the railroad company.

Learned counsel for appellees contend that appellants were interested in the result of the suit, and knew of the services being performed by appellees, and that this fact is sufficient to bring the case within the rule that, where an attorney performs services for another with his consent, and there is no agreement for compensation, the law will imply a contract to pay what the service is reasonably worth. This is a familiar principle, and has been repeatedly applied by this court. *Ford v. Ward*, 26 Ark. 360; *Hogg v. Laster*, 56 Ark. 382; 19 S. W. 975; *Lewis v. Lewis' Estate* (Ark.) 87 S. W. 134. It does not, however, always follow that because one receives the benefit, directly or indirectly, of the services of another, the law implies a contract to pay therefor. *Roselius v. Dela-*

chaise, 5 La. Ann. 481, 52 Am. Dec. 597; *Rives v. Patty* (Miss.) 20 South. 862, 60 Am. St. Rep. 510. Each case must stand upon its own peculiar facts. But the facts of this case lack the essentials for an application of this principle, for the reason that appellants were not parties to the suit, and appellees were employed by another. If appellants had, by their course of conduct, induced appellees to render the service, or if they had been parties to the suit, and remained silent and accepted the services of appellees, even though employed by another, the law would imply an agreement on their part to pay for the service. But, inasmuch as they had already been employed to defend the suit, appellants had the right to assume that a display of interest in the suit on their part would not be taken as an implied agreement to pay the fee; and, on the other hand, appellees, after having been previously employed by Worthen, the manager of the railroad, to defend the suit brought against him and the railroad, had no right to assume from such display of interest by appellants that they would pay the fee. Appellants were acting in a representative capacity as directors of the railroad corporation, and had the right, and it becomes their duty, to manifest a degree of interest in the suit without incurring personal liability for the fee. No intimation was given them during the pendency of the suit that they would be called upon to pay any part of the fees, and nothing was said or done, so far as appears from the testimony, to call for a disclaimer of any willingness to become responsible for the fee. We see nothing whatever in their conduct from which an agreement to pay for the services of the attorneys can be implied. It is not contended that appellants are bound by the statements or assurances made by Davis to appellees after the trial concerning payment of the fee. There was no consideration for a contract made at that time after the performance of the services for payment of the fee. Giving to the evidence its fullest probative force in favor of the cause of action of appellees, it falls entirely to establish any contract, either express or implied, on the part of appellants to employ appellees, or to pay them a fee for services performed in the suit named. It proves neither a contract nor facts or circumstances from which one can be implied.

The verdict not being sustained by sufficient evidence, the judgment must be revers-

ed, and remanded for a new trial. It is so ordered.

HILL, C. J., and WOOD, J., dissent.

HILL, C. J. (dissenting). S. L. Harr brought suit for about \$77,000 against the Mississippi & Little Rock Railway Company and R. W. Worthen, its president. Worthen employed McClintock & Lankford, a firm of lawyers, to defend the suit, and later Trimble to assist them. The services were performed, and that the amount recovered is a reasonable fee is not disputed. The railway company was hopelessly insolvent, a fact known to all parties in this litigation. Worthen was a large stockholder and bondholder, and his bonds were pledged to the Ward estate for borrowed money. Appellees have an unsatisfied judgment against him for their fees, and presumably he is insolvent. Shortly after the employment of these lawyers, they got into communication with Oscar Davis, the appellant, who evinced much interest in the litigation. He was a nominal stockholder of the railroad company, and its receiver. His wife was one of the heirs of Ward, the principal creditor of the road, and he was a trustee of the Ward estate. He had such conferences with the attorneys as any client would have, and they looked to him to bring the necessary witnesses to the trial, which he did, and pay the expenses thereof. He attended the trial, claimed the privilege of staying in court as a party in interest instead of being excluded as a mere witness. He paid part of the expenses of the trial, his brother-in-law Ward paid the witnesses, and Davis paid, after the trial, the stenographer's fees for making the transcript. After the trial he assured both Lankford and Trimble that their fees would be paid. The whole course of proceedings indicated he was the real client, and his interest would naturally make him so, while the nominal parties were the insolvent railroad and its bankrupt president. Under these circumstances, where the services were for the benefit of the party, and he knowingly accepts them, very slight evidence is required to raise an implied contract to pay for them.

The evidence which the jury credited on all conflicting matters, was sufficient, in our opinion, to raise an implied contract, and the judgment ought to be affirmed.

WOOD, J., concurs in this opinion.

FRANKS v. STATE.

(Court of Criminal Appeals of Texas, March 1, 1905. On Rehearing, June 23, 1905.)

1. JURY—PREJUDICE OF JURORS.

Prejudice against the crime of murder does not disqualify a juror on a prosecution for homicide.

2. SAME.

Prejudice against the plea of insanity does not disqualify a juror on a prosecution for murder, when the defendant interposes no plea of insanity in the case.

On Rehearing.

3. HOMICIDE—COOLING TIME—EFFECT.

Where defendant and deceased had been engaged in an altercation, and there was thereby created in the mind of defendant such a degree of anger or terror as to render him incapable of cool reflection, and there was a cessation of the difficulty, and the defendant thereafter renewed the difficulty and killed deceased with a pistol, and the renewal of the difficulty was after sufficient cooling time, and for his reason to interpose so as to comprehend the consequences of the act about to be committed, the killing was not manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 62, 63.]

4. SAME—SELF-DEFENSE.

The mere pursuit of a person with intent to bring on a difficulty does not deprive the pursuer of the right of self-defense, where, after coming up to the pursued, the pursuer does not act with intent and calculated to provoke the difficulty.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 146, 150.]

Brooks, J., dissenting in part.

Appeal from District Court, Falls County; Waller S. Baker, Special Judge.

Wallace Franks was convicted of murder in the second degree, and he appeals. Reversed.

Tom Connally and Rice & Bartlett, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, the penalty assessed being confinement in the penitentiary for a term of 25 years.

The first bill of exceptions shows that, in the formation of the jury, William Eggerton was summoned as a talesman, and afterwards sat upon the trial. Upon his voir dire examination he was asked whether he had formed or expressed an opinion relative to the guilt or innocence of the defendant. He answered that, at the time of the killing of young Galloway by defendant, he said to the person who told him about it, "There goes another plea of insanity." The juror further stated he had no prejudice against defendant, but, like all good citizens, he had a prejudice against the crime of murder. The juror in all other respects qualified. Whereupon defendant at this time had exhausted all of his peremptory challenges, and challenged said juror for cause. The court thereupon inquired of counsel whether the defense would involve the question of insan-

ity, and, being answered in the negative, the court overruled said challenge for cause, and had said jury sworn. We do not think there was any error in the ruling of the court. The mere fact that a juror has a prejudice against the crime of murder would not disqualify him; nor can we see how it would injure the rights of the defendant if he had a prejudice against the plea of insanity, when the defendant made no such plea.

Complaint is made by appellant of the following charge given by the court at the request of the county attorney: "If you find from the evidence that, prior to the shooting, deceased, without defendant's consent, seized money that was defendant's property, or that defendant fairly and reasonably believed was his property, and that deceased refused to give up such money, and that deceased and defendant had a difficulty over said money, then, if you believe that they separated, and that thereafter defendant followed deceased up the road, then, if you believe that defendant, in following deceased, did so, not for the purpose of renewing or provoking a difficulty with deceased, but with an honest intention to demand of deceased the return of the money which defendant honestly believed that deceased had wrongfully taken from him, and the deceased, in refusing to comply with such demand, was about to make an unlawful attack upon defendant with a knife, of such a nature as to inspire defendant with the reasonable belief that he was in danger of serious bodily injury or death from such attack, and that, acting on such belief, defendant fired the fatal shot, he would be justified in so doing. On the other hand, you are charged that, where the possession of personal property has once been lost, the owner has no lawful right to regain it by such means as result in a homicide. So, in this case, if you believe that prior to the shooting the deceased, without the defendant's consent, seized money that was defendant's property, or that defendant fairly and reasonably believed was his property, and that deceased refused to give up such money, and that defendant and deceased had a difficulty on account thereof, and that after they separated you believe beyond a reasonable doubt that defendant armed himself and followed deceased up the road, and you further believe from the evidence, beyond a reasonable doubt, that defendant so armed himself and followed deceased with the intention of renewing or provoking a difficulty with deceased, and that thereafter he shot and killed deceased, but if done upon express malice, as defined in the charge, he would be guilty of murder in the first degree, and if upon implied malice, as defined, would be guilty of murder in the second degree, and if done upon the immediate influence of sudden passion, aroused by an adequate cause, as defined in the charge, he would be guilty of manslaughter." Appellant excepted to said

charge, because if defendant renewed the difficulty or provoked the same without the intention of doing serious bodily harm to deceased, and only for the purpose of demanding his money, he would be guilty of no offense, and because said charge, in effect, negatived defendant's right to resist an attack which imperiled his life or inspired him with a reasonable belief of suffering serious bodily injury at the hands of deceased if he provoked or renewed the difficulty, no matter what his purpose or object may have been in so doing. We do not think the charge is erroneous. The words "renew and provoke the difficulty," here used in the charge, are synonymous terms, and, as we understand the law, are an apt presentation of the same to the facts of this case. The substance of the evidence shows that appellant and deceased made a wager of a dollar each that appellant could not throw a certain anvil over his head. They placed the money in the hands of a bystander, and appellant picked up the anvil and threw it over his head. Deceased immediately grabbed all the money out of the bystander's hand. At least, appellant thought so; but the evidence rather indicates that one of the dollars fell upon the floor, and deceased did not get it. However, knowledge of this does not appear to have been brought home to appellant. Thereupon a heated controversy or colloquy ensued between appellant and deceased as to the possession of the money; appellant insisting that he had won the money fairly; deceased insisting that he had not, and refusing to give it up. Appellant picked up a hammer, deceased drew his knife, and in this posture passed out of the blacksmith shop. Thereupon appellant picked up a piece of iron in a manner indicating he would throw it at deceased. The bystander stepped aside. However, appellant did not throw. Deceased and appellant continued to abuse each other. Appellant went off to his boarding house. Deceased and companion started home. Appellant secured a pistol, came back, hunted deceased, and, discovering that he had started home, ran after and followed him something like 250 yards; hallooing to deceased to stop, which he did. Appellant demanded the money of deceased, which he refused to give up. Appellant at this juncture drew his pistol, and deceased started to run. Appellant fired two bullets into his back as he ran off, and deceased fell, and died instantly. Appellant testified that deceased opened his knife and made a gesture or demonstration as though to stab him with it, and that he fired immediately upon this demonstration being made. Without repeating in detail, this is the substance of the testimony as gleaned from the record.

Appellant asked that the court give the jury the following instruction, which was refused, to wit: "If you believe from the evidence that, shortly before the killing, defendant had won a dollar from deceased,

which deceased refused to deliver, and which he suddenly snatched from the hands of the stakeholder, whereupon a quarrel ensued between deceased and defendant, and in which deceased drew a knife upon defendant and threatened to kill him, and immediately thereafter defendant went to where deceased was, and again demanded possession of said dollar, and deceased again refused to give it to defendant, but began to curse and abuse defendant and to make a demonstration upon defendant as though to draw a knife, and you believe that such facts, acts, and circumstances, taken together, did arouse in the mind of the defendant such a degree of anger, rage, resentment, or terror as to render his mind incapable of cool reflection, and while in such condition he shot and killed the deceased, you are charged that he could not be convicted of any offense higher than the grade of manslaughter." We do not think this charge was called for by the facts, since the evidence does not show that immediately thereafter defendant went to where deceased was, but, on the contrary, the evidence shows that they separated, defendant going to his boarding house, where he secured his pistol, and some time thereafter followed deceased some distance up the road towards deceased's house, and there shot and killed him. Appellant also asked the court to charge on the right of appellant to kill deceased if deceased had robbed appellant. We do not think this charge should have been given, under the evidence.

Appellant also excepted to the following portion of the court's charge: "You are charged, in this connection, that if you believe from the evidence that prior to the homicide, if any, defendant, Franks, and deceased, Galloway, had been engaged in an altercation of words and threatening gestures, and that there was thereby created in the mind of the defendant, Franks, such a degree of anger, rage, sudden resentment, or terror as to render the defendant, Franks, incapable of cool reflection, and you find that there was a cessation of said difficulty, if any, and that thereafter defendant, Franks, renewed the difficulty, and killed deceased, Galloway, with said pistol, if he did, and you further find that such renewal of the said altercation, if any, was after sufficient cooling time from the original altercation, if any—that is, if there was sufficient time for such anger, rage, sudden resentment, or terror of the defendant, Franks, if any, to subside, and for his reason to interpose to such an extent as to comprehend the consequences of the act about to be committed, if any—then the homicide would not be manslaughter; and in passing upon this question the jury should consider all the facts." Appellant excepted to this charge on the ground "that it was not demanded by the facts in evidence; that there was only a few moments between what the court termed the first and second difficulties, the facts showing that the same

was one continuous difficulty or trouble, without cessation in fact; and because said charge fails to give a definition of "cooling time," and left the jury without a rule in reference thereto; and because upon the subject of cooling time said charge did not require the jury to find as a fact that defendant's mind had in fact become cooled to such an extent as to comprehend the consequences of his act; but the court instructed the jury, as a matter of law, that if sufficient time had elapsed for such anger, rage, sudden resentment, or terror to subside, and for reason to interpose to such an extent as to enable him to comprehend the consequences of the act about to be committed, then the homicide would not be manslaughter; thus withdrawing the issue of manslaughter from the jury, and in effect directing the jury to find against defendant on the issue of manslaughter, even if defendant's mind had not in fact cooled." The evidence, as stated above, shows that there had been a previous difficulty. The parties separated, and some little time thereafter the difficulty was renewed. Clearly, this presents the issue of cooling time. We think the charge of the court is correct. It follows the charge approved by this court in *Surrell v. State*, 29 Tex. App. 321, 15 S. W. 816. However, appellant cites, to support his contention, the cases of *Jones v. State*, 33 Tex. Cr. R. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; *Eanes v. State*, 10 Tex. App. 421; *Halliburton v. State*, 32 Tex. Cr. R. 51, 22 S. W. 48. In each of the last cases cited the issue of cooling time was not, in law, involved, since the defense alleged in each was insult to a female relative. The statute authorizes reduction of the homicide to manslaughter in such case, regardless of the length of time elapsing between the act or information in reference to the insult, if, as a matter of fact, the deceased's mind was not cool. Hence said issue of cooling time is out of those cases. In *Orman v. State*, 24 Tex. App. 504, 6 S. W. 544, the defense of insult to a female relative was also involved. There Judge Wilson, delivering the opinion of the court, held that the issue of cooling time was not involved where the defense is insult to a female relative. We take it that a careful inspection of the statute will demonstrate this fact, since the Legislature, in the passage thereof, directly laid down another basis than the ordinary causes for manslaughter. In *Wadlington v. State*, 19 Tex. App. 266, it was held: "However great the provocation may have been, if there be sufficient time for the passion to subside and for reason to intervene, the homicide will be murder." In this case the proof shows that, after deceased was made to release hold of defendant, some two or three minutes elapsed before defendant fired. The court held that the issue of cooling time should have been charged in connection with the issue of manslaughter. In *Jones v. State*, supra, the court very properly say "that cool-

ing time is not a matter of law, but a matter of fact," but very improperly, as we take it, after a careful review of the authorities, held that the charge given by the court was erroneous, and further erred in holding "that it is not so much a question of time in which the mind may become cool and sedate, as it is one of the actual conditions of the mind at the time the homicide occurred." It is further stated "that the law has not undertaken to prescribe the time in which the mind may become cool, passing from a disturbed or enraged condition, nor can it well do so. It must depend upon testimony, not law." It is further stated that, "if at the time of the homicide the mind of the slayer be cool and deliberate, his crime would be murder in the first degree. If, on the other hand, it was aroused to sudden passion, to the point of being beyond cool reflection, brought about by an adequate cause, the killing would usually be of no higher grade than manslaughter. Whether the mind be cool or otherwise is a question of fact, not of law, and relates to the actual condition of the mind, and not to his status merely from a lapse of time." This case is supported by the *Eanes* and *Halliburton* Cases, supra, but neither of them, as we take it, announces the correct proposition of law. We agree with said cases that cooling time is a question of fact, but it is the time that is the fact to be ascertained, not the condition of the defendant's mind. If defendant's mind is the fact to be ascertained, then cooling time has nothing to do with the question. Suppose a quarrel occurs between A. and B.; a year passes, and A. meets B. to-day and shoots and kills him. It is doubtful whether the issue of cooling time could be in the case, or whether the issue of manslaughter could possibly be suggested by these facts alone. Then the only connection between the previous difficulty and the final one is the fact that brings the issue of cooling time into the case. Then it becomes a question of fact as to how long a time, or whether sufficient length of time for an ordinary man to cool, has elapsed. This is not a question of law, but a question of fact. If sufficient time has elapsed between the first and second colloquy for a reasonable, rational creature to cool, then the law presumes that he has cooled. He may not be cool, but he cannot insist upon manslaughter from the fact that he has such a disordered mind that it cannot cool in a reasonable time. The law judges defendant by the rule of the average human mind, and, if the average human mind would cool between the first and second difficulty, then the jury are warranted in the presumption that the defendant has an average human mind, and that therefore his mind had cooled. If the jury do not think that time has been sufficient for his mind to cool, then he is entitled to manslaughter; and, if it has, then he is not entitled to it.

In *People v. Sullivan*, 7 N. Y. 306, Horri-gan & Thompson's Criminal Defenses, pp. 69, 70, we find this language: "The court was further requested to charge the jury that if they believed the prisoner, in the heat of passion, caused the death of the deceased, it is not murder. This was properly refused. The designed killing of another without provocation, and not in sudden combat, is certainly none the less murder because the perpetrator of the crime is in a state of passion. The court was also requested to charge that if the jury believed that Smith, having had the fight with Sullivan, and by his conduct and blows aroused and excited the passions of the prisoner, and then returned, thereby keeping up the excited passions of the prisoner, and under such excitement the prisoner stabbed the deceased, it is not murder. This request was erroneous, and was properly rejected. Where, after mutual combat, a question arises whether there has been time for excited passions to subside, the question always takes this form—whether there had been sufficient time to cool, and not whether, in point of fact, the defendant did remain in a state of anger. The request presented simply the question whether the defendant continued in anger up to the time of killing." Bishop, in his New Criminal Law, § 711, subd. 2: "If the passion had time to cool, the offense is not reduced to the lower degree, though in fact it had not cooled. For 'when anger, provoked by a cause sufficient to mitigate an instantaneous homicide, has been continued beyond the time which, in view of all the circumstances of the case, may be deemed reasonable, the evidence is found of that depraved spirit in which malice resides.' Section 712. We have no rule for determining how much time is necessary for cooling. In the nature of things, it must depend much on what is special to the particular case. Commonly the time in which an ordinary man under like circumstances would cool is deemed reasonable. 'If two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain, that is murder, for there was time to allay the heat, and their after meeting is of malice.' An hour seems to have been thought sufficient. Three hours have been. Where a witness testified that the prisoner was 'absent no time,' though there was a pause in the fight, there it was adjudged not to have been a cooling." Section 713. "Ordinarily the sufficiency of the cooling time and the sufficiency of the provocation are respectively deemed questions of law, not of fact. But the time required to cool, for example, is sometimes, it is believed with great propriety, submitted to the jury."

We might multiply authorities on this question, but we deem it unnecessary to do so, taking it as thoroughly established that cooling time is a question of fact, where the issue is in the case, to be submitted to the jury as a question of fact on time, and not

upon the condition of the defendant's mind. It follows, therefore, that the court's charge complained of was not error.

Other matters complained of by appellant we do not deem necessary to review. There being no error in the record, the judgment is affirmed:

HENDERSON, J. I believe the charge on cooling time announces a correct proposition, and that the case should not be reversed on that account, and I agree to the conclusion reached.

DAVIDSON, P. J. I dissent and will write my views.

On Rehearing.

HENDERSON, J. Appellant insists on several grounds for rehearing, but, in the view we take of it, it is only necessary to consider two. In our opinion, the charge of the court was correct on the doctrine of cooling time, as heretofore announced.

While appellant reserved an exception to the action of the court giving the state's special requested instruction, yet, in the argument in submitting the case, he failed to call attention to the same; and, while it was referred to, it was not thoroughly discussed, in the original opinion. In his motion for rehearing he has presented his assignment of error to this charge with much earnestness and force. The exceptions pointed out by him to the charge are special, and it does not occur to us that the first two exceptions taken point out any error in the action of the court. However, the third and last exception reads as follows: "Said charge in effect negatives the defendant's right to resist an attack which imperiled his life, or inspired him with the reasonable belief of suffering serious bodily injury at the hands of the deceased, if he provoked or renewed the difficulty, no matter what his purpose may have been in so doing. The court, after instructing the jury, in general terms, if they believed that deceased seized property defendant believed was his, and refused to give up the same, and they had a difficulty on that account, and that they afterwards separated, and that thereafter defendant followed deceased up the road, not for the purpose of renewing the difficulty, but with the honest intention to demand of deceased a return of the money which he believed deceased had wrongfully taken from him, and that deceased refused to comply with his demand, and was about to make an unlawful attack upon him with a knife, and the defendant reasonably believed he was in danger of serious bodily injury or death from said attack, and that on said account he fired and killed deceased, he would be justified in so doing. The court then proceeded to instruct the jury, as follows: "On the other hand, you are charged that, where the possession of personal property has once been lost, the owner has no lawful right to regain it by

such means as result in homicide. So, in this case, if you believe that, prior to the shooting, deceased, without defendant's consent, seized money that was defendant's property, or that defendant fairly and reasonably believed was his property, and that deceased refused to give up such money, and that defendant and deceased had a difficulty on account thereof, and that, after they separated, you believe beyond a reasonable doubt that defendant armed himself and followed deceased up the road, and you further believe from the evidence, beyond a reasonable doubt, that defendant so armed himself, and followed deceased with the intention of renewing or provoking a difficulty with deceased, and that thereafter he shot and killed deceased, he would not be justified in so shooting and killing deceased, but, if found upon express malice, as defined in the charge, he would be guilty of murder in the first degree, and if upon implied malice, as defined, would be guilty of murder in the second degree, and if done under the immediate influence of sudden passion aroused by an adequate cause, as defined in the charge, he would be guilty of manslaughter." Now, the vice here suggested is that the charge merely requires the jury to believe that, if appellant armed himself and followed deceased with the intention of renewing the difficulty, he would be guilty of some offense, no matter what occurred when he came up with deceased; that is, the charge does not require that after meeting with deceased he do some act to bring on the difficulty, but it merely states, if he followed him with the intention of renewing the difficulty, and thereafter he shot and killed deceased, he would be guilty of murder or manslaughter, as the case might be. Clearly the charge in question contains this vice, and it is not necessary to cite authorities in order to show it. All the cases hold that mere pursuit of a party with intent to bring on a difficulty does not deprive one of the right of self-defense; that after he comes up with the party he must then do some act with intent and calculated to provoke the difficulty. Here the court simply instructed the jury, if he pursued him with intent to renew the difficulty, and he afterwards killed him, no matter what occurred when they met, he would be guilty of murder or manslaughter, as before stated. At first it occurred to the writer that the special objections urged to this charge did not raise the question, or point out the particular vice in the charge. But as before stated, we believe the third ground relied on by appellant reaches the vice in the charge pointed out above.

We note in this connection that appellant requested a number of special instructions along the same line, which were given by the court, and which are correct in terms. However, they contravene the proposition announced in the charge above criticised, and,

taking the charges together, were calculated to leave the jury in a confused and uncertain state of mind as to what was the law.

We accordingly hold that because the court gave this charge the motion for rehearing is granted, and the judgment is reversed and the cause remanded.

BROOKS, J. (dissenting). I do not agree with the opinion of the majority of the court reversing the case on motion for rehearing. If the charge complained of by appellant puts a restriction upon appellant's right of self-defense, then special charges Nos. 2, 4, 5, and 6, given by the court at the request of appellant, clearly cover any possible harm in the charge complained of, and render harmless any inaccuracy therein. Said charges are as follows:

"You are charged that it is not unlawful for a person to bet or wager money on his skill and ability to throw an anvil over his head; so that, if in this case you believe from the evidence that prior to the shooting that deceased and defendant mutually made a bet as to whether or not the defendant could pick up and throw an anvil over his head, and that each placed the money so bet, to wit, one dollar, in the hands of one Calvin Stuckey, as a stakeholder, and that thereafter defendant did pick up and throw said anvil over his head, and did win said bet, then you are instructed that the defendant would, in law, be entitled to the possession of the money so won in the hands of said stakeholder. And if, after winning said money, deceased grabbed or snatched said money out of the hands of the stakeholder, and refused to give same to defendant, and thereafter started away with said money, then you are charged that defendant would have the lawful right to seek deceased for the purpose of demanding the possession thereof. And you are further charged that in going in quest of deceased he would have the lawful right to arm himself in anticipation of any attack the deceased might make upon him when they met; and if you further believe that defendant looked deceased up and after overtaking him, demanded his money, which deceased refused to surrender, whereupon an altercation ensued between them, in which deceased cursed and abused defendant, and drew a knife upon and started towards defendant in a threatening manner, and defendant believed, from the acts, conduct and declaration of deceased, he was in danger of being killed or of suffering serious bodily injury at the hands of deceased, then he would have the lawful right to shoot and kill deceased; and, if you so believe, you will acquit defendant, or, if you have a reasonable doubt thereof, you will find him not guilty. And in this connection you are charged that you must place yourself in the position of defendant, and view the facts and circumstances in evidence from his standpoint, and if, from all the facts and

circumstances in evidence, you believe that it reasonably appeared to defendant at the time of the shooting he had a reasonable expectation or fear of death or suffering serious bodily injury at the hands of deceased, then defendant would have the lawful right to shoot and kill deceased in defending himself from such real or apparent danger; and in this connection you are charged that said danger need not be in fact real, but need only be apparent, viewing the same from defendant's standpoint at the time; and, if defendant began shooting at deceased under circumstances indicated above, you are instructed that he would have the right to continue to shoot so long as he believed himself in danger from such threatened attack of deceased, if any."

No. 4. "The fact that the person arms himself before going to ask or demand possession of property that may belong to him, or that he believed belonged to him under the facts in evidence, does not deprive him of the right to defend himself from an unlawful attack made upon him. So, if you believe from the evidence that deceased had a dollar in his possession, which defendant had won from him, and defendant, for the purpose of demanding possession thereof, armed himself and sought deceased with the view of demanding possession thereof, and that, upon meeting, deceased, after cursing or abusing defendant, advanced upon him with a drawn knife, and defendant believed he was about to suffer serious bodily injury at the hands of deceased or be killed by deceased, fired upon deceased with a pistol in order to protect himself from such assault, if any, on the part of deceased, then, if you so believe, you will find him not guilty, or, if you have a reasonable doubt thereof, you will acquit him; and, in passing upon this issue, you will view the facts and circumstances in evidence from the standpoint of defendant as it appeared to him at the time of the difficulty, and not as the same may appear to you now."

No. 5. "You are charged that, if you believe from the evidence that, immediately before the killing, defendant had won a dollar from deceased, which deceased snatched and carried away, and refused to give up to defendant when demanded, then you are charged that defendant would have the right to seek deceased for the purpose of demanding

the money, and in doing so he would have the lawful right to arm himself, if he anticipated any unlawful attack upon himself; and if, after overtaking deceased and demanding his money from him, deceased abused defendant and started towards him with a knife, then you are charged that defendant would have the right to use any force within his power to protect himself; and if, while deceased was making or in the act of making an unlawful attack upon defendant with a knife, defendant shot and killed deceased, then he would be guilty of no offense, and, if you so believe, you will find him not guilty. You are further charged in this connection that the fact that defendant armed himself before going to seek deceased would not impair or abridge his right of self-defense, if his purpose in seeking deceased was to demand his money."

No. 6. "If you believe from the evidence in this case that shortly before the killing the defendant had won a dollar from deceased, which had theretofore been placed in the hands of one Calvin Stuckey under an agreement that, if defendant would pick up and throw over his head a certain anvil, the said dollar should belong to and be delivered to defendant, and that deceased immediately thereafter snatched said dollar from the hands of said Calvin Stuckey, whereupon a quarrel ensued between deceased and defendant, and in which the said deceased drew a knife upon defendant, and threatened to kill him, and started away with said money, and defendant immediately thereafter went to where deceased was, and again demanded the possession of said dollar, and deceased again refused to give it to defendant, but began to curse and abuse defendant, and to make a demonstration as though to draw a knife upon him, and you believe that such facts, acts, and circumstances, taken in connection with the previous wrongs done him by deceased, and the circumstances all taken together were of such a character as to arouse in the mind of defendant such a degree of anger, rage, sudden resentment, or terror as to render his mind incapable of cool reflection, and while in such condition he shot and killed deceased, you are charged that he could not be convicted of any offense higher than the grade of manslaughter."

Therefore I believe the motion for rehearing should be overruled.

HARTIN COMMISSION CO. v. PELT.

(Supreme Court of Arkansas. June 24, 1905.)

1. APPEAL — RECORD — BILL OF EXCEPTIONS — INSTRUCTIONS.

Where error¹ was assigned to the modification of an instruction, but the instructions were neither copied nor called for in the bill of exceptions, they could not be noticed, though other parts of the transcript purported to contain the instructions.

On Rehearing.**2. SALES — IMPLIED WARRANTY.**

Where a seller of cotton by description expressly refused to warrant the grade, he was not liable for breach of an alleged implied warranty that the cotton was of the grade or description used.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 761.]

Appeal from Circuit Court, Columbia County; Charles W. Smith, Judge.

Action by the J. F. Hartin Commission Company against J. S. Pelt for damages for breach of an alleged warranty of the grade of a lot of cotton sold and delivered by the defendant to the plaintiff. Upon trial before jury a verdict was returned in favor of defendant, and the plaintiff appeals. Affirmed.

Stevens & Stevens, for appellant. Smead & Powell, for appellee.

MCCULLOCH, J. Appellant assigns error committed by the court in modifying the first instruction asked in its behalf and in giving over its objection several instructions asked by the defendant. The bill of exceptions recites that the court modified instruction numbered 1 asked by the plaintiff, and gave instructions numbered 2, 3, 4, 5, 6, and 7 asked by defendant, to which the plaintiff excepted; but the instructions are neither copied nor called for in the bill of exceptions, and cannot, therefore, be noticed, even though there is found in other parts of the transcript what purports to be instructions of the court of corresponding numbers. *Newton v. Russian* (Ark.) 85 S. W. 407. We must therefore presume that the jury were properly instructed, and as the testimony was sufficient to sustain the verdict, and no other error of the court is pointed out, the judgment must be affirmed. It is so ordered.

On Rehearing.

The appellant files a petition for rehearing, alleging that the bill of exceptions contained proper calls for the instructions of the court, but that the clerk failed to copy same in this record, and asking that the judgment of affirmance be set aside and a writ of certiorari be issued to bring up the original bill of exceptions, which is exhibited with the petition.

It is not alleged that there was an express warranty of the grade of the cotton. On the contrary, it is undisputed that appellee, the seller, expressly refused to warrant the grade. But it is contended that in cases of

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sales of commodities by description a warranty of the described grade or quality is implied, and that is the question sought to be raised by this instruction asked by appellant which was modified by the court. We do not deem it necessary to pass upon that question in this case, for, if the law is as contended by counsel for appellant, that rule cannot be applied where the seller has expressly refused to make the warranty. The rule is concisely stated as follows: "In the sale of goods by description there is a warranty that they shall answer the description, where it is given by way of indicating the character or quality of the article sold, and not for the purpose of identifying it merely, and when the buyer relies upon it as a warranty. It is not an implied warranty, but is construed, under such circumstances, as constituting an express undertaking that the article shall be as described." 30 Am. & Eng. Enc. L. p. 153, and cases cited. In order to imply a warranty from the language or contract of the seller, an intention to warrant must be apparent, and it would be anomalous to hold that a warranty of grade or quality will be implied from the sale of a commodity by description where the seller expressly refuses to warrant. Such refusal negatives any intention to warrant. *Tabor v. Peters*, 74 Ala. 95, 49 Am. Rep. 804; *Jones v. Quick*, 28 Ind. 125; *Figge v. Hill*, 61 Iowa, 430, 16 N. W. 339; *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. 196; *Henson v. King*, 48 N. C. 419. "Whether language of description is to be construed as a warranty of quality must depend essentially upon the intention and understanding of the parties as collected from their entire contract." *Maxwell v. Lee*, supra. There is a difference between a contract for the sale of articles to answer to certain description and a sale of certain specific articles then in the hands of the seller, and described to be of certain grade and quality. In the former case there is, until acceptance by the purchaser, a warranty that the article shall answer the description; whilst in the latter case no warranty is implied unless an intention to warrant appears. The case at bar falls within the latter class. Appellee had on hand at various times three lots of cotton, which he sold to appellant, but refused to warrant the grade. We find, therefore, that, treating the record as if properly containing the instructions of the court, no error is shown.

The petition for rehearing is denied.

SHARP et ux. v. FITZHUGH.

(Supreme Court of Arkansas. May 27, 1905.)

1. BANKRUPTCY — POWERS OF TRUSTEE — AVOIDANCE OF TRANSFER.

Under Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3452], authorizing the trustee to avoid any

transfer by the bankrupt which any creditor might have avoided, it is immaterial whether such transfer were made four months prior to the adjudication of bankruptcy or not.

2. HOMESTEAD—CONVEYANCE TO WIFE—COMPLAINT BY CREDITORS.

Creditors may not complain of the conveyance to the wife of the homestead, although it is bought by the husband with his own funds. [Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 182.]

3. SAME—RENTS AND PROFITS.

Where the legal title to the homestead is in the wife, she is entitled to the rents and profits thereof, and to property purchased with such rents and profits, and may hold the same against creditors of the husband.

4. HUSBAND AND WIFE—PROPERTY BELONGING TO WIFE—IMPROVEMENTS BY HUSBAND.

The wife's property is not liable to creditors of the husband for augmentation of the rents and profits or enhancement of the value thereof on account of any reasonable contribution of the husband's time, labor, and skill in the management of the property.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 573, 574.]

5. SAME—INVESTMENT OF FUNDS—BURDEN OF PROOF.

Where a husband works and manages his wife's farm, and, in addition, controls in his own right other farms of equal productiveness, and mingles the products of all at will, the burden is on the wife to show, as against creditors of the husband, the amount of profits received from her own farm, and how they were expended, and that funds used in purchases and investments were not furnished by the husband, and did not accrue from his earnings.

Appeal from Crawford Chancery Court; J. Virgil Bourland, Chancellor.

Suit by H. L. Fitzhugh, as trustee of the estate of John Sharp, a bankrupt, against John Sharp and others. From a decree for plaintiff, defendants Sharp appeal. Affirmed in part.

This is a suit brought in the chancery court of Crawford county by H. L. Fitzhugh, as trustee of the estate of John Sharp, a bankrupt, against said John Sharp and his wife, Ella Sharp, and others, to subject certain property, real and personal, held in the name of Ella Sharp, to the payment of the debts of said bankrupt. John Sharp prior to the year 1897 failed in business, and was indebted to creditors in large sums, which he did not pay. On April 29, 1902, he filed his petition in bankruptcy, and was duly adjudged a bankrupt; and appellee, H. L. Fitzhugh, was by the creditors elected as trustee of the estate of the bankrupt. This suit was brought by said trustee, for the benefit of the creditors of the estate who had proved their claims, by direction of the bankruptcy court. It is alleged that John Sharp, while insolvent, and with fraudulent intent to cheat, hinder, and delay his creditors, purchased in the name of his wife, Ella Sharp, the following land, viz.: 80 acres of land bought from the Union Central Life Insurance Company, designated in the proof as the "Homestead Tract"; 40 acres bought from H. H. Hilton, trustee, for the sum of \$200, known as the "Hilton Forty"; one lot

in the town of Alma bought from Hillyer and others for the sum of \$200; another lot in the town of Alma bought from Sam B. Locke, as guardian, for sum of \$300; another lot in the town of Alma bought from Jones and others for sum of \$300; and 782 acres, known as the "G. N. Wright Farm," bought from the Union Central Life Insurance Company for the sum of \$12,000, of which the sum of \$1,000 was paid cash, and the remainder on a credit of 10 years, with 6 per cent. interest, payable annually. It is further alleged: That said bankrupt is the owner of the following personal property held in his wife's name, to wit: \$3,500 invested as partner in a mercantile business conducted in the town of Alma with defendant Frank Wright, under the firm name of Wright & Co.; \$750 invested in the capital stock of a sawmill company in Oklahoma Territory; and a note of defendant C. C. Montague for the sum of \$250, executed to Ella Sharp in settlement of the purchase price of a pair of mules and a wagon and lot of corn sold to Montague. That said bankrupt was and is the real owner of said property, and placed the same in the name of his wife, the said Ella Sharp, for the purpose of defrauding his creditors. The defendants John Sharp and Ella Sharp filed their joint answer, denying that any of the property described was owned by John Sharp, or that title was taken in the name of Ella Sharp for the purpose of defrauding his creditors, and alleging that all of it was the separate property of Ella Sharp, and was bought with her money, except the homestead 80, which was conveyed to her by the Union Central Life Insurance Company in consideration of her joining her husband in a conveyance to said company of her dower in the equity of redemption of a farm known as the "Sharp Place," upon which the company held a mortgage. Mrs. Sharp also filed a separate supplemental answer, claiming the homestead 80 and the Hilton 40 as her homestead. The chancellor in the final decree dismissed the complaint as to this property, and declared the same to be her homestead, and no appeal from that part of the decree was taken by the plaintiff. The Union Central Life Insurance Company and C. C. Montague were made defendants and served with process, but failed to appear. The court rendered a decree in favor of the plaintiff, except as to the 120 acres held to be the homestead of the defendants, and canceled the legal title of Mrs. Sharp thereto, and declared the same to be assets of said bankrupt estate in the hands of the trustee, subject, however, to the lien of the Union Central Life Insurance Company on the Wright farm for \$11,000, balance of the purchase price. The defendants John Sharp and Ella Sharp appealed to this court. John Sharp died pending the appeal, and upon suggestion of his death the cause, as to him, was abated.

W. S. McCain and J. E. London, for appellants. Brizzolara & Fitzhugh, Jesse Turner and Sam R. Chew, for appellee.

McCULLOCH, J. (after stating the facts).
1. Appellants raise here, for the first time, a question as to the power of the trustee to maintain this suit; urging that he is empowered to sue to set aside only such conveyances in fraud of creditors as were made within four months next before the adjudication of bankruptcy. It is doubted that this question, though it goes to the power of the trustee to maintain the suit, can be raised here in the case, when no such objection was made below, either by demurrer or answer. It seems clear, however, that under subdivision "e," § 70, of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3452]), the trustee is clothed with plenary power to sue to avoid any transfer made by the bankrupt of his property which any creditor may have avoided, whether made within four months prior to the adjudication of bankruptcy or not. *Collier on Bankruptcy* (4th Ed.) p. 523; *Brandenburg on Bankruptcy* (3d Ed.) p. 438; *In re Gray*, 3 Am. Bankr. R. 647, 47 App. Div. 554, 62 N. Y. Supp. 613.

2. It appears from the evidence in this case that in the beginning of the year 1897 appellants, John Sharp and his wife, Mrs. Ella Sharp, were practically without any property, except the homestead 80 acres, which the Union Central Life Insurance Company had the preceding year bargained to Mrs. Sharp, and which that company conveyed to her the next year. They were then occupying this tract as a homestead, and on January 29, 1897, bought the Hilton 40-acre tract, adjoining the homestead. The large farm formerly owned by John Sharp had been taken under a mortgage held by the insurance company. The G. H. Wright farm which is in controversy, it appears, was formerly the property of Mrs. Sharp's father, and was then owned by the Union Central Life Insurance Company. During that year Mrs. Sharp obtained a judgment against said company for the recovery of about \$1,000 upon some liability, the character of which is not disclosed in this record, but which is conceded to be disconnected from the subject-matter of this controversy. She realized out of this judgment only the sum of \$465, the remainder going to the attorney who conducted that litigation for her as contingent fee. In December of that year (1897) the insurance company bargained the Wright farm to Mrs. Sharp for the sum of \$12,000, of which \$1,000 was paid cash, and the remaining sum of \$11,000 was agreed to be paid in 10 years from date, with interest at the rate of 6 per cent. per annum, payable annually. The interest has been paid regularly. The principal is not due, and remains unpaid. It is shown by the testimony of Mrs. Sharp and of the agent

for the insurance company, who is now one of the attorneys for appellants in this case, that this bargain was made personally by Mrs. Sharp and the agent, and that she made the payment of \$1,000 by satisfaction of her part (\$465) of said judgment, and the remainder (\$535) in cash. John Sharp and Mrs. Sharp testify that the \$535 paid in cash was realized from the crops raised on the homestead 80 and the Hilton 40 during the year 1897, which belonged to Mrs. Sharp; and this is uncontradicted, save as to some contradictory evidence as to the amount of crops raised by the tenants on the place. Notwithstanding this contradiction, we think it satisfactorily appears by the proof that the payment was made with funds realized from crops raised on that place, which belonged to Mrs. Sharp, as rents and profits of the homestead which had been conveyed to her. The creditors could not complain of the conveyance to her of the homestead, even if bought by the husband with his own funds. *Wilkes v. Vaughan* (Ark.) 83 S. W. 913, and cases cited. And it follows that, if the legal title to the homestead was rightfully in her, she was entitled to the rents and profits thereof. To deny her the rents and profits of the homestead would be to deny her the use of the property itself.

The contract for the sale of the Wright farm to Mrs. Sharp by the insurance company is not in the record, but it is shown to have been in writing, and that by its terms the company agreed to convey the lands to Mrs. Sharp upon payment of the balance of the purchase price. It is further shown that John Sharp also signed the contract, or indorsed his name on the back of it. John Sharp rented from the insurance company for the year 1898 and subsequent years, up to the time of the trial of this case below, for an annual rental of \$1,200, the farm known as the "Sharp Place," which he had formerly owned. This place contained from 100 to 200 acres more cleared land than the Wright place. Both places were operated from year to year by John Sharp, and it is not shown with accuracy the amount of crops raised on each place, though Sharp undertakes to state the number of bales of cotton raised on the Wright place each year. We think that it appears with reasonable certainty that a sufficient amount was realized from year to year from rents and profits of the Wright place and the homestead, including the Hilton tract, to meet the annual interest payment of \$660 and taxes and repairs. The only contribution, therefore, which has been made by John Sharp toward the purchase of the Wright place, was his judgment and experience as a farmer, and his time devoted to the management. It is shown that he managed the place, rented it, and collected rents, directed the making of repairs, etc., and the operation generally of the farm, the same as he did the Sharp place, which he had rented. He says that his at-

tention to the Wright place occupied about one-fourth of his time. Mrs. Sharp is a woman of no business ability or experience, and gave no time or attention to the operation of the farms. This court, in *Morris v. Fletcher*, 67 Ark. 105, 56 S. W. 1072, 77 Am. St. Rep. 87, held that the creditors of the husband could follow and subject to the payment of their debts money and the value of material furnished by him in improving his wife's property, but said that "under no circumstances can the husband's creditors make the wife's separate estate liable for mere labor performed by him." The Supreme court of Alabama, in the case of *Nance v. Nance*, 84 Ala. 375, 4 South. 699, 5 Am. St. Rep. 378, which was cited with approval by this court in *Morris v. Fletcher*, supra, said: "The evidence shows that the husband expended his skill and labor in making valuable erections and improvements on the lots after marriage, and it is insisted that complainants have a right to condemn to their demands the value of the labor. The bestowment of the labor in improving the separate estate of the wife did not constitute her a debtor to the husband, nor can her separate estate be charged therewith in favor of the husband's creditors." The court, however, in that case held that creditors could reach money or materials belonging to the husband, and used by him in improving his wife's property, provided the amount did not exceed the limit of his personal exemptions. We are not prepared to say that there are no limitations upon the right of the husband to expend his time, labor, skill and experience in managing or improving the separate property of his wife, and deny his creditors the fruits of the same in the enhancement of the value of the land, and the increased rents and profits by reason of such contribution; but we have no hesitancy in announcing the rule that the wife's property is not liable to the creditors of the husband for augmentation of the rents and profits or enhancement of value on account of any reasonable contribution of his time, labor, or skill in the management of the property. We think the proof is sufficient, by a clear preponderance, to show that the first payment of \$1,000 on the purchase of the Wright place was made by Mrs. Sharp out of her own funds, and that the annual interest payments since that time have been paid out of the net proceeds of the rents and profits issuing from that place and from her homestead. The chancellor therefore erred in decreeing the purchase in her name to be fraudulent and void.

3. The other property in controversy, viz., the lots in the town of Alma, the sawmill stock, Montague notes, and investment with Wright & Co., were all acquisitions during the year 1901. As stated before, neither Sharp nor his wife had any money or property of substantial value in 1897; and it is manifest that the above acquisitions resulted

from operation of the Wright farm bought by Mrs. Sharp, or the Sharp and other farms rented and operated by John Sharp from year to year. His farming operations during those years, aside from his management of the Wright farm, seem to have been quite extensive, though he is unable to show any substantial profits arising therefrom. His own statement as to the amount of crops raised on the various farms under his control is not clear, and there is some conflicting testimony on the point. His testimony as to the quantity of cotton raised on the Wright place is 135 bales for the year 1898, of which his wife received 31 as rent, 115 bales for the year 1899, of which she received 28, and 205 bales for the year 1900, of which she received 51. The Sharp place was much larger, and, according to some of the witnesses, more productive, yet he does not show any profits during the same years from that place. We think that this proof establishes the receipt of sufficient profits from the Wright farm to cover the annual payments of interest, taxes, and repairs on that place, but not that all the funds invested in other property came from that source. Under the circumstances, the burden is upon Mrs. Sharp to show distinctly that the funds she used in these purchases and investments were not furnished by her husband, nor that they accrued from his earnings. Especially is the rule applicable where it is shown that in addition to her farm he had the management and control in his own right of other farms of at least equal productiveness and mingled the products of all at will. She is held to a strict showing of the amount of profits received from her own farm and how it was expended. *Hershey v. Latham*, 46 Ark. 542; *Driggs v. Norwood*, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; *Leonhard v. Flood*, 68 Ark. 162, 56 S. W. 781; *Reeves v. Slade*, 71 Ark. 611, 77 S. W. 54; *Wilkes v. Vaughan*, 78 Ark. —, 83 S. W. 913; *Davis v. Yonge*, 73 Ark. —, 85 S. W. 90. Conceding that the proof shows that the profits from the Wright farm exceeded the aggregate amount paid on interest, taxes, and repairs on that place, and that some of the subsequent investments came from that source, we cannot say, with any degree of certainty, from the proof what amount thereof was so invested, and in which of the investments her funds were used. Unless we can find from the proof, which we do not, that all of the subsequent purchases and investments were made with her funds, how can we single out any particular purchase or investment, and say that this or that was made with her funds? We can do this with the Wright farm, for the reason that we find that the first payment was made with her funds, the contract for purchase was made by her, the profits from that place were sufficient to cover the payments subsequently made, and we can assume that these profits were primarily applied in the payment on

that place. The chancellor found that the proof did not sustain the claim of Mrs. Sharp that these purchases and investments were made with her own funds, and not with those of her husband, and we think his findings in that respect are not against the preponderance of the testimony.

As to the lands described as the Wright farm, the decree is reversed and remanded, with directions to enter a decree dismissing the complaint for want of equity. In all other respects the decree is affirmed.

BROWN v. TAYLOR.

(Supreme Court of Tennessee. May 22, 1905.)

1. COVENANTS — ACTIONS — DEFENSES — KNOWLEDGE OF BREACH.

Where a covenant against incumbrances is inserted in a deed of conveyance, the covenantee may sue at law for a breach thereof, consisting of an unexpired lease upon the premises, although he had actual knowledge of such lease.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 40.]

2. SAME—BREACH—DAMAGES—COUNSEL FEES.

A covenantee, in a covenant against incumbrances which is breached by the existence of an unexpired lease on the premises, cannot recover as damages counsel fees incurred in a misdirected action to evict the lessee prior to the expiration of his term.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 261.]

3. SAME—SPECIAL DAMAGES.

The fact that a purchaser of land disclosed to his vendor that his purpose in buying the same was to subdivide it does not entitle him to special damages for a breach of the vendor's covenant against incumbrances, whereby the purchaser was prevented for a time from obtaining possession of a portion of the land which was subject to an unexpired lease, where the streets upon which the subdivision was to front had not been, and could not be, formally opened to the public until after the expiration of the lease, and consequently the breach of the covenant was not the essential cause of preventing the opening of the land for subdivision.

4. SAME—ORDINARY DAMAGES.

In the absence of circumstances authorizing the recovery of special damages, the covenantee's damages for a breach, consisting of an unexpired lease, of a covenant against incumbrances, is the rental value of the premises during the currency of the lease.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, §§ 238-242.]

Appeal from Circuit Court, Shelby County; J. S. Galloway, Judge.

Action by Harris L. Brown against Ford N. Taylor. From the judgment rendered, both parties appeal. Modified.

R. G. Brown, for plaintiff. Flippin & Neuhardt, for defendant.

McALISTER, J. The plaintiff below, Harris L. Brown, recovered judgment against the defendant, Ford N. Taylor, for the sum of \$92.65, as damages for breach of covenant against incumbrances contained in a deed for

the sale of land. Both sides appealed and have assigned errors.

The cause was heard by the circuit judge, without the aid of a jury, upon evidence which is practically undisputed. The record reveals that on the 29th of February, 1904, Ford N. Taylor and wife conveyed to Harris L. Brown, by deed duly executed and recorded, a tract of land in the suburbs of Memphis, for which Brown agreed to pay the sum of \$5,000 whereof \$1,400 was paid in cash, and notes executed for the balance of the purchase money, due in one, two, and three years, with interest from date. The deed contained the usual covenants and warranties that the premises were free from incumbrances and that the grantors would forever defend the same against all lawful claims whatever.

It is disclosed by the record that the property was purchased by Brown for the purpose of making a subdivision, and it was agreed that, upon certain cash payments being made, any portion of the property desired would be released from the operation of the trust deed executed to secure the deferred payments.

It further appears that at the date of the deed there was an incumbrance on the land, consisting of an outstanding lease, with 10 months to run before its expiration. It was contended on behalf of Taylor that Brown had actual knowledge of the incumbrance, and that the lessee thereby became his own tenant. It is shown that Taylor, the vendor, before executing the conveyance, stated to the agent who was negotiating the contract of sale that there was a gardener on the land who had a lease until such time as he could get his crop gathered for that year, probably some time in September or October, and that he desired this gardener to be protected. It is further shown that this agent, before the deed was executed or title examined, communicated to Brown the fact that there was a gardener on the place and Taylor wanted him protected, and that this gardener was at the time paying as rental the sum of \$7.50 per month. Brown replied that he did not know about the \$7.50 per month, but supposed the matter could be arranged in some way. Plaintiff below now seeks to recover damages for breach of the covenant against incumbrances, upon the facts stated in regard to the existence of an outstanding lease on the premises. It is denied on behalf of Taylor that Brown is entitled to any recovery, for the reason that he accepted a deed with full knowledge of this incumbrance, and that he must look to the tenant for his protection. Counsel for defendant cites in support of his contention Ballard's Law of Real Property, vol. 6, § 142, in which the rule is thus stated: "Where the grantee in a conveyance of lands in fee simple which contains a covenant against incumbrances, and before execution and delivery of the deed, has actual knowledge of the existence of a lease

made between grantor in said conveyance and a tenant, the tenant being in actual possession of the premises, the grantee cannot maintain against his grantor an action for breach of covenant"—citing *Demars v. Koehler*, 60 N. J. Law, 314, 38 Atl. 808. In the last case the court said: "There can exist no question in law that an outstanding term of an unexpired lease on the premises conveyed is an incumbrance, within the covenant against incumbrances contained in the deed of conveyance. *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. 94; *Jarvis v. Buttrick*, 1 Metc. (Mass.) 480; *Batchelder v. Sturgis*, 3 Cush. 201; *Carter v. Denmans' Ex.*, 23 N. J. Law, 261-272; *Grice v. Scarborough*, 2 Spears, 649, 42 Am. Dec. 391; *Maupin on Real Estate*, p. 293, § 125."

While this rule is undoubtedly supported by highly respectable authority, it is not in our view the sound rule, and is not sanctioned by the weight of authority. The true rule has thus been formulated in the *Cyclopedia of Law and Procedure*, vol. 11, p. 1066, as follows: "Knowledge on the part of the purchaser of the existence of incumbrances on the land will not prevent him from recovering damages on account of it, where he protects himself by proper covenants in his deed"—that is to say, we may add, a covenant against incumbrances. The author cites in support of the text cases from 23 states of the Union, including the case of *Perkins v. Williams*, 5 Cold. (Tenn.) 512. In the last case cited, decided by this court in 1868, it was held that covenant of seisin embraces a defect of title, constituting want of seisin to covenant, although such defect of title was known to covenantee at the time of the making of the covenant. "Knowledge by covenant or of such a defect will not bar his action at law for breach of covenant"—citing *American notes to Wallam v. Hearn*, 2 Leading Equity Cases; also, *Rawle on Covenants*, c. 13. It is true that the matter involved in the last case was an alleged breach of covenant of seisin, and it was held that, while equity would not lend its aid to rescind a covenant of seisin, although the covenantor be insolvent, where it appears that the covenantee knew of the defect of title at the time he took the conveyance, in such a case the party will be left to such remedy as he can obtain at law for breach of the contract. *Rawle*, in the second edition of his valuable work on *Covenants of Title* (page 149), states the law to the same effect as follows: "In a case where there are known incumbrances of any kind on property, subject to which purchaser agrees to take, these should, for the vendor's protection, be especially and expressly excepted from the covenant, as otherwise the fact of their being known to the purchaser will, according to the weight of authority, be no bar to his recovery upon it." So, in a case in Connecticut, it was said: "How can plaintiff's knowledge destroy the effect of defendants' covenant? Suppose de-

fendants had sold a farm, which they and the purchaser knew they did not own. could that knowledge destroy or affect the covenant of seisin? If not, by what rule can such knowledge impair a covenant of warranty against incumbrances? Such evidence might probably be excluded on two grounds: One, because of its immateriality, and the other, under the rule that parol evidence is not admissible to control or contradict the effect of written instruments." *Rawle on Covenants*, p. 157. Again, on page 152, Mr. *Rawle* says: "It has, moreover, been said that the fact of the purchaser having notice of the incumbrance is the very reason for his taking covenant within whose scope it is included, and that the vendor may be expected to discharge it out of the purchase money. For all these reasons, therefore, whenever the contract is that the purchaser takes the land cum onere, the incumbrances should be expressly excepted in the deed from the operation of the covenant, in which case, of course, the covenantor will not be liable."

The general rule is that the right of action on covenant against incumbrances arises upon evidence of an incumbrance, irrespective of any knowledge on the part of grantee, or of any eviction of him, or of any actual injury it has occasioned him. 2 *Greenleaf on Ev.* § 242; 2 *Washburn on Real Property*, § 717. So that it is clear upon authorities plaintiff below was entitled to maintain his action at law for breach of covenant against incumbrances, notwithstanding his actual knowledge of the unexpired lease upon the premises.

The remaining question that arises is in respect of the proper rule for admeasurement of damages. The trial judge adopted as a measure of the damages the rental value of said property for the unexpired term at \$3 per month. He also allowed counsel fees, amounting to \$10, incurred by Brown in a misdirected action before a justice of the peace to evict the lessee from the premises. It was admitted on all hands that the lessee was rightfully in possession of the premises, and, of course, the purchaser, Brown, had no right to evict him until the expiration of his term. It may be remarked there was no authority for the allowance of counsel fees in such a case; but, on the contrary, in *Williams v. Burg*, 9 Lea, 455, it was expressly decided by this court that counsel fees are not taxed as costs, nor regulated as to amount by law in this state, and that sums paid therefor by the covenantee for defense in ejectment by adverse claimant are not recoverable from covenantor. This principle is conclusive of any allowance for counsel fees in this case.

Recurring to the question made touching the measure of damages, it is insisted on behalf of counsel for Brown that, when he purchased this land, he disclosed to his grantor that his purpose in buying the land was to make division, and the proof of the record

establishes this contention. It further appears that, by reason of the existence of this outstanding lease, the purchaser was prevented from acquiring immediate possession of the premises; but it does not appear that this fact prevented a subdivision of the premises. On the contrary, it distinctly appears that the streets upon which this subdivision was to front, although dedicated to the public, had not been formally opened, and could not have been opened up to and including the time of the expiration of this lease. The contention on behalf of Brown is that, having thus been deprived of immediate possession of his premises, he should be entitled to recover at least the interest he was paying on the deferred payments, and should not be confined to the rental value of the premises. Plaintiff invokes the familiar rule that, when a contract is made under special circumstances and those circumstances are communicated by one party to another, the damages resulting from breach of contract, which they would reasonably contemplate, constitute the true measure for the assessment of damages, citing 13 Cyc. of Law and Procedure, p. 34. We are unable to concur in this contention, for the obvious reason that it does not appear from this record that the breach of covenant against incumbrances was the essential cause of preventing the opening of this land for subdivision; but, on the contrary, it appears that, if the plaintiff, Brown, had obtained immediate possession of the premises, subdivision could not have been made on account of unopened streets until after the expiration of the term of this lease. Hence it does not appear that special damages, claimed by Brown to have been within the contemplation of the parties, in fact resulted as a proximate consequence of the breach of covenant. Hence the facts herein stated do not present a case for the application of the rule invoked, but for the ordinary rule which obtains in such cases, namely, the rental value of the property during the period purchaser was kept out of possession. As stated in the *Cyclopedia of Law and Procedure*, in speaking of a covenant against incumbrances, that being a covenant of indemnity, the general rule for the measure of damages in actions for its breach, by reason of an incumbrance existing upon the property at the time of sale, is the loss actually sustained by the covenantee, with interest. Damages, costs, and expenses, when given as a penalty for breach of covenant, mean the necessary, natural, and proximate damages resulting from such known performances, and not some remote accidental or special injury to the party to whom the right of action accrues. The author further says that, in an action for breach of covenant against incumbrances, if the incumbrance has inflicted no actual injury to plaintiff, and he has paid nothing towards removing or extinguishing it, he can only recover nominal damages. Where incumbrance is removed by the gran-

tor without expense or trouble to grantee, the latter can recover only nominal damages—citing volume 11, pp. 1164, 1165; *Egan v. Yeaman* (Tenn. Ch. 1897) 46 S. W. 1012.

We are constrained to hold, upon the facts disclosed in this record, that the plaintiff has sustained actual damages in being deprived of immediate possession of the premises; but, in view of all the facts, it is adjudged that he is only entitled to recover rental value of the property during the currency of the lease as compensation for the breach of covenant against incumbrances. As modified herein, the judgment is affirmed.

WILSON v. ALEXANDER.

(Supreme Court of Tennessee. June 8, 1905.)

1. APPEAL—REVIEW OF FACTS—CANON OF CONSTRUCTION.

The Supreme Court, in disposing of an assignment that there is no evidence to sustain the judgment, must adopt the theory of the facts most favorable to the successful party.

2. SAME—ASSIGNMENTS OF ERROR—QUESTIONS PRESENTED.

An assignment of error that there is no evidence to sustain the judgment raises a question of law as well as one of fact, viz., whether the facts, considered most favorably to the party successful below, justify in law the judgment rendered.

3. MASTER AND SERVANT—RELATION AS TO STRANGERS—ESTABLISHMENT.

The unexplained fact that one is seen operating the machinery of a carrier is sufficient, if there is nothing in the circumstances to negative the conclusion, to justify the inference that such person is acting as a servant of the carrier.

4. LANDLORD AND TENANT—HOLDING OVER TENANT—CONDITIONS OF HOLDING.

A tenant who holds over after the expiration of his term continues to occupy the relation of tenant towards his former landlord on the same conditions as those of the preceding term.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 284.]

5. SAME—TERMINATION OF RELATION—EVIDENCE.

Where a tenant of a ferry continued to operate the same after the expiration of his term, and on the occurrence of an accident to a stranger's property, the landlord, though an old man, and though it was winter, went to the ferry, a distance of 20 miles, and investigated the matter, thus disclosing great concern and interest, the court was justified in finding that the tenant was then acting not as tenant, but as a servant of his former landlord.

6. FERRIES—LIABILITY OF FERRYMAN—INCEPTION.

A ferryman becomes responsible for the safety of a team which undertakes to use the ferry as soon as the operator of the ferry directs the driver of the team to drive upon the ferryboat.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Ferries, §§ 86, 87.]

7. SAME—NEGLECT OF FERRYMAN.

A ferryman on whose boat mules were being driven, which, in backing, pushed the boat from under them, and they were drowned, was negligent in not having his boat secured to the bank, in permitting holes through which water could be seen to be in the floor of the boat,

and in not anticipating that the mules might back off the boat before they were safely upon it.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Ferries, §§ 86, 87.]

8. SAME—CONTRIBUTORY NEGLIGENCE.

A driver of a team, who is signaled by a ferryman to go upon the boat, may rely upon the skill and knowledge of the ferryman, and is not guilty of contributory negligence in driving upon the boat although he knows that it is not fastened to the bank.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Ferries, § 84.]

9. NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

Surprise in the evidence of a certain witness as to the date of a conversation, and the discovery of new contradictory evidence, is not ground for a new trial, where the party applying therefor substantially admitted in his evidence that the conversation referred to took place on the date specified, but denied the things claimed to have been said therein, and the newly discovered witness does not undertake to testify to the substance of the conversation, and does not state that he was present thereat.

Error to Circuit Court, Haywood County; J. R. Bond, Judge.

Action by O. Alexander against J. R. Wilson. There was a judgment for plaintiff, and defendant brings error. Affirmed.

King & Willis, for plaintiff in error. Bate Bond, for defendant in error.

NEIL, J. This action was brought to recover damages for the negligent drowning of two mules at a ferry in Haywood county, alleged to belong to the defendant below, Wilson, plaintiff in error here. The case was heard before the circuit judge without the intervention of a jury. A judgment was rendered in favor of the defendant in error for \$303, the value of the mules and the harness on them at the time, also sued for.

The theory of the plaintiff below was that the ferry was both owned and operated by Wilson at the time of the injury; that the person then actually in charge of the ferry and operating it, one Ike Williamson, was the servant or employé of the defendant Wilson.

The defendant below advanced two theories. The first one was that he had sold the ferry and the land adjoining it to Ike Williamson by parol, and that when the injury occurred, January 11, 1904, his vendee, Williamson, was operating the ferry on his own account, as owner. His second theory is that, if the first be not made out in the evidence, then that Williamson was his tenant for the year 1903, and was holding over for the year 1904 on the same terms under which he had rented the property for the previous year.

The chief error assigned by defendant below on his appeal to this court is that there is no evidence to sustain the judgment rendered by his honor the circuit judge.

In disposing of this assignment, two principles must be kept in view. The first is

that the theory of the facts most favorable to the party successful below must be the one adopted here. The second is that the assignment we are to consider always raises a question of law as well as one of fact; that is, treating as established the version of the facts most favorable to the party successful below, the question always arises, do these facts establish in law a ground for relief, or a defense, as the case may be; in short, do these facts justify in law the decision which the lower court reached, whether for plaintiff or defendant?

We shall, for convenience, take up at this point the first theory of the defendant below—the theory of a parol sale on December 1, 1903, consummated by a writing on January 23, 1904.

The plaintiff below contends that the two witnesses who testify to the parol sale, Wilson and Ike Williamson, are both discredited; the first by contradiction of his evidence by other witnesses, and the second by direct impeachment through the testimony of witnesses who say that he is unworthy of belief; and, further, that the theory of a parol sale was a thing hatched up between these two after the accident to the mules, with a view to evading on the part of Wilson any claim which the plaintiff below might have against him. We are bound to say that there is some evidence to support both of these contentions, and we must treat the facts as so established. It results that we must conclude that there is nothing in defendant's first contention.

We shall consider together the defendant's second contention and the plaintiff's basic contention, the latter being, as stated, that Wilson, after January 1, 1904, was operating the ferry through Ike Williamson as his agent or servant.

There is no direct evidence to support this contention. We have seen that both Wilson and Williamson say that the latter was operating it under his alleged parol purchase, but, as stated, this solution cannot be considered, because the circuit judge, on the grounds already stated, had the right to disbelieve the evidence of these witnesses, and we must assume that he did. The plaintiff says that it is shown that Wilson was the owner of the property at the time of the accident, and that Ike Williamson was operating it. There is evidence to support this conclusion, and it must be treated as established. Plaintiff also says that, if a man is seen operating the machinery of a carrier, this fact, unexplained, is sufficient to justify the conclusion that the latter is acting as a servant of the former. We think this is a sound general deduction, if there is nothing in the manner or circumstances of the occurrence to negative the conclusion. Applying this deduction, counsel for plaintiff below argues that, inasmuch as Wilson was the owner of the ferry, and Ike Williamson was operating it, and the evidence of neither of these wit-

nesses is credible, and the fact is unexplained, we must conclude that Ike Williamson was in fact the agent or servant of the said Wilson.

But defendant's counsel says there is an explanation in the evidence. He insists as matter of fact that it is shown that Ike Williamson was the tenant of Wilson for the year 1903, and, as matter of law, that the presumption would be, if the said Williamson held over after the expiration of his term, the year 1903, into the next year, 1904, he would occupy the relation of tenant to his former landlord on the same terms as those of the preceding year. The statement of fact as to the tenancy of 1903 is sustained by the witness Rawlings, and there is no evidence to the contrary. The statement of the legal principle, if there was in fact a holding over, is sustained by our own cases of *Brinkley v. Walcott*, 10 Helsk. 22, and *Hammond v. Dean*, 8 Baxt. 193; *Hendrixson v. Cardwell*, 9 Baxt. 391, 40 Am. Rep. 93; *Noel v. McCrory*, 7 Cold. 623; *Shepherd & Mitchell v. Cummings*, 1 Cold. 354; and the principle is a general one.

So, if we assume that Ike Williamson was holding over, the conclusion seems inevitable that he was operating the ferry at the date of the accident as the tenant of defendant, Wilson, and not as his agent or servant.

Plaintiff's counsel, however, refers to a circumstance which he insists furnishes evidence that Ike Williamson was the servant of Wilson, and not holding over as his tenant. This fact is that when the mules were drowned Ike Williamson immediately went to the home of Wilson, and told him of the calamity that had happened, and Wilson thereupon, though an old man, braved the wintry weather of January, and proceeded to the ferry, 20 miles away, to investigate the matter, a journey that required of him two days and one night going, pursuing his investigations, and returning; and that while near the ferry he hunted up the man who drove the mules, and made inquiry of him.

Counsel for the plaintiff rightly argued that these facts showed great concern on the part of Mr. Wilson. He argued further that this great concern was natural and reasonable if defendant Wilson was operating the ferry himself through Ike Williamson as his agent or servant, and was therefore responsible for the negligence of the latter; but quite unreasonable if the latter was only a tenant, and therefore responsible himself, only, for injuries. This view is certainly a strong one. The inference seems to be sound and just.

His honor the circuit judge had the power to choose between this view of the matter and the one just presented in favor of the defendant. He had the right to hold, and no doubt did hold, that the facts referred to furnished a direct inference of fact that Ike Williamson was holding after January 1st as the servant of Wilson, and not as his tenant;

there was never in fact any holding over, hence no extension of the tenancy.

The assignment, therefore, that there was no evidence to support the judgment, must be overruled.

Another assignment raises the point that Hop Wilkes, the servant of plaintiff who drove the wagon, was guilty of negligence which proximately contributed to the injury.

The injury occurred in the following manner: The ferryboat was defective in that it had holes in the floor through which the water could be seen. Likewise, it had no means of fastening it to the bank. When the mules were driven on, hitched to the wagon, they began to back, and in doing so pushed the hind wheels against the bank, and the boat out from under them in front, and so fell forward into the river, and were drowned. Plaintiff's servant, Hop Wilkes, knew that the boat was not attached to the bank, but was told by Ike Williamson, the servant of defendant in charge of the ferry, to drive on, which he did, with the result stated.

In *Sanders v. Young* it is said: "A ferryman is liable as a common carrier. * * * Irrespective of the statute of 1842, the keeper of a public ferry is bound to have a boat safe and sufficient for all of the uses and purposes incident to his employment. He is likewise bound at all times to have a skillful ferryman, and a sufficient force to manage the boat, and to take proper care of persons and all kinds of property received for transportation; and for all loss or injury occasioned by neglect of these duties and precautions he is liable." 1 Head, 220, 221, 73 Am. Dec. 175.

"As soon as the ferryman signifies his assent to receive horses and vehicles upon his boat, his liability as a common carrier attaches, and it necessarily continues until the property is landed." 12 Am. & Eng. Ency. Law (2d Ed.) p. 110.

In *Cohen v. Hume*, 1 McCord (S. C.) 439, wherein the above principle was expressed, it was held that the ferryman's liability as a common carrier attached, although the vehicle was only upon the slip and was being driven by the servant of the owner.

In *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135, wherein the injury complained of occurred while the wagon was being driven from the boat, the same rule was stated. In this latter case it is said: "The principle deduced from the authorities is that as soon as the ferryman signifies his assent or readiness to receive the passenger he becomes liable for his safe transit and delivery, and is liable if any accident occurs, except by act of God or the public enemy."

"In two of the cases just cited the accident occurred in driving into the flat or boat, and in both cases it was held to be the duty of the ferryman to see that the teams were safely driven on board the boat. 'If,' says the court in those cases, 'the ferryman thinks proper, he may drive himself, or may unhar-

ness the team or unload them for the purpose of getting them safely on board; but if he permit the party to drive himself, he constitutes him quoad hoc his agent, and is responsible for all accidents." *May v. Hanson*, 63 Am. Dec. 137. And in *Blakeley v. Le Duc*, 19 Minn. 187 (Gil. 152), it was held that the ferryman's liability had attached, although only the front wheels of the stage coach had gotten upon the boat when the boat broke away from the bank.

In *Willoughby v. Horidge*, 12 C. B. 742, 74 E. C. L. 742, a ferryman was held liable for injuries to a horse which fell from the slip in leaving the boat, owing to the defective condition of the guard rail. In *Richards v. Fuqua's Adm'rs*, 28 Miss. 792, 64 Am. Dec. 121, a ferryman was held liable for loss of a wagon and mule attached thereto, caused by the boat, which was not provided with an apron, breaking from its moorings, owing to their defective condition, when the gunwale was struck by the rear wheels of the wagon.

In *Sturgis v. Kountz*, 165 Pa. 358, 30 Atl. 976, 27 L. R. A. 390, a ferryman was held liable for the loss of a horse, which, on being frightened by a whistle, backed from the boat through a defective guard chain.

In *Lewis v. Smith*, 107 Mass. 334, in which the plaintiff sought to recover for the loss of a horse, which was under his control while on the boat, and which fell from the boat for want of barriers at the forward end, evidence that the boat had been operated without barriers for 30 years without accident was held inadmissible.

We are of the opinion that in the present case the ferryman became liable for the property as soon as his agent directed the driver of the vehicle to drive upon the boat, and that it was negligence on the part of the ferryman in not having the boat secured to the bank; also in permitting holes in the bottom of the boat; also in not anticipating just such an occurrence as happened, viz., that the team might back off of the boat before they were safely placed upon it.

We are of opinion that it was not contrib-

utory negligence on the part of the driver of the vehicle to go upon the boat at the invitation of the ferryman, although he knew the boat was not fastened to the bank. He had the right to rely upon the skill and knowledge of the ferryman. Indeed, as has been seen, the property passed into the custody of the ferryman immediately upon his directing the driver to go upon the boat with the team.

It is insisted by the defendant that, even after the horses got into the water they might have been saved but for the negligence of the servant of the plaintiff in not properly assisting in the rescue of the animals. One of the witnesses of the defendant, who undertakes to prove this circumstance, is discredited by testimony of the witnesses who say he is unworthy of belief, and the other by self-contradictions, and we need not consider this matter further. The circuit judge no doubt disregarded their evidence entirely, as he had the right to do, and, following the rule already laid down as to taking the most favorable view in behalf of the party who was successful below, we must do the same.

It is insisted that a new trial should be granted because of surprise in the evidence of one Dickinson as to the fixing of a certain date and the discovery of evidence whereby it could be shown that Dickinson was incorrect. We think this is immaterial. It is substantially admitted by the defendant. Wilson, in his testimony that the conversation referred to did take place on the date fixed by Dickinson, but he denies that the things were said in that conversation which Dickinson claims were said. The new witness does not undertake to say anything about the substance of the conversation, and does not say that he was present thereat. His evidence would be of no service, and a new trial should not be granted therefor. *Turnley v. Evans*, 3 Humph. 223.

The foregoing covers the substance of all of the matters contained in the several assignments filed, and, none of them being sustained, the judgment of the court below must be affirmed.

**FARMERS' & MERCHANTS' BANK v.
BANK OF RUTHERFORD.**

(Supreme Court of Tennessee. June 3, 1905.)

**1. BILLS AND NOTES—FORGED INSTRUMENTS—
NEGLECT OF DRAWEE.**

A bank on which a forged check is drawn in the name of a customer, whose signature is well known to it, is negligent, where the cashier does not examine the signature closely, but passes the check, relying on previous indorsements.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 439, 453.]

**2. BANKS—PAYMENT OF CHECKS—BEARER OF
PAPER—NECESSITY OF IDENTIFICATION.**

Where a check is in the ordinary form, and is payable to bearer, so that no indorsement is required, a bank, to which it is presented for payment, need not have the holder identified, and is not negligent in failing to do so.

**3. BILLS AND NOTES—LIABILITY OF IN-
DORSERS—WARRANTY OF SIGNATURE.**

An indorser of negotiable paper does not warrant to the drawee the genuineness of the maker's signature, but such warranty only extends to subsequent holders in due course of trade.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 669, 670.]

**4. SAME—PAYMENT OF FORGED INSTRUMENT—
EFFECT—ESTOPPEL AGAINST DRAWEE.**

Where the drawee bank received and paid a forged check, which had been previously honored and indorsed by other banks, and held the check for 30 days or more, it thereby admitted the same to be correct, and was estopped to deny the genuineness thereof, or to avoid, as to the indorsing banks, the effect of its act in accepting and paying the check.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 127.]

**5. SAME—ACCEPTANCE OF CHECK—GUARANTY
OF GENUINENESS.**

The drawee of a check, by accepting the same, makes himself a guarantor thereof.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 127.]

Appeal from Chancery Court, Gibson County; John S. Cooper, Chancellor.

Suit by the Farmers' & Merchants' Bank against the Bank of Rutherford. From a decree for complainant, defendant appeals. Reversed.

Deason, Rankin & Elder, for appellant. W. S. Coulter, for appellee.

WILKES, J. The bill was filed by complainant bank against the defendant bank to recover from it the amount of a forged check, which was drawn on complainant bank, for \$54.75, and, after being indorsed by the defendant bank and others, was presented to, and paid by, complainant bank.

The check was in the words and figures following:

"Dyer, Tenn., Octo. 28, 1903.

"Farmers' & Merchants' Bank:

"Pay to J. L. Freeman, or bearer, fifty-four ⁷⁵/₁₀₀ dollars. For cotton.

"Johnston Merc. Co."

The ground upon which the recovery was sought was that the Bank of Rutherford was negligent in cashing this check for a stranger without identification, and thereafter indors-

ing it, so as to give it circulation, and to mislead complainant bank, the payee, to presume it was genuine, and pay it to the holder.

The check, after being indorsed in the name of J. L. Freeman, was cashed by the Bank of Rutherford, and indorsed by it, and passed to the Jackson Banking Company, then to the St. Louis Trust Company, Continental National Bank of Chicago, and Fourth National Bank of Nashville, and by the latter bank was sent by mail to complainant as the drawee bank, and paid by it. The complainant bank at the time of payment wrote or stamped on its face the words: "Paid Nov. 7, 1903. Farmers' & Merchants' Bank, Dyer, Tenn."

The cashier of complainant bank states that, when the check was presented for payment, he did not examine the signature closely, and, if he had, he would have detected that it was a forgery, but that he was thrown off his guard by the indorsements of the defendant bank and others.

It held the check, thus cashed and marked "Paid," some 30 days, when the forgery was discovered, whereupon it entered up a credit upon the account of the mercantile company to balance the charge made against it when it was paid, and thereupon brought suit against the Bank of Rutherford for the amount of the check.

The chancellor gave judgment for the amount, and the Bank of Rutherford has appealed and assigned errors.

It is insisted that the case is governed by the principles announced in *People's Bank v. Franklin Bank*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884.

In that case it was held that a bank that negligently cashed a forged check, purporting to be drawn upon another bank, and had upon its indorsement of such check received payment of the drawee bank, is liable for the amount paid by it upon discovery that the check is forged, and the fact that the indorser bank is unable to give the name of the person who presented the forged check, to whom it was paid, or to positively identify such person, is sufficient evidence of negligence to make it liable, and that the drawee bank will not be precluded from recovery by the fact that, relying upon the indorsement of the indorsing bank, it paid the check without investigation as to its genuineness.

If this case is not distinguishable from that in some essential feature, and that is affirmed as sound, it must be considered as determinative of the present case.

As an original proposition: we would not assent to the correctness of *People's Bank v. Franklin Bank*, and think the great weight of authority is against it, and that it is contrary to one of the most important rules regulating the law of negotiable instruments, to wit, that the drawee of the check should be held to know the signature of its customers, and to pay only such paper as has a genuine signature.

But we think there are two important distinctions between *People's Bank v. Franklin Bank* and the present case.

The first is that in that case the payment was made direct by the drawee bank to the bank that negligently cashed the check, and, after indorsing it, put it in circulation, and, as against the indorsing bank, there was no consideration received by the drawee bank, while in the present case the check had passed through a number of hands, and had been paid, not to the alleged negligent bank, but to the Nashville bank.

In the present case the drawee bank is not suing the Nashville bank, from which it received the check, and to whom it paid the money, but is suing a remote indorser, with whom it had no transaction, except as a remote indorser.

In other words, the Rutherford bank received none of the money of the complainant bank, but it received the amount of the check from the Jackson Banking Company. It is the Nashville bank which has received the money of the complainant bank for the worthless paper cashed by it.

In addition, the check in *People's Bank v. Franklin Bank* was payable to the order of Morgan, and was indorsed in the name of Morgan; the indorsement being also a forgery. In order to cash this check, it was necessary that it be indorsed by Morgan, and that he should be identified; and it was incumbent on the bank, when it cashed it, to see that the indorsement was made, and that it was genuine.

But in the present case the check was payable to Freeman, or bearer. It was not necessary to be indorsed at all, and was indorsed, as the proof shows, simply as a compliance with the custom of the Rutherford bank. It was not only not necessary that it should be indorsed, but it was not necessary that Freeman, the holder, should be identified, and hence it was not negligence in the bank to fail to have him identified, and it was a bona fide holder, if it paid to bearer, with or without indorsement.

In *People's Bank v. Franklin Bank* identification and a genuine indorsement were not only material, but absolutely necessary, and a failure to require them was negligence. In the present case neither indorsement nor identification was necessary, and a failure to require them was not negligence.

Liability in *People's Bank v. Franklin Bank* is predicated upon negligence, which does not exist in the present case.

On an examination of the record we are not able to find any negligence on the part of the Rutherford bank, while that of the complainant bank is apparent and glaring; and, if a comparison is allowable, the negligence of the drawee bank was much the greater.

The mercantile company was its customer, and had been for years. Its place of business was next door to the complainant bank. Its signature was well known to complainant bank. The cashier says he did not examine the signature closely, or he would have easily have detected the forgery.

On the other hand, there was nothing to excite the suspicion of the Rutherford bank. It was a common cotton check, such as was usual and common in every day transactions; and, being payable to bearer, it was not necessary to identify the holder when it was cashed.

We are of opinion that the indorser of negotiable paper does not warrant to the drawee the genuineness of the signature of the maker, but such warranty only extends to subsequent holders in due course of trade. The drawee of the check is the party to pass upon the genuineness of the signature of the drawer.

This is the rule, we think, by the law merchant and by the negotiable instrument law. It is the rule laid down in New York, upon whose statute our negotiable instrument law is based, and of which it is substantially a copy; and, in construing the negotiable instrument law, it has been said by this court in *Unaka Bank v. Butler*, 83 S. W. 657, that great weight should be given to the decisions of New York.

In this case the complainant bank received and paid the check, thereby admitting the check to be correct, and held it for 30 days or more, and it is precluded and estopped to deny the genuineness of the signature, or to avoid the effect of its act in accepting the check and paying it.

The indorser of a check does warrant and guaranty the genuineness of the check to all subsequent holders in due course; but the drawee is not a holder in due course.

A holder in due course is defined, in section 52, p. 150, of the negotiable instrument act (Acts 1899, c. 94), and the definition does not embrace the case of a drawee.

A holder means a payee or indorsee who is in possession, or the bearer. Acts 1899, p. 139, c. 94.

The drawee, when he accepts the check, makes himself the guarantor thereof.

The liability of an indorser only arises when the necessary proceedings on dishonor are taken; but this feature of the law is not presented in this case.

Without commenting further upon the several points raised by counsel, we are of opinion that the complainant bank has no right in law, or in equity and good conscience, to recover from the defendant bank the amount of this check, and the chancellor was in error; and his decree is reversed, and the suit is dismissed, at cost of complainant.

FITE, Superintendent of County Workhouse,
v. STATE ex rel. SNIDER.

(Supreme Court of Tennessee. May 22, 1905.)

1. CONSTITUTIONAL LAW—SENTENCE—COMMUTATION FOR GOOD CONDUCT—STATUTORY PROVISIONS—INVASION OF PARDONING POWER.

A statute authorizing the commutation of a penal sentence for good conduct of the prisoner, and specifically defining the credits to be allowed for good conduct, which is in existence at the date of the prisoner's conviction, becomes a part of his sentence, inheres into his punishment, and is not an invasion of the pardoning prerogative vested in the Governor by Const. art. 3, § 6.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 87.]

2. SAME—DELEGATION OF LEGISLATIVE AUTHORITY.

Shannon's Code, § 7423, authorizing the board of commissioners of the county workhouse to deduct for good conduct, and on recommendation of the superintendent, a portion of the time for which any person has been sentenced, or a portion of the fine which he is working out, but failing to prescribe a schedule of credits to be allowed for good conduct, and leaving the whole matter to the arbitrary discretion of the board of workhouse commissioners, is an unconstitutional delegation of legislative authority.

3. STATUTES—CONSTITUTIONALITY—ACTS VOID IN PART.

Section 18 of the workhouse law (Shannon's Code, § 7423), authorizing the board of commissioners to deduct for good conduct a portion of the time for which any person has been sentenced, is so independent of other provisions of the law that its unconstitutionality does not affect them.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 58-66.]

Appeal from Criminal Court, Shelby County; John T. Moss, Judge.

Habeas corpus proceedings by the state, on the relation of Nick Snider, against J. S. Fite, superintendent of county workhouse of Shelby county. From a judgment of discharge, defendant appeals. Reversed.

L. T. M. Canada, for appellant. The Attorney General, for appellee.

McALISTER, J. The question involved in this case is in respect to the constitutionality of a certain provision of the workhouse law embodied in Shannon's Code, § 7423, namely: "The board of commissioners may on recommendation of the superintendent, deduct, for good conduct, a portion of the time for which any person has been sentenced, or a portion of the fine, if he or she be working out a fine."

The subject-matter of the inquiry arises on the petition of one Nick Snider, prisoner in the county workhouse of Shelby county, for the writ of habeas corpus to be discharged from said confinement upon the ground that a proper credit and allowance for good time under said act would entitle him to his liberty. The record reveals that the prisoner was under confinement in said workhouse under the judgment of the criminal court of

Shelby county, on the 17th day of November, 1903, upon a conviction of unlawfully carrying a pistol, and the assessment of a fine of \$50 and confinement in said workhouse for a period of 11 months and 29 days. On the 14th of March, 1904, in accordance with the recommendation of the superintendent of said workhouse, the board of workhouse commissioners directed that the relator, Snider, be relieved of eight months of his term of imprisonment on account of his good conduct.

It further appears that on March 28, 1904, said board of workhouse commissioners directed that the sum of \$45 of the fine of \$50 imposed upon the relator by judgment of the criminal court be remitted. Thereafter, on the 1st of April, 1904, said board of workhouse commissioners, in view of the credits allowed on fine and sentence of said Nick Snider, relator, ordered his discharge from the county workhouse upon payment of all costs, which was accordingly done.

It appears, however, that the judge presiding over the criminal court of Shelby county, conceiving that the action taken by the board of workhouse commissioners was beyond their authority, issued an order directing the superintendent of the workhouse to hold relator in custody until he had served out his term of imprisonment and paid the fine imposed, or had secured or worked out said fine in the manner directed by law. Thereupon the relator filed his petition for the writ of habeas corpus, which being heard by the judge of the Second Circuit court of Shelby county, it was adjudged that the relator was illegally restrained of his liberty, and he was ordered to be discharged, and the defendant, Fite, as superintendent of the Shelby county workhouse, was taxed with all costs of proceeding.

The said Fite, superintendent, aforesaid, appealed, and has assigned the following error: "The orders of the board of workhouse commissioners of Shelby county relieving relator of \$45 of the fine of \$50 imposed upon him, and reducing jail sentence from 11 months 29 days to 3 months and 29 days, were beyond the authority vested in said board of workhouse commissioners, and were null and void, because:

"(1) The statute under which said board claimed authority to make said orders is unconstitutional, in that it attempts to confer the pardoning power upon said board, in violation of section 6 of article 3 of the Constitution of the state; and,

"(2) It is also violative of section 1 of article 6 of the Constitution of the state in that it attempts to confer upon said board judicial power to review, revise, and modify valid judgments of criminal and circuit courts of this state."

The provisions of the workhouse law material to be mentioned in this investigation are embodied in section 18, c. 123, p. 271, of the act of 1891, compiled in Shannon's Code

in section 7423, namely: "The board of commissioners may on recommendation of the superintendent deduct, for good conduct, a portion of the time for which any person has been sentenced, or a portion of the fine, if he or she be working out a fine. Should any prisoner escape, he or she shall forfeit all deductions that have been allowed and when recaptured, should be made to work out the costs of same in addition to other costs in the case. The commissioners may discharge any prisoner when satisfied from the certificate of physician in charge that he or she is physically unable to do labor or for any cause when they may deem it best for the institution and the public good."

The argument of the Attorney General is that the exercise of the power conferred upon said board of workhouse commissioners is both violative of section 6 of article 3 of the Constitution of the state, vesting in the Governor the pardoning power, and is also in contravention of section 1, art. 6, of the Constitution, vesting all judicial power in the courts of this state, because the necessary effect of the exercise of said power by the board of workhouse commissioners is to constitute said board a judicial tribunal for the purpose of reviewing, modifying, and reversing the judgment of courts of competent jurisdiction acting under the power vested in them by the Constitution of the state.

We have several cases in this state in which intimations were thrown out touching the constitutionality of such acts, but no case in which the precise point now presented was involved. In *State v. Dalton*, 109 Tenn. 544, 72 S. W. 456, the court was dealing with the power of the circuit judge to relieve a convict of imprisonment imposed by a valid judgment rendered at a former term. In its opinion this court said: "The vestiture of the power to grant reprieves and pardons in the chief executive is exclusive of all other departments of the state, and the Legislature cannot, directly or indirectly, take it from his control, and vest it in others, or authorize or require it to be exercised by any other officer or authority. It is a power and a duty intrusted to his judgment and discretion, which cannot be interfered with, and of which he cannot be relieved. The circuit judge's action in remitting the imprisonment and releasing the costs adjudged against the defendant cannot be sustained under section 7226 of Shannon's Edition of the Code, or Act 1891, p. 271, c. 123, § 18 (Shannon's Code, § 7423), authorizing the discharge of convicts confined in workhouses under certain circumstances."

In *The State ex rel. v. McClellan*, 87 Tenn. 52-55, 9 S. W. 233, the act of 1885 (Acts 1885, p. 87, c. 15) allowing to convicts certain specific credits on their terms of imprisonment in consideration of good conduct was involved, but it appeared in that case that the judgment under which the prisoner was serving had been rendered prior to the passage of the

act of 1885, and for that reason the court expressed no opinion touching its constitutionality. In that case, however, the court said as follows:

"The act of 1885 (passed at the extra session June 12th) * * * is also referred to, and it is insisted that the relator was and is entitled to the benefit of that act; but such cannot be its effect, though it purports to be for the benefit of those then as well as thereafter confined in the penitentiary, because to the extent of provision for those then confined it is an attempted exercise of the pardoning power, which is vested alone in the Governor under the Constitution, and is void."

Again, in the case of *Rogers v. State*, 101 Tenn. 425, 47 S. W. 697, the question as to the constitutionality of this section of the workhouse law was raised, but not decided, as the case went off on another point.

There seems to be much authority on this subject in other states of the Union, which we find upon examination is not altogether harmonious.

The Supreme Court of Michigan in *People v. Daniel Cummings*, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285, in passing upon the constitutionality of a statute of that state providing for indeterminate sentences and the disposition, management, and release of criminals under such sentences, says as follows: "It is not clear from the reading of this statute whether the board of control is given power of absolute discharge from imprisonment or not. If so, it would be clearly unconstitutional, as an exercise of such power would certainly involve one of two things, and perhaps both. It would be an exercise of judicial power in determining the term of imprisonment of a citizen or an act of grace, to wit, the bestowing of a pardon and release of the prisoner before his term of imprisonment has expired. The judicial power of this state by the Constitution is vested in certain specified courts, and the pardoning power is vested absolutely in the Governor of the state." The court then proceeded to hold that this act provided for the exercise of the pardoning power and also for the exercise of judicial power by said board of control.

In *Commonwealth v. Halloway*, 44 Pa. 210, 84 Am. Dec. 431, it was held that such legislation was not an interference with the pardoning power, for the reason that "pardon operates directly on the crime, and only indirectly on the criminal." But it was further held by a divided court that such diminution of sentence by reason of good conduct was an interference with judicial power, and therefore void. In the midst of its opinion the court said as follows: "From what judicial sentence may not the Legislature direct deductions to be made, if this act be constitutional? What they may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judic-

sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions?" Further on the court says: "In respect to one of the relators, who was convicted and sentenced before the law was passed, it is considered very clear that it is a legislative impairing of an existing legal judgment. But is it not equally so in respect to him who was sentenced since the date of the act. The court could not have taken the act into account in measuring the sentence because they could not know how many days of abatement the prisoner would earn.

In *State ex rel. Attorney General v. Peters*, 43 Ohio St. 629, 4 N. E. 81, the Supreme Court of that state, dealing with a kindred statute, held:

"It was not an interference with executive or judicial powers conferred on these departments by the Constitution of the state."

In *State ex rel. v. State Board of Corrections et al.*, 16 Utah, 478-488, 52 Pac. 1090, a similar question arose, and the Supreme Court of that state held the act unconstitutional, as being in violation of the Governor's constitutional prerogative of pardon. That court said: "The power to either pardon or commute can only be exercised by that authority in which it is vested by the Constitution." On the other hand, such statutes allowing good time as credit on sentences have been upheld. *Opinion of Justices*, 13 Gray (Mass.) 618; *State v. Austin*, 113 Mo. 538, 21 S. W. 31; *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047; *In re Fuller*, 34 Neb. 581, 52 N. W. 577; *Ex parte Nokes*, 6 Utah, 106, 21 Pac. 458; *State v. Patterson* (N. J. Sup.) 22 Atl. 802.

The Congress of the United States, it appears, has also provided for credits on sentences of federal convicts confined in state penitentiaries where there is no statute of the particular state providing for such allowances. Rev. St. §§ 5543, 5544 [U. S. Comp. St. 1901, p. 3721].

We are of opinion, upon an examination of the authorities and upon principle, that such legislation, where the credits are specifically defined by statute, and where the provisions of the statute operate alone upon sentences of convicts who have been imprisoned subsequent to the passage of the statute, is not an invasion of the constitutional prerogative of the Governor. Said Chief Justice Marshall in *United States v. Wilson*, 7 Pet. 150, 8 L. Ed. 640: "A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from punishment the law inflicts for a crime he has committed. * * * It releases the offense and obliterates it in legal contemplation." Per Justice Field in *Osborn v. United States*, 91 U. S. 474, 478, 23 L. Ed. 388. A full and absolute pardon releases the offender from entire punishment prescribed for his offense,

and from all the disabilities consequent upon his conviction. *Ex parte Garland*, 4 Wall. 380, 18 L. Ed. 366.

Again: "A pardon discharges the individual designated from all or some specified penal consequences of his crime. It may be full or partial, absolute or conditional." *Bouvier's Law Dictionary*, title "Pardon."

We think it quite obvious that an act of the Legislature specifically defining credits for the good conduct, in existence at the date of the judgment against the convict, becomes a part of the sentence, and inheres into the punishment assessed. In California a statute providing in express terms that certain credits or deductions from a term of imprisonment shall be allowed for good conduct, without requiring any action on the part of the Governor for this purpose, was held not to be unconstitutional as an infringement on his power to pardon, as it does not take away or interfere with such power in any way. In the opinion of the court the statute simply fixed the term of imprisonment in certain cases and upon certain conditions, and this provision entered into and became a part of the judgment of the court below. *Ex parte Wadleigh*, 82 Cal. 518, 23 Pac. 190.

In *re Canfield*, 98 Mich. 644, 57 N. W. 807, it was held that the right of a convict to a prescribed reduction from his sentence upon compliance with the rules of the prison, which were prescribed by 2 How. Ann. St. Mich. § 9704, was one of which he could not be deprived, and that the act of 1893, the effect of which was to deprive a person sentenced under the prior statute of this right in part by reducing the amount of his credits, is to that extent an *ex post facto* law, because its effect is to increase, and not to mitigate, his punishment. It was held, therefore, that the prisoner was entitled to credit upon the basis of the statute under which he was sentenced.

Such, however, would not be the effect of an act of the Legislature passed subsequent to the conviction of a particular convict, for, as held in *State ex rel. v. McClellan*, supra, that would be a clear invasion of the prerogative of the Governor. The scale of the punishment for the violation of a particular statute is fixed in the first place by the Legislature, and in the next it is administered by the court or jury. The power of the Governor under the Constitution is exercised, of course, with reference to penalties and punishments inflicted by particular statutes, and when judgment is pronounced upon the convict assessing his punishment by implication of law he is entitled to the provisions of a statute prescribing credits for his good behavior; but the credits are in the nature of a payment by the state to the convict for his good behavior, in order to stimulate him to conform to the rules of the institution and to avoid the commission of crimes and misdemeanors during his imprisonment. Such

statutes are prompted by the highest motives of humanity, and are looked upon with favor both by state and federal Legislatures.

The constitutional infirmity of section 18 of the workhouse law of 1891, now under review, is that no specific credits are provided as a reward for good behavior of the convict. The whole matter is left to the arbitrary discretion of the board of workhouse commissioners. It is plainly a delegation of legislative authority, which renders this part of the workhouse law unconstitutional and void. In this respect section 18 of the workhouse law is wholly unlike the acts of 1869-70 and 1885, which specifically prescribed the credits that are to be allowed, and which statutes have been enforced from time to time by the courts.

As already seen in *State v. McClellan*, supra, the act of 1869-70 was recognized by the court as a constitutional enactment, and it was accordingly applied in fixing the unexpired term of imprisonment of relator in that case. It may be remarked in this connection that the acts of Congress in allowing credit for good time specifically prescribed the scale by which they are to be graduated. But while section 18 of the workhouse law is for this reason unconstitutional and void, it is so independent of the other provisions of the act as not thereby to affect their constitutionality. See *State ex rel. v. Cummins*, 99 Tenn. 682, 42 S. W. 880. If the Legislature had fixed a scale of credits for allowances of good time to workhouse prisoners, this section of the act would stand within constitutional limitations; but with-

out it it is clearly void as a delegation of legislative authority. So, if the Legislature had fixed some graduated scale for the reduction of fines assessed against the prisoner, then the board of workhouse commissioners might have carried out the legislative authority. But, as already seen, section 18 of the workhouse act authorizes the commissioners to remit a portion of the fine without fixing any basis for its remission.

As the law now stands, the remission of fines and reduction of terms of imprisonment of convicts confined in the county workhouses of the state are wholly without authority, and subject such officials granting them to individual liability for malfeasance in office. It is the duty of the courts and executive officers of the state to disregard, as well as to resist with all their official authority, the exercise of unlawful functions and assumed power by those who are acting in open violation of the statutes and Constitution of the state. It is very plain that under the existing laws, and until their amendment by the Legislature, the Governor alone is clothed with authority to remit fines and penalties and to reduce the terms of imprisonment of convicts confined in the county workhouse under judgments of the circuit and criminal courts of the state.

The judgment of the circuit court will therefore be reversed, the cause remanded, and the prisoner committed to the sheriff of the county, to be returned to the official in charge of the county workhouse, to serve out his fine and imprisonment assessed by the criminal court of Shelby county.

O'HAIR v. O'HAIR.

(Supreme Court of Arkansas. July 29, 1905.)
HUSBAND AND WIFE—FINANCIAL TRANSACTIONS—PRESUMPTION OF GIFT.

Where a husband advances money to pay for land, title to which is placed in his wife's name, it will be presumed that such advancements constitute a gift to the wife, and the law will not raise any implied promise on her part to repay the money, nor impress the land with a trust in the husband's favor for the payments made by him.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 253.]

Appeal from Pulaski Chancery Court; Jesse C. Hart, Judge.

"Not to be officially reported."

Suit by Lizzie C. O'Hair against J. T. O'Hair. From a decree for plaintiff, defendant appeals. Affirmed.

James A. Comer, for appellant. Blackwood & Williams, for appellee.

HILL, C. J. The parties to this suit are husband and wife. They have been married 32 years, and are parents of nine children, and in their old age have fallen into litigation with each other over lots 4, 5, and 6 in block 142 in the city of Little Rock. Lot 4 was purchased in 1887 by Mrs. O'Hair from her mother, contrary to the wishes of Mr. O'Hair. It was heavily incumbered, and the equity not of great value. Part of lot 5 was purchased by Mrs. O'Hair, or, rather, she made a small payment on the purchase price while Mr. O'Hair was in Colorado for his health, and without his knowledge. The other parts of the lot were purchased subsequently. The titles were taken in Mrs. O'Hair's name, and the evidence shows that the mortgages were reduced and the purchase price paid by moneys derived from Mr. O'Hair, Mrs. O'Hair, their children, and the rents from the property. Lot 6 was purchased by Mr. O'Hair, paid for by him, and the title taken in his wife's name. He was then in embarrassed circumstances, and testifies that the title was put in her name to protect her and the family from anything which might happen to him, and to secure a home for themselves and their children. Mr. O'Hair is seeking to impress a trust upon lots 4 and 5 in his favor for the payments made for their purchase, which he claims was practically all made by him, and upon lot 6 on account of an understanding with his wife that it was to be held for their mutual benefit.

Passing the question of the sufficiency of the evidence to establish a trust, even if the transaction was between strangers (see *Tillar v. Henry* [Ark.] 88 S. W. 573), there is no trust in this case. Judge Eakin thus expressed the whole situation as presented by this record: "This is only a claim for money advanced to buy a piece of land for the wife and improve it. It was a good thing for the husband to do, and may be supposed to have been done from a desire to protect her

against want. The law will not raise any implied promise on her part to repay it. It will be presumed to be a gift." *Ward v. Estate of Ward*, 36 Ark. 586. The principles controlling this case may be found in *Milner v. Freeman*, 40 Ark. 67; *Robinson v. Robinson*, 45 Ark. 481; *Bogy v. Roberts*, 48 Ark. 17, 2 S. W. 186, 3 Am. St. Rep. 211; *White v. White*, 52 Ark. 188, 12 S. W. 201; *Rhea v. Bagley*, 63 Ark. 374, 38 S. W. 1039, 36 L. R. A. 86; *Culberhouse v. Culberhouse*, 68 Ark. 405, 59 S. W. 38; *Grayson v. Bowlin*, 70 Ark. 145, 66 S. W. 658; and many more on the same line.

The decree is affirmed.

BATTLE, J., absent.

CROSS et al. v. JOHNSTON.

(Supreme Court of Arkansas. July 22, 1905.)
SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE—POSSESSION AND IMPROVEMENTS.

Where a vendee in a parol contract, who had, prior to his purchase, been in possession of part of the land as tenant, paid \$50 on the purchase price when the contract was made, and not only continued to remain in possession of the land of which he was tenant, but took immediate possession of the remainder of the land purchased which was uncleared, and commenced to make improvements upon the same by clearing it and getting it ready for cultivation, there was such part performance on his part of the contract of purchase as to take the same out of the statute of frauds and authorize a specific performance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 134, 135.]

Appeal from Circuit Court, Calhoun County, in Chancery; Charles W. Smith, Judge.

Suit by B. B. Johnston against Elizabeth Cross and others. From a decree for plaintiff, defendants appeal. Affirmed.

Elizabeth Cross was the owner of 120 acres of land in Calhoun county, which she contracted to sell to B. B. Johnston on the 1st day of March, 1899. He agreed to pay Mrs. Cross \$285 for the land. He paid \$50 of this at the time of the contract, and was to pay the remainder when the deed was executed. There was an acre or two of this land cleared, and Johnston had rented this cleared land from Mrs. Cross for that year, and had possession of it at the time he purchased. The next day after making the purchase Johnston took possession of and commenced to clear up and improve additional portions of the land he had bought. A few days afterwards he had a deed prepared, and sent it by one of his sons to Mrs. Cross, with the balance of the purchase money to complete the purchase, but Mrs. Cross had changed her mind and refused to execute the deed. Soon afterwards she sold the land to the Pearson Lumber Company for \$275—\$10 less than Johnston agreed to pay first. Johnston brought this action in

equity against Mrs. Cross and the lumber company, in which he alleged that he had paid part of the purchase money, had taken possession under his contract and made improvements, etc., and that the lumber company had notice of his purchase from Mrs. Cross at the time it purchased from her; and he asked that her deed to the lumber company be canceled, and that she be required to execute a deed to him. The court found the facts in favor of the plaintiff, and ordered Mrs. Cross to execute a deed to him, but made no order in reference to the deed she had executed to the lumber company. The defendants appealed.

Thornton & Thornton, for appellants.
Smead & Powell, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal from a decree ordering the specific performance of a contract to sell and convey land. The evidence is amply sufficient to support the finding of the chancellor that the plaintiff did contract to sell this land to the plaintiff, and that the lumber company, which afterwards bought the land from her, had notice of his purchase at the time it purchased. But the contract of the plaintiff with Mrs. Cross was not in writing, and the main question in the case is whether the facts in proof are such as to take the contract out of the statute of frauds. The plaintiff paid \$50 on the purchase when the contract was made, and he took immediate possession of the land, and commenced to clear and improve the land. Plaintiff, it is true, was already in possession of the cleared land as a tenant; but there was only an acre or two of this cleared land, and the plaintiff had no control of the uncleared land until his purchase. If the only possession shown had been that he continued to remain in possession of the land that he had already held as tenant, that would not have been sufficient, but the evidence shows that he not only held the cleared land, but after the purchase, and in pursuance of his contract, plaintiff took possession of the uncleared land, and commenced to make improvements upon the same by clearing the same and getting it ready for cultivation. He had no authority as tenant to cut timber and clear the land, and these acts of plaintiff shows that he had taken possession of the land as owner thereof. As the evidence shows that this was done under the contract of purchase, we think that this, in connection with the part payment of the price, was sufficient to take the case out of the statute, and to authorize the decree rendered by the court. *Morrison v. Peay*, 21 Ark. 110; *Pomerooy on Contracts*, § 115.

By some oversight the decree of the court made no reference to the deed of Mrs. Cross to the Pearson Lumber Company. But unless this deed is canceled it is evident that a deed from Mrs. Cross to the plaintiff will be of no avail. As this was probably a mere

oversight, the case, if plaintiff desires, may be remanded so that the decree can be corrected in that respect, but, if that is done the additional cost must be paid off by the plaintiff. In other respects the decree is affirmed.

MOORE v. STATE.

(Supreme Court of Arkansas. July 8, 1905.)
HOMICIDE—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to sustain a conviction of murder in the first degree.

Appeal from Circuit Court, Union County; Charles W. Smith, Judge.

Kyle Moore was convicted of murder in the first degree, and appeals. **Affirmed.**

W. M. Van Hook, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

BATTLE, J. Kyle Moore was indicted for, and convicted of, murder in the first degree. He was charged with killing Lige Moore. He appealed to this court.

Was the evidence adduced at his trial sufficient to convict him? This is the only question in the case.

The evidence tended to prove the following facts:

On Wednesday, the 21st day of December, 1904, in the afternoon, about 6 o'clock, appellant borrowed from Jim Johnson a pistol—"a thirty-eight double-action Colts." Between 9 and 10 o'clock of the same evening appellant and deceased were together at one Ben Tatum's, and later at Green Kennedy's shanty, where they both displayed their pistols. They left Kennedy's a short time after 10 o'clock, with the avowed intention of going to a party at Dan Mosely's a distance of three miles. After that the deceased disappeared. On the 2d day of January following his body was found near a trail, in thick woods, the nearest way for footmen to travel to go to Mosely's from Kennedy's. He was shot in the back, and a bullet was extracted from his body, which corresponded in size to the pistol that appellant had that night. The body was in a state of decomposition. Appellant reached the party alone, and, calling one Armstrong aside, confidentially told him that he had killed Lige Moore, and said he killed him at a place that was about where his body was found, and that he shot him four times, and displayed a pistol which he said was all he got, and that deceased did not have any money. The pistol was identified as the property of deceased, and was traced by the evidence adduced at the trial from deceased to appellant, from appellant to Ed. Moore, and from Ed. Moore to John Apoh Moore, and was produced and identified at the trial. He said he fired four shots. A witness (Simpson) passing near the place about that time heard four pistol shots in that direction. He said the deceased had no money, which shows he searched him. It

was proved that the day before the killing was deceased's pay day. Robbery seems to have been the motive of the killing, which occurred in Union City, in this state.

We think the evidence was sufficient to sustain the verdict.

Judgment affirmed.

HINSON et al. v. STATE.

(Supreme Court of Arkansas. July 22, 1905.)

1. WITNESSES — IMPEACHMENT—IMMATERIAL MATTERS.

In a prosecution for assault with intent to kill a witness for defendant, who was not asked, and had not testified as to whether he knew, previous to the difficulty, that the assault was going to be made, was asked "if he did not state * * * that he knew that there was going to be a difficulty, * * * and that he went * * * to see it well done." Witness replied in the negative, and the state called the person to whom the statement was claimed to have been made, and he answered that the witness did make such a statement. *Held*, that the testimony of the state's witness contradicted defendant's witness on an immaterial matter, and should not have been admitted.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1278.]

2. CRIMINAL LAW—TRIAL—IMPROPER ARGUMENT.

Argument of the prosecuting attorney that certain testimony contradicted defendant's witness on a material point, and showed him unworthy of belief, was improper, and prejudicial, where such testimony contradicted the witness on an immaterial matter.

3. HOMICIDE — AGGRAVATED ASSAULT — EVIDENCE—SUFFICIENCY.

In a prosecution for assault with intent to kill, evidence *held* sufficient to show that defendants were guilty of aggravated assault.

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

R. H. Hinson and E. S. Scott were convicted of assault with intent to kill, and appeal. Reversed, except on condition.

R. H. Hinson and E. S. Scott were, in March of this year, engaged in logging, and lived with their wives in tents on the bank of the St. Francis river northeast of Forrest City. Not far away lived one Al. Smith, upon whom, on the 14th day of March, they committed an assault. Smith was struck on the head with a stick, and severely hurt, and the grand jury of St. Francis county indicted the defendants for an assault with intent to kill. On the trial the evidence showed the following facts: On the night of the 13th of March Smith indulged to some extent in intoxicating liquors, and while under the influence thereof he went to the tent where Hinson lived, and inquired if he was there. On being told that he was not at home, he made use of insulting language about him in the presence of Hinson's wife and child. Scott and his wife came from their tent to Hinson's tent, and after some persuasion induced Smith to return to his home. The witnesses say that after Smith returned home he came out of his house with

a shotgun and pistol and fired into the tent. One of the bullets from the pistol, so the witness testified, passed through the tent not far from where Mrs. Hinson was seated in the tent with her child. Witnesses also testified that Smith, while at the tent, made threats against Hinson. The next day, while Smith was near the place where logs were being placed in the river, Scott accosted him, and requested him to pay the money that Smith owed him. Smith told him that he would do so, but said that he might have to go to his house to get the money. Scott then said that when they arranged their business matters he wanted Smith to settle for his conduct of the previous night. To quote the language of one of the witnesses for the state: "Smith then asked, 'What have I done?' Mr. Scott said: 'You cursed me, and abused me. You called me a son of a bitch, and threatened to kill me.' Mr. Smith said: 'I did not do it. If I did, I apologize to you for it.' And about that time Mr. Scott struck him on the side of the head with a stick, staggering him, and knocked him partially down; and I think he struck him again. About the same time the defendant Hinson, who was standing near, ran up, and struck Mr. Smith with a stick, and knocked him down. I think he struck him two or three times—once on the back, and once or twice on the head. When Mr. Hinson took part in the fight, Mr. Scott quit, and Scott and I caught hold of Hinson, and tried to pull him off of Mr. Smith. Hinson had dropped his stick, and had Smith by the throat with one hand and was hitting him with the other. While Scott and I were trying to separate Hinson and Smith, they became engaged in a scuffle for a pistol in Smith's right hip pocket, and one Mr. J. S. Turner ran up and took the pistol from both of them, and carried it and gave it to Mr. Baily, who was sitting near in a wagon. When we succeeded in separating Hinson and Smith, Smith started off towards his house. When he had gone but a short distance, Hinson broke loose from us, and followed Smith, overtook him, and, I think, he struck him two or three times. Mr. Garrett went up, and caught hold of Hinson, and Smith got up and started towards his home, and Hinson threw his stick after him." The sticks with which the assault was made were introduced in evidence, and a witness testified that a man could be killed with them. Other witnesses testified that after Hinson commenced his assault upon Smith that Scott made no further effort to injure Smith, but, on the contrary, endeavored to prevent Hinson from striking him. There was some testimony on the part of the defendant that Smith attempted to draw a pistol during the assault, and Hinson testified that he struck Smith because he thought he was about to draw his pistol in the effort to carry out the previous threats against himself and Scott. The jury returned a ver-

dict of guilty against both defendants for the crime of assault with intent to kill, and assessed the punishment of each of them at one year in the penitentiary, and judgment was rendered against them accordingly, and they appealed.

R. J. Williams, for appellants. Robt. L. Rogers, Atty. Gen., for the State.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment convicting the defendant of an assault with intent to kill one Al. Smith. While the evidence does not fully satisfy us that either of the defendants intended to kill Smith, the assault made by Hinson was very persistent, and, had no one interfered, might have resulted in the death of Smith. As to Hinson, therefore, we think the evidence is sufficient to sustain the judgment. The evidence against Scott, while it shows an assault, does not, to our minds, show an intent to kill. Before noticing that point in future, we call the attention to the argument of the appellants that improper evidence was admitted against them. One Garrett, who testified for the defendants, and whose daughter was the wife of Scott, was asked on his cross-examination by the attorney for the state "if he did not state to one Duke, a day or two after the difficulty, while he (Garrett) was on his way to Round Pond, that he (Garrett) knew that there was going to be a difficulty between Scott and Smith when they met, and that he went down there where they were to see it well done." The defendants objected to the asking of this question, but the court overruled the objection, and the witness responded that he had made no such statement to Duke or to any one else. Afterwards the attorney for the state was, over the objections of the defendants, permitted to ask Duke whether Garrett had made such statement to him. The answer of the witness was, "Yes, sir; he told me that he knew there was going to be a row next morning, and that he went down there to see it out." Now, the witness Garrett was not asked whether or not the defendants or either of them had not told him that they intended to have a difficulty with Smith, or make him settle for his conduct of the previous night. He was not asked to state whether he knew there was going to be a difficulty between the defendants and Smith before it happened, or if he had any reason to believe that there would be trouble between them previous to the difficulty. If these questions had been asked, and had been answered in the negative, then, to refresh his memory, or to impeach him, the witness might have been asked if he had not made contrary statements to Duke. But, without having asked the witness anything

of his own previous knowledge of the difficulty, the attorney for the state propounded to the witness the question as to whether he had not previously stated to Duke after the fight that "he knew there was going to be a row next morning, and went down there to see it out." As the witness answered this question in the negative, no prejudice would have resulted had not the court permitted the state, by its attorney, to prove by Duke that the witness had stated to him after the difficulty that he knew it was going to take place, and went down to see it out. Now, as Garrett was not asked and did not testify whether he knew previous to the difficulty that the assault was going to be made, it was entirely immaterial what he said to Duke on the subject, for the answer did not tend either to corroborate or contradict his previous testimony, for the reason that he had not testified on that point. This testimony of the witness Duke contradicted Garrett about an immaterial matter, and should not have been permitted. That the admission of this improper testimony was probably prejudicial is shown by the argument of the prosecuting attorney, for he contended in his argument before the jury that this testimony of Duke contradicted Garrett on a material point, and showed that he was unworthy of belief. It may have also aroused in the minds of the jury a suspicion that the assault upon Smith was premeditated, and caused them to find the defendants guilty of a higher grade of crime than they would otherwise have done. Proper exceptions were saved both to the admission of this evidence and to the argument of prosecuting attorney based upon it. We are of the opinion that evidence was incompetent, and that for that reason the argument also was improper and prejudicial. In conclusion we will say that, though there may be evidence sufficient to support the judgment of an assault with intent to kill against the defendants, we feel very doubtful on that point, especially as to the defendant Scott. But, while we have doubt as to whether the defendants intended to kill Smith or not, we think it is clear that they were not justified in making the assault upon him. The evidence makes it very clear that both of these defendants were guilty of an aggravated assault, and one of them may have been guilty of a higher crime. On the whole case we are of the opinion that the judgment may be reversed, and a new trial ordered, unless the Attorney General should prefer to have the judgment sustained against them for one of the lower grades of crime included in the indictment. Unless he files a motion to that effect within one week, the judgment will be reversed, and a new trial ordered.

CROSBY v. HENRY.

(Supreme Court of Arkansas. July 22, 1905.)

1. TRUSTS — RESULTING TRUSTS — EVIDENCE — SUFFICIENCY.

In a suit to procure the declaration of a resulting trust, evidence held sufficient to support a finding that defendant bought the property as trustee for plaintiff and plaintiff paid for it.

2. SAME—CHARACTER OF PROOF.

Constructive trusts sought to be proved by parol evidence cannot be established by slightly preponderating testimony, or anything short of evidence that is clear and satisfactory.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 160.]

3. SAME—STATUTE OF FRAUDS.

Where one pays the price of land, title to which is taken by another under a parol agreement that the latter shall hold the title in trust for him, a trust results in favor of the former by operation of law from such payment of the price, notwithstanding the statute of frauds.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 93.]

Appeal from Miller Chancery Court; James D. Shaver, Chancellor.

Suit by George Henry against Ike Crosby. From a decree for plaintiff, defendant appeals. Affirmed.

A. M. Garrison, for appellant.

MCCULLOCH, J. George Henry, the appellee, brought this suit in chancery against appellant, Ike Crosby, seeking to have declared in his favor a resulting trust in a certain tract or lot of real estate in the city of Texarkana, conveyed by Mrs. Annie L. Doyle to appellant. The chancellor granted the prayer of the complaint, and entered a decree declaring the plaintiff to be the equitable owner of said property, and that the defendant, Crosby, held the legal title in trust for the plaintiff. The decree divested the title out of said defendant, and vested same in the plaintiff, and the defendant appealed to this court.

In the year 1888 Henry became the owner in fee simple of the property in question, and occupied the same as his homestead. He subsequently mortgaged the property, and in 1894 it was sold under foreclosure decree, and the purchaser at that sale conveyed it to Mrs. Doyle. In January, 1895, Crosby, by verbal agreement, purchased the property from Mrs. Doyle's agent at the price of \$150, payable \$25 at once, and the balance in monthly installments of \$10 until the full price, with interest, should be paid. The agent testified that he did not make the first payment of \$25 and the first monthly installment until May 17, 1895, and was usually tardy in his payments, but made the final payment of \$10 on May 3, 1898, making the total sum of \$190 principal and interest. Mrs. Doyle thereupon delivered to him her deed conveying the property to him. Henry's wife is a stepdaughter of Crosby, and he claims that Crosby bought the property from Mrs. Doyle pursuant to an agreement

that he should do so for Henry's benefit, that he (Henry) should pay the price, and that Crosby should reconvey the property to him as soon as he procured a deed from Mrs. Doyle. Henry testifies to these facts, and also that he paid to Crosby, from time to time, the several amounts, which Crosby paid over to Mrs. Doyle's agent. He also testifies that after the execution of Mrs. Doyle's conveyance to Crosby the latter had agreed to convey the property to him in compliance with their agreement, but had failed to do so, and subsequently repudiated the agreement, and refused to execute the conveyance. As to these facts his testimony is corroborated by that of two other witnesses, one Richardson and wife. Henry's wife also testified that her husband sent the money to her, from time to time, from Dallas, Tex., where he was at work, and that she paid it over to Crosby to be used in paying for the property. She testified that she made one or two payments direct to Mrs. Doyle's agent, but that those payments were made in the name of Crosby. The agent testified that she made the alleged payments in Crosby's name. Henry is in possession of the property, and has occupied it continuously since 1888, and urged this circumstance in support of his claim. Crosby, in his answer, undertakes to explain Henry's continued possession by saying that he allowed Henry to occupy the place free of rent in consideration of the fact that he (Crosby) occupied free of rent during the same period a house and lot owned by Henry's wife. In his deposition he says that Henry's wife allowed him and his wife (her mother) to occupy the house on account of that relationship. Henry and his witnesses testified that Crosby paid rent on the property he occupied. Crosby denies that he ever agreed to buy the property for Henry, or that the latter paid any of the purchase price. On the contrary, he swears that he bought the property in his own name for his own use, paid for it with his own money, and had no agreement with Henry concerning it.

All the parties are negroes, with limited education or none at all, and there are many inaccuracies and some inconsistencies in the testimony of each. This is equally true of the testimony of each, and the controversy is resolved into a "swearing match" between Crosby on the one side and Henry and his wife (she being permitted to testify to payment made by her as agent for her husband) and Richardson and his wife. As to the main facts whether Crosby bought the property as trustee for Henry and whether Henry paid for it, Crosby testifies one way and Henry and his witnesses another. The testimony is irreconcilable, and the version of one side or the other must be entirely rejected. The chancellor accepted the statement of Henry and his witnesses as true, and we cannot say that his conclusion was erroneous. We are not unmindful of the rule announced by this

court, and well supported by other authority, that constructive trusts sought to be proved by parol evidence cannot be established by slightly preponderating testimony, or anything short of evidence that is clear and satisfactory. *Tillar v. Henry* (Ark.) 88 S. W. 573, and cases there cited. But in this case there is a very decided preponderance in favor of the appellee, and a refusal to accept his version of the facts and to grant the relief sought would be entirely arbitrary. Nor does this conclusion controvert the rule that an express parol trust is void under the statute of frauds. The trust here arises, not from the express agreement of Crosby to purchase the land for the benefit of Henry, but from the payment of the purchase price by Henry under the agreement that the purchase should be for him. The trust results under those circumstances by operation of law, and the fact that Crosby expressly agreed to hold the title in trust does not change its character as a resulting trust. *Grayson v. Bowlin*, 70 Ark. 145, 66 S. W. 658.

Decree affirmed.

MUTUAL LIFE INS. CO. v. ABBEY.

(Supreme Court of Arkansas. July 22, 1905.)

1. LIFE INSURANCE — SOLICITING AGENT — WAIVER OF PAYMENT OF PREMIUM — AUTHORITY.

A soliciting agent employed by a general agent of an insurance company, requiring all premiums to be paid in cash, cannot bind the company by accepting notes in lieu of cash for a premium, nor by agreeing that default in payment of premiums shall not work a forfeiture of the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 948, 957.]

2. SAME—GENERAL AGENT—WAIVER OF CASH PAYMENT OF PREMIUMS—AUTHORITY.

An agent of an insurance company clothed with authority to transact generally the company's business in a state and to collect the premiums, and granted permission to accept notes to himself in lieu of cash premium payments, the company looking to him instead of the policy holder, has authority to bind the company by accepting notes in lieu of cash payments of premiums, whether he paid the company or not.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 948, 953, 957.]

3. SAME — ACTION ON POLICY — WAIVER OF PAYMENT OF PREMIUMS — ACCEPTANCE OF NOTES—EVIDENCE—INSTRUCTIONS.

Where, in an action on a life policy, issued by a company requiring cash payments of premiums, the evidence on the issue whether the general agent of the company authorized to accept notes accepted notes in lieu of cash for the first year's premium on the policy on the understanding that failure to pay the same at maturity should not work a forfeiture of the policy was conflicting, an instruction limiting a recovery on finding that the general agent accepted the notes in lieu of cash payment correctly submitted the question to the jury.

4. SAME—EVIDENCE—SUFFICIENCY.

Evidence in an action on a life policy held to warrant a finding that the general agent of the insurer accepted the policy holder's notes

in lieu of cash payment of premium when the policy was delivered, authorizing a recovery though the notes were not paid.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Mary E. Abbey against the Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Edwards Lyman Short and Rose, Hemingway & Rose, for appellant. Murphy & Mehaffy and James P. Clarke, for appellee.

HILL, C. J. Mr. H. L. Rummel was a general agent of the appellant life insurance company, being district manager for the state of Arkansas. Mrs. George was a soliciting agent of Mr. Rummel's. The company accepted no notes for premiums, but Mr. Rummel authorized his solicitors to take notes for premiums, and directed them, when the party was not strong financially, to divide the annual premium into quarterly payments. When Mr. Rummel approved the notes taken by the solicitors, and the application was accepted by the company, and the policy written, he would pay the first note and deliver the policy. The company required all premiums to be paid in cash, and if Mr. Rummel took a note he paid the company, and the note was his individual property. He transacted 90 per cent. of his business in notes, and the company was aware of his method of business. Geo. M. Farr was a letter carrier in the city of Little Rock, and Mrs. George solicited him to take life insurance with the company she was working for. She succeeded in getting him to apply for a \$2,000 policy, and his application was accepted, and the policy written and delivered. He paid no cash, but he and his wife executed four promissory notes, in usual form of negotiable notes, to the order of Mrs. George, due three, six, nine, and twelve months from date, respectively. The quarterly premiums were due in advance, and the effect of these notes was to carry the payments over a period of one year, instead of nine months. The agreement when the notes were executed, and the subsequent conduct of Farr, are subjects of sharp conflict in the evidence. Farr paid none of the notes, and died before the fourth note became due, and his widow, who has remarried, brought suit on the policy, and recovered in the circuit court, and the company has appealed.

The evidence adduced on the part of Mrs. Farr (now Mrs. Abbey) was, in substance: That there was an understanding with Mrs. George that there was to be no forfeiture of the policy till the fourth note fell due, and she was preparing to pay the notes at the end of the year. That when the first one came due they were to pay it, and, if not, that Mrs. George would stand good for it; and that, if a stipulation had been put in the notes that the policy would forfeit when

any note was not paid, she would not have signed them. That after Farr's death Mrs. George told her to pay Mr. Rimmel the money, that the policy was as good as ever, and that she (Mrs. George) had an interest of \$40 in the premium. The notes were never returned to her or to Farr. The testimony on behalf of the company was, in substance: That Farr was told that the policy would forfeit on nonpayment of any one of the notes; that at his request, and on his promises to repay the amounts, Mrs. George got Mr. Rimmel to pay each of the two first notes, and that Farr afterwards declined to pay or continue the policy, and said he would take cheaper insurance; that Mrs. George indorsed the first and second notes to Mr. Rimmel, but did not indorse the last two; that the last notes were never accepted by Rimmel, but merely retained by him with the understanding that as each note was paid he would accept the next one. After Farr's death Mr. Rimmel gave the last two notes to a clerk to return to Mrs. Farr, and the clerk lost them. The evidence is undisputed that Mrs. George was the agent of Mr. Rimmel, and had no express authority to accept notes finally; only to take them subject to his approval and acceptance. Mr. Rimmel wrote Farr several letters demanding payment of each of the first notes, explaining that he had paid them to the company, thereby giving and continuing life to the policy; and he threatened suit upon them, and finally offered to grant further indulgence if he would get a surety.

Mrs. George had no right to waive cash payment and accept notes therefor. She was a mere soliciting agent under the general agent, and she could not bind the company by accepting notes in lieu of cash for the first or any subsequent premium. Nor could she bind the company by any agreement that default in payment of premiums would not forfeit the policy. *Ins. Co. v. Hampton*, 54 Ark. 78, 14 S. W. 1092; *Ins. Co. v. Kennerly*, 60 Ark. 532, 31 S. W. 155; *Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; *Fidelity Mutual Ins. Co. v. Bussell* (Ark.) 86 S. W. 815; *Ins. Co. v. Lewis*, 187 U. S. 336, 23 Sup. Ct. 126, 47 L. Ed. 204. Mr. Rimmel, the general agent, was clothed with authority to transact generally the company's business in this state, and to collect the premiums, and was permitted by the company to accept notes to himself in lieu of cash to the company, the company looking to him instead of the policy holder for the cash in such cases. This general power gave him authority to bind the company by accepting notes in lieu of cash; and, whether he paid the company or not, when he accepted a note and waived cash payments the company was bound by his act, for it was within the apparent scope of his agency. See *Miller v. Life Ins. Co.*, 12 Wall. (U. S.) 285, 20 L. Ed. 398, and long line of decisions following and approving it

collected in 7 Rose's Notes on U. S. Reports, pp. 546-549. In *Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305, this court approved the doctrine above stated, and said it was in accordance with "the consensus of modern authority." In *Southern Life Insurance Company v. McCain*, 96 U. S. 84, 24 L. Ed. 653, the Supreme Court of the United States said: "The law is equally plain that special instructions limiting the authority of a general agent, whose power would otherwise be coextensive with the business entrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as if no special instructions were given. Were the law otherwise, the door would be open to the commission of gross frauds. Good faith requires that the principal shall be held by the acts of one whom he has publicly clothed with apparent authority to bind him. Story on Agency, §§ 128, 127, and cases there cited." The court sent the case to the jury under instructions correctly embodying the principles above stated. The right to a recovery was limited to finding from the evidence that Mr. Rimmel accepted the notes and instructing that there could be no recovery on any agreement or understanding with Mrs. George to this effect; that the jury must find that Mr. Rimmel accepted the notes in lieu of cash payment, including the third note, before the beneficiary could recover. The jury was correctly instructed, and has found that Rimmel accepted all of the notes. The question of difficulty before the court is whether there is legally sufficient evidence to sustain this finding. There is positive testimony from Mr. Rimmel and Mrs. George that only the first two were accepted, but Mrs. George's testimony is contradicted either directly or by necessary implication on all material matters by Mrs. Abbey. Against this positive testimony of Mr. Rimmel and Mrs. George are these facts: Mr. Rimmel took and retained all four notes, and promptly paid the company for the first two as they fell due. They were negotiable, and not due, and did not belong to him unless he had accepted them; and yet he retained all of them long after Farr had defaulted on the first two, and after he had repeatedly threatened suit on them. The taking of four notes instead of one indicates that credit was to be extended for the first year, and not merely the first quarter, and the absence of a clause in the notes forfeiting the policy in case of default gives color to this theory. If Farr gave the notes with that understanding with Mrs. George, their retention by Rimmel would indicate an approval of that agreement of his agent. Farr put out these four absolute obligations, good in the hands of an innocent purchaser, and there was no consideration for any of them except the first when they were taken, under Mr. Rimmel's theory, and yet after three defaults they are still retained, and the

fourth, yet not due, also retained. These and other facts in evidence are sufficient to support the finding that the notes were accepted by Mr. Remmel when the policy was delivered.

The judgment is affirmed.

GOLEY v. STATE.

(Supreme Court of Arkansas. July 22, 1905.)

MURDER—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to support a conviction of murder in the first degree.

Appeal from Circuit Court, Union County; Charles W. Smith, Judge.

One Goley was convicted of murder, and appeals. Affirmed.

R. G. Harper and W. M. Van Hook, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

MCCULLOCH, J. Appellant was indicted at the March term, 1905, of the Union circuit court for the crime of murder in the first degree. He was tried, and convicted of the degree of murder charged, and appealed to this court.

The appeal questions only the sufficiency of the evidence, no objections having been made to the instructions of the court, and no error in the proceedings is assigned. The deceased was a brother-in-law of appellant, and was waylaid and shot while he was riding along a public road. His body was found lying in the road with 12 buckshot wounds, and the wadding from a gun was found near the body. Twenty-one gum shells loaded with buckshot were found buried under appellant's porch, and the wadding in these shells corresponded with that found near the dead body. When arrested, appellant disclaimed any knowledge of the death of deceased, but later confessed to the sheriff and others that he had shot deceased, and gave as a reason that deceased had been "slipping around his house trying to shoot him." He admitted that he stood behind a tree on the roadside, and saw deceased and another man pass, and, knowing that deceased would return that way soon, waited, and shot him as he repassed. Another witness introduced by the state testified that on the day of the killing appellant came to the house of witness and bought a shotgun, promising to pay witness therefor the following Saturday, but returned the gun Sunday night (the killing having occurred on Saturday), and asked witness to take it back. He also testified that appellant met him at the coroner's inquest, and asked him not to say anything about him (appellant) having had the gun, and promised to take the gun later and pay for it. Appellant was introduced as a witness in his own behalf, and admitted that he killed deceased, and testified as to the details of the killing, and his reasons for committing the

act. He said that his father, wife, and another brother-in-law told him that deceased had threatened to kill him, and that his brother-in-law told him to buy the buckshot shells and kill deceased. He claimed that the killing was done at the instigation of his brother-in-law. A plea of insanity was interposed, and two physicians and several other witnesses were introduced and testified, in support of the plea, that appellant was a mental imbecile. The physician whose opinion is mainly relied upon to establish mental incapacity described appellant's condition as follows: "Mentally the defendant is very weak, belonging to the highest type of imbecility. He is troubled, too, with incompetency of will, inability to control himself, due to his general nervous condition. The authorities say this trouble is inherited, and there are one or two idiots in the defendant's family. Owing to this condition, when he is excited or agitated, he would be likely to do anything, and the question of right or wrong would not occur to him. He would be irresponsible in that condition. It is my opinion that if the defendant had been informed a few minutes prior to the shooting that deceased intended to kill him, his mental condition would have been in a violent state, and he would not have comprehended the enormity of the crime." During the progress of the trial, appellant, in open court, and in the presence of the jury, assaulted a witness (his brother-in-law) while on the witness stand, and this is relied on as a circumstance tending to show insanity. The state introduced in rebuttal two physicians and several other witnesses, all of whom testified that appellant was of an order of intelligence below the average, but was not insane nor mentally unsound. This was, in substance, the testimony in the case, and upon proper instructions the jury found appellant guilty, and of sufficient mental capacity to commit the crime. We think the testimony is ample to support that finding, and the verdict will not be disturbed.

The judgment is therefore affirmed.

NEAL v. CONE.

(Supreme Court of Arkansas. July 8, 1905.)

1. SALES—VENDOR'S LIEN.

Kirby's Dig. § 4966, provides that in an action for the price of property in possession of the vendee the court may order such property sequestered. Held, that the statute applies only where the property is in the possession of the vendee, and does not give a lien which can be enforced by seizing the property after it has passed into the hands of third parties, who have purchased the same for value, although such parties may have had notice that the purchase money had not been paid.

2. SAME—RESERVATION OF TITLE.

The fact that there was an understanding between the vendor of timber and the vendee thereof that the vendor was to have the purchase money before the staves into which the timber was to be manufactured were sold did not amount to a reservation of title.

3. SAME—ACTION FOR PRICE—TRYING RIGHT OF POSSESSION.

Kirby's Dig. § 4966, provides that in an action for the price of personal property the court may, on petition of plaintiff, where the property is in the possession of a vendee, make an order that it be sequestered. *Held* that, though the seller of timber reserved title until payment, an action founded on an affidavit filed under the statute could not be converted into an action of replevin to try the title and right of possession of one claiming under plaintiff's vendee.

Appeal from Circuit Court, Calhoun County; Charles W. Smith, Judge.

Action by R. H. Cone against O. F. Neal. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The appellee filed the following affidavit before J. S. Newton, Justice of the Peace.

"The plaintiff, R. H. Cone, states the defendant, Gray Rogerson, by a verbal promise agreed to pay to the plaintiff two cents apiece for all the Pipe staves and one cent apiece for all the West India staves he should make on the N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ Sec. 32, Town. 15 S., Range 14 W., as the purchase price of the timber used in manufacturing said staves, which the plaintiff sold and delivered to the defendant, which is of the value of sixty-three and seventy-six one hundredths dollars, which staves was sold by the defendant Rogerson to defendant Neal with notice of this lien, and which is now in the possession of said O. F. Neal, and in said county. The purchase price of said timber is herewith filed, and plaintiff says that no part of the sum specified therein has been paid, and that he has a lien on said Pipe and West India staves to secure the payment of said sum, with interest due thereon. He therefore prays for an order directing the constable to take said staves and hold them subject to the order of this court, and for judgment for the amount due on said account. R. H. Cone.

"Subscribed and sworn to before me Oct. 28, 1898. J. S. Newton, J. P."

On the return day of the writ there was a trial, and judgment in favor of Cone for \$51, and a lien declared on the staves. From this judgment Neal appealed to the circuit court. In the circuit court the record shows that issue was joined "upon the affidavit of plaintiff and the answer of the defendant." But the answer does not appear in the record. So we presume no written answer was filed in the justice or circuit courts. The cause was submitted to the jury upon the evidence and instructions to which there was no objection, and they returned a verdict in favor of appellee "for the staves in controversy," and judgment was entered accordingly, from which this appeal is prosecuted.

Thornton & Thornton, for appellant. O. L. Poole, for appellee.

WOOD, J. (after stating the facts). The affidavit of the appellee and his evidence and that of the only other party to the contract

out of which the suit arose show that the suit was an effort upon the part of appellee to enforce a vendor's lien on a lot of staves for the purchase price of the timber that was used in the manufacture of the staves. It appears that appellee asked and was granted on his affidavit an order directing the officer to take the staves designated, which was duly executed, and in this way appellee seeks to establish a vendor's lien upon the staves under sections 4966, 4967, of Kirby's Digest. This statute only gives the vendor of personal property in an action brought for the recovery of the purchase money the right to seize the property purchased while it is in the possession of the vendee. It does not give him a lien which he can enforce at law by seizing the property after it has passed into the hands of third parties, who have purchased the same for value, although such parties may have notice before their purchase that the purchase money has not been paid. An effort to enforce a vendor's lien for the purchase money is inconsistent with a claim of title to the property itself. It is true that appellee testified that it was the understanding between him and the party to whom he sold the timber that he was to have the money for the purchase thereof before the staves were sold. But this was not tantamount to a reservation of title, and all the other evidence shows conclusively that title was not reserved. But, if title had been reserved, then the action founded upon the affidavit in suit was improper. This action could not be converted from an action to recover purchase money under the statute supra into an action of replevin to try the title and right of possession to the property. The verdict and judgment were not responsive to the pleadings and proof in the case.

Reversed and remanded for further proceedings.

SARLO v. PULASKI COUNTY.

(Supreme Court of Arkansas. July 22, 1905.)

1. INTOXICATING LIQUORS—LICENSE—PRIVILEGE—REVOCATION.

A liquor license is a mere privilege, subject to revocation by the state or its authorized governmental agencies.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 113.]

2. SAME—AUTHORITY OF COUNTY COURT.

Under Kirby's Dig. § 5120, authorizing the county court to issue liquor licenses where it is voted to be lawful so to do, a county court authorized to issue licenses must treat alike all applicants possessing the legal qualifications, and it cannot license favored persons and exclude others possessing similar qualifications.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 73.]

3. SAME—CONDITIONS—AUTHORITY TO IMPOSE.

A county court authorized to issue licenses for the sale of intoxicating liquors has the power to adopt as a condition to the granting of any license that the license on violation of the law regulating the liquor traffic may be re-

voked, and on a licensee assuming the condition he cannot complain of a revocation because of a violation of the law.

McCulloch, J., dissenting.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Information by the prosecuting attorney of the county of Pulaski for the revocation of a liquor license issued to Joe Sarlo. From a judgment of the circuit court affirming a judgment of the county court revoking the license, Joe Sarlo appeals. Affirmed.

Fulk, Fulk & Fulk, for appellant. J. C. Marshall, for appellee.

HILL, C. J. When the matter of granting liquor license in Pulaski county for the year 1905 came before the county court, the court decided to grant license in the county upon this condition or reservation which was incorporated in the license issued to all applicants who were found qualified, to wit: "Conditioned that this license is issued by the consent and agreement of the licensee, upon the condition that if the licensee shall permit gambling upon the premises, or if gambling occurs upon the same through his connivance or agency, or if he is guilty of a breach of the Sunday law, or the law against keeping disorderly houses, the county court may at any time revoke this license, this license being issued upon the express condition, and with that reservation." Sarlo agreed to the terms, accepted the license, and conducted a saloon thereunder. He violated the Sunday law against keeping open saloon, and was fined therefor. The prosecuting attorney filed information before the county court reciting these facts, and praying revocation of his license. He was cited to answer, and on a hearing the license was revoked, and he appealed to the circuit court, where the case was tried on an agreed statement of facts developing the facts as set forth herein. The circuit court revoked the license, and Sarlo brings the case here.

The authorities are practically uniform in holding that a liquor license is a mere privilege, revocable at the will of the state. It is not a contract between the state and the licensee, and no property rights inhere in it. Constitutional limitations against impairing obligations, retroactive laws, etc., cannot be invoked in support of rights under it. It is not a vested right for any definite period; in fact, is not a vested right at all, but is a mere permission temporarily to do what otherwise would be a violation of the criminal laws. *Metropolitan Board v. Barrie*, 34 N. Y. 667; *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197; *Schwuchow v. Chicago*, 68 Ill. 444; *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. 424; *Columbus v. Cutcomp* (Iowa) 17 N. W. 47; *Martin v. State*, 23 Neb. 371, 36 N. W. 554; *Black on Intoxicating Liquors*, §§ 127-129. The power of the state over liquor licenses is complete. It is part of the

internal police of the state, in which the power of the state is sovereign. The state may repeal the statute authorizing the license; revoke, annul, or modify the license; create conditions, limitations, and regulations subsequent to its issue burdening its exercise; and may delegate these powers to agencies of the state, as municipal corporations, county courts, boards of excise commissioners, etc. 17 Am. & Eng. Enc. (2d Ed.) pp. 262, 263; *Metropolitan Board v. Barrie*, 34 N. Y. 667; *Schwuchow v. Chicago*, 68 Ill. 444; *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197; *Boston Beer Co. v. Massachusetts*, 9 U. S. 25, 24 L. Ed. 989; *Black on Intox. Liq.* § 127. In this state the issuance of liquor licenses is committed to the county court subject to a veto upon such issuance when the vote at the last biennial election in the county, township, or ward is against it. Kirby's Dig. § 5120. The grant or refusal of license, where it is voted to be lawful to issue it, is exclusively and finally determined by the county court. The county court may license all qualified persons applying therefor or may license none. It cannot be controlled in determining a policy of license or no license. When a policy of license is adopted, then the court must treat all alike who possess the legal qualifications. It cannot license favored classes or persons, and refuse others possessing similar qualifications. *Whittington, Ex parte*, 34 Ark. 34; *Ex parte Levy*, 43 Ark. 42, 51 Am. Rep. 50; *Ex parte Clark*, 69 Ark. 435, 64 S. W. 223. Possessing this power derived from the state, which clearly has the power to insert conditions in the license like the one under consideration, or authorize one of its agencies to do so, the question remains, does the power above outlined in the county court include the power to grant licenses subject to a condition that the laws regulating the liquor traffic shall be obeyed by the licensee under penalty of revocation? The Supreme Court of Louisiana recently said: "We do not criticize the proposition pressed upon our attention that, where the power is delegated to a municipal corporation to forbid the sale of intoxicating liquors, it may grant the privilege of selling on terms and conditions it chooses to impose, and that then it has the power claimed for it to impose the additional condition that a license shall be subject to recall on violation of any statute or ordinance relating to the liquor traffic; that the municipality could then, as it were, exercise a sort of resolutive condition." *Shreveport v. Dralss*, 111 La. 511, 35 South. 727. The state of Illinois conferred on municipalities the power to license, regulate, restrain, and suppress the liquor traffic. The Supreme Court of that state said: "The Legislature, then, having conferred such power, it was for the common council to determine whether they would wholly suppress the sale of intoxicating liquors, or grant the privilege on such terms and conditions as they might

choose. And the power was ample under this grant to impose as a condition that when a license is granted it should be liable to revocation on the violation of the ordinances regulating the traffic, or, having absolute control over the whole subject of granting licenses, they may impose any other condition calculated to protect the community, preserve order, and to suppress vice." *Schwuchow v. Chicago*, 68 Ill. 444. In Georgia a similar case arose, and the court said: "Under the charter the mayor and general council have power to grant licenses for the sale of liquors, or to prohibit the sale altogether by refusal to issue licenses. If they have power to prohibit the sale altogether by refusal to issue license therefor, they certainly have the right to issue license under such restrictions, conditions, and limitations as may seem proper to them." *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197. The power of issuing liquor licenses was vested in the Commissioners of the District of Columbia, and they made a rule denying license to keepers of provision stores. One of the applicants contested, and claimed that this was legislative power, with which the commissioners were not vested; that the commissioners must pass on the applicants individually, and not exclude a class who otherwise possessed the legal qualifications to obtain license. The court said: "If they are invested with such discretion, may they not, by rule made in advance, say that in a given instance they will not issue a license, if it is apparent that there is some good reason for making such rule? If it is an arbitrary rule, made without cause or reason for it, and is simply oppressive, it would be beyond the power of the commissioners, and this court might so declare." *U. S. v. Commissioners*, 6 Mackey (17 D. C.) 409.

Another phase of the case is presented in the consent of Sarlo to the condition. A case similar in many respects arose in Iowa, and the court said: "In this case the plaintiff took his license from the city with the distinct provision written upon it that 'a violation of any of the ordinances of the city by the party holding this license shall work a forfeiture of the same.' It was somewhat in the nature of a reservation, evidently intended as a safeguard against allowing improper persons to hold license, and the plaintiff took it with a full understanding of the consequences attendant upon a violation of the ordinances of the city. Having entered into the stipulation, so to speak, with the city, he cannot be heard to complain that while engaged in prosecuting the very business permitted by the license he violated an ordinance of the city, and the very terms of the license itself, and that, therefore, his license was revoked." *Hurber v. Baugh*, 43 Iowa, 514. In Pennsylvania the court authorized to issue licenses imposed a condition upon a saloon keeper that he was not to sell beer in kettles, on account of the too great de-

mand in the neighborhood for that form of drinking. He agreed to the condition, which was entirely beyond any statutory requirements. He violated the terms of his agreement. The court held that it was within the discretion of the licensing power to impose these conditions, which were manifestly promotive of the peace and sobriety of that particular locality, and the failure to observe them worked a revocation of the license. *Gerstlaue's License*, 5 Pa. Dist. R. 97. In *Schwuchow v. Chicago*, 68 Ill. 444, and *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197, importance was attached to the fact that the licensees had accepted the terms imposed by the municipalities, and took their licenses, as did Sarlo, with it written in the face thereof.

The power of the county courts is not so broad and extensive as the power conferred on municipalities and excise boards in the cases reviewed, and it is not clothed with superintending power over the liquor traffic. Its power over it is derived solely from the power to refuse license at all, and to determine the character of the applicants applying therefor. In the cases reviewed the power to impose conditions requiring obedience to the laws and other conditions promotive of the public good is derived from the power to refuse license, in that way prohibiting the business. The county court does possess this power of refusing license, and should, in determining the question of whether license should be granted, take into consideration the character of the applicants, particularly their character as to observance of the laws regulating their business. In the exercise of these duties the county court of Pulaski county adopted a policy of no license to any one except on condition of an obedience to the laws regulating saloons and a forfeiture of the license on a failure to obey these laws. The court is of opinion that it was within the power of the county court to adopt a requirement of obedience to the laws as a condition of granting any licenses, and, when the licensees voluntarily assumed these conditions, instead of refusing the license or availing themselves of their legal remedies to contest this power and the manner of its exercise, they cannot complain of a revocation of the license produced by their violation of the law contrary to their agreement and the terms of the license.

The judgment is affirmed.

BATTLE, J., concurs in the judgment; not the opinion.

McCULLOCH, J. (dissenting). I do not agree with the majority of the court that the county court had either the power to insert the condition in the license, or to revoke the license after breach of the condition. However wholesome the exercise of such power may seem to be, it is sufficient to say that the Legislature has not seen fit to confer

that authority, and it is not within the province of the courts to read it into the statute. The power to regulate and control the liquor traffic is vested exclusively in the General Assembly, which may delegate it to any other body or tribunal. It has not yet done so. The county court has no legislative power, and is not invested with power to regulate the sale of liquor. Its powers are limited solely to that of determining, after the people have voted affirmatively on the license question, whether or not license shall be granted, and to issue the same to such persons of good moral character who apply therefor. To that extent it may exercise the veto power to prohibit the liquor traffic altogether; but when it has determined upon the policy, and found the applicant to be a person of good moral character, and issued to him a license to sell whisky for the year, its powers are completely exhausted, so far as that applicant is concerned. In passing upon the question of license to a given applicant, the court must first determine whether or not he is a person of good moral character. The court cannot make a determination of that question, and take the applicant upon probation, so to speak, by granting a license upon condition that he shall thereafter continue to be of good moral character, or that he shall not thereafter violate the law, under penalty of having his license revoked. None of the cases cited in the opinion of the majority, with a single exception, sustain the view that the county court has power either to insert the condition or to revoke the license. All of them are cases where the power of revocation is sought to be exercised by municipal boards having legislative functions, and empowered to regulate the liquor traffic. It is conceded, as before stated, that the Legislature has power either to impose conditions upon liquor licenses or to revoke them, or to authorize some other body to regulate the traffic by the imposition of conditions, and to exercise the power of revocation. The Legislature of this state has done neither. I am not aware of the decision of any court holding that a court or other body not exercising legislative functions can revoke a license once issued, with the single exception of a decision of a district court of Pennsylvania cited in the majority opinion. In the case of *Lantz v. Hightstown*, 46 N. J. Law, 102, the learned judge delivering the opinion of the court said: "In regard to the exercise of the power over the subject of licensing inns the statute contains express mention of the grounds upon which the court of common pleas shall proceed to revoke the license before the expiration of the time for which it is granted. Revision, p. 489, § 24. This section contains a wide scope for judicial action, and the prescription of causes which shall be the ground for revocation is an implied admission of the absence of the power to revoke without legislative sanction. I know of no case where this power has been

asserted in a case not coming within those mentioned in the act. I can find no instance in the practice of boards of excise or other licensing bodies in which the power of revocation has been exerted except under the provisions of a statute." Our statute (Kirby's Dig. §§ 2052-2057) prescribes the offenses for which the license of a saloon keeper may be canceled, and it may be said that this excludes the power to revoke for any other cause. It is not contended that the county court has, under this statute, the power to adjudicate the guilt of the licensee of the offenses named, and to revoke his license on that ground. That power is lodged in the courts exercising criminal jurisdiction, and the cancellation of the license follows as a part of the penalty for the violation of the law.

The right of the county court to revoke the license is based in the majority opinion upon the ground that the appellant accepted the license, and voluntarily assumed the performance of the conditions imposed, and cannot, therefore, now be heard to dispute the power of the court to impose the conditions to revoke the license for his failure to perform them; an application, as I understand it, of the doctrine of estoppel. I think it is a misapplication of that doctrine, as the license is in no sense a contract, and appellant was not, by acceptance of the license, barred from disputing the power of the court to insert conditions not authorized by law. In the case of *Drew County v. Burnett*, 43 Ark. 364, the county court had exacted of an applicant for liquor license a tax of \$50 in excess of the amount fixed by the statute. He paid it under protest, and sued the county to recover the excess, and this court held that the requirement of payment of the excess was an illegal exaction, and that the applicant could recover it from the county. Now, if the majority of the court are correct in their view that the power of the county court to prohibit the liquor traffic altogether involves the power to permit it upon conditions, then it could be said with equal force that the court has the power to issue license only on condition that the applicant pay an assessment in excess of the tax fixed by statute. This court has held (properly, I think) in the case cited above that the county court cannot exact excessive amount for the license, and I think it reasonably follows from this that the county court has no power to impose any condition at all, and that, if such are imposed, the court lacks power to enforce them.

BURNETT v. STATE.

(Supreme Court of Arkansas. July 8, 1905.)

1. CRIMINAL LAW — CONSTITUTIONAL GUARANTIES — RIGHT TO SPEEDY TRIAL.

Kirby's Dig. § 2044, providing that, if any man prosecuted for seduction shall marry the female seduced, such prosecution shall not be

terminated, but shall be suspended; but further providing that if at any time thereafter the accused shall willfully, and without cause, desert and abandon such female, then the prosecution shall be continued, and proceed as though no marriage had taken place—does not, as to a defendant who makes no demand for trial notwithstanding the marriage, and who afterwards abandons the woman, and is subjected to renewed prosecution, constitute an unconstitutional violation of the right of accused persons to a speedy trial.

2. SAME—FORMER JEOPARDY.

Nor does the suspension of the trial before verdict, by the act of accused, or for his benefit, or at his request, on account of the marriage, and the subsequent trial after the desertion, put accused twice in jeopardy of his liberty.

3. SAME—EVIDENCE—PRESUMPTIONS.

In the absence of a showing in the record to the contrary, it will be presumed that accused consented to the suspension, and the state need not prove, in rebuttal of a plea of former jeopardy, that accused expressly consented to the suspension.

4. SAME—APPEAL—HARMLESS ERROR.

Where the record raises a presumption of consent by accused to a suspension of a former prosecution, parol proof by the state of accused's express consent to such suspension is immaterial and harmless.

5. SEDUCTION—CORROBORATION OF PROSECUTRIX—NECESSITY—INSTRUCTION.

In a prosecution for seduction, a charge that defendant cannot be convicted upon the uncorroborated testimony of the prosecutrix, and the corroboration must be upon every material fact testified to by her necessary to constitute the offense, is not erroneous.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, §§ 83-86, 90.]

Appeal from Circuit Court, Pope County; Daniel B. Granger, Judge.

Ira Burnett was convicted of seduction, and appeals. Affirmed.

Appellant was indicted, tried and convicted of the crime of seduction alleged to have been committed by obtaining carnal knowledge of Fannie Bruton, an unmarried woman, by virtue of a false promise of marriage. The case was here on a former appeal (72 Ark. 398, 81 S. W. 382), and after it was reversed and remanded he was again tried and convicted, and again appeals to this court.

O. C. Reid and Sellers & Sellers, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

MCCULLOCH, J. 1. During a former trial of appellant for the offense, and after the jury had been impaneled and sworn and the testimony introduced, appellant and the prosecuting witness, Fannie Bruton, procured a license, and were duly married in open court, and the court thereupon suspended the trial, discharged the jury, and continued the case. In the last trial in which the judgment of conviction was rendered from which he now appeals he interposed a plea of former acquittal, and introduced in the support of the plea the record of the former suspended trial.

Section 2044, Kirby's Dig., is as follows:

"If any man against whom a prosecution has begun either before a justice of the peace or by indictment by a grand jury for the crime of seduction, shall marry the female alleged to have been seduced, such prosecution shall not then be terminated, but shall be suspended: provided, that if at any time thereafter the accused shall willfully and without such cause as now constitute a legal cause for divorce, desert and abandon such female, then, at such time, such prosecution shall be continued and proceed as though no marriage had taken place between such female and the accused." Learned counsel for appellant contend that the above-quoted statute is unconstitutional in that the suspension provided for serves to deprive the defendant under indictment of a speedy trial; and that, even if the statute is held to be valid, so as to suspend a prosecution at all, it does not apply after jeopardy has attached. They say that to apply it after jeopardy has attached would be to put the defendant in jeopardy twice for the same offense, which is forbidden by the Constitution. It is argued that, if the statute is valid, the marriage of the defendant and the female alleged to have been seduced would ipso facto deprive the court of jurisdiction to proceed further, even though the marriage was without reference to the prosecution, and the defendant was demanding a speedy trial notwithstanding the marriage. We are not confronted with such a state of facts here. The statute can be held to be void in so far as it denies an accused person a speedy trial where he demands it, notwithstanding the marriage, and yet be held valid and enforceable in a case where no demand for trial is made. In *Stewart v. State*, 13 Ark. 720, this court quoted with approval the following language of the Supreme Court of Mississippi in the case of *Nixon v. State*, 2 Smedes & M. 507, 41 Am. Dec. 601: "By a speedy trial is there intended a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays manufactured by the ministers of justice." And this court in the same case said: "We think the spirit of the law is that, for a prisoner to be entitled to his discharge for want of prosecution, he must have placed himself on record in the attitude of demanding a trial, or at least of resisting postponement." The statute in question, providing for a suspension of the prosecution upon the intermarriage of the parties, was designed for the benefit alike of the person accused of the offense and of society; and, as a protection to society against an insincere show of repentance on the part of the accused, it further provides that if he shall thereafter willfully desert the female whom he has, by the marriage, rescued from the disgrace brought upon her by his criminal act, the prosecution may be renewed. He is not bound to marry the female, nor to invoke the benefit of the stat-

ute, if he does so before the termination of the prosecution; but, if he does so, he cannot thereafter complain because of a suspension of the prosecution on that account, when he has never demanded a speedier conclusion of it. Nor can it be said that the suspension of the trial before verdict, on account of the marriage, and subsequent trial anew after the desertion, is putting the accused twice in jeopardy of his liberty. If the trial be suspended by the act of the accused himself, or for his benefit, or at his own request, no jeopardy has attached by reason of that trial. Mr. Bishop, in speaking of this constitutional guaranty, says: "This guaranty of immunity from a second prosecution is, in its nature, a restraint on the courts, not on the party. It would be absurd to promise a man protection from his own act, but reasonable to make the like promise as to the act of another." 1 Bishop, Crim. Law, § 1043. In *Atkins v. State*, 16 Ark. 568, Chief Justice English, speaking for the court, said: "Lord Coke seems to have been of the opinion that a jury charged in a capital case could not be discharged without giving a verdict, even though with the consent of the prisoner and the Attorney General. 1 Inst. 227b; 3 Inst. 110. But the doctrine was fully discussed in the Case of the Kinlocks, Foster, 22, and the law settled to be that, where the jury is discharged by the consent and for the benefit of the prisoner, he cannot avail himself of such discharge as ground to be released from further prosecution." This court held in *Whitmore v. State*, 43 Ark. 271, that jeopardy attached from the time that the jury was impaneled and sworn, and that the discharge of a juror without the consent of the accused, except for death or illness of a juror or other overruling necessity, operates as an acquittal; but the court said that, "while there is no right of challenge for cause after the jury is sworn, the court might, upon the demand of the prisoner, have stopped the trial, and called another jury, without its having the legal effect of an acquittal;" citing *Stewart v. State*, 15 Ohio St. 155. And the court further said that, "if the jury is discharged without an obvious necessity, and without the defendant's consent, express or implied, he cannot be again placed upon trial for the same offense." The effect of the statute is to provide grounds for suspension of the trial at any time before verdict, and there is no jeopardy unless the suspension be ordered without the consent of the accused, either express or implied. The special plea of former acquittal was properly overruled.

2. In the hearing of appellant's plea of former acquittal the state was permitted, over his objection, to prove by oral testimony that he had in the former trial consented to the suspension of the trial and

discharge of the jury. This is assigned as error. The record of the former trial, which was introduced by appellant in support of his plea, recites that he and the prosecuting witness procured a marriage license, and were married in open court, the presiding judge performing the marriage ceremony, and "whereupon the jury in this case was by the court discharged, and this cause continued until next term." The record does not show that appellant objected to the suspension of the trial, and, the same being for his benefit, his consent will be implied. Hence the record, standing alone, was insufficient to sustain the appellant's plea of former jeopardy, and it was unnecessary for the state to prove by parol an express consent. The testimony was therefore immaterial, and not prejudicial, as it did not tend to impeach or contradict the record.

3. It is contended by counsel that the court erred in its instruction as to the necessity for corroboration of the testimony of the female seduced, and in refusing to give the instruction on that subject asked by appellant. The court instructed the jury on this point as follows: "You are instructed that you cannot convict the defendant upon the uncorroborated testimony of the prosecuting witness, and the corroboration must be upon every material fact testified to by her necessary to constitute the offense charged; and if you find that her testimony is uncorroborated upon any material fact necessary to constitute the offense you will acquit the defendant." We find no valid objection to this instruction. It is equivalent to an instruction that there must be corroboration as to the promise of marriage, its falsity, and that the defendant obtained carnal intercourse with the female by virtue of such false promise.

Other rulings of the court are assigned as error, all of which we have considered, but are not deemed of sufficient importance to discuss in this opinion. None of them are sufficient to warrant a reversal of the case.

The instructions of the court upon the whole correctly and fully declared the law applicable to the case. The evidence was sufficient to sustain the charge made against the defendant in the indictment. It shows that he falsely promised to marry the prosecuting witness, Fannie Bruton, and by virtue of that promise seduced her. She bore a child as the result of the illicit intercourse, and afterwards, during his trial for the offense, he married her, but soon afterwards commenced a course of conduct towards her which necessarily rendered the relations between them intolerable to her, and caused her to consent to a separation.

We find no error in the proceedings, and the judgment is affirmed.

HILL, C. J., absent, and not participating.

TAYLOR v. GODBOLD.

(Supreme Court of Arkansas. July 29, 1905.)

1. BROKERS — GOOD FAITH — INTEREST CON-
TRARY TO PRINCIPAL'S.

A broker who sells for his principal at a higher price than he discloses cannot recover commissions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 48.]

2. STATUTE OF FRAUDS—SALES.

A sale of cotton seed for a price in excess of \$30, without any delivery of any part of the goods sold, without the giving of anything in earnest, and without any note or memorandum, was void under the statute of frauds (Kirby's Dig. § 3656).

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by A. Godbold against C. M. Taylor. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Godbold was a cotton seed broker; Taylor a planter, owning a plantation at South Bend, on the Arkansas river. They had a transaction over the purchase of Taylor's cotton seed, and Godbold's version of it was given in this letter:

"Little Rock, Ark. Feb. 4, 1903. Dr. C. M. Taylor, City—Dear Sir: I was very much surprised when I received your letter of the 31st ult., saying that you had sold your cotton seed. On or about January 10 I met you at the Capital Hotel, and asked you when you got ready to sell your cotton seed to let me know; and you replied you were ready then, provided you got your price. I asked you what you would take for them, and you said you would take \$14 f. o. b. bank of river. Just at that time Mr. M. D. L. Cook came into the hotel, and you asked me to excuse you, that you wanted to speak to Mr. Cook. In the meantime I telephoned to Mr. C. C. Johnson, manager of the Southern Cotton Oil Mill Company, and asked him what he would give me for 250 tons of cotton seed, more or less, on the river below Pine Bluff. He replied that he would give me \$15 and my commission, which is 50 cents per ton. I waited at the hotel until you and Mr. Cook got through with your conversation, and I then told you that I would take your seed, and you said that you would have the seed out of about 500 bales when you got through ginning; that is why I said you would have about 250 tons, less planting seed; that is the remark you made at the time, and thinking you intended to sell me the seed, I went so far as to see Captain Brashear of the Dardanelle, and told him you wanted him to send a boat down to South Bend to get your household furniture, etc. You made the remark that you would just as soon the seed would come to Little Rock as not, as you wanted the boat to go down the river. Now, Doctor, I will certainly expect my commission out of the sale of these seed, \$1.50 per ton on 500 bales, less planting seed for the place. Am sorry we had this misunder-

standing. I have even borrowed \$50 from Mr. C. C. Johnson thinking it a bona fide sale, and had already sold the seed to this mill. Please let me hear from you in the matter, and oblige, yours truly, A. Godbold."

Taylor refused to consummate the alleged sale, and Godbold sued him for commissions, and testified to the transaction in substance as stated in the foregoing letter, and on cross-examination the following testimony was given by him: "I did not tell Dr. Taylor that I had sold the seed to the Southern Cotton Oil Company for \$15 per ton. I expected to get the seed from Dr. Taylor at \$14 per ton, and to make the profit at \$15 per ton. Q. If you were selling the seed for Dr. Taylor as a broker, do you not think you should have told him that you were selling them at a dollar more? A. If Dr. Taylor had put the seed in my hands. I simply asked him what he would take. Q. Then you did not understand that the seed was in your hands as a broker? A. No, sir. Q. Then you understood that Dr. Taylor was selling the seed to you? A. For the mill, yes. I claim that fifty cents per ton is my commission, but if a man says he will take \$14 and a man offers me \$15, I take it. Q. If you were the broker, was it not your duty to sell the seed for the highest price? A. Yes, sir. Q. Then, if you were acting as his broker and agent, would you not expect him to have the profit? A. Yes, sir. Q. Then you were not acting as Dr. Taylor's agent in this matter? A. No, sir. Q. And you did not claim to be his agent in the matter? A. No, sir." Redirect examination: "Q. You were simply acting as a go-between. A. Yes, sir. Q. You were not employed by Dr. Taylor exclusively, were you? A. No, sir. Q. Now, how did you hold yourself out to the world—as the agent of one party, or how was it? A. I suppose I am the agent of both parties in a way. I locate the seed, and sell it to the mills. I should think Dr. Taylor knew me well enough to know that I was not the consumer of 250 tons of cotton seed."

The court sent the case to the jury under instructions which would have been proper if Godbold was a broker in good faith to his principal. Godbold recovered commissions at the rate of 50 cents per ton, and Taylor appealed. Both parties have died, and the cause is revived in the name of their respective administrators.

Ratliffe & Fletcher, for appellant. Blackwood & Williams and J. G. Dunaway, for appellee.

HILL, C. J. (after stating the facts). Godbold, under his own testimony, cannot recover as a broker. Mr. Mechem thus states the reason: "Like other agents in whom trust and confidence are reposed, the broker owes to his principal the utmost good faith and loyalty to his interests. * * * It is his duty, therefore, to fully and freely disclose to his principal at all times the fact of

any interest of his own or of another client which may be antagonistic to the interests of his principal, and he will not be permitted to take advantage of the situation to make gain for himself by forestalling or undermining his principal." *Mechem on Agency*, § 952. It is unquestionably good law as well as good morals that the unfaithful broker who seeks a profit from the transaction other than the commission for his brokerage cannot recover of his principal for any commissions. *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; *Shaeffer v. Blair*, 149 U. S. 248, 13 L. Ed. 856, 37 L. Ed. 721; *Mechem on Agency*, §§ 952, 972, and numerous authorities cited. This necessarily reverses the case, and there is another matter which calls for its dismissal. Either the sale, as claimed by Godbold, was through him as broker or to him individually. If the former, he cannot recover on account of his failure to disclose to his principal that he had sold to his (the principal's) advantage at \$1 per ton and commissions above what the principal asked; and, if the latter, he cannot recover because he is precluded by the statute of frauds. *Kirby's Dig.* § 3856. It is true that the statute of frauds is not pleaded in this action. There is no room for it, as the action is for broker's commissions. But, if the action is sought to be maintained on the other theory, the facts as stated by Godbold show the contract to be void.

The judgment is reversed, and cause dismissed.

BATTLE, J., absent.

HOT SPRINGS ST. RY. CO. v. BODEMAN.
(Supreme Court of Arkansas. July 8, 1905.)

WITNESS—IMPEACHMENT—COLLATERAL MATTERS.

Where, in an action against a street railway company for injuries to a passenger while alighting by reason of the starting of the car, the issue was whether the injuries were caused by defendant's negligence or plaintiff's contributory negligence, defendant cannot contradict plaintiff's testimony that he had not been in the habit of jumping on passing cars to steal rides.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1224.]

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by Charles E. Bodeman, by his next friend, E. M. Bodeman, against the Hot Springs Street Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. W. Reetor, for appellant. Wood & Henderson, for appellee.

MCULLOCH, J. Appellee, a boy nine years of age, by his next friend brought this suit against appellant to recover damages for personal injuries received in alighting from appellant's street car. The testimony introduced on the part of the appellee tended to establish the fact that he and his brother were passengers on the street car, and gave a signal to the motorman to stop the car at a regular stopping place; that the car was brought to a stop, but appellee was delayed in getting off by other passengers ahead, and before he could alight the motorman started the car; that as soon as the car started he told the motorman that he wanted to get off, and the motorman told him that he would have to jump off, which he did, and was thrown down and hurt. The testimony introduced by appellant tended to show that appellee alighted from the car when it stopped, but undertook to jump on the rear end of the car as it passed, to steal a ride, and that while so doing he was thrown down and hurt. The motorman testified that he did not tell the boy to jump, that he had no recollection of seeing either of the boys on the car during that trip, and did not know of the accident until he had reached the end of his run and returned. The jury accepted the version offered by appellee, and returned a verdict in his favor.

Appellee and his brother were asked by appellant's counsel whether or not they were in the habit of jumping on passing cars to steal rides, to which they both answered in the negative, and appellant then offered testimony to contradict them, showing that they were in the habit of jumping on cars, and that the brother had done so on the day of the accident, and was driven from a car by the manager. The court refused to permit the introduction of this testimony, and error is assigned in that particular. This testimony was properly excluded, as the issue involved in the trial was as to whether the injury was caused by negligence of appellant's servants or was the result of the plaintiff's own negligence. The testimony was sharply in conflict on this question, and the habit of appellee in jumping on cars upon other occasions had no legitimate bearing on this issue. Appellee and his brother could not, as witnesses, be contradicted on immaterial collateral matters.

No error is found in the instructions of the court. The evidence is sufficient to sustain the verdict, and the judgment is affirmed.

HILL, C. J., absent, and not participating.

ST. LOUIS, I. M. & S. RY. CO. v. SHAVER.
(Supreme Court of Arkansas. July 29, 1905.)

1. RAILROADS—KILLING OF STOCK—NEGLECT—QUESTIONS FOR JURY.

In an action against a railroad for the negligent killing of horses, whether the engineer had time to sound the stock alarm after discovering the horses on the track, and whether, if the stock alarm had been given, the horses would probably have cleared the track, and whether the presumption of negligence raised against defendant under the statute had been overcome by proof, *held*, in view of the evidence, which was conflicting, questions for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1637.]

2. APPEAL—REVIEW OF FACTS—CONCLUSIVENESS OF VERDICT.

A verdict of the jury sustained by the evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3928.]

Appeal from Circuit Court, Greene County; Allen Hughes, Judge.

Action by A. S. Shaver against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee recovered judgment against appellant for the alleged negligent killing of two horses. The only question here is, was the evidence sufficient to sustain the verdict and the charge of negligence? The plaintiff testified that he saw tracks of horses where "they came on the track above the trestle, and they ran toward the trestle, and the train ran after them and caught them." He saw the tracks north of the trestle, 40 or 50 yards. To the best of his knowledge they were the tracks of his horses. "It seemed like the horses were killed close to the edge of the trestle." One was lying on the north side and the other on the south side of the trestle. The engineer testified that "as he came on the trestle there was a heavy fog lying over the creek, and he saw the horses in front of the engine." He did not see the horses come on the track. "It looked like they came right up the dump. They were not on the track there." He was "about twelve or fifteen feet from them." When he saw them he put on the emergency brakes. He did not have time to blow the whistle. He was keeping a lookout all the time, and his hand was on the brake valve when he saw them. The engine was within twelve feet of them before he saw them. He guessed the fog prevented him from seeing them before. They "seemed to be going straight across the track." "Question. They got on the track and undertook to cross? Answer. I don't know. They were not on the track, and all I could see was their neck." No earthly person could have prevented striking the horses. The fireman testified he was keeping a lookout. He saw a horse coming from the engineer's side. He did not see anything on the track before the horse was struck. He says, on the side he was on, he

could not have seen anything on the track closer than 30 or 40 feet to the engine. The horse was knocked off on his side.

B. S. Johnson, for appellant. W. W. Bandy, for appellee.

WOOD, J. (after stating the facts). The evidence was sufficient to sustain the verdict. The jury were warranted in finding that the horses ran on the track 40 or 50 yards before they were knocked off and killed. The horses, it appears from the testimony of plaintiff, ran 120 or 150 feet. The engineer says he was looking out, but saw the horses first 12 or 15 feet in front of the engine, and only saw their necks, as they seemed to be "going straight across the track." If the horses ran upon the track 120 or 150 feet, as the evidence of plaintiff would indicate, then from the time the engineer first saw them 12 or 15 feet ahead they must have run on the track, if plaintiff's evidence be true, about 108 or 140 feet. But the testimony of the engineer tended to show that the horses did not run down the track, but "came" right "up the dump," and "went straight across." This is in direct conflict with what the testimony of plaintiff tended to show. The fireman was not asked about the fog, but his evidence tended to show that on account of the "boiler head of the engine" he could not see anything "closer than thirty or forty feet to the engine." But for this obstruction it is not shown how far the fireman might have seen. There were such conflicts in the testimony as to make the proper deductions to be drawn from it a matter for the jury. *Ry. v. Chambliss*, 54 Ark. 214, 15 S. W. 460. It was for them, under the proof, to say whether the presumption of negligence under the statute had been overcome by the proof. The engineer testified that he did not have time to sound the whistle. But it was for the jury to say whether he had time to sound the stock alarm after discovering the stock, and whether, if the stock alarm had been given, the horses would likely have cleared the track. The jury found that there was negligence, and we will not disturb their verdict, as there is evidence to support it. *Ry. v. Chriscoe*, 57 Ark. 192, 21 S. W. 431; *Ry. v. Costello*, 68 Ark. 32, 56 S. W. 270.

Affirmed.

LIDDELL v. JONES.

(Supreme Court of Arkansas. July 22, 1905.)

EXEMPTIONS—LIABILITIES ENFORCEABLE—PURCHASE PRICE—SUCCESSION OF CREDITOR TO RIGHTS OF SELLER.

A buyer of personalty gave a note for the price, secured by a mortgage covering such and other goods. A creditor of the seller sued the latter and garnished the buyer. The creditor obtained a judgment against the buyer for the debt which he owed the seller. *Held*, that the creditor, being possessed of the rights of the seller, could levy on the goods bought by the

buyer; Const. 1874, art. 9, § 1, and Kirby's Dig. § 4966, providing that exemptions cannot be claimed in property in the hands of a buyer against a debt for the price.

Appeal from Circuit Court, Clay County, Eastern District; Allen Hughes, Judge.

Action by W. G. Jones against Robt. Liddell. From a judgment for plaintiff, defendant appeals. Reversed.

Hawthorne & Hawthorne, for appellant. J. H. Hill and F. G. Taylor, for appellee.

HILL, C. J. The appellee, Jones, purchased two horses and harness of one Strong for \$180, and to secure payment of the purchase money executed a mortgage to Strong on the horses and harness and also one log wagon. Strong was indebted to Hancock, who sued him, and caused attachment to issue, and ran a garnishment on Jones. The result of this proceeding was the sustaining of the attachment and a judgment against Jones in favor of Hancock for the debt of \$180 which he owed Strong for the horses. Hancock caused execution to issue, and the horses, harness, and wagon were levied on. Jones filed a schedule of his personal property, and claimed this property as exempt. The circuit court held it exempt, and the sheriff, representing the rights of Hancock, the judgment plaintiff, prosecuted this appeal.

There are two lines of decisions on the effect of a garnishment; one holding that it amounts to a compulsory assignment of the debt, and carries with it the liens securing the debt; the other holding that it does not operate as an assignment, but is an impounding of the debt for the garnisher's benefit. The cases on this subject are collected in a note under section 192, Rood on Garnishment. This court, in *Smith v. Butler*, 72 Ark. 350, 80 S. W. 580, held that the garnishment, when carried into judgment, operated to transfer to the garnisher all the rights of the judgment defendant, and give him the rights and remedies possessed by him, including a lien to secure the indebtedness. Therefore it follows that Hancock became the owner of the debt of Jones and the mortgage securing it, and became possessed of the same rights which Strong, the mortgagee, possessed. When Hancock levied on the property in question he waived the mortgage which he then owned by operation of law. No one else could levy on the property, because mortgaged chattels are not subject to execution. *Jennings v. McIlroy*, 42 Ark. 239, 48 Am. Rep. 61. The mortgagee, however, can waive his mortgage rights, and levying an execution upon the property is inconsistent with the mortgage, and a waiver of it. *Cox v. Harris*, 64 Ark. 213, 41 S. W. 426, 62 Am. St. Rep. 187. It follows that the levy was proper, and the property subject to the execution.

The next question is whether Jones could claim the property as exempt. It is provid-

ed by article 9, § 1, Const. 1874, and section 4966, Kirby's Dig., that exemptions cannot be claimed in property in the hands of the vendee against the debt for its purchase. It is contended that Hancock, as an involuntary assignee of Strong, is not clothed with Strong's rights in this regard; but these cases settle that question against the appellant: *Oreanor v. Oreanor*, 86 Ark. 91; *Morris v. Ham*, 47 Ark. 293, 1 S. W. 519; *Smith v. Butler*, 72 Ark. 350, 80 S. W. 580. The log wagon was properly held to be exempt, as there was no debt for the purchase money due against it, and no mortgage was sought to be enforced against it in this action. In fact, a position inconsistent with the mortgage, so far as Hancock's rights were concerned, was taken. The court erred in holding the horses and harness exempt from seizure under the execution, as it was levied to enforce a debt for purchase money while the property was in the hands of the purchaser.

Reversed and remanded, with directions to enter judgment in conformity herewith.

MARTIN v. STATE.

(Supreme Court of Arkansas. July 8, 1905.)
LARCENY—EVIDENCE—SUFFICIENCY—STATEMENT.

Evidence held sufficient to support a conviction for larceny.

Appeal from Circuit Court, Lee County; Hance N. Hutton, Judge.

"Not to be officially reported."

Albert Martin was convicted of larceny, and appeals. Affirmed.

W. A. Compton, for appellant.

WOOD, J. The appellant was convicted on a good indictment of the crime of grand larceny. The only question presented on this appeal was whether or not the evidence was sufficient to support the verdict. The appellant was found in possession of a coat and vest worth, according to the proof, \$10.35. The proof tended to show that the coat and vest had been sent by express, C. O. D., to one Whittaker, at Forrest City. It remained at the express office for some time before it was stolen. Appellant was told that he was suspected of having stolen the express package containing the coat and vest, and if he wanted to keep out of trouble he had better produce it. Appellant acknowledged that he had a coat and vest of the description named, but explained that he had bought it from a little black negro at Forrest City, and he said that he had worn it openly since he purchased it. Other witnesses were introduced, tending to corroborate appellant, but there were some contradictions and inconsistencies in their testimony, and upon the whole the jury was not satisfied with appellant's explanation of how he came into possession of the property alleged to have been recently stolen; and, while the evidence of appellant's guilt is not

very satisfactory to us, we think it was sufficient to support the verdict of the jury, and the judgment is therefore affirmed.

HUNTON v. MARSHALL.

(Supreme Court of Arkansas. July 22, 1905.)

REAL ESTATE BROKERS—RIGHT TO COMMISSIONS—PROCURING CAUSE OF SALE.

On the listing of property with a real estate agent he showed it to a prospective purchaser, who said that he would not buy for a short time. The agent informed the owner, who agreed to sell it for the price at which the agent had offered it if the purchaser would pay the agent's commission. The agent communicated the price to the purchaser, stating what his commission would be, and the purchaser promised to decide the matter in a few days. While these negotiations were pending, the owner sold the property to the prospective purchaser for a sum which exceeded the original offer by about the amount of the agent's commission, which, as between the seller and buyer, was deducted from the price. *Held*, that the agent was the procuring cause of the sale, and entitled to commission.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 74.]

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Styles T. Rowe, Judge.

Action by J. E. Marshall against Mrs. E. H. M. Hunton to recover the amount of commission alleged to have been earned by the plaintiff as a real estate agent under employment by the defendant for the sale of certain real estate in the city of Ft. Smith, owned by her. The plaintiff recovered judgment for the amount sued for, and defendant appeals. Affirmed.

Mechem & Mechem, for appellant. Winchester & Martin, for appellee.

MCCULLOCH, J. (after stating the facts). No exceptions were saved below on the introduction of testimony, and none to the rulings of the court in giving or refusing instructions. The only question presented by counsel here is whether or not the plaintiff was the procuring cause of the sale, so as to entitle him to commission. It is not disputed that plaintiff was a real estate agent, that defendant listed her property with him for sale at the stipulated price of \$2,250, and that he at once opened up the first negotiations with one Crawford, who finally became the purchaser. Appellee testified that as soon as appellant placed the property in his hands he offered it to Crawford, and showed it to him, and that Crawford was pleased with it, but said he would not buy for a short while; that the next day he informed appellant of these facts, and she then told him that she had decided to put the price up to \$2,400, but finally agreed that it might sell to Crawford for \$2,250, net to her, Crawford to pay the commission; that he communicated this price to Crawford, with a statement that his commission would be \$115, and Crawford replied that he was still

not quite ready to purchase a house, but would decide about it in a few days. Some days later, while the negotiations were still pending between appellee and Crawford, appellant sold the property to Crawford for \$2,400, less the commission, and refused to pay appellee a commission.

We think it is quite clear that appellee was the procuring cause of the sale under his employment for that purpose, and is entitled to the commission, though the sale was made and consummated by the owner. *Scott v. Patterson*, 53 Ark. 49, 13 S. W. 419.

Affirmed.

MILLER v. GRADY.

(Supreme Court of Arkansas. July 8, 1905.)

1. EXECUTION—SALE—RIGHTS OF PURCHASER—RETURN—OMISSIONS OF OFFICER.

The purchaser at execution sale by a constable is not precluded from setting up his rights acquired at the sale by any failure of the constable to make proper return of the execution.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 793.]

2. SAME—LEVY—PRIORITIES.

Where a constable had levied on property under an execution issued by a justice, he secured a prior lien as against the sheriff subsequently levying under an execution issued from the circuit court.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, §§ 226-239.]

Appeal from Circuit Court, Sevier County; James S. Steele, Judge.

Action by G. M. Miller against one R. M. Grady. From a judgment in favor of defendant, plaintiff appeals. Reversed.

This is an action in replevin, brought by appellant against appellee. Appellee claimed the property by virtue of a levy made by him as sheriff under an execution issued by the circuit clerk of Sevier county on June 16, 1902. Appellant claimed the property in controversy by purchase at an execution sale made by a constable of Sevier county on July 2, 1902, under an execution issued by a justice of the peace for said county on June 16, 1902, and levied upon the property in suit before the appellee, as sheriff, levied upon same. It appears that certain laborers filed before one J. L. Flanigan, a justice of the peace of Sevier county, their claim against the Star Antimony Company, for work and labor performed by them for said company amounting to \$74. They prayed and were granted a writ of attachment, which was issued, and executed by the constable on the 3d day of June, 1902, by taking possession of the property in controversy, and duly serving the writs on the Star Antimony Company, and summoning it to appear and answer the plaintiffs' claims. On the 16th day of June, 1902, the return day of the summons, judgment by default was rendered in favor of the plaintiffs for the amounts claimed, but the record does not show what disposition was made of the at-

tachments. The record shows, however, that on the 16th day of June, 1902, execution was issued by the justice, made returnable on the 2d day of July, 1902, and delivered to the constable. The justice docket shows the above. It also contains this entry: "Return of execution satisfied." "On the 2d of July, 1902, the constable returned the execution satisfied in full. Jno. L. Flanigan, J. P." A copy of the execution is set forth in the record, and it does not show any return indorsed upon it. Flanigan, who rendered the judgment and issued the executions, testified that the constable to whom he delivered the executions advertised the property for sale on the 2d of July, 1902, and did sell the same to the appellant for a cash consideration of \$400, the appellant being the highest bidder at the sale. He further testified that he thought it was several days after the executions were placed in the hands of the constable that the appellee, sheriff, came out to the mines and levied his execution on the property. The appellant introduced in evidence a bill of sale from the constable to appellant for the property in controversy, showing a consideration of \$400, in hand paid. Appellant also introduced one Paul Knod, Sr., who testified without objection "that defendant [appellee], Sheriff Grady, did not come out to the mine and levy his execution upon the property involved in this suit for several days after the constable, John E. Dorsey, had levied on said property and advertised it for sale." The appellee showed by the clerk of Sevier county that he issued an execution in favor of Smith, Allen & Co. against the Star Antimony Company on the 16th day of June, 1902, and on the same day delivered it to R. M. Grady, the sheriff. Appellee testified that he, as sheriff of Sevier county, levied the execution on the property involved in this suit as the property of the Star Antimony Company. He did not remember what day he levied the execution, but thought it was soon after it was delivered to him. He returned the execution to the clerk. The clerk further testified that the execution which he issued had been lost.

S. A. Downs, for appellant. Lake & Wingo, for appellee.

WOOD, J. (after stating the facts). No question was raised in the court below as to the manner in which the levy was proved, nor as to the proof of the satisfaction of the execution directed and delivered to the constable, Dorsey, from whom appellant claims. Appellee virtually concedes that appellant would not be precluded from setting up his rights as a purchaser at the execution sale by the constable by any failure of the constable to make proper return of the execution, showing what had been done under it. It clearly appears that the constable levied on the property in controversy prior to the levy that was made by the appellee, and under the decision of this court in *Derrick v.*

Cole, 60 Ark. 397, 30 S. W. 760, secured the prior lien; and it is also reasonably clear from the evidence that appellant purchased at the sale made by the constable under this levy. Appellant's claim to the property in controversy is therefore prior and superior to the claim of appellee.

The judgment is therefore reversed, and the cause is remanded for new trial.

LONG v. McDANIEL.

(Supreme Court of Arkansas. July 8, 1905.)

1. STATUTE OF FRAUDS—DEBT OF ANOTHER—PROMISE WITHIN STATUTE—CONSIDERATION.

Where a plumber and the lessee of premises used as a barber shop agreed on a price for the placing of certain plumbing in the shop, but the plumber did not order the materials or commence work until the owner of the building had agreed with him to pay if the lessee did not, the owner's promise was not within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 16-18.]

2. NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

A new trial will not be awarded for newly discovered evidence which is merely cumulative.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 218-220.]

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Action by A. P. McDaniel against E. A. Long. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. A. Long was the owner of a building in Forrest City, Ark., known as the "Imperial Hotel." One of the lower rooms of the building was rented by Long to D. F. Keath to be used as a barber shop. E. P. McDaniel, a plumber, fitted up this room with bath tubs, a range, boiler, and heater, drain pipes, etc. He afterwards brought his action against Long, the owner of the building, to recover \$186.40, the value of his work and labor, and for material and merchandise furnished in making such improvements. The defendant denied that the plaintiff had done any work or labor or furnished any materials or merchandise at his instance or request. He further denied that he had any control over the barber shop at the time the improvement was made, or that he has any interest in the bath tub, boiler, and heater, etc., for which suit is brought. On the trial the plaintiff testified, in substance, that Keath wanted the bath tubs and other improvements put in his barber shop; that he agreed with Keath upon the price, but that before he ordered the material or did the work he went to see the defendant, Long, and asked him what he thought about it. Long replied, "You go ahead and put the stuff in, and if Mr. Keath don't pay for it I will, but don't say anything about my agreement, for I don't want him to know about that; but I want the fixtures to stay in the house." He further testified that but for

this agreement on the part of Long he would not have ordered the material unless Keath had "put up the money for it." In other parts of his testimony he spoke of Long as being "security" for the debt, but said that he ordered the goods on the promise of Long to pay for them. The plaintiff was corroborated by testimony of the traveling salesman through whom the material was purchased by McDaniel. He said: "I was showing plumbing goods to Mr. Keath in the presence of Dr. Long and S. P. McDaniel, and, after explaining same to both Mr. Keath and Dr. Long, I named the price of these goods. Dr. Long turned to McDaniel, and said, 'Mack, you had better order the goods.'" On the other hand, the testimony of the defendant tends strongly to show that the material was purchased and the work done by McDaniel for Keath, and that Long took no part in the transaction, and made no promise in reference thereto. After being instructed by the court, the jury returned a verdict in favor of the plaintiff for \$96.45, and defendant appealed.

S. H. Mann, for appellant. John Gatling, for appellee.

RIDDICK, J. (after stating the facts). The question presented by this appeal is whether the promise of the defendant upon which the plaintiff seeks to recover comes within the statute of frauds, and is invalid, because not in writing. Counsel for defendant contends that, conceding the testimony of plaintiff to be true, as the jury has found it, the substance of the whole transaction was an agreement by the defendant Long to pay the debt of the barber, Keath, and that such an agreement is within the statute, and must be in writing, in order to bind the defendant. But, while the price of the work and the material had been agreed on between McDaniel and Keath, McDaniel did not order the material or commence the work until Long promised to pay for it if Keath did not. The bath tubs, fixtures, and other improvements were to be put in a building owned by Long, and the jury were justified in finding that it was beneficial to him to have such improvement made, and that, in order to induce McDaniel to order the material and do the work, he made the promise. If the testimony of McDaniel was true, he was induced to order the material and do the work by virtue of this promise of Long that he would see that plaintiff was paid. It was then a debt of Long as well as of Keath, and the promise of Long to pay was founded on a consideration directly beneficial to him, and the statute does not apply. "When," says the Court of Appeals of New York, "the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of

payment, irrespective of the liability of the principal debtor." *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 320.

No objections are urged against the instructions, and, while the case is a close one on the facts, we think the evidence sufficient to support the judgment.

The newly discovered evidence for which the defendant also asked a new trial was cumulative, and on the whole case we are of the opinion that the judgment should be affirmed.

HENSON v. STATE.

(Supreme Court of Arkansas. July 8, 1905.)

RAPE — INDICTMENT — VARIANCE — CONVICTION OF STATUTORY OFFENSE.

Kirby's Dig. § 2005, defines rape as the carnal knowledge of a female forcibly and against her will. Section 2008 provides for the punishment of any person who carnally knows and abuses a female under the age of 16 years. Section 2413 authorizes a conviction of any offense included in that charged in the indictment. An indictment charged that defendant raped "a female under the age of 16 years * * * forcibly and against her will." The evidence showed carnal knowledge, but failed to show force. *Held*, that a conviction of carnal abuse was sustained by the indictment, and was proper.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 616; vol. 42, Cent. Dig. Rape, §§ 42, 99.]

McCulloch, J., dissenting.

Appeal from Circuit Court, Pulaski County; Robert J. Lea, Judge.

Dave Henson was convicted of carnal abuse of a female, and appeals. Modified.

John D. Shackelford, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

BATTLE, J. Dave Henson was indicted by a grand jury of the Pulaski circuit court for rape committed upon the person of Lula Hohelmer, a female under the age of 16 years, and was convicted of carnal abuse of a female under the age of 16 years, and his punishment was assessed at 5 years' imprisonment in the penitentiary, and he appealed.

The indictment against him is as follows:

"The grand jury of Pulaski county, in the name and by the authority of the state of Arkansas, accuse Dave Henson of the crime of rape, committed as follows, to wit: The said Dave Henson, in the county and state aforesaid, on the 18th day of February, A. D. 1905, in and upon one Lula Hohelmer, a female under the age of sixteen years, forcibly, violently, and feloniously did rape and assault her, the said Lula Hohelmer, then and there violently, forcibly, and against her will, feloniously did ravish and cruelly know, against the peace and dignity of the state of Arkansas. [Signed] Lewis Rhoton, Prosecuting Attorney."

Could appellant be lawfully convicted of carnal abuse of a female under 16 years of age under this indictment?

Section 2005 of Kirby's Digest defines rape as follows: "Rape is the carnal knowledge of a female forcibly and against her will."

And section 2008 provides: "Every person convicted of carnally knowing, or abusing unlawfully, any female person under the age of sixteen years shall be imprisoned in the penitentiary for a period of not less than one year nor more than twenty-one years."

Section 2413 is as follows: "Upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment."

In *Davis v. State*, 45 Ark. 464, this court held: "Under an indictment for murder the accused may be convicted of an assault with intent to kill, provided the indictment contain all the substantive allegations necessary to let in proof of the inferior crime, and the proof show that the offense of which he is convicted and the one charged in the indictment are the same." The court said: "An assault with an intent to kill, though a felony by our law, is not one of the degrees of homicide; but it is an attempt to commit murder, and is virtually included in every murder that is committed with violence. All the elements of murder, except the actual killing, must conspire to constitute the crime."

Carnal knowledge of a female is necessary to constitute rape, and when the female is under 16 years of age carnal abuse is included in that offense.

Mr. Bishop says: "Though a man cannot commit rape of his own wife, except as principal in the second degree, the indictment need not negative a marriage between the defendant and the injured woman. Still, in prudence, it may be well, when fornication and adultery are indictable, to insert this sort of negative. Then, if the proof of force should fail, there may be a conviction for one of the other offenses." 2 Bishop on Criminal Procedure (3d Ed.) 956.

Under a statute which provides: "Whenever any person indicted for a felony, shall, on trial, be acquitted by verdict of part of the offense charged in the indictment, and convicted of the residue thereof, such verdict may be received and recorded by the court, and thereupon the person indicted shall be adjudged guilty of the offense, if any, which shall appear to the court to be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly" (Rev. St. 1836, c. 137, § 11)—the court held in *Commonwealth v. Goodhue*, 2 Metc. (Mass.) 193, that "a defendant indicted for rape alleged to have been committed upon his daughter may be convicted of incest, if the jury find the criminal connection, but that it was not by force and against the will of the daughter." It was alleged in the indictment in that case "that the defendant un-

lawfully had carnal knowledge of the body of his daughter."

In Kentucky they have a statute which reads as follows: "Whoever shall carnally know a female under the age of twelve years, or an idiot shall be confined in the penitentiary not less than ten nor more than twenty years." In *Fenston v. Commonwealth*, 82 Ky. 549, it was held that a defendant charged with committing a rape upon a female under 12 years of age could be convicted of the offense described in the statute quoted. *Young v. Commonwealth*, 96 Ky. 573, 29 S. W. 439.

The carnal knowledge of a female is an essential element of rape. In this case the defendant was charged with carnal knowledge of a female under the age of 16 years, and that was the offense defined in section 2008, before quoted, and is clearly charged in the indictment against the appellant; and, inasmuch as it was not committed forcibly and against the will of the injured female, the appellant was properly found guilty of that offense.

The majority of the judges are of the opinion that the punishment assessed against the appellant is excessive, and should be reduced to two years' imprisonment in the penitentiary, and it is ordered that the judgment herein be modified accordingly.

MCCULLOCH, J., dissents.

DOWELL v. SCHISLER.

(Supreme Court of Arkansas. July 29, 1905.)
APPEAL—INSTRUCTIONS—OBJECTIONS—SUFFICIENCY.

Where an objection to two instructions was made in gross, and the objection to one was waived because omitted from the motion for new trial, the court on appeal cannot consider the other.

Appeal from Circuit Court, Greene County; Allen Hughes, Judge.

Action by S. O. Dowell against H. R. Schisler. From a judgment for defendant, plaintiff appeals. Affirmed.

H. L. Ponder and Johnson & Huddleston, for appellant. J. D. Block and Hawthorne & Hawthorne, for appellee.

MCCULLOCH, J. This is a suit by appellant, Dowell, to recover of appellee, Schisler, commissions on the sale of a sawmill plant and other property. The sale was made direct by Schisler to the Culver Lumber Company, but Dowell asserts that he procured the purchaser, and thereby earned a commission. No objections were made to the giving or refusal of instructions, except to the giving of two upon request of the defendant; but the objection was made in gross to both instructions, and, as the objection to one was waived by omitting the same from the motion for new trial, and no ob-

jection to it is urged here, we cannot consider the other. An objection in gross to several instructions cannot be considered unless all the instructions embodied in such objection are bad. *Wells v. Parker* (Ark.) 88 S. W. 602; *Young v. Stevenson* (Ark.) 86 S. W. 1000, and cases cited.

Nothing remains for us to consider but the sufficiency of the testimony, giving it the strongest force which the jury were warranted in giving it. No useful purpose is to be served by discussing the testimony in detail here. We think it is sufficient to sustain the verdict and the judgment must be affirmed.

BATTLE, J., absent.

REMMELE v. WITHERINGTON.

(Supreme Court of Arkansas. July 22, 1905.)

1. APPEAL—REVIEW OF FACTS—CONCLUSIVENESS OF SUBETTES.

A verdict based on conflicting testimony sufficient to sustain a verdict for either party, and returned upon instructions to which there was no objection, is conclusive on appeal.

2. INSURANCE AGENT—POWERS—ACCEPTANCE OF PREMIUM NOTE.

Where a special insurance solicitor, acting under a general agent, had no authority from the company to accept notes for premiums, but was authorized by the general agent to accept such notes, and turn them in to him, the solicitor, in accepting a premium note made out to himself, and indorsing it over to the general agent, acted as agent for the general agent, and not for the policy holder, and the general agent was responsible for any fraud of the solicitor connected with the execution of the note.

Appeal from Circuit Court, Calhoun County; Charles W. Smith, Judge.

Action by H. L. Remmel against A. L. Witherington. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action brought by appellant, Remmel, against appellee, Witherington, to recover the amount of a negotiable promissory note for the sum of \$414.60, executed by appellee to one Ward, and by the latter assigned before maturity to appellant. Appellant was the general agent for a life insurance company, and Ward was a subagent, or, as he is designated in the proof, a special agent, working under appellant. The note in question was executed to cover the first annual premium for a policy of \$10,000 in said insurance company. Appellee, Witherington, was illiterate, and unable to write his name, but signed the note by mark, and the note and signature were written and witnessed by Ward. Ward also wrote the signature of appellee to the application for insurance. The policy for \$10,000 was issued by the company, and mailed to appellee, who declined to accept it and refused to pay the note for the alleged reason that he intended only to apply for insurance in the sum of

\$2,000, and to execute a note for premium on a policy for that amount, and that Ward had taken advantage of his illiteracy and fraudulently imposed upon him by writing his signature to an application for a \$10,000 policy and a note for premium thereon, instead of for \$2,000, as agreed upon. He pleaded this a defense to the action, and the jury returned a verdict in his favor.

Thornton & Thornton, for appellant. Smead & Powell, for appellee.

McCULLOCH, J. (after stating the facts). The testimony was conflicting on the issue as to the alleged fraud on the part of Ward in writing the application for a policy of \$10,000 and the note for the premium on that amount, instead of \$2,000; but the jury found, upon instructions to which there was no objection, in favor of appellee, and we must treat that issue as settled. The testimony is sufficient to have sustained a verdict either way on that issue.

Appellant asked an instruction, which the court refused, telling the jury that "if the defendant requested the witness Ward to sign his name to note sued on, that he became the agent of defendant in signing the note, and if he did not follow defendant's instructions then the plaintiff, if he took the note before maturity, and for a valuable consideration, is not responsible for the act of the agent." The refusal of the court to give the instruction is now urged as ground for reversal. The proof did not warrant the giving of this instruction. Ward was acting under authority from and control of appellant. It is shown that the company does not accept notes for premiums, but that the taking of notes by a special agent is done for the general agent, and that in so doing he acts for his superior, the general agent. Ward testified on that point as follows: "Q. Does Mr. Remmel take up all those notes taken by special agents? A. Yes, sir; we are not allowed to handle any paper whatever. Q. Then, while this note is taken in your name, it is really for Mr. Remmel? A. Yes, sir; and indorsed right over to him. Q. You did that because you were authorized by him to do so and turn it in to the general agent? A. Yes, sir." This shows that Ward in taking the note was the agent of appellant, who is responsible for his acts in regard thereto. *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458. We do not mean to say that a person may not act as the agent of both parties to a transaction for some purposes, where there is no conflict of interest; but that rule cannot be applied to the facts here, where Ward was the agent of appellant in taking the note.

We find no error, and the judgment is affirmed.

BANK OF BATESVILLE v. MAXEY et al.
(Supreme Court of Arkansas. July 29, 1905.)

1. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—NECESSITY OF PROOF.

A receipt given by attorneys to a debtor is not evidence against the creditor, in the absence of a showing that the attorneys were attorneys for the creditor.

2. SAME—PROOF OF AUTHORITY.

A bank advanced money to a merchant on a note signed also by sureties. The merchant having gone into bankruptcy, an attorney who was retained by the bank generally, but who had no authority to collect claims for it except when they were specially intrusted to him, acting for other creditors, and without any special authority from the bank, afterwards had a meeting with the merchant and some of his sureties on the note, at which it was divulged that a third party was a secret partner with the merchant, and liable for the debts contracted by him. Thereupon the attorney secured evidence against the third party, and induced him to settle for the merchant's debts, including the note to the bank. The attorney then paid over the sum collected on the note to the bank, deducting his commissions for making the collection, and the bank sued the sureties for the difference between the amount received by it and the face of the note. *Held*, that the attorney was not, under the circumstances, acting for the bank, and payment to him was not payment to the bank, and did not affect the liability of the sureties for the balance due on the note.

3. SAME—RATIFICATION.

Nor was the act of the bank in accepting the money from the attorney and failing to return the same a ratification of the attorney's acts in such sense as to make the attorney its agent in the premises.

4. SAME—ESTOPPEL TO DENY AUTHORITY.

Since the act of the bank in receiving the money from the attorney did not mislead or injure the sureties in any way, but was a direct advantage to them, the bank was not estopped, as against the sureties, to deny the authority of the attorney.

5. SAME—RATIFICATION.

In order that the act of a creditor in accepting money collected by an attorney who acted without authority from the creditor in making the collection may amount to an implied ratification of the attorney's acts, such acceptance must be accompanied with a full knowledge of the facts, and must be inconsistent with any other reasonable hypothesis than that of approval of the attorney's acts.

6. PRINCIPAL AND SURETY—COLLECTION FROM PRINCIPAL—EXPENSE—CHARGE AGAINST SURETIES.

A creditor who, at the suggestion of the principal debtor, and without authority from the sureties, filed his claim in bankruptcy proceedings pending against the principal, cannot charge the sureties with the expense of a collection made in that way.

Appeal from Circuit Court, Independence County; Gustave Jones, Special Judge.

Action by the Bank of Batesville against R. L. Maxey and others. From a judgment for defendants, plaintiff appeals. Reversed.

R. L. Maxey, a merchant of Independence county, borrowed \$2,000 from the Bank of Batesville, and executed therefor the following note: "\$2000.00. Batesville, Ark., Dec. 23, 1901. Four months after date, we or either of us promise to pay to the Bank of Batesville, two thousand dollars, at ten per

cent. interest per annum from date until paid for value received. [Signed] R. L. Maxey. W. E. Greenway. W. W. Edmonson. M. D. Maxey. M. G. Farris. John H. Maxey. J. F. Morris. David Dearing. J. B. Northcut. E. T. Fulks." Maxey afterwards, before the note came due, failed in business, and was forced into bankruptcy, his estate being worth about 17 cents on the dollar. But the other parties to the note, who were in fact only sureties of Maxey, owned enough property to make the note good and the bank entirely safe. During the progress of the bankruptcy proceedings, Maxey, in order to protect his own sureties as far as possible, requested the cashier of the bank to file the note in the bankruptcy court so that a pro rata part of the proceeds of the bankrupt's estate might be paid thereon. In compliance with this request, the cashier filed the note with the referee in bankruptcy. After the note was filed, some of the other creditors of Maxey raised an objection, and denied the right of the owner of the note to participate in the proceeds of the estate. Thereupon the cashier of the bank requested Mr. Casey of the firm of Yancey, Reeder & Casey, to look after the matter, in order that the note might not be stricken from the file of claims, and might be allowed its pro rata share of the proceeds. The attorneys did this, and the note was allowed as a claim against the estate. A dividend of 17 per cent. was afterwards paid on the claims against the bankrupt, which amounted to \$348 on this note. Of this sum 10 per cent. was retained by the attorneys of Yancey, Reeder & Casey, or paid by the bank to them, and the remainder, \$313.20, was credited on the note. This dividend apparently exhausted all the assets of the estate, and left the balance of the note unpaid. The firm of Yancey, Reeder & Casey held for collection a number of claims against the bankrupt, Maxey. Among these clients who had claims against Maxey was the White River Grocer Company, of which D. D. Adams was manager. After the bankrupt's estate had apparently been exhausted by the payment of the dividend mentioned, Adams received a telephone message from Maxey, asking him to come up to Penter's Bluff, and requesting him to bring Mr. Yancey and also Mr. Wolf, the cashier of the bank, with him. Maxey stated to Adams that if he would come up to the Bluff he would have parties there who could tell him how he could collect his debt. The cashier declined to attend the meeting, but Adams went up with his attorney, Mr. Yancey. They met there Maxey, the bankrupt, and also Fulks and Greenway, two of Maxey's sureties on the note to the bank. These parties gave information that tended to show that one Davis, a man of some financial means, was interested in the mercantile business that Maxey had carried on to such an extent as to make him responsible for the debts that Maxey had contracted in the line

of that business. They also gave information which tended to show that Davis had withheld goods of the value of \$181 belonging to Maxey's estate, and had failed to turn them over to the trustees of that estate in bankruptcy. These parties—Adams, representing his company; Fulk and Greenway, two of the other sureties on the note of Maxey to the bank; Maxey himself; and Yancey, the attorney—discussed ways and means by which Davis could be made to pay these debts. Yancey advised them that if they could prove the facts stated by them Davis could be made to pay the debts. Yancey and the firm of attorneys of which he was a member proceeded then along the line of the facts divulged at the meeting to obtain evidence to show that Davis was liable for such debts. From time to time they had consultations with Maxey and the other parties who had been present at the first meeting. They obtained the affidavits of Maxey and others, showing that Davis was an owner of an interest in the business that Maxey had carried on, and that he was liable for the debts, and also that he had withheld goods of the bankrupt's estate. They then had Davis summoned before the referee in bankruptcy to answer these charges. When Davis arrived in Batesville on the day set for the hearing of matters, Yancey took him to his office, and showed him the affidavits of witnesses tending to show that he was liable for the debts and had withheld assets of the bankrupt. A few hours afterwards Davis and his attorney met Yancey, and the attorney of Davis told him that under the facts which could be proved he was liable, and advised him to settle the debt without further litigation. Davis did so, but, as he had been summoned to answer before the referee for a certain amount of goods of the bankrupt which he had withheld, it was agreed that he should pay the value of those goods, \$181, to the referee, and that it should be distributed through him to the creditors. The balance he paid to Yancey, Reeder & Casey, who executed to him a receipt for the same in the following words:

"\$4,740.67. Batesville, Ark. July 11, 1902.

"Received from W. E. Davis the sum of forty seven hundred and forty dollars and sixty seven cents in full settlement of the following accounts, and notes proved in bankruptcy in the estate of R. L. Maxey:

Talley Lumber Company,	\$68.00	\$	64.35.
Charles Mosby,			37.50.
J. B. Younger,			541.33.
Seaton & Lindsay,			32.68.
L. R. Simpson,			59.15.
White River Grocery Company,			234.31.
Bank of Batesville,			1,758.92."

—Then follow the names of other creditors represented by the attorneys, and amounts due each, the receipt being signed, "Yancey, Reeder & Casey, Attorneys for the Above-Mentioned Creditors." The attorneys then deducted 25 per cent. of the amount collected for their services in collecting, and paid the balance to the creditors. To the bank they

paid \$1,309.19, which sum it credited on the note. Afterwards the bank demanded of the sureties that they pay the balance due on the note, and upon their refusal to do so brought this action at law to recover the same.

The defendants appeared, and for answer admitted the execution of the note. But they alleged that the money was borrowed by Maxey to use in the mercantile business carried on in his name at Penter's Bluff, and was so used, but that the business, though carried on in the name of Maxey, in fact belonged to W. E. Davis, and that Davis was in law liable for the debts of that business, including the debt of the bank for borrowed money; that Davis, after Maxey had become bankrupt, agreed with Yancey, Reeder & Casey that he would pay in full all claims of the creditors of R. L. Maxey represented by them; that said attorneys represented the plaintiff, bank of Batesville, and received from Davis payment of the balance due on said note in full; and that the bank, with full knowledge that such attorneys had acted for them in such settlement, received a part of said money, and thus ratified and confirmed their action. They further set up that under the circumstances the bank was estopped to deny that Yancey, Reeder & Casey were its attorneys in that settlement. Wherefore they allege that the bank was bound by the settlement, and could not recover under this action.

On the trial the court, at the instance of the defendant, gave, among others, the following instructions: "(1) The jury are instructed as a matter of law that if a person adopts a transaction done in his behalf by an agent who had no authority to do it, he must adopt it in its entirety. He cannot adopt it in part and repudiate it in part. And if the jury believes from the evidence that Yancey, Reeder & Casey accepted for the plaintiff the money paid by Davis, and that the plaintiff bank either adopted or retained a part of the money so received by said attorneys for it, after it had notice that said attorneys had acted for them in the premises, then this was a ratification of the acts of Yancey, Reeder & Casey in accepting said money, and plaintiff is bound thereby." The jury returned a verdict in favor of the defendant, and the bank appealed.

S. D. Campbell, J. C. Yancey, and Saml. M. Casey, for appellant. W. S. Wright, for appellees.

RIDDICK, J. (after stating the facts) This is an action by a bank against a number of defendants, who were sureties on a promissory note of one Maxey, executed by him to the bank for a loan of \$2,000. The defendants for answer set up that the note had been paid by one W. E. Davis, who was not a party to the note. It is admitted that Davis did pay to Yancey, Reeder & Casey, a firm of attorneys, an amount equal to the

balance due on this note, and that they gave him a receipt for the same in full as attorneys for the bank. It is also admitted that after deducting a fee for making the collection these attorneys paid the balance of the money to the bank, which credited the net amount paid to it on the note. The net amount paid the bank left a balance unpaid on the note equal to the amount retained by the attorneys for a fee, and the decision in this case is narrowed down to the question as to whether the attorneys represented the bank in making the collection from Davis, so that a payment to them was in law a payment to the bank, or whether, if they did not represent the bank, the circumstances are such as to estop the bank from denying that they did present it, or to show that the bank ratified the act of the attorneys in making the settlement with Davis. The evidence showed that Maxey, the principal in the note, had failed in business, and was a bankrupt at the time the note became due. Though Maxey had failed, the sureties on the note were solvent, and made it perfectly good. But the bank, at the request of Maxey, filed the note with the referee in bankruptcy, in order that it might receive its proportion of the bankrupt's estate, and to protect the sureties to that extent. A small amount was paid on the note from the assets of the estate, but a considerable sum remained due for which the sureties were liable to the bank. While matters stood in this condition, Yancey and one Adams, manager of the White River Grocery Company, a creditor of Maxey, had a meeting at Penter's Bluff with Maxey and two of the sureties on the note of Maxey to the bank. Maxey divulged facts which tended to show that one Davis was a secret partner in the mercantile business carried on by Maxey, and that Davis was liable for debts contracted in the course of that business. Now, the bank was not interested in this matter, for the sureties on its note made it perfectly good; and while the evidence shows that the firm of Yancey, Reeder & Casey, of which Yancey was a member, were retained by the bank generally, they had no authority to undertake collection of claims held by the bank unless they were specially requested to do so. They had never been requested to collect this note, further than to have it allowed by the referee as a claim against the estate of Maxey in bankruptcy. At the time of this meeting at Penter's Bluff the note was in the possession of the bank, and Yancey had no authority from the bank to collect it, or to take steps for that purpose. He did not go to Penter's Bluff at the instance or request of the bank, or to represent it, but as the attorney for Adams, the manager of the White River Grocery Company, and as the attorney for the other creditors of Maxey whose claims he held for collection. These debts were unpaid, and Yancey was interested in getting information that would show that

Davis, a man of means, was liable for the payment of them. The two sureties present were interested, for, if the amount due the bank from Maxey could be collected from Davis, they would be relieved from liability to pay it. The outcome of this meeting was an understanding that Yancey should go ahead and get up the evidence against Davis, and, if possible, compel him to pay these debts, including the debt due the bank. It is unnecessary for us to consider whether this understanding, taken in connection with the subsequent action of Yancey in collecting these debts from Davis, and to that extent relieving the sureties of this debt, was sufficient to make them liable for a fee for Yancey's services. We may assume that these two sureties had no thought of such a thing; that, knowing that Yancey represented a number of creditors who had claims against Maxey, and supposing that he also represented the claims of the bank, they expected that he would look to these parties, and not to them, for his fee. Whether this was so or not is immaterial here, for, as before stated, the evidence shows that the bank had not authorized Yancey to collect this debt as their attorney or agent. He did subsequently collect money to the amount of these debts from Davis, and gave him a receipt in full against them, signing thereto the name of his firm as attorneys for all the creditors represented, including the bank. The receipt that these attorneys gave tends to show that they were assuming to act for the bank in making the collection, but they say that the receipt was given in that form to identify the different debts for which the money was paid, and to satisfy Davis. However that may be, the receipt is no evidence against the bank until it be shown that the attorneys were attorneys for the bank; and this, as before stated, is not shown. A payment by Davis to these attorneys was not, under the facts of this case, a payment to the bank, and did not affect the debt due the bank.

It is contended with much force that the bank ratified the act of the attorneys by afterwards receiving the money. We are not able to agree with this contention. No express ratification is claimed, and, to amount to an implied ratification, the act of the bank must be done with full knowledge of the facts, and must be inconsistent with any other reasonable hypothesis than that of approval of the acts of the attorneys who assumed to act as its agent. But there is nothing to show that at the time the bank accepted this claim it had notice that these attorneys had assumed the act for it, and had given Davis a receipt in full for this debt. The attorneys certified that they did not act for the bank, but for the sureties; and, as the bank had not authorized them to collect this note, the mere payment by them to the bank of money collected from Davis did not notify the bank that they assumed

to act as its agents and had made a full settlement of the debt with Davis. If the bank was seeking to hold Davis liable for the balance due on the note, it is doubtful if it could retain the money secured by the attorneys from him by executing this receipt in full, and at the same time reject the settlement. But Davis was not a party to this note, and the bank has never asserted that he was liable for it. This is not an action against Davis, but against the parties to this note, with whom no settlement was made, and who have paid nothing on the note. If, after discovering that a receipt in full had been executed by these attorneys to Davis for this debt, the bank had refused to retain the money, and returned it to him, this might have resulted in injury to the sureties, and in the end the bank might have been compelled to shoulder the loss, if any had resulted from the return of the money. Davis was not asking for a return of the money, and a return of it to him might have resulted in injury to the sureties or the bank. The only safe course for the bank to pursue was for the bank to hold the money. Under these circumstances the failure of the bank to return the money is not inconsistent with a denial on its part of the right of these attorneys to collect the money for the bank, or their right to give a receipt in full against the note. As the bank could not return the money without risk of injury to itself or the sureties, its retention thereof was not in law a ratification of the act of the attorneys. *Martin v. Hickman*, 64 Ark. 217, 41 S. W. 852; *Brown v. Wright*, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467; *Bryant v. Moore*, 28 Me. 84, 45 Am. Dec. 96; *Thacher v. Pray*, 113 Mass. 291, 18 Am. Rep. 480; 1 Clark & Skyles, Agency, p. 327.

It follows from what we have said that instruction No. 1, and other instructions given at the request of the defendants, in which the court told the jury, in substance, that if the bank retained the money paid to it by Yancey, Reeder & Casey after notice that these attorneys have assumed to act for the bank in the settlement made with Davis it would be a ratification of the acts of the attorneys in making the settlement, was, in our opinion, erroneous and misleading. For these instructions, abstractly considered, may be correct in stating that a principal cannot ratify a part of the transaction and reject another part, yet, under the facts here, it was misleading. As the act of the bank in receiving this money from the attorneys who had collected it from Davis did not mislead or injure the defendants in any way, but, on the contrary, was a direct advantage to them to the extent of such payment, we see no grounds of estoppel.

On the whole case we are of the opinion that the facts in evidence make out a clear case in favor of the bank, except as to \$34.80, the amount paid by the bank to the attorneys after \$384 collected through the bank-

ruptcy proceedings. The evidence shows that these attorneys were requested to look after this matter in the bankrupt court by the cashier of the bank. He did it at the suggestion of Maxey to protect the sureties on Maxey's note. The collection of the \$348 in this way resulted in a benefit to the sureties to that extent; but, as they did not authorize this step to be taken for them, they cannot be charged with the expense of the collection. The bank authorized it, and a payment of that amount to the attorneys was a payment to the bank. But, as we have said, the collection from Davis was not authorized by the bank, and it is responsible only for the part of that collection that came to its hands.

For the reasons stated, the case is reversed, and the cause remanded for a new trial.

WHITE RIVER MINING & NAVIGATION CO. et al. v. LANGSTON.

(Supreme Court of Arkansas. July 29, 1905.)

1. WITNESSES—IMPEACHMENT—CONTRADICTION OF TESTIMONY.

In ejectment for a mining claim, where the issue was whether plaintiffs had done the \$100 worth of assessment work required by the mining laws during a certain year, and plaintiffs' agent testified that he had done actual development work on the lands amounting to over \$200, and stated on cross-examination that only a small part of the work in question had been done on another claim, certified copies of affidavits filed by the witness in the United States General Land Office, showing that the work in question had been done entirely on the other claim, were competent to contradict the witness.

2. EJECTMENT — PLEADING — VARIANCE — SOURCE OF TITLE.

Where a complaint in ejectment for a mining claim based plaintiffs' title solely on a location of the claim, and the sole issue raised by the answer was one of forfeiture of the location for failure to perform the assessment work required by law, plaintiffs could not, after the case was before the jury, rely on adverse possession as a source of title.

Appeal from Circuit Court, Marion County; Elbridge G. Mitchell, Judge.

Ejectment by the White River Mining & Navigation Company and another against A. L. Langston. From a judgment for defendant, plaintiffs appeal. Affirmed.

Woods Bros., for appellants. Horton & South, for appellee.

McCULLOCH, J. This is an ejectment suit, brought by the White River Mining & Navigation Company and H. D. Armstrong against A. L. Langston to recover possession of the land embraced within the boundaries of a mining claim, and involves a contest between appellants and appellee as rival claimants under mining claims held by them respectively. The claim of appellants was located on January 1, 1899, and that under which appellee holds on January 1, 1901. Appellee alleged in his answer that appel-

lants failed to do as much as \$100 worth of assessment work during the year 1900, as requiring by the mining laws, thereby forfeiting the claim. A trial was had before a jury upon this issue, and the same resulted in a verdict and judgment for the defendant.

The mining claim under which appellants assert title was located by E. C. Cook and others, who subsequently conveyed to appellants, and the assessment work on the claim is alleged to have been done for them by Cook, as their agent. On the trial they introduced Cook as a witness to prove the amount of assessment work done, and he testified that during the year 1900 he caused to be done for appellants "actual development work on said lands to the amount of \$60 and over \$200 in making a road from said land to Buffalo City on White river." The witness was asked by counsel for appellee, on cross-examination, if he had not, as agent for the owner of another mining claim, known as the "Small Hope Placer," caused the road work in question to be done as assessment work on that claim, and if he had not procured and filed in the United States General Land Office as final proof to obtain a patent of the Small Hope placer claim the affidavits of two persons, Honeycutt and Gardner, showing that said road work had been done as work on that claim. He answered that only a small part of this work had been applied on the Small Hope placer claim, and thereupon appellee was permitted to read in evidence certified copies of said affidavits of Honeycutt and Gardner filed by the witness in the United States General Land Office, showing the cost of the road work during the year 1900, and that it had been done on the Small Hope placer claim. This ruling of the court is assigned as error. The evidence was competent for the purpose of contradicting the witness. He testified that only a small part of the road work was applied on the Small Hope placer claim, and it was competent to contradict him by showing that he had procured and filed the affidavit as proof that this work was done entirely on the other claim. His act in procuring and presenting the affidavits was in direct contradiction of his testimony in this case to the effect that only a part of it was applied on the Small Hope placer claim and the remainder upon the claim in controversy. The testimony of the other witnesses was conflicting as to which claim should have received credit for the road work. Omitting this credit from the claim in controversy, the amount of assessment work done during the year 1900 fell short of the amount essential to prevent a forfeiture. There was sufficient testimony to warrant the jury in finding that the whole of the road work was done upon the Small Hope placer claim and none upon the claim in controversy. No complaint is made, and no error is assigned, as to instructions of the court, and, the jury having settled the issue

of fact against appellants upon legally sufficient evidence, there is no reason for disturbing the verdict.

Counsel for appellants urge further that the testimony shows that appellants have held adverse possession of the land for more than the statutory period of limitation, and were thereby fully invested with title. No issue of that kind was tendered by the pleading. The complaint filed by appellants set forth their claim of title under a location of the mining claim on January 1, 1899, and by the answer of the defendant the sole issue joined was as to a forfeiture for failure to perform the requisite amount of assessment work during the year 1900. A different cause of action and source of title could not be introduced into the case after the issue was joined and the case was before the jury.

Judgment affirmed.

BATTLE, J., absent.

TILLAR v. CLAYTON et al.

(Supreme Court of Arkansas. July 29, 1905.)

1. VENDOR AND PURCHASER—VERBAL CONTRACT OF PURCHASE—POSSESSION BY PURCHASER.

Neither a purchaser taking possession of land under a verbal contract of purchase nor his heirs can dispute the title while the purchase money remains unpaid, when sued to foreclose the vendor's lien.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 381, 382.]

2. SAME—FORECLOSURE OF VENDOR'S LIEN—BURDEN OF PROOF.

A purchaser taking possession of land under a verbal contract of purchase has the burden of proving payment of the price in an action to foreclose the vendor's lien.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 792.]

3. ADVERSE POSSESSION—VENDOR AND PURCHASER.

Limitations do not run against a vendor in favor of a purchaser holding under a contract of purchase until there is an open disclaimer of the holding under the contract brought to the notice of the vendor.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 357.]

4. APPEAL—OBJECTIONS NOT RAISED BELOW.

Where, in a suit to foreclose a vendor's lien, defendant failed to plead the omission of the vendor to tender a deed with his complaint, and based his defense on other grounds inconsistent therewith, defendant cannot, on appeal, raise the objection that no deed was tendered.

5. VENDOR AND PURCHASER—DEATH OF PURCHASER WITHOUT PAYING PRICE—SALE TO HIS HEIR.

A vendor verbally sold land. The purchaser took possession, but did not pay any part of the price. On the purchaser's death the vendor sold the same to an heir of the purchaser, who represented that he had purchased the interests of the other heirs. He executed a note to the vendor for the price in an amount less than the price agreed to be paid by the original purchaser, with interest to the date of the purchase by the heir. Held, that the amount of the reduction inured to the benefit of the other heirs of the original purchaser.

6. SAME—FORECLOSURE OF VENDOR'S LIEN—TENDER OF DEED.

The vendor in a suit to foreclose the vendor's lien for the amount of the note executed by the heir, together with interest, is entitled to a decree of foreclosure on his tendering in court a deed conveying the land to the widow and heirs of the purchaser according to their respective rights.

Appeal from Desha Chancery Court; Marcus L. Hawkins, Chancellor.

Suit by J. T. W. Tillar against L. A. Clayton and others. From a decree dismissing the bill, plaintiff appeals. Reversed.

Appellant, J. T. W. Tillar, brought this suit claiming a lien, as vendor, on 80 acres of land in Desha county, and praying for foreclosure of the same. He alleged that he first sold the land by verbal contract to one C. C. Clayton, who died intestate before paying any part of the purchase price, leaving appellees, his widow and heirs, who were all defendants to the suit; that thereafter, on July 8, 1898, appellee L. A. Clayton, one of the children of C. C. Clayton, purchased the land from appellant on credit, giving five notes aggregating the sum of \$945.60, which includes interest to maturity, due and payable on the 1st days of July, 1899, 1900, 1901, 1902, and 1903, respectively, and appellant executed to him a title bond or covenant to convey said land on payment of said notes; that at the time of said purchase said L. A. Clayton represented to appellant that he had obtained all the interest of said widow and heirs in and to said land. He also alleged that nothing had been paid on said notes. L. A. Clayton answered, denying that Tillar was ever the owner or in possession of the land, and averring that Tillar had been unable to make title or to put him in possession of the land, and hence that Tillar had failed to perform the conditions of the title bond. The widow and other heirs answered, denying that plaintiff ever owned the land, and denying that C. C. Clayton had ever made any agreement with plaintiff about the land, or that C. C. Clayton had ever gone into possession under any agreement with him, or that either of them had sold their interest to L. A. Clayton; and they averred that as widow and heirs of C. C. Clayton they claimed the land by seven years' adverse possession. A. C. Stanley testified that he and appellant were formerly in the mercantile business as partners under the firm name of Tillar & Stanley, and that about the year 1881 Tillar bought the land in question from one Pitser Miller; that the land was considered assets of the partnership, and that he (witness) verbally sold the same to C. C. Clayton at the price of \$10 per acre, with the understanding that he (Clayton) should go ahead and clear the land, and that a deed should be made to him when he paid the purchase price; that no deed or other papers were ever executed, no payment made, and that the land remained on the taxbooks in the name of Tillar & Stanley, and the taxes

were paid by them; and that Clayton never claimed title to the property, though, pursuant to his purchase, he had taken possession of the land, and cleared a portion of it. He further testified upon the dissolution of the partnership he quitclaimed his interest in the land to Tillar. Appellant testified to the same facts, substantially, and that Clayton never paid anything on the price, but made promises up to the time of his death to pay same. He also testified that he never heard of C. C. Clayton nor of appellees claiming the land prior to the commencement of this suit, that the friendly relations between himself and C. C. Clayton were very intimate, and that no written contract was executed covering the sale and purchase of the land. All the testimony introduced by appellees was that of appellee J. R. Clayton, a son of C. C. Clayton, who said that his father died in possession of the land, claiming to be the owner thereof by purchase from A. C. Stanley. He said he did not know whether or not his father ever paid for the land. The chancellor found in favor of the defendants, and dismissed the complaint for want of equity.

W. S. McCain, for appellant. X. O. Pindall, for appellees.

McCULLOCH, J. (after stating the facts). The conclusion of the chancellor was erroneous, and finds no support in the record. The evidence is undisputed that C. C. Clayton took possession of the land under his verbal purchase from Tillar & Stanley, and neither he nor his heirs can dispute the title while the purchase money remains unpaid. *Johnson v. Douglass*, 60 Ark. 39, 28 S. W. 515. The burden is upon the appellees to prove payment of the purchase price, and they introduced no proof at all tending to establish payment. On the contrary, the undisputed testimony of both Stanley and Tillar shows that nothing was ever paid on the purchase price.

The statute of limitations does not run against a vendor in favor of a vendee holding under a contract for sale and purchase; nor does it run where the original possession of the holder seeking to plead the statute was in privity with the rightful owner, until there be "an open and explicit disavowal and disclaimer of holding under that title and assertion of title brought home to the other party." *Williams v. Young*, 71 Ark. 164, 71 S. W. 669; *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Ringo v. Woodruff*, 43 Ark. 469; *Coleman v. Hill*, 44 Ark. 452; *Duke v. State*, 56 Ark. 485, 20 S. W. 600. It being shown that the original possession of Clayton was subordinate to the rights of his vendor, the law presumes that it continued in subordination thereto until some hostile act is shown, and that notice thereof was brought home to the vendor. No act of hostility is shown in this case either by C. C. Clayton or his heirs after his

death, and the plea of adverse possession is not sustained by the proof.

Counsel for appellees contend that appellant is not entitled to the relief sought for the additional reason that he failed to tender a deed with his complaint. This would have been a good defense if it had been pleaded, but appellees failed to plead the omission, and based their defense on other grounds inconsistent with that plea. It is too late now for them to object here for the first time that no deed was tendered.

Computing interest upon the purchase price agreed upon in the original sale to C. C. Clayton from the date of that sale, would make that amount to more than the notes executed by L. A. Clayton; but appellant elected to sell to L. A. Clayton for the reduced amount, and that reduction inures to the benefit of the other heirs of C. C. Clayton. Appellant asks for a foreclosure for the amount of the L. A. Clayton notes and interest, and he is entitled to decree therefor, but must execute and tender in court a deed in proper form conveying the land to appellees, as widow and heirs of C. C. Clayton, according to their respective rights as such.

The decree is therefore reversed, and the cause remanded, with directions to enter a decree of foreclosure in favor of appellant in accordance with this opinion.

BATTLE, J., absent.

SHORTER UNIVERSITY v. FRANKLIN BROS.

(Supreme Court of Arkansas. July 22, 1905.)

APPEARANCE—CORPORATIONS.

Where, in a suit on an account against a corporation, the summons ran to an officer thereof, but the corporation took a change of venue, and on trial the evidence was solely on the issue as to whether the corporation or another was debtor, which issue was sent to the jury on instructions given at the instance of the attorney for the corporation, the court properly found that the corporation had appeared.

On petition for rehearing. Denied.

For former opinion, see 88 S. W. 587.

HILL, C. J. On petition for rehearing the appellant has filed an abstract and presented anew the questions raised on the hearing. The case should be affirmed on the merits as well as for the reasons heretofore given. The principal contention is that the court erred in amending the judgment so as to make it against Shorter University, instead of T. H. Jackson, superintendent of Shorter University. The account on which the suit was instituted was against Shorter University, but the summons ran to T. H. Jackson, superintendent of Shorter University. The university took a change of venue from one justice court to another, and on the trial in the circuit court the evidence was solely on the issue whether the university was the debtor, or whether one Cox, super-

intendent of the boarding department, was the debtor. This issue was sent to the jury on instructions given at the instance of the attorney of the university precluding a recovery against it unless the evidence showed the goods were purchased under authority of the board of trustees. The question that the university was not the real defendant was not raised until after verdict. The court properly found on the facts that the university had appeared. There is a conflict in the evidence on the authority of Cox that has gone to the jury under instructions drawn by appellant's counsel, and the verdict has settled it.

The motion is overruled.

BYRD v. STATE.

(Supreme Court of Arkansas. July 8, 1905.)

1. CRIMINAL LAW—EVIDENCE—INSANITY—OPINIONS OF NONE EXPERTS.

In a prosecution for murder, witnesses who have detailed the acts of defendant may properly state whether they considered him insane or not.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1045.]

2. SAME—VOLUNTARY DRUNKENNESS.

Voluntary drunkenness, though producing temporary mental aberration, is no excuse for crime.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 65-67, 70.]

3. SAME—ARGUMENT TO JURY—HARMLESS ERROR.

In a prosecution for murder, a statement by the prosecuting attorney in argument that the case was so cruel and barbarous that it was without a parallel in the history of crime was merely an expression of his opinion on the gravity of the crime as shown by the evidence, and was not cause for reversal.

Appeal from Circuit Court, Ouachita County; Charles W. Smith, Judge.

Tom Byrd was convicted of murder, and appeals. Affirmed.

C. S. Poole and J. S. McKnight, for appellant. Robert L. Rogers, Atty. Gen., for the State.

RIDDICK, J. This is an appeal from the judgment of the Ouachita circuit court convicting the defendant, Tom Byrd, of murder in the second degree for killing one Mr. Burnsides in Calhoun county, the venue having been changed to the former county before trial. The evidence shows that on the 4th day of September, 1904, at the town of Woodbury, the defendant, Tom Byrd, became intoxicated from drinking whisky. While in this condition he met Mr. Burnsides on the street. Burnsides was a man 59 years old, weighed about 115 pounds, and was very weak, even for a man of his age, while the defendant was 28 years old, weighed about 170 pounds, and was a strong man physically. Byrd was cursing at the time he met Burnsides, and one of the witnesses testified that Burnsides requested him "to have respect for the ladies if not for the men." whereupon Byrd caught Burnsides by the

collar, and said to him, "You God damned old son of a bitch, you told a lie on me, and caused me to pay out \$27, and I am going to kill you." Burnsidess asked him not to strike him, but the defendant struck him, and then threw him to the ground, and sat down astride him, and commenced to beat and pound him in the face with his hands and fists, occasionally catching him by the neck or shoulders, and then raising his head from the ground and pounding it back against the ground. Some moments intervened before any one attempted to interfere and stop the furious and brutal attack of the defendant upon the helpless old man. When they did attempt to separate them, Byrd frustrated their attempt by putting his hand in his pocket as if he was about to draw a pistol and threatening to kill any one who should interfere. After he had pounded Burnsidess into unconsciousness, some one went to him, told him he had killed the old man, and induced him to desist and leave. Byrd went home. When he reached home he met his wife, and told her that he had killed Burnsidess. Soon after that he left his home, and was a fugitive from justice for several days, when he surrendered to the officers. His victim was also taken home, where he lingered from Sunday afternoon, the time of the assault, until early on the morning of the following Wednesday, and then died without having regained consciousness. The only excuse for the assault that caused his death, presented at the trial, was that the defendant was insane. But the testimony on this point shows, in our opinion, nothing more than that the defendant occasionally drank intoxicating liquors to excess, and that when he did so he was more than ordinarily violent and unreasonable, even for a drunken man. When in this condition he sometimes threatened to kill himself, and acted in a fitful, unreasonable way, as drunken men often do. Several of the witnesses who detailed these acts of the defendant were then asked by his counsel whether they considered him insane or not, but the presiding judge refused to permit these questions to be answered. In this ruling we think the judge erred, for such testimony has often been held to be competent by this court. *Green v. State*, 64 Ark. 523, 43 S. W. 973; *Shaeffer v. State*, 61 Ark. 241, 32 S. W. 679. But if we assume that these witnesses would have answered that the defendant was insane, this testimony would have shown nothing more than that the use of intoxicating liquors had a very bad effect on the defendant, and that they produced in him a species of temporary insanity; but this kind of insanity is ordinarily no excuse for crime. "The law," says Mr. Bishop, "deems it wrong for a man to cloud his mind or excite it to evil by the use of intoxicating drinks; and one who does this, then, moved by the liquor, while too drunk to know what he is about, performs what is ordinarily criminal, subjects himself

to punishment; for the wrongful intent to drink coalesces with the wrongful act done while drunk, and makes the offense complete." He goes on to say that there is an exception to this rule where a necessary ingredient in the offense charged is a specific intent, and the intoxication is to such an extent as to render the defendant incapable of forming such an intent. In other words, when it is necessary to show a specific intent to make out the crime, anything that rebuts the fact that there was such an intent is competent evidence to be considered. If the man was too drunk to form such an intent, that may be considered. *Bishop's New Crim. Law*, §§ 398-400. In this case the fact that the defendant was intoxicated at the time he assaulted Burnsidess may have raised in the minds of the jury a reasonable doubt as to whether there was a specific intent to kill, and led them to reduce the crime to murder in the second degree. But no specific intent to kill is necessary to constitute the crime of murder in the second degree under our statute, and the law is that "the intention to drink may fully supply the plea of malice aforethought"; so that, if one voluntarily becomes too drunk to know what he is about, and then without provocation assaults and beats another to death, he commits murder, the same as if he was sober. 1 *Bishop, New Crim. Law*, § 401. Now, in this case defendant was not at the time of the killing laboring under delirium tremens, or other forms of more or less fixed insanity caused by continued intoxication. The insanity that he was laboring under, if any, was the immediate result of the intoxicating liquor he drank on the day of the homicide. In other words, he was simply drunk from the effects of liquor which he had voluntarily taken. While in that condition he met this infirm old man, towards whom it seems that he entertained some grudge on account of a suspicion that the old man had instigated a prosecution against him, and with passions inflamed and excited by the drink he had taken he assaulted him, and beat him into unconsciousness, without any provocation whatever. It is no doubt true that if he had been sober this deed would not have been done. While his passions were inflamed by drink, his subsequent conduct shows that defendant was not so drunk that he did not know what he was doing. The fact that a few minutes afterward he told his wife what he had done, and made preparations to escape, and did elude the officers for several days, shows that he at once appreciated the gravity of the crime he had committed. But if we concede that he was insane, it was not delirium tremens, but only his ordinary condition when drunk. He voluntarily drank the whiskey and became drunk. The books are full of cases holding that such insanity, which is only another word for drunkenness, is no excuse for crime. *Casat v. State*, 40 Ark.

511; *The People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162.

The statement of the prosecuting attorney in his closing argument that "the case is so cruel and barbarous that it is without a parallel in the history of crime" was only the expression of his opinion as to the gravity of the crime as shown by the evidence, and the ruling of the court thereon furnishes no ground for reversal.

On the whole case we find no reason to overturn the judgment of the circuit court, and it is therefore affirmed.

CARTER v. REEVES.

(Supreme Court of Arkansas. July 29, 1905.)
HUSBAND AND WIFE — GIFTS — EVIDENCE — SUFFICIENCY.

In an action by the mother of a deceased wife against the surviving husband to recover personal property owned by the wife at the time of the marriage, evidence held to support a finding that the husband had acquired the property by gift from the wife.

Appeal from Circuit Court, Yell County, in Chancery; William L. Morse, Judge.

Action by Fanny Carter against I. R. Reeves. From a judgment for defendant, plaintiff appeals. Affirmed.

Sellers & Sellers, for appellant. H. M. Jacoway, Jr., and Walter D. Jacoway, for appellee.

HILL, C. J. The widow of one Jeff Howell was possessed of about 600 acres of land, about 150 in cultivation, and considerable personal property of the kind usually appertaining to farms, and all of it was derived through her marriage to Howell. She married the appellee, Reeves, and he took up his abode in the mansion of the former husband, and entered into the possession and enjoyment of the estate as if he was the founder thereof, instead of the successor in the affections of the widow of the former owner. He exercised control and management of the property, real and personal; and both he and his wife were industrious, and applied themselves to the farm work assiduously, but the testimony leaves doubt whether to the betterment of the farms or not. Reeves says he had about \$550 in money and personal property, which went into the common fund in farming this property. There is a serious conflict, partially growing out of statements of Reeves when he had a "wee bit too much," as to the extent of his personal property which he claims was devoted in the husbanding and care of the property. These matters are not important, for the case hinges on whether the wife gave him the personal property. Mrs. Reeves died about nine years after her marriage to Reeves, and this is a suit by her mother to recover the personalty, and Reeves claims it under a gift from his wife. The chancellor

found that it was given to him, and the mother has appealed.

Reeves testifies positively to the gift, and he is corroborated by five of the intimate friends and neighbors of the family, who testified to repeated statements made by Mrs. Reeves that she had given this property to her husband, and wanted him to have it when she died. He is also corroborated by the character of his control and possession of it, which seems to have impressed some of the witnesses as if he was the owner. On the other hand, his testimony on other points is contradicted. Members of Mrs. Reeves' family knew nothing of the gift of the property to Reeves, although they were intimate with her, and to some she appeared to be manager of the farm, and some testify that Reeves consulted her and obtained her consent to exercise acts of ownership. The contention is made that the decree is not sustained by the evidence, and that the evidence of the gift from wife to husband—considering the fiduciary relation—is not sustained by that quantum of proof required in such transactions. The preponderance is decidedly with Reeves, and, considering the persuasive effect accorded the chancellor's finding, the court cannot say the gift is not sufficiently proved in this case. The husband and wife were evidently congenial and affectionate. She had no children by Reeves, and was bereft of the one child of Howell's; and as the property of each, much or little, was used for the common benefit, it is natural that she should dispose of it as Reeves and her neighbors say she did.

The judgment is affirmed.

BATTLE, J., absent.

CARPENTER v. SMITH.

(Supreme Court of Arkansas. July 29, 1905.)

1. EVIDENCE—SECONDARY EVIDENCE—FOUNDATION—LOSS OF ORIGINAL.

An exemplification of the records of the state land commissioner is not the best evidence of a patent, and is not competent to prove the patent, in the absence of a showing of the loss thereof or an accounting for its absence.

[Ed. Note.—For cases in point, see vol. 20. Cent. Dig. Evidence, § 1303.]

2. QUIETING TITLE—PROOF OF TITLE—NECESSITY.

Plaintiff in a suit to quiet title must show title in himself.

[Ed. Note.—For cases in point, see vol. 41. Cent. Dig. Quietening Title, § 36.]

3. ADVERSE POSSESSION—POSSESSION UNDER TAX DEED—SUFFICIENCY.

Possession under a tax deed for more than two years, evidenced by fencing the land with a substantial wire fence, repairing the fence in case of a break, and using the land for hoe cutting part of the time, and leasing the same at another time, such possession being open, continuous, and adverse, gives title to the possessor, under Kirby's Dig. § 5061, declaring that no action for the recovery of lands shall be maintained against the purchaser at a tax sale unless the plaintiff or his predecessor was seized

or possessed of the lands within two years next before the commencement of suit.

4. TAX SALE—ACQUISITION OF VOID TITLE—ESTOPPEL TO ASSESS.

The fact that taxes assessed against land had been paid by defendant or his grantors, and that the land should not have been sold for nonpayment of taxes, and that a tax title based on such a sale was void, did not preclude defendant or his grantors from acquiring the tax title for the purpose of strengthening their title, nor estop defendant from setting up adverse possession under the tax title.

5. ADVERSE POSSESSION—POSSESSION UNDER TAX TITLE—INVALIDITY OF TAX DEED.

Under Kirby's Dig. § 5061, providing that no action for the recovery of lands shall be brought against a purchaser at a tax sale unless plaintiff or his predecessor was seized of the lands within two years next before the commencement of such action, the fact that a tax title is void does not affect a title acquired by adverse possession thereunder.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 462.]

Appeal from Arkansas Chancery Court; John M. Elliott, Chancellor.

Suit by W. M. Carpenter against John Y. Smith. From a decree for defendant, plaintiff appeals. Affirmed.

H. A. & J. R. Parker, for appellant. John L. Ingram, John F. Park, and Geo. C. Lewis, for appellee.

WOOD, J. Appellant filed suit against appellee to quiet his title to the land in controversy and cancel certain deeds alleged to be clouds thereon. The answer denies appellant's title, and sets up title in appellee from two separate and distinct courses, pleads the two-years statute of limitations, and laches and stale claim. Appellant alleged title from the state of Arkansas by swamp-land patent to Robert B. Southard, one of his alleged grantors. To prove the patent he offered in evidence an exemplification from the records of the State Land Commissioner. No showing was made as to loss of the original patent, and exception was taken to the introduction of this testimony. From what we have said to-day in the companion case of *Carpenter v. Dressler*,¹ submitted with this, following the decisions of this court in *Steward v. Scott*, 57 Ark. 158, 20 S. W. 1088, and *Driver v. Evans*, 47 Ark. 300, 1 S. W. 518, the appellant did not show title in himself through mere conveyances from the government. After exceptions were filed to the exemplification of the records of the State Land Commissioner to prove patent in Southard, the first grantor, appellant made no offer to produce the patent or to show its loss, and did not ask for a postponement to be allowed to do so, evidently relying upon such exemplification as competent and proper evidence. This was not the primary, and therefore best, evidence, and could not, according to the rule announced, be substituted for it without first showing the loss, or accounting for the ab-

sence of the best evidence. Appellant therefore falls to prove title in himself. This was necessary before he could remove cloud. He must first show that he has title to quiet. *St. Louis Refrigerator and Wooden Gutter Co. v. Thornton* (Ark.) 86 S. W. 852. This alone is sufficient to affirm the decree of the lower court. But we are also of the opinion that the plea of the two-years statute under tax deed is sustained by the proof. It appears that on the 13th day of June, 1892, the land in controversy was sold at tax sale for the nonpayment of the taxes of 1891, and the clerk of the county court of Arkansas county issued on this sale (the land not having been redeemed) to appellee's grantor, William Chesshire, a clerk's tax deed therefor dated July 11, 1894. On the 25th day of March, 1895, Chesshire conveyed the land in question to appellee, John Y. Smith. In March, 1897, appellee inclosed the entire tract of land with a substantial fence, and has held open and adverse possession thereof ever since. This suit was filed in the clerk's office of Arkansas county June 7, 1900, and therefore appellee had held open, continuous, adverse possession of said land for more than three years prior thereto.

It is unnecessary to set out in detail the testimony upon which our conclusion is reached. The testimony shows that as early as February, 1897, appellee's grantor, Chesshire, fenced from three to six acres for the purpose of penning cattle, and that late in the spring of that year the entire tract was fenced with a three-wire fence. The wire was galvanized, and the posts set 16 feet apart. The fence was shown to be the best in that neighborhood. The land was fenced for the purpose of preserving it for hog cutting, and it was used for that purpose some in 1898 and 1899, and in 1900 was leased. It was shown that the fence was broken down in places, but this was repaired, and there is no evidence to warrant the conclusion that possession of the land was ever abandoned after it was taken in the manner indicated. On the contrary, the preponderance of the evidence clearly shows that the land was looked after and the possession maintained, open, continuous, and adverse till the bringing of this suit. Two years of such possession under his tax deed was sufficient to give appellee title. Section 5061, Kirby's Dig.; *Helena v. Horner*, 58 Ark. 157, 23 S. W. 966; *Cooper v. Lee*, 59 Ark. 460, 27 S. W. 970; *Woolfork v. Buckner*, 60 Ark. 163, 29 S. W. 372; *Finley v. Hogan*, 60 Ark. 499, 30 S. W. 1045; *Woolfork v. Buckner*, 67 Ark. 411, 55 S. W. 168; *Orill v. Hudson*, 71 Ark. 890, 74 S. W. 299; *Boynnton v. Ashabraner* (Ark.) 88 S. W. 568.

But it is contended that an agreement between appellant and appellee at the trial that the taxes had been paid since 1875 by Hopkins, the original grantor, and his grantees, precludes the appellee from setting up the two-years statute. The agreement was

¹ Rehearing pending.

tantamount to saying that the taxes had been paid by appellee or his grantors, and hence there should have been no forfeiture and sale of the land for taxes, and that the tax title was therefore void. But we fail to see how this could have prevented appellee or his grantors from acquiring such title for the purpose of quieting and strengthening such title as they had or claimed. Nor do we understand how appellee could be estopped from setting up adverse possession, if he chose, under this void tax title. If he or his grantors paid the taxes, then surely it was no fault of his that the lands were improperly forfeited and sold for taxes, and he had the perfect right to acquire such outstanding void title, and to claim all the benefits that could be obtained under it. The agreement negatives the idea that appellee's grantors permitted the land to forfeit in order to acquire title thereby. That the tax title was void makes no difference. See *Gates v. Kelsey*, 57 Ark. 523, 22 S. W. 162, and *Finley v. Hogan*, supra.

It is unnecessary to consider the question of laches.

The decree is affirmed.

BATTLE, J., absent.

WHITE RIVER R. CO. v. HAMILTON et al.
(Supreme Court of Arkansas. July 22, 1905.)

1. CONTRACTS — BREACH — ACTION — RECOVERY FOR TORT.

Where a contract between a railroad company and the owner of land over which a right of way was secured required the railroad company to reconstruct fences when the same were on the right of way, and the landowner sued for destruction of his crop by cattle, owing to the railroad company failing to rebuild fences pursuant to the contract, an instruction that authorized a recovery if the crop was destroyed by the breaking or throwing down of the fences, whereby stock broke in, was erroneous, as authorizing a recovery for a tort when a contract was counted upon.

2. SAME—INSTRUCTIONS.

An instruction that, if the jury found that the railroad agreed to fence its right of way, and in consequence of its failure the crop was left exposed to the inroads of stock, etc., then the company was liable, was erroneous, the contract requiring merely a reconstruction of fences when the same were on the right of way.

Appeal from Circuit Court, Baxter County; John W. Meeks, Judge.

Action by T. Hamilton and others against the White River Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

The substance of the evidence showed that those who cleared a right of way for defendant's railroad over lands owned by one of the plaintiffs and occupied by the other as tenant took down fences, and left them in such condition that stock entered the lands, destroying the crops. The first instruction referred to in the opinion was as follows: "This is an action by the plaintiffs for damages alleged to have been caused by the destruction of the crop raised by the plaintiff

Thos. Hamilton on the lands of the plaintiff G. E. Cunningham. If you find from the evidence that the plaintiff Thos. Hamilton planted and cultivated a crop on the lands of the plaintiff G. E. Cunningham, described in plaintiffs' complaint, during the farming season of the year 1902, and that the defendants, or either of them, caused the destruction of said crop, or any part thereof, by breaking or throwing down the plaintiffs' fences, whereby the stock broke in and destroyed the same, you will find for the plaintiffs, and assess their damages at the value of the crop so destroyed, or such part thereof as was destroyed." The second instruction was as follows: "If you find from the evidence that the defendant White River Railway Company, in accepting a deed to its right of way through the lands of the plaintiff G. E. Cunningham, agreed to fence its said right of way, and that in consequence of its failure to so fence its said right of way the crop of the plaintiff was left exposed to the inroads of stock, and thereby damaged or destroyed, you will find for the plaintiffs against both of the defendants, and assess the damages of the plaintiffs at the value of that part of said crop so destroyed." And the third was as follows: "If you find from the evidence that the plaintiffs erected a fence around the crop mentioned in plaintiffs' complaint sufficient to protect the same, and that the defendants, or either of them, or their employees, broke or threw down said fence, whereby the plaintiffs' crop was destroyed by stock, then you will find for the plaintiffs the value of the crop so destroyed, or so much thereof as you find was destroyed in consequence of such throwing down or breaking of said fence."

B. S. Johnson, for appellant. Thomas Hamilton et al., pro se.

HILL, C. J. This was an action by a landowner and his tenant for the destruction of the tenant's crop by cattle destroying it, owing to the railroad company failing to rebuild, replace, and maintain fences pursuant to a contract between the railroad and the landowner. The contract sued upon was in a deed to a right of way over the land in which this is part: "Said railway company to reconstruct fences when same are on right of way, and to provide necessary road crossings and stock guards." There is no allegation and no evidence to impeach the above-quoted clause as being the correct written evidence of the contract.

The court gave three instructions, which will be set out by the reporter, together with the substance of the evidence. The first instruction is erroneous in that it authorizes a recovery for a tort when the complaint counted alone upon a contract. The second instruction is erroneous in that it states that, if the jury find from the evidence that in accepting the deed the railroad company

agreed to fence its right of way, and, in consequence of its failure, the crop was left exposed to the inroads of stock, etc., the company was liable; whereas the deed alone evidenced the contract, and it was to reconstruct fences when the same are on the right of way, which may be a very different matter from fencing the right of way. The third instruction is, like the first, based on the theory that the action is one of tort for breaking or throwing down the fences. The railroad company had a right, in the construction of the road, to break and throw down the fences, and agreed to reconstruct them when they were on the right of way. The plaintiffs' action must be, under the complaint and evidence, confined to a breach of the stipulation in the deed, and it cannot be made broader than the parties made it; nor can a tort arise from the railroad breaking the fences, for this contract clearly contemplates such to be done, and required their reconstruction. For a failure to comply with its terms the company is liable, and to its terms the action must be limited.

Reversed, and remanded for new trial.

CHURCH v. GALLIC.

(Supreme Court of Arkansas. July 29, 1905.)

1. APPEAL—RIGHT TO PROSECUTE—RES ADJUDICATA.

Under Kirby's Dig. § 1227, providing that, where an appellant's right of further prosecuting an appeal has ceased, the appellee may move for a dismissal, an appellee may plead on appeal that since the appeal was taken a judgment has settled against appellant the rights asserted on the appeal.

2. JUDGMENT—RES ADJUDICATA—EFFECT ON PENDING ACTION.

A judgment in ejectment sustaining the validity of a deed from defendant to plaintiff was a bar to the further prosecution of a suit in equity between the parties to cancel the deed, though the equity suit was first commenced.

Appeal from Garland Chancery Court; Leland Leatherman, Chancellor.

Suit by Mahala Church against Gus Gallic. From a decree dismissing the complaint, plaintiff appeals. Appeal dismissed.

Appellant, Mahala Church, was the owner of the property in controversy, certain real estate in the city of Hot Springs, and on December 22, 1890, by warranty deed duly executed, acknowledged, and recorded, reciting a cash consideration of \$500, she conveyed this property to Lula Oborg. Appellee, Gallic, claims the property under the last will of Lula Oborg. Mrs. Church remained in possession of the property, and commenced this suit in equity against Gallic in 1901 to cancel said deed, alleging that she intended to execute only a testamentary paper, and, being illiterate, did not know that she executed a deed; and that she had continuously remained in actual, open, and exclusive adverse possession of the property, claiming it as the owner, since the execution of the

deed, a period of more than seven years. Gallic appeared by his solicitor, and answered this complaint, asserting title in himself under said deed and the last will of Lula Oborg, and denying all the allegations of the complaint concerning fraud or mistake in the execution of said deed. He also denied that the plaintiff had held adverse possession of the property, but alleged that she occupied the premises as tenant at will of Lula Oborg. The cause was heard upon the pleadings and depositions, and a final decree rendered dismissing this complaint for want of equity, and the plaintiff appealed to this court.

After the appeal was taken in this case, appellee, Gallic, brought an ejectment suit against Mrs. Church in the circuit court of Garland county for recovery of possession of said premises. A trial of that cause was had, which resulted in a judgment in favor of the plaintiff therein, Gallic, for the possession of the property. An ineffectual effort was made by Mrs. Church to take an appeal to this court from that judgment, which failed by reason of the bill of exceptions not being signed by the presiding judge and filed in due time. She then filed her suit in chancery for relief against this judgment, and on final hearing that complaint was dismissed for want of equity, and on appeal the decree was affirmed. *Church v. Gallic*, 88 S. W. 307. The judgment in the ejectment suit, having become final, is now pleaded by appellee in bar of appellant's right to prosecute this appeal.

James E. Hogue, for appellant. R. G. Davis, for appellee.

McCULLOCH, J. (after stating the facts). The statute regulating appeals to this court and the practice in disposing of same provide that an appellee may, by motion to dismiss or answer, raise the question of the appellant's right to further prosecute an appeal. Kirby's Dig. §§ 1227, 1228. An appellee may plead in this court that since the appeal was taken a court of competent jurisdiction has, by judgment duly rendered, settled against the appellant the rights asserted in the case on appeal. *Pillow v. King*, 55 Ark. 633, 18 S. W. 704. The fact that the suit on appeal having been commenced first in point of time, and in a different court from that in which the subsequent judgment was rendered, does not obviate the bar of such adjudication. The pendency of the first action might have been pleaded in the second suit in bar of the right to maintain the same, but, if not pleaded, or if, after the plea is amended, judgment upon the merits of the controversy in the second suit is allowed to become final, it is a bar to further prosecution of the first suit. "The fact that a judgment was obtained after the commencement of the suit in which it is pleaded does not prevent its being a bar. It is the first judgment for the same cause of action

that constitutes an effective defense, without regard to the order of time in which the suits were commenced. Hence it follows that a prior judgment upon the same cause of action sustains the plea of a former recovery, although the judgment is in an action commenced subsequent to the one in which it is pleaded." 2 Black on Judgments, § 791; Finley v. Hanbest, 30 Pa. 190; David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661. In Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063, this court said: "Under the statutes of this state a defendant, when sued at law, must make all the defenses he has, both legal and equitable. If any of his defenses are exclusively cognizable in equity, he is entitled to have them tried as in equitable proceedings, and for this purpose to a transfer of the cause to the equity docket or chancery court, as the case may be." Horsley v. Hilburn, 44 Ark. 458; Reeve v. Jackson, 46 Ark. 272. A judgment of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the suit. Ward v. Derrick, 57 Ark. 500, 22 S. W. 93. All of the rights and matters asserted in this suit by appellant could have been adjudicated in the ejectment suit, or she could have pleaded the pendency of this suit in bar of appellee's right to maintain that suit. Having failed to do either, she is barred by the final judgment in that case from seeking further to adjudicate the question in this case. Her right to prosecute this appeal has, on that account, ceased, and the same must be dismissed. It is so ordered.

BATTLE, J., absent.

WILLIAMS et al. v. STATE, for Use of SCHOOL DIST.

(Supreme Court of Arkansas. July 8, 1905.)
SCHOOL LANDS—SALE—INADEQUACY OF PRICE—SETTING ASIDE SALE.

The statute providing that the collector shall report all sales of school lands to the county court, which may reject or confirm the sale, and that, if any sale be rejected, the court may direct a reoffering of the land, specifying the minimum price at which it may be sold, gives the court authority to reject a sale on account of inadequacy of price.

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Exceptions to the report of the collector on a sale of school lands, and from a judgment of the circuit court rejecting and refusing to confirm the sale W. E. Williams and others appeal. Affirmed.

S. H. Mann and Rose, Hemingway & Rose, for appellants. Robt. L. Rogers, Atty. Gen., for appellee.

MCCULLOCH, J. This is an appeal from the judgment of the circuit court rejecting

and refusing to confirm a sale of school lands made by the collector. Exceptions to the collector's report of sale were filed in the county court by certain citizens, and that court sustained the exceptions, and rejected the sale. On appeal the circuit court heard the cause upon oral testimony establishing the market value of the lands, and found that it was sold for an inadequate price, and for that reason rejected the sale.

It cannot reasonably be contended that the finding of the court as to the value of the land is not sustained by the evidence, but appellants urge that, the sale having been properly and regularly made on petition of a majority of the adult inhabitants of the township, as provided by statute (this fact being admitted), it was the duty of the county court to confirm it, notwithstanding the inadequacy of the price. They invoke the application of the rule that a judicial sale, which has been regularly and fairly made, will not be set aside for mere inadequacy of price, unless the inadequacy be so great as to shock the judicial sense of justice. But a sale of school land by the collector upon petition of the inhabitants of the township is not a judicial sale, though the statute requires that it must be confirmed by the county court. It is purely a statutory proceeding, and the statute alone must be looked to in ascertaining its terms and effect. The statute provides that the collector, after having advertised, appraised, and sold the land, shall "report all sales to the county court, which may reject or confirm the same," and that, "if any sale be rejected, the county court may direct the collector to again advertise and offer the land, and may specify the minimum price at which the tract or tracts may be sold, not to be less than two-thirds of the appraised value." This court, in a recent opinion, concerning the power and duty of the county court with reference to such sales, said: "The authority to order the sale being in the male inhabitants, the jurisdiction of the county court is confined to protecting the inhabitants against a sacrifice of the land. The inhabitants decide when the land shall be sold. All that remains for the county court to do is to prevent a sacrifice by the sale of the land below its true value." Ex parte Young, 85 S. W. 1133. In the case at bar both the county and circuit courts found from the evidence introduced that the land had been sold for an inadequate price, and it became the duty of the court to prevent the sacrifice by rejecting the sale and ordering a new sale, either with or without fixing a minimum price. We have no doubt, from the language used in the statute, that it was intended to give the court authority to reject the sale on account of inadequacy of price as well as on account of irregularities or unfairness. In no other way could the court completely protect the interest of the public. The power of the court to either "reject or confirm" the sale is not to be

exercised arbitrarily, so as to amount to the prohibition of a sale which the statutes authorize the inhabitants of the township to order. That is what we held in *Ex parte Young*, *supra*. The court should investigate the facts as to the regularity of the advertisement, appraisal, and sale, the fairness of the sale, and adequacy of the price, and then either confirm the sale or reject it and order a new sale. We find that this is precisely what was done by the court below in this case, and, there being sufficient evidence to sustain the finding, the judgment must be affirmed.

HILL, C. J., absent, and not participating.

W. F. MAIN & CO. v. TRACEY & WITHERINGTON.

(Supreme Court of Arkansas. July 22, 1905.)
SALE—COUNTERMANDING ORDER.

A countermand of an order for goods, not having been received till after they were shipped, will not prevent recovery of the price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 45.]

Appeal from Circuit Court, Calhoun County; Charles W. Smith, Judge.

Action by W. F. Main & Co., wholesale jewelry merchants of Iowa City, Iowa, against Tracey & Witherington, retail merchants of Woodbury; Calhoun county, Ark., to recover the price of a bill of jewelry sold by the former to the latter. A verdict was rendered in favor of the defendants, and plaintiffs appealed. Reversed.

Thornton & Thornton, for appellants. O. L. Poole, for appellees.

MCCULLOCH, J. Appellees gave a written order for the bill of jewelry to the traveling salesman of appellants, and same was forwarded to appellants for acceptance and shipment of the goods. Appellees thereafter wrote and mailed a letter to appellants countermanding the order. This case is similar upon the facts to the recent case of *Merchants' Exchange Company v. Sanders*, 84 S. W. 786, except that in the *Sanders* case the proof failed to show satisfactorily that the letter countermanding the order was received before the acceptance of the order and shipment of the goods, while in this case the manager of appellants' business testifies positively that the countermand was not received until after the shipment of the goods. His testimony is uncontradicted on this point. There was no other testimony tending to show when the letter was or could have been received. Neither the precise date when the letter was mailed, nor the length of time which would, in the ordinary course of mail, have been required to carry the letter to appellants' place of business, was proved, nor any other circumstance from which the jury could have found that the

letter was received by appellants before shipment of the goods. This being true, the verdict finds no support from the evidence, as it is shown beyond dispute that appellees gave the order for the goods, and the same were shipped to them in accordance with the terms of the order.

The court erroneously gave an instruction at appellees' request submitting the case to the jury upon a theory not warranted by the pleadings or proof, but the bill of exceptions does not disclose any objection thereto by appellants, and we cannot consider the assignment of error as to that in the motion for new trial.

On account of the insufficiency of the evidence to sustain the verdict, the judgment is reversed, and the cause remanded for a new trial.

McELVANEY v. SMITH.

(Supreme Court of Arkansas. July 29, 1905.)

1. APPEAL—GENERAL OBJECTION TO INSTRUCTION.

A general objection to an instruction submitting the question of notice will not avail on appeal, the attention of the trial court not having been called to the fact that the answer did not deny the allegation of the complaint that notice was given, and defendant having, without objection, introduced evidence that notice was not given.

2. INSTRUCTIONS—PREJUDICIAL ERROR.

Giving an instruction, in an action of unlawful detainer, that plaintiff claimed the land was rented to defendant for the year, but that the contract was conditioned, and that, if that was so, he must show a compliance with the conditions, is prejudicial where plaintiff did not claim he had rented to defendant for the year, but positively denied it, and testified that he only agreed to rent if he did not sell, which he was then trying to do, and which he succeeded in doing.

3. EVICTION OF TENANT—DAMAGES—COST OF REMOVAL.

Where a tenant is unlawfully evicted from a farm in January, and compelled to seek a temporary abode for his family till he can find a suitable farm to rent, it cannot be said, as matter of law, that he cannot recover as damages for the eviction the cost not only of the removal to temporary quarters, but of the removal to permanent quarters.

4. SAME—RENTAL VALUE.

A tenant may not, because of an unlawful eviction, recover on account of rental value, there being no evidence that the rental value exceeded the debt he agreed to pay.

[Ed. Note.—For cases in point, see vol. 82, Cent. Dig. Landlord and Tenant, § 723.]

5. INSTRUCTIONS—SPECIAL EXCEPTION.

The defect of an instruction in appearing to assume a fact, instead of leaving it to the jury, being one of form, calls for a special exception.

Appeal from Circuit Court, Craighead County, Jonesboro District; Hance N. Hutton, Judge.

Action by McElvaney against Smith. Judgment for defendant. Plaintiff appeals. Reversed.

McElvaney was the owner of a farm in Craighead county, which he rented to Smith

for the year 1899. Smith continued to remain on the land after the expiration of his term, and was put out by an action of unlawful detainer. On the trial the testimony for McElvaney tended to show that he only rented the farm to Smith for 1899; that during the latter part of that year he was endeavoring to sell the farm, but, as a sale was uncertain, he told Smith that if he failed to sell the place he would rent the place to him for another year. He further told Smith that he would furnish him wheat to plant part of the farm in wheat, and that, if the place was sold, he would pay Smith for his interest in the wheat, or make some other satisfactory arrangement about it. Smith planted the wheat, and afterwards McElvaney sold the place, and notified Smith to leave, which he refused to do. He was put out by an officer under a writ sued out in this action, but was permitted to retain his interest in the wheat crop, and afterwards sold it. On his side Smith introduced evidence tending to show that he rented the farm for the year 1900, and then planted his wheat. That when McElvaney sold the place Smith offered to surrender possession, provided McElvaney should pay him \$50, and allow him to retain his part of the wheat, which McElvaney refused to do. The other facts sufficiently appear from the opinion. There was a verdict in favor of the defendant, and damages assessed at \$34, and judgment accordingly. Plaintiff appealed.

Frierson & Frierson, for appellant. Eugene Parrish, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment against plaintiff in an action of unlawful detainer brought by him against the defendant. On the trial the presiding judge instructed the jury, in substance, that, unless a written notice to vacate was given to defendant three days before the execution of the writ of possession evicting him from the premises, the eviction was unlawful, and that, unless such notice was proved, the finding must be for the defendant. The counsel for plaintiff duly excepted to this instruction, and now contend that the judge erred in giving it, for the reason that it was alleged in the complaint that notice was given, and there was no denial in the answer. But it does not appear that the attention of the trial judge was ever called to the fact that the answer did not raise the issue of whether there was notice or not. The testimony for the plaintiff tended to show that written notice to vacate was given, while the defendant testified to the contrary. No objection was made to this testimony, and the trial judge was no doubt led to believe that the parties regarded the question of notice as an issue in the case, and therefore gave an instruction in regard to it. Only a general objection was made to this instruction. It is too late now to put in the special objection that no such issue was rais-

ed, and the answer must be treated as amended so as to conform to the proof. *Nicklace v. Dickerson*, 65 Ark. 422, 48 S. W. 945.

The court also told the jury in his instruction that the plaintiff "claimed that the land was rented to Smith for the year 1900, but that the contract was conditioned," and that, if that was so, he must show a compliance with the conditions. But the record shows that plaintiff did not claim to have rented the land to Smith for the year 1900. He positively denied that he had rented Smith the land for that year. He testified that he only agreed to rent it in the event that he did not sell it, which he was trying to do. As he did sell the land, the contingency on which, according to his testimony, he agreed to rent it, did not happen, and according to plaintiff's statement he did not rent it. This instruction of the court touched the pivotal point in the case, and, as it misrepresented the contention of the plaintiff on that point, and was contrary to his testimony, it was misleading and prejudicial. We think the court erred in giving it over the objection of plaintiff.

The only point necessary to notice relates to the measure of damages. When a landlord unlawfully evicts a tenant from the premises, the tenant is entitled to recover as damages whatever loss results to him as a direct and natural consequence of the wrongful act of the landlord. If the rental value of the place from which he is evicted is greater than the price he agreed to pay, he may recover this excess, and, in addition thereto, any other loss directly caused by the eviction, such as the expense of removal to another place. *Grosvenor Hotel Co. v. Hamilton* [1894] 2 Queen's Bench Div. 836; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059; *Sutherland on Damages* (2d Ed.) 865. But counsel contend that this expense is limited to one removal, and that if, after the tenant is settled on another place, he takes a notion to make a second move, he cannot recover for the expense of the second removal. This, in the absence of special circumstances, is no doubt true. But a tenant evicted in January, as this one was, may be compelled to seek a temporary abode for his family to shelter them until he can find a suitable farm to rent. When he is compelled by the eviction to seek first a temporary shelter, and then to make another removal, we are not able to say, as a matter of law, that he cannot recover the entire cost, for these two moves might be so closely connected as to be in effect one, and directly caused by the eviction. The evidence does not show how long defendant remained at the Pardew place before the second removal, but it leaves the impression that this was only a temporary stopping place. The language of the instruction of the court on the measure of damages, by which the jury were told that assessing the damages they might "take into consideration the rental value of the land, the trou-

ble and expense of removing, expense of renting a house rendered necessary by such removal, and all other damages flowing from the dispossession," is to a certain extent objectionable, for it appears to assume that the renting of the Pardew house was made necessary by the eviction. But the court no doubt intended to leave to the jury the question of whether the renting of this house was made necessary by removal, and the defect in the instruction, being one of form only, should have been raised by a special exception.

Another objection to this instruction is that it tells the jury they may consider the rental value of the land. But as there is nothing to show that the rental value of the land from which defendant was evicted was greater than the amount he had agreed to pay for it, there was no room for any damages in that respect, and the jury should have been so told.

On the whole case we are of the opinion that for the reasons stated the judgment should be reversed, and the caused remanded for a new trial. It is so ordered.

BATTLE, J., absent.

McGAHA et al. v. STATE.

(Supreme Court of Arkansas. July 22, 1905.)

LARCENY—EVIDENCE—SUFFICIENCY.

Evidence on a trial for hog stealing examined, and held to support a conviction.

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Horace McGaha and another were convicted of hog stealing, and they appeal. Affirmed.

P. Gorman, for appellants.

McCULLOCH, J. Appellants were indicted, tried, and convicted of hog stealing, and appealed to this court.

No complaint is made of the court's instructions, and no error is assigned except that the verdict is not sustained by the evidence. A witness introduced by the state (one Kennard) testified that he went to the house of appellants, and as he rode up saw them kill the hog in question, which he identified as the property of the prosecuting witness, Jeffries. He identified it by both the flesh marks and ear marks, and said that he had tried to buy it from Jeffries, and was well acquainted with its appearance and marks. Jeffries testified that he lost a hog of that description about the time Kennard claimed to have seen the defendants kill this one. This testimony is quite sufficient to sustain the verdict as to the identity of the property stolen. Horace McGaha, one of the defendants, testified that he bought the pig from John Bean, and Bean testified that he sold a hog to McGaha, and both described the ear marks of the hog differently from the description given by Kennard and Jeff-

ries. The jury believed the statements of the state's witnesses, and rejected those of said defendant and his witness, and we cannot say that they were wrong in doing so.

The judgment is affirmed.

SHEEKS-STEPHENS STORE CO. v. RICHARDSON et al.

(Supreme Court of Arkansas. July 8, 1905.)

1. LABORER'S LIEN—MORTGAGE ON CROP—PRIORITY.

Under the law of 1895 (Acts 1895, p. 217, No. 146) extending the laborer's lien law so as to give laborers who perform work on any object or thing a lien thereon for the price of their labor, whether their labor produced the thing upon which the labor is expended or not, the lien of a laborer who assisted in raising a crop is prior to that of a mortgage given before the crop is produced.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 181.]

2. SAME—NOTICE.

One who takes a mortgage on a crop to be produced in the future does so with notice of the liens of laborers employed in producing the crop, especially where the contract with the laborer and the commencement of his labor are prior to the execution of the mortgage.

3. SAME—BONA FIDE PURCHASERS.

Where purchasers of cotton which was subject to a laborer's lien merely credited the price of the cotton on a past-due account against the seller, they were not bona fide purchasers as against the laborer.

Appeal from Circuit Court, Clay County, Western District; Allen Hughes, Judge.

Action by E. M. Richardson and another against the Sheeks-Stephens Store Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

James Mulholler rented a farm in Clay county from one McGrew for the year 1901. In February of that year he hired Joseph Carter to assist him in making the crop, agreeing to pay him about \$15 per month and board. On March 16, 1901, Mulholler executed a mortgage on the crop to be grown on the land during that year to the Sheeks-Stephens Store Company, of Corning, Ark., to secure them for supplies to be furnished to him during that year. This mortgage was recorded on the 6th day of May following. Carter worked on the crop until the latter part of June. Mulholler only paid him \$1.90, and was at the time he quit owing him over \$40. Mulholler delivered two loads of cotton to the Sheeks-Stephens Store Company in September and on 3d of October, 1901. Before this cotton was delivered, McGrew, who had a lien on it for his rent, notified the Sheeks-Stephens Store Company to hold the amount of his rent out of the cotton delivered. The evidence for the plaintiff tended to show that the proceeds of this cotton, after deducting cost of picking, was to be paid by the store company on the rent note of McGrew. For the defendant it tended to show that there was no such agreement, and it was placed to the credit of Mulholler on his

account due the store company. Afterwards Carter brought suit before a justice of the peace to enforce his laborer's lien on the crop, and had the cotton which had not been delivered to the Sheeks-Stephens Store Company attached. He procured a judgment and an order of sale. But before the cotton was sold, Richardson, the constable to whom the order of sale was delivered, and Hopson, the attorney for Carter, made an agreement with the Sheeks-Stephens Store Company that the attached cotton might be delivered to the Sheeks-Stephens Store Company and sold by them, and, after paying the cost of picking and the amount due for rent, they were to pay the remainder of the proceeds to Richardson, to be applied on the judgment of Carter against Mulholler. Hopson and Richardson testified to facts tending to show that Mr. Sheeks, who represented the store company in making this contract, represented to them, as an inducement for them to make it, that there was only about \$100 unpaid on the rent note, and they say, in substance, that they understood from him that the two loads of cotton previously delivered had been applied on the rent, and that only the balance of the rent was to be paid from the proceeds of the attached cotton. Five more loads of cotton were delivered to the store company in pursuance of this agreement. The store company paid the rent note and costs of picking the cotton, but claimed that the proceeds of the cotton was not sufficient to pay those charges, and refused to pay Richardson anything for Carter. Richardson brought this action before a justice of the peace to recover about \$45 which he claimed had been received by the store company over and above the costs of the rent and picking. The justice gave judgment in favor of plaintiff, and on trial de novo in the circuit court a judgment was rendered in favor of plaintiff for \$44, from which judgment the defendant appealed.

G. B. Oliver, for appellant. D. Hopson, for appellees.

RIDDICK, J. (after stating the facts). This action was brought by a constable who had attached cotton against a mercantile firm to whom, by consent of the parties, he had delivered it for sale, to recover the proceeds of the cotton. The plaintiff in the attachment suit was a laborer, who claimed a lien on the cotton. While the action is brought in the name of the constable, it is for the use and benefit of the laborer, and the action is, in effect, a contest between a laborer who claims a lien on cotton for the price of his labor in producing it and a firm of merchants who claim a lien thereon by virtue of a mortgage for supplies furnished the owner of the crop.

In the first place, we are of the opinion that the act of 1895 (Acts 1895, p. 217, No. 146) did not change the law so far as such a

laborer is concerned. The prior act of 1868 gave laborers a lien on the production of their labor. The act of 1895 extended this law so as to give laborers who perform work on any object or thing a lien thereon for the price of the labor, whether their labor produced the thing upon which the labor is expended or not. When the work of the laborer does not produce the thing upon which he labors, he takes a lien, but it is subject to prior liens. But when the labor for which a lien is claimed produces the thing upon which a lien is claimed, then no lien can, under the statute, be prior to that. No lien upon a crop can be prior to that which the statute gives the laborer who prepares the ground, plants and produces the crop. The lien of a mortgagor does not attach to a crop until it is produced, and therefore cannot be prior to the lien which the statute gives the laborer who produces it. The lien of the landlord for his rent is, by the statute, made superior to that of the laborer. But, in order to make this mortgage a superior lien to that of the laborer who produced the crop, it would, under any view of the statute, be necessary to show that it was a prior lien, which, as we have shown, cannot be done. The court, we think, properly held that the lien of this laborer was superior to that of the mortgagee who furnished the supplies to raise the crop.

Again, the facts here do not show that the defendants were bona fide purchasers without notice. One who takes a mortgage on a crop to be thereafter produced must know that it requires labor to produce it, and under the statute laborers have liens for their work. He therefore takes his mortgage with notice of such liens, and subject thereto, especially when, as in this case, the contract made by the owner of the crop with the laborer, and the commencement of his labor, was prior to the execution of the mortgage. Of course, if appellants had subsequently bought and paid for this cotton without notice of such lien, they would be protected; but they paid nothing out on the purchase of the cotton. Only two loads were delivered to them before the attachment was levied, and they admit that they credited the price of that on a past-due account. This was not sufficient to make defendants bona fide purchasers of the two loads. The laborer then had a lien for his wages on all the cotton delivered to appellants, subject to the lien of the landlord for rents, and we think the evidence justified the jury in finding that under the agreement with the plaintiff defendant had the right to retain only that portion of the proceeds of the cotton required to pay the balance due on the rent note and for picking, after applying the proceeds of the two loads of cotton which defendant received before the attachment. That question was submitted to the jury, and found against defendants, and we find no error in the instructions that

would justify a reversal. While these instructions are not quite so clear as they might have been, we think that those asked by defendant were, under the facts proved, erroneous and misleading, and were properly refused.

On the whole case we think the judgment should be affirmed, and it is so ordered.

THOMPSON v. BAXTER et al.

(Supreme Court of Arkansas. July 22, 1905.)

1. APPEAL—ERRORS AVAILABLE—MATTERS NOT AFFECTING APPELLANT.

An attachment plaintiff cannot contend on appeal that the court erred in rendering judgment for costs against his surety on the attachment bond.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 3560.]

2. SAME—REVIEW OF FACTS—CONCLUSIVENESS OF VERDICT.

The Supreme Court cannot pass upon conflicting evidence which has gone before a jury.

3. TENDER—FAILURE TO TENDER COSTS—WAIVER OF OBJECTION.

Plaintiff sued defendants in justice court for \$94. Defendants tendered \$5, but failed to tender the accrued costs. Plaintiff refused the tender because he claimed the full amount demanded by him, but made no objection on the ground that the costs were not tendered. The tender was kept good by payment of the sum tendered into court, and the justice gave judgment for the amount tendered and costs prior to the tender. Plaintiff appealed to the circuit court, which rendered the same judgment. *Held*, that plaintiff could not, on motion to retax costs, raise for the first time the insufficiency of the original tender for failure to include a tender of costs, and recover subsequent costs on that ground.

Appeal from Circuit Court, Craighead County, Jonesboro District; Hance N. Hut-ton, Judge.

Action in justice's court by N. J. Thompson against Ed and Vernon Baxter. From the judgment rendered, plaintiff appealed to the circuit court, and again appeals from the judgment rendered in that court. Affirmed.

N. J. Thompson, pro se. Lamb & Gautney, for appellees.

HILL, C. J. Thompson sued Ed and Vernon Baxter in a justice of the peace court for the sum of \$94, and caused an attachment to issue. Baxter, on the day after suit was filed, made a tender of \$5, and, upon it being refused, delivered the money to the constable to keep the tender good as a deposit in court. On the trial Thompson recovered \$5, and appealed, and recovered judgment in circuit court for the same amount. In both courts there was a finding that the tender was made and kept good, and that Thompson recover costs prior to the tender, and the costs subsequent thereto were adjudged against him. Three questions are raised on appeal:

1. That the court erred in rendering judgment for costs against the surety on the at-

tachment used, the contention being that it was not conditioned to cover costs. Thompson alone appealed. The surety has not appealed, and Thompson cannot raise this question for him.

2. The next question presented is that the finding of the jury was not supported by the evidence as to the compromise of the debt sued for at \$5 having been reached. Baxter's testimony does sustain it, and that is sufficient, as this court cannot settle conflicting evidence which has gone before a jury.

3. The only other question presented is one of costs. The appellant contends that tender after suit without tender of accrued costs will not prevent the recovery of costs subsequent thereto. This is true, but appellant is not in an attitude to complain of it. He refused the tender because he claimed a larger sum, and made no objection to it at the time on account of the costs not being tendered, which were then a trivial sum. The justice court gave judgment for the amount tendered and costs prior to the tender. This is exactly what he was entitled to if his present contention is correct. From this he appealed, and the circuit court gave the same judgment, and after judgment on motion to retax costs the insufficiency of the tender was for the first time raised. The money had been paid into court immediately on appellant's refusal to accept it, and the litigation had progressed thereafter as to whether appellees owed a larger sum to appellant, for which he was suing, or only the \$5 which was tendered. Appellant cannot now obtain advantage of a failure to tender the trivial sum due for costs when it was refused because a much larger sum than the tendered amount was claimed, and for which he preferred and elected to litigate.

The judgment is affirmed.

PRICE v. GREER.

(Supreme Court of Arkansas. July 29, 1905.)

1. TRESPASS—TITLE TO MAINTAIN.

In an action for trespass on land plaintiff must show either title or possession, and mere color of title is not sufficient.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, §§ 13-20, 33, 34.]

2. SAME—SUFFICIENCY OF EVIDENCE.

Where, in an action for trespass on several tracts of land, the proof did not show plaintiff's title or possession to all the tracts, or show the amount of timber cut from each tract, but the verdict fixed the gross value of the timber cut from all the land, it could not be sustained.

3. ADVERSE POSSESSION—PAYMENT OF TAXES—STATUTE—CONSTRUCTION.

Act March 18, 1899 (Acts 1899, p. 117, No. 66), providing that unimproved and unclosed land shall be deemed to be in the possession of the person who, having color of title, shall have paid taxes for at least seven years in succession, and that not less than three of such payments must be made subsequent to the passage of the statute, means that the payment of taxes under color of title constitutes possession for each successive year in which payment

is made, provided, however, that such payment be continued for at least seven years in succession, and not less than three years after the passage of the statute.

4. TRESPASS—PLAINTIFF'S TITLE—EVIDENCE—PAYMENT OF TAXES.

In an action for trespass on lands, evidence considered, and *held* insufficient to show that plaintiff had paid taxes on the lands in three payments before the date of the trespass and after March 18, 1899, when Acts 1899, p. 177, No. 66, in relation to possession acquired by payment of taxes under color of title, took effect.

5. SAME—ISSUES—PAYMENT OF TAXES—ANSWER—SUFFICIENCY OF DENIAL.

Act March 18, 1899 (Acts 1899, p. 117, No. 66), provides that unimproved and unclosed land shall be deemed to be in the possession of the person who, having color of title, shall have paid taxes for at least seven years in succession, not less than three of such payments being subsequent to the passage of the statute. In an action for trespass on lands plaintiff alleged the payment of taxes for 12 years, and the answer denied that plaintiff was the owner or had possession of the lands, though the answer did not specifically deny the payment of the taxes. *Held*, that the denial was sufficient to put in issue the payment of the taxes in the absence of any motion at the proper time for a more specific denial.

6. TRESPASS—ACTION—COMPLAINT—SUFFICIENCY.

In actions for trespass on land it is not necessary for the complainant to deraign title, but only necessary for him to allege that he is the owner or in possession.

[*Ed. Note.*—For cases in point, see vol. 48, Cent. Dig. Trespas, § 81.]

Appeal from Circuit Court, White County; Hance 'N. Hutton, Judge.

Action by B. W. Greer against C. A. Price. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action brought by appellee, B. W. Greer, against appellant, C. A. Price, for trespass upon several tracts of lands claimed by appellee, aggregating 495.97 acres, by cutting timber therefrom. The complaint alleges that the plaintiff is the owner of the lands in question, and that he "has been in the possession of the same and paying the taxes assessed against said lands continuously for the past twelve years." Damages are laid in the sum of \$3,000. The defendant answered, admitting that he cut the timber on the land, and admitting that plaintiff was the owner of the land at the time of the suit, but denied that plaintiff was the owner of the land at the time the timber was cut, and denied "that the plaintiff is in possession of said land, and has been in such possession for the past twelve years." The jury returned a verdict in favor of the plaintiff, and assessed the damages at \$1,250, and the defendant appealed.

J. G. Holland and J. W. & M. House, for appellant. S. Brundidge, Jr., for appellee.

McCULLOCH, J. (after stating the facts). In actions for trespass upon land it devolves upon the plaintiff, before he can maintain the action, to show either title or possession. Mere color of title is not suffi-

cient. The plaintiff in the trial below introduced a chain of title deeds conveying the lands in question, running back to a deed from one John A. Cole in 1881. These deeds constituted color of title, but do not show a perfect chain of title. He also introduced a deed, dated February 7, 1872, from John A. Cole, as clerk of White county, to John A. Cole (whether the grantor and grantee is the same individual does not appear), conveying part of the lands (295.97 acres) pursuant to sale for taxes. The validity of the tax sale and appellee's title thereunder is attacked by appellant, but we need not determine the question of its validity, inasmuch as the proof does not show the amount of timber cut from each tract, and, as the verdict of the jury fixes the gross value of the timber cut from all the land, the case must be reversed, unless the plaintiff has shown his right to recover for the timber cut from the other tracts. The burden was upon appellee to prove his title or possession. It is not claimed that he had actual possession, the lands being wild and unoccupied, but he sought to establish title to and possession of all the lands by showing compliance with the act of March 18, 1899 (Acts 1899, p. 117, No. 66), in paying taxes.

This court, construing that statute in the case of *Towson v. Denson*, 86 S. W. 661, held that the payment of taxes on wild and unimproved land under color of title constitutes possession for each successive year in which payment is made, provided, however, that such payments be continued for at least seven years in succession, and not less than three after the passage of the statute. The only testimony on the point was that of J. H. Greer, a brother and agent of the plaintiff, who said that he had "paid taxes on all these lands since 1891." He did not say what years he paid, nor give the dates of payments. This was sufficient to warrant the jury in finding that he paid the taxes continuously since 1891, and made the payments within the times required by law for paying taxes; but it does not authorize a finding that three payments were made before the date of the trespass and after March 18, 1899, so as to bring the case within the terms of the statute. The trespass commenced in June, 1901, and, in order to have made three tax payments before that time, he must have paid for the years 1898, 1899, and 1900. Now, the jury could have found from this testimony that the plaintiff paid the taxes for the year 1900 on or before April 10, 1901, and for the year 1899 on or before April 10, 1900, but there was nothing on which to base a finding that he paid for the year 1898 after March 18, 1899. The taxes of that year were payable at any time from the first Monday in January to April 10, 1899, and, for aught that appears in proof, the same may have been paid before March 18, 1899. The burden was upon plaintiff to show, if such was a fact, that he

made this payment after March 18, 1890, for that was essential in order to show compliance with the terms of the statute. This being true, the evidence is insufficient to sustain the verdict as to title or possession of the plaintiff, and the same must be set aside, and a new trial granted.

It is urged by counsel for appellee that the allegation of tax payments by the plaintiff is not denied in the answer, and was not an issue in the trial below; but we think he is mistaken. It is true that the defendant's answer does not specifically deny the payment of taxes by the plaintiff, but it does deny that the plaintiff was the owner or has had possession of the land. If a more specific denial was to be required, it should have been pointed out by motion at the proper time. In actions for trespass upon real estate it is not necessary for the plaintiff in his complaint to deraign title. It is only necessary for him to allege that he is the owner or in possession. All other allegations of ownership of a more specific character may be treated as surplusage, and the defendant need not deny them.

The title and possession of plaintiff was, we think, denied with sufficient certainty to put the same in issue, and, as the testimony failed to establish either, the judgment must be reversed, and the cause remanded for a new trial.

BATTLE, J., absent.

HENRY v. BEAL & DOYLE DRY GOODS CO.

(Supreme Court of Arkansas. July 22, 1905.)

BILL OF EXCEPTIONS—FAILURE TO FILE IN TIME—EFFECT.

A bill of exceptions not filed within the time allowed by the trial court will not be noticed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2404, 2405.]

Appeal from Circuit Court, Howard County; James S. Steele, Judge.

Action by the Beal & Doyle Dry Goods Company against J. E. Henry, in which Etta Henry filed an interplea. From a judgment for plaintiff, the interpleader appeals. Affirmed.

Robertson & Martineau, for appellant. Feazel & Bishop, for appellee.

McOULLOCH, J. Appellant's bill of exceptions was not filed within the time allowed by the trial court, so we cannot take notice of same, and there is nothing before us to show any error in proceedings or rulings of the circuit court. The motion for new trial was overruled on February 11, 1903, and leave was granted to appellant to file her bill of exceptions within 90 days from that date. The same was signed by the presiding judge on May 13th, and filed in the

office of the clerk on May 14, 1903. This was too late, being two days over the time allowed.

Judgment affirmed.

TERRY v. CLARK et al.

(Supreme Court of Arkansas. July 29, 1905.)

EVIDENCE—HEARSAY.

On an issue of whether plaintiff or her husband owned household goods attached by defendants, testimony of the county clerk that the husband, in making his assessment of household goods, stated that he had been at considerable expense refurnishing his house, and that he increased his assessment \$500, was hearsay, and incompetent, under Kirby's Dig. § 3095, subd. 4, declaring the husband and wife incompetent to testify for or against each other as to confidential communications, but competent to testify in regard to any business transacted by one for the other.

Appeal from Circuit Court, Hempstead County; Joel D. Conway, Judge.

Action by Mrs. Elizabeth Terry against A. B. Clark and others. From a judgment for defendants, plaintiff appeals. Reversed.

Feazel & Bishop, for appellant. Jas. H. McCollum, for appellees.

WOOD, J. This suit is over certain household furniture claimed by appellant, and which had been attached by appellee Clark, and was held by the officers for him as the property of one D. P. Terry, the attachment debtor. The appellant was the wife of D. P. Terry. The question of fact as to whether Mrs. Terry or her husband owned the property attached was properly submitted to the jury, and we would not disturb the verdict upon the evidence in the record. The court erred, however, in permitting one A. J. Forgy to testify to a conversation he had with D. P. Terry at the time Terry assessed his property in 1901. Forgy was the clerk of the county, and had custody of the assessment rolls, and testified that D. P. Terry made the assessment of household goods before him in 1901. He was asked to "state to the jury, in that conversation had with Mr. Terry, if he claimed the household goods in his residence." The witness answered: "He stated this to me; he advised with me; he asked me, before he made his assessment, as to whether he had to assess it both years. He stated he had been to a considerable expense remodeling his house and refurnishing his house, and he wanted to know if his house improvements would be subject to taxation. I told him it would. He made an assessment at an increase of \$500 on that item." This testimony was objected to by the appellant, and her objection was overruled. This testimony was clearly hearsay, and incompetent. Section 3095, Kirby's Dig. subd. 4; Collins v. Mack, 31 Ark. 684; Watkins v. Turner, 34 Ark. 663. This testimony was highly prejudicial, for it tended to prove that Terry was the owner of the property in

controversy, and was probably considered by the jury as the strongest testimony on that point. We cannot tell. It was very damaging testimony on the very question at issue between appellant and appellees.

For this error the judgment is reversed, and the cause remanded for a new trial.

WALKER v. LOUIS-WERNER SAWMILL CO.

(Supreme Court of Arkansas. July 29, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE.

The negligence of a railway in running its engine without a headlight and without a lantern, and in starting the same without signaling, cannot be deemed the proximate cause of injury to an employé who left the engine to get sand, and who, while walking by the side of the engine, fell down with his hand across the rail, and was injured, in the absence of evidence that the headlight, if burning, would have lighted the place where the employé was walking, or that the failure of the railroad to give the signal or to furnish a lantern caused the employé to stumble and fall, or that the fall was not the result of an accidental mishap or clumsiness of the employé.

2. SAME—BURDEN OF PROOF—INFERENCES.

In an action for injuries to a servant the burden of showing that defendant's negligence was the proximate cause of the injury is on plaintiff, and where the evidence leaves the whole matter to conjecture the inference from the undisputed evidence most favorable to defendant must be taken.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 879, 897.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

A servant on a railroad engine, who carelessly failed to discover that there was plenty of sand in the sand bucket, and got off the engine in the dark, and without a lantern, to get sand, in consequence of which he fell and was injured by having his hand run over by the engine, was guilty of contributory negligence.

Appeal from Circuit Court, Nevada County; Joel D. Conway, Judge.

Action by Lee Walker against the Louis-Werner Sawmill Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The testimony of plaintiff referred to in the statement of the court, and on which the opinion is based, is as follows: "I am twenty years old. The injury occurred November 22, 1901, between 8 and 9 o'clock at night, after dark. The train stopped to make a coupling over a hill and to get sand. There was some trouble in making the coupling, and I went back to help. When I got to the back end of the engine, Mr. Norwood, the brakeman, told me not to come in, as I had no lantern, as it was dangerous, and I was likely to get hurt. I started round to the front end, and before I got there, and when I was in about four feet of my place, the engine started." It was admitted at the trial that the Sayre Lumber Company was the local name of the Louis-Werner Sawmill Company, the defendant. The witness, continuing, said: "I had worked some

time the first of the year on the railroad, and had worked on the train about a month, when they laid me off for about a week. I had a lantern when I worked on the train the first time. They kept all lanterns at the commissary, and each man stood good for his own lantern. When I quit I took my lantern back. The second time when I went to work I applied to the bookkeeper for a lantern. He had charge of the affairs of the company at that point. I also spoke to Mr. Sparkman about it the morning I got hurt. I met him, and asked him if I could get a lantern, and he told me he did not know. I had been out a few trips without a lantern. Mr. Painter told me that he would have some in a few weeks, but that he had none at that time. We usually made two trips over the road each day. We seldom made three trips. The day I got hurt we were coming in on our second trip. We usually got in in the daytime, but sometimes would be after dark. They had a sand box on the engine, but did not use it. The sand was kept in a bucket sitting on the pilot between myself and the other brakeman. When the train stopped this night I got off to get sand. Mr. Norwood went back to make the coupling. When he told me not to come in, I went to get on the front end of the engine, not expecting them to start before they gave the signal. The engineer was between Norwood and myself on the opposite side. They had three lanterns on the train, two of which were in the cab, to see about the steam and water. There were four men on the train. The engineer, fireman, and Mr. Norwood each had a lantern. Each man, when he got his lantern, was charged with it, and if he returned it he was given credit for it. Tuley Norwood got the lantern which I turned in when I was laid off the first time. The headlight was not lighted the night I was injured, because there was no oil, and had not been lighted for four or five days, and during this time there was no oil in the headlight. Garland Nichols had charge of the train, and gave orders for running it. The train was loaded with logs. They were flat cars, called 'skeleton cars,' with no steps on them. The brakeman generally rode on the front end coming in. The front end of the engine had an 8x10 piece to sit on and the board for our feet. Norwood sat on one end and I on the other, and sat close to the rail, with the bucket between us, and sanded the track with our hands. We got the sand off the side of the road. I got no sand that night, as there was plenty in the bucket. They gave no signal, but just opened the throttle and started, and when I was within four feet of my place, walking by the side of the engine, I fell down, and my left hand fell across the rail. It had rained that morning, and it was a dark night. My hand was so badly mashed that it was amputated, and I was laid up about a month. Before I got hurt I received \$1.50 a day. Since that time

night watching is about the only thing that I can do. I paid no doctor's bill, except that I contributed fifty cents a month out of my wages for a doctor. I suffer some yet, as I imagine that the fingers to my hand which has been cut off hurt me. When I was notified not to attempt to make the coupling, I started back to my place, and had gone about twenty feet, I reckon, when the engine started. I had not stopped, and was just going a common gait. Nichols, I think, made the coupling. I was walking towards the front of the engine, and expected the signal before the train started; but I did not stop. Mr. Norwood had his lantern in his hand. I did not see him when I got hurt. I think he had gotten on the engine, but whether in front or not I do not know. His lantern had been sitting there on this piece of timber. Something was said about lighting the headlight. I remember hearing the engineer say that night he had no oil. He said this when we started over the hill the first time and at the time we lighted the lantern. I had worked on this train the first time about three weeks, but I worked on the railroad with Mr. Owens the first of the year."

On July 29, 1902, plaintiff filed his amended and substituted complaint, in which he alleged that he was a minor, and sued by D. C. Walker, his next friend, and that, on the 22d day of November, 1901, he was in the employ of the defendant as a common workman, assisting in running one of its trains, which train was engaged principally in hauling logs to the mill owned by the defendant at Sayre, Ark.; that he had no experience in running trains or engines, which was well known to the defendant; that the engine upon and about which he was placed to work was not provided with an apparatus with which to sand the track, had no headlight, and was not provided with lanterns; that plaintiff was set to work, while said train was running, to sand the track, it being his duty to pour sand on the track with a can from a place upon the pilot of the engine; that the defendant failed to provide a safe place for him to sit, and that on the night the injury occurred, after dark, the train stopped, and plaintiff left his position on the pilot to assist in making a coupling and to procure sand; that the engine had no headlight, and plaintiff was not provided with a lantern; that there was no light about the engine except one lantern in the cab, and defendant kept no lookout, and could not have seen plaintiff if he had kept a lookout, on account of the failure of the defendant to provide lights; that while plaintiff was in the discharge of his duty the engineer, who was also a conductor, and in charge of the train, negligently and without warning started the train; that the defendant had failed to provide a safe and sound roadbed, in that the ties were of uneven lengths, some six and some eight feet long, and that in attempting to regain his position on account of

having no light and the insecure place he was required to work and of the uneven ties, he stumbled over said uneven ties, and fell with his hand upon the track, and was so badly injured that amputation of his hand became necessary to save his life; that the defendant gave him no warning of the unsound and unsafe condition of the engine and track, and that by reason of youth and inexperience he was not aware of the danger to which he was exposed; that by reason of his injury his ability to earn a living had been greatly and permanently decreased; that he suffered great pain, to his damage in the sum of \$5,000. The answer denied the material allegations of the complaint and pleaded contributory negligence. As the conclusion of the court is based upon the testimony of appellant himself, the reporter will set it out in full. The circuit court directed verdict for appellee.

Geo. R. Haynie and McRae & Tompkins, for appellant. Gaughan & Sifford, for appellee.

WOOD, J. (after stating the facts). Conceding that the appellee was guilty of negligence, which we think the proof tends to show, still there is nothing to show that such negligence was the proximate cause of the injury, or concurred in producing it; and, if it did, then it is clear from appellant's testimony that his own negligence also contributed. While appellant testifies that the night was dark, and that the headlight was not burning, and that he had no lantern, and that no signal was given before starting, still it does not appear that if the headlight had been burning it would have lighted the place where appellant was walking when he was injured. Nor does appellant say that the failure to give the signal or to furnish him a lantern caused him to stumble and fall. He says, "When I was within four feet of my place, walking by the side of the engine, I fell down, and my left hand fell across the rail." He does not say that it was caused by the darkness or the starting of the engine without signal. We know that his injury was caused by his falling, but no one can say from the evidence what was the cause of his falling. The jury were not at liberty to find as a fact that the appellant fell because he could not see, or because the engine started without a signal. If such had been the fact, appellant might have stated it as a fact. If such was the fact, appellant knew it better than any one else. It was not shown that the place where appellant was walking was rough. For aught that the proof shows to the contrary, appellant's fall may have been the result of accidental misstep, not caused by any of the things charged as negligence in the company. It might just as well have been attributed to some inherent clumsiness or physical defect in appellant as to any other cause. The whole matter was left to conjecture, and in such

case the inference from the undisputed evidence most favorable to appellee must be taken, for appellant has the burden.

Again, it appears that appellant did not get off to help make the coupling, but to get sand. He says, "When the train stopped this night, I got off to get sand." True, after he had gotten off "to get sand," finding that no sand was needed, he started to assist in making the coupling, but was told that he was not needed for that, and was warned to "keep out," as the place was dangerous. It appears that he did not discover that the bucket contained "plenty of sand" until he was off the engine. "I didn't get any sand; they had plenty to go over the hill," he says. Again, he says, "I got off, and saw there was enough sand in the bucket." Then he went around to see about the trouble in coupling. Now, it was shown that he sat on one end of a plank on the front of the engine, and another brakeman sat on the other, and there was a sand bucket between them from which they each sanded the track. The bucket was about "two or three feet" from appellant, and he could just as easily have discovered that it had "plenty of sand" before he got off as afterwards; yet he says he "got off to get sand," and "as quick as he got off he saw he had plenty of sand." "If he had noticed he would have known" that there was "plenty of sand in the bucket." It conclusively appears that the carelessness of appellant himself in not discovering that there was plenty of sand in the bucket was the cause of his getting off, and, if he had not left the engine to get sand, he would not have been injured, of course. He was guilty, by his own undisputed evidence, of contributory negligence.

The court did not err. Let the judgment be affirmed.

BATTLE, J., absent.

ST. LOUIS, I. M. & S. RY. CO. v. HITT et al.
(Supreme Court of Arkansas. July 29, 1905.)

RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Where a brakeman standing at a crossing, which was blocked by a standing freight train, told plaintiffs, who were waiting to drive over the crossing, that it would soon be clear, and when the train cleared the crossing the brakeman was standing near by and in a position where he could better see the tracks than plaintiffs could, plaintiffs could take into consideration that the brakeman was in a favorable position to see any danger, and would doubtless give them warning thereof.

Battle and Riddick, JJ., dissenting.

On rehearing. Motion denied.

For former opinion, see 88 S. W. 908, 911.

HILL, C. J. In their brief on motion for rehearing counsel for the appellant challenges the correctness of various statements in the "statement by the court," and also raise anew questions of law determined on the former hearing. The statement by the court does not purport to decide any conflicts in

the evidence, nor detail the testimony of the witnesses, but merely to state facts deducible from the evidence most favorable to appellees in order to test the sufficiency of them to sustain the verdict.

1. The first statement challenged is that the train on the side track was 1,200 feet long. They quote from the engineer in charge of it to the effect that he had only a couple of cars attached to the engine; but further in his evidence he showed he was going back to couple to the rest of the train, and that it altogether had about 20 cars, and that their average length was 60 feet, which would make the whole train 1,200 feet, as stated. As it was all between the Hitts and the main line, part on either side of the crossing, it was considered by the court as it was presented to the Hitts.

2. The next statement challenged is this: "They started to drive across slowly. A brakeman at the pilot of the engine was standing on the ground, and they had passed in front of him, not more than twenty-five feet away. No watchman was kept at the crossing. The brakeman made no effort to stop the wagon, and he knew the passenger train was coming." There is some negative testimony to the effect that there was no hallooing to the Hitts by the brakeman, but the court did not intend to find that as a fact deducible from the evidence, but merely that no effort to stop them was made which was known to the Hitts. The court was considering the situation entirely as viewed by the Hitts when they started to drive across, and was not sustaining any negligence against the company predicated on the dereliction of the brakeman to stop the Hitts. The court has no doubt that the truth was exactly as stated by the brakeman, as follows: "You made no effort to get in front of the team and stop them?" "No, sir; I didn't make any effort to get in front of it." "Did they reply to you when you hallooed to them?" "No, sir; not that I remember. Whether they noticed it or not, I can't tell." Counsel argue the point as if the court was predicated negligence against the appellant on the ground that the brakeman made no effort to stop them, and call attention to the abundant evidence of his and other cries to them just before they were struck. As stated, the court did not consider the conduct of the brakeman in considering evidence of the negligence of the appellant, and was considering the situation of the brakeman and his actions, so far as known to the Hitts, in determining whether or not they were guilty of contributory negligence per se in attempting to make the crossing. The brakeman had a few minutes before, when the crossing was blocked by the train, told them it would soon be cleared, and it was soon cleared, and he was seen standing near by, and in a position where he could better see and hear than they could. In determining whether the clearing of the way was an invitation to

cross, and that it was safe to cross, the Hitts could properly take into consideration that the brakeman was standing in a favorable position to see any danger, and, as stated in the opinion, aside from any duty resting on him, would doubtless, from humanity's sake, warn them of any danger which his better position would enable him to see and hear. The fact that they did not hear his cries later, which is shown, does not change the situation as presented to them when they started to make the drive across the tracks. While not a factor in determining the negligence of the company, it is a factor in measuring the conduct of the Hitts, and as such alone was it considered by the court. The statement complained of should read: "The brakeman made no effort to stop the wagon known to the occupants."

3. Other matters are presented in the brief, and have been considered, but they are the same matters heretofore presented and considered, and of them counsel say: "The court's attention was called to all of these facts in the original brief, and the record shows them as we have here quoted them. Are we not entitled to a rehearing? And should not this case be reversed? We have tried respectfully to refer the court to the testimony, which has been evidently overlooked; or, if not overlooked, has not been carefully considered, by the majority of this court. We deem it our duty to bitterly protest against the ruling of the majority of this court. We deem it our duty to show to this court how it has rendered a judgment directly in violation of the repeated decisions, unbroken, of this court." The court is unaware of overruling or failing to follow any previous decision of this court, but, on the contrary, believes that it is but applying the principles of many previous decisions. On the chief point in the case—whether the action of the Hitts in making the drive across the track was per se contributory negligence, or whether they exercised the care required by law—the court applied a familiar principle, upon which the authorities are collected in *Ry. v. Martin*, 61 Ark. 549, 88 S. W. 1070, and which is fully stated by the Supreme Court of the United States in *Ry. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642.

The motion for rehearing is denied.

BATTLE and RIDDICK, JJ., dissent.

CRAWFORD v. STAINBACK.

(Supreme Court of Arkansas. July 22, 1905.)

PARTNERSHIP—DISSOLUTION—RECEIVERSHIP—SALE OF ASSETS—PROPERTY NOT INVENTORIED.

In a suit by partners for a receiver to wind up the firm business, a sale of the assets was ordered according to an inventory which had been filed. This inventory was prepared by the receiver, assisted by the partners, one of whom, whose brother was the firm's bookkeeper, had an intimate knowledge of all the details of

the business, while the other did not. The inventory did not contain certain notes which had been given to the firm and negotiated to the firm's bank, nor certain material which had been bought by the firm, and neither the receiver nor the partner least acquainted with the business had knowledge of these items. At the sale the property was purchased in behalf of a corporation in which the partner most conversant with the firm's business owned a majority of the stock. This partner also had the bill of the material referred to antedated so as to apparently precede the sale, when in fact it was shipped after. *Held*, that the notes and material did not pass by the sale.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Petition by P. W. Crawford, Jr., against L. A. Stainback. From a judgment for defendant, plaintiff appeals. Reversed.

Dan W. Jones, for appellant.

HILL, C. J. L. A. Stainback and P. W. Crawford, Jr., were partners doing a wholesale and retail business in builders' material and like lines of wares in the city of Little Rock under the firm name of Stainback, Crawford & Co. They agreed to dissolve, and, being unable to agree on a disposition and settlement of the business, united in a suit to have a receiver appointed and the partnership wound up in the chancery court. The receiver was duly appointed, and was directed to sell the personal property described in the inventory of assets, in bulk, at public auction, for cash, to the highest bidder. The receiver made the inventory assisted by the partners, who examined it after completed. The inventory did not contain five notes which had been given to the firm, and which had been negotiated to the firm's bank upon the firm's indorsement; and did not contain certain material bought of Sickels & Co. to complete a contract of the firm for the inside furnishing of the Majestic Hotel at Hot Springs. The receiver had no knowledge or information in regard to these matters. Stainback's brother was the bookkeeper of the firm, and he (Stainback, the partner) was thoroughly familiar with all the details of the business. Just how familiar Crawford was with the details is not clear, but it is clear that he did not possess the intimate familiarity of Stainback, and that these matters were wholly in Stainback's charge. Crawford's father bid upon the assets of the firm at the sale \$35,900, and he relied entirely upon the inventory as furnishing a complete list of the assets. Other bidders did the same, and the court's order called for the sale to be according to this inventory, which had been filed in court. J. P. Stainback, the bookkeeper, bought the assets at the sale for \$36,000. He bought for a corporation then formed, in which his brother, L. A. Stainback, owned a majority of the stock. Crawford filed a petition praying that the notes and said material (and other matters not presented on this appeal) be charged as assets of the firm. The chan-

cery court held that the notes passed to the purchaser, subject to the lien of the bank and that their payment should be out of the firm assets, and that the material bought of Sickels & Co. passed to the purchaser, and its cost was a firm debt. Crawford appeals from this finding.

Whether Stainback performed his full duty to his partner in disclosing the existence of these notes and material and not listing them in the inventory is a matter upon which the evidence conflicts; and the court is of opinion that he did not do so, and, furthermore, is of the opinion that the assets passing to the purchaser were only those listed. Stainback is in no position to claim that the notes passed when he was in charge of that department of the business and did not list them, and he wrote to Sickels & Co. to have the shipping of the material antedated so as to apparently precede the sale, when in fact it was shipped subsequently. The evidence shows that the purchaser at the sale was to take the contracts as they were, and to furnish the material to finish them.

The decree is reversed, and the cause remanded, with directions to enter a decree in conformity herewith.

RIDDICK and McCULLOCH, JJ., non-participating.

LITTLE ROCK & FT. S. RY. CO. v. EVANS.
(Supreme Court of Arkansas. July 8, 1905.)

1. DEEDS—DESCRIPTION—DEFINITENESS.

In an action against a railroad company for damages caused by the appropriation of plaintiff's land for a right of way, deeds, one of which described the land as "N. E. fr. quarter of the N. E. fr. quarter, Section 22—8—22 W.," and the other as "N. E. fe. N. E. quarter of Section 22, township 8 N. range 22 W.," described the land with sufficient definiteness.

2. EMINENT DOMAIN—VALUE OF LAND TAKEN—EVIDENCE.

In an action against a railroad company for damages caused by the appropriation of plaintiff's land for a right of way, plaintiff, although somewhat self-contradictory, testified that the land had a market value, and would sell readily in the market, and that its market value had been decreased to a certain amount. Other witnesses testified that the land had a market value, one of them saying that the same piece of land had sold some years before for a certain sum, and was worth much less than that after construction of defendant's right of way. The jury were instructed that in estimating damages they were not bound by the figures testified to by the witness, but must take the testimony, and arrive at a just conclusion themselves. The jury returned a verdict for plaintiff for less than the damages estimated by any of the witnesses. *Held*, that defendant could not complain on the ground that the market value of the land was not shown as a basis for estimating damages.

Appeal from Circuit Court, Johnson County; Jeptha H. Evans, Judge.

Action by Joseph Evans against the Little Rock & Ft. Smith Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Oscar L. Miles, for appellant. Cravens & Covington, for appellee.

BATTLE, J. Joseph Evans sued the Little Rock & Ft. Smith Railway Company for damages caused by the use and appropriation of his lands by the defendant for a right of way for its railway. The defendant denied the appropriation and damage. Plaintiff recovered judgment against the defendant for \$380, and the defendant appealed.

It is contended by appellant that the description of the land in the deed adduced by the appellee in the trial of this action as evidence of his title to the land appropriated for right of way was not sufficient to identify the land. It is described in one deed as "N. E. fr. quarter of the N. E. fr. quarter, section 22—8—22 W.," and in the other, "N. E. fe. N. E. quarter of Section 22, township 8 N. range 22 W." It was described in both deeds as situated in the county in this state. It was admitted by the parties that the tract in controversy contained 7.09 acres. We understood from this description that the land meant is the northeast fractional quarter of the northeast quarter of section 22, in township 8 north, and in range 22 west, situated in the county of Johnson, in the state of Arkansas. This description is sufficient. *Chestnut v. Harris*, 64 Ark. 580, 43 S. W. 977, 62 Am. St. Rep. 213; *Boles v. McNeil*, 66 Ark. 422, 51 S. W. 71.

It is contended by the appellant that the evidence admitted to prove damages was incompetent, because it did not show the market value of the land.

The testimony of Joseph Evans in the trial of the action, by question and answer, was in part as follows:

"Q. State what you think is the difference between the value of the tract of land before the railroad was changed and after the change?"

The defendant objected, and the court said, "He can state what he thinks was the market value of the land before and after taking."

"A. I think the land for a quarry would be cheap at \$2.50 per acre—the land used. The other part would be damaged at least one-half, north of the railroad. All would be destroyed south of the railroad."

"Q. The fair market value of that land before this proposed change and price—what is the difference in your judgment?"

"A. I think it is worth more to-day than it was ever before, because the work that had been done on it was a benefit to it. It is in a better condition to-day for a quarry than ever."

The witness, being asked a question, said "I ask the court to enlighten me," and the court asked, "What is the difference between the value of that land before the railroad took this right of way and after it appropriated the right of way?"

The witness answered:

whole piece of land; and I think the front land is worth \$250 per acre, and the other perhaps one half—\$125—south of the proposed new line."

"Q. Now, Mr. Evans, you have estimated the value of the land taken in the right of way at \$250 per acre. If the balance of the land is damaged, what is the difference between the market value of the whole tract before the railroad was moved and the value of the whole tract since? For instance, you estimate the value of the land taken, and the damage, if any, to the balance, what do you think is the market value of the land?"

"A. I think the land is worth to me—a fair valuation would be—\$800 before they went on it this time, like it was before they went on it; and after they occupied that front \$200 would be a big estimate of the value.

"Q. That would make a difference of \$600 damages?"

"A. That is as less a valuation as I can put on it."

Cross-Examination.

"Q. Now, Mr. Evans, has that kind of land any market value in this state?"

"A. It has a value.

"Q. I am not talking about that. I am talking about the market value—what the general public who desired to purchase that kind of land would pay.

"A. That would be guesswork on my part. That is the only land of that character.

"Q. Do you know of any land of that kind selling in this state per acre?"

"A. I don't know that I do.

"Q. The values you gave to the jury are just your own personal estimate of it?"

"A. That is what I consider it worth.

"Q. You consider it worth that, but you know of no market value for that kind of land?"

"A. That land is valuable, but I do not know what it is worth.

"Q. I am talking about the market value of the land. What would such land as this bring, placed upon the market in the ordinary course of trade, a reasonable time given in which to effect a sale—has it a market value?"

"A. It certainly has.

"Q. Tell us where any such land can be or has been sold in the market?"

"A. I don't think there is a man living, who has got any money, that would see it, but what would buy it."

C. A. Holt was asked and answered in part as follows:

"Q. Tell what you think its market value is; that is, before the new road was put there?"

"A. I think it is worth \$800.

"Q. From your knowledge of the market value of that land, what is the difference between the value of that tract of land as a whole, considering the value of the land that

is in the right of way and the damage to the other, if there is any damage to the other, what is the difference in the fair market value of the land before the railroad appropriated this particular right of way and afterwards?"

"A. I placed the market value before at \$800. I think \$100 would be a poor price for it; that is, a difference of \$700."

Cross-Examination.

"Q. You state the difference in the market value was \$700?"

"A. Yes, sir.

"Q. Know of any such lands selling in the markets of this state?"

"A. Yes, sir.

"Q. Do you know of any land such as that selling in the market of this state?"

"A. This same piece of land sold for \$800.

"Q. When?"

"A. 1870 some time.

"Q. To whom?"

"A. The railroad company.

"Q. Don't you know there was a house on that land, which was torn down and destroyed, which entered into the value of that land?"

"A. Not of my own knowledge.

"Q. Do you know what the market value per acre of rock quarry land is in the state of Arkansas?"

"A. I don't know. I am not in that business. I suppose if it was worth that 25 years ago it is worth that to-day."

S. M. Brown:

"Q. Tell the jury what your idea is of the fair market value of the two and one-half acres of land embraced in this proposed right of way?"

"A. I think a fair valuation of it as a rock quarry would be \$250 or \$300 per acre.

"Q. As a quarry?"

"A. Yes, sir.

"Q. You are making your own personal estimates of these values?"

"A. Yes, sir."

This was the sum and substance of all the evidence as to the damages.

On motion of the defendants the court instructed the jury as follows:

"In estimating the damages for this appropriation, the jury are not bound by figures testified to by any witness, but must take the entire testimony, and from the entire testimony in the case arrive at a just conclusion themselves."

Evans' testimony is in confusion, and to some extent contradictory. He testified that the land in question had a market value, and would readily sell in market. It does not appear that he was so ignorant of the market value of land as to be unable to give an opinion as to the same. Values of land are not certain, and at best are matters of opinion. His opinion may be worth little; but, taking his testimony as a whole, it may be fairly inferred that his estimate of the land in

question was based upon what he knew about the market value of lands generally—one of the modes of asserting the market value of land.

Holt based his estimate upon the sale of the same land to appellant 25 years before. Appellant paid \$800 for it, and it is worth as much now as then. This is in the nature of an admission as to its value. He did not remember of any house upon it at that time. No evidence to show that there was was adduced.

It does not appear that Brown did not know the market value of such land as that in question.

The jury returned a verdict in favor of the appellee for \$380. No witness estimated the damages so low. They seem to have followed the instructions given at the request of the appellant, discarded the estimates of witnesses, and found one of their own. It certainly cannot complain of their following its instructions.

Judgment affirmed.

EVANS v. ST. LOUIS, I. M. & S. RY. CO.
(Supreme Court of Arkansas. July 8, 1905.)
APPEAL—TIME FOR TAKING—DEATH OF DEFEATED PARTY.

Under the statute providing that an appeal or writ of error shall not be granted except within one year after the rendition of the judgment, unless the party applying therefor was an infant, or of unsound mind, at the time of its rendition, in which cases an appeal or writ of error may be granted to such or their legal representatives within six months after the removal of their disabilities or death, the fact that the party against whom the judgment was rendered dies within the year limited for appeal does not extend the time.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1907.]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by J. S. Evans, in his own right and as administrator of Venna Evans, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Appeal dismissed.

S. J. Hunt and White & Althelmer, for appellant. B. S. Johnson, for appellee.

BATTLE, J. Appellee, St. Louis, Iron Mountain & Southern Railway Company, moves the court to dismiss the appeal herein because it was not taken within the time prescribed by law.

The judgment appealed from was rendered on the 15th day of April, 1902. The appeal in this case was taken on the 6th of June, 1903, more than one year after the rendition of the judgment. The plaintiff against whom the judgment sought to be re-

viewed was rendered, died on the 17th day of October, 1902. This did not extend the time of appeal for revivor beyond the year. The statute absolutely provides: "An appeal or writ of error shall not be granted except within one year next after the rendition of the judgment, order or decree sought to be reviewed, unless the party applying therefor was an infant or of unsound mind at the time of its rendition, in which cases an appeal or writ of error may be granted to such or their legal representatives within six months after the removal of their disabilities or death." The appeal must be taken within the one year unless the party applying therefor was an infant, or of unsound mind, at the time of the rendition of the judgment, order, or decree. Only two exceptions are made, and the applicant for the appeal in this case does not come within either of them. No authority is given the court to extend the time.

The appeal granted is dismissed.

ST. LOUIS, I. M. & S. RY. CO. v. ROWLAND.

(Supreme Court of Arkansas. July 22, 1905.)

RAILROADS—CATTLE GUARDS—FAILURE TO CONSTRUCT—REMEDY.

Under the statute requiring railroads to construct cattle guards, and subjecting them to a penalty for failure to do so, a recovery of the penalty is the only remedy open to one whose stock is killed in consequence of a violation of the statute.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1545.]

Appeal from Circuit Court, St. Francis County; Hance M. Hutton, Judge.

"Not to be officially reported."

Action by J. M. Rowland against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

B. S. Johnson, for appellant. W. Gorman and P. Gorman, for appellee.

HILL, C. J. This is an action against the appellant railway company charging it with knowingly and negligently permitting a cattle guard to remain in an unsafe condition, whereby a horse of the appellee was killed while attempting to cross it. The court sent the case to the jury on an issue of care and watchfulness of the railway company in the maintenance of the cattle guard. The case was tried on the wrong theory. The construction of the cattle guard is only a statutory duty, and the statute which requires this duty provides the remedy for its violation, and that is necessarily exclusive. This question was recently considered and so decided in *Railway v. Busick* (Ark.) 86 S. W. 674.

Judgment reversed, and cause remanded.

ST. LOUIS, I. M. & S. RY. CO. v. CLEERE.

(Supreme Court of Arkansas. July 22, 1905.)

1. FOREIGN ADMINISTRATOR—MARRIED WOMAN AS ADMINISTRATRIX.

Kirby's Dig. § 6003, permits a foreign administrator to sue in the state, and section 7823 provides that the courts of Arkansas shall take judicial notice of the laws of other states. *Held* that, as a married woman may act as administratrix in the state of New York, an administratrix appointed in the state of New York might sue in Arkansas, though she had married subsequent to her appointment.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2330.]

2. CARRIERS—NEGLIGENCE—INSTRUCTIONS.

Plaintiff's intestate, on leaving a passenger coach placed on a side track adjacent to the main track and across from the station, was killed by an engine backing on the main track, and in an action for the death the court instructed that if defendant backed an engine between the coaches and platform without a guard or lookout, without signal or warning which would reasonably attract the attention of a man of ordinary care, defendant was guilty of negligence; and another instruction stated that defendant's only duty in running the engine was to use ordinary care with reference to the speed, to keep a lookout while passing through the station, and to give signals, and that, if such things were done, there was no negligence. *Held*, that such instructions, when taken together, were correct, and not erroneous on the ground that the word "guard" required greater care than that required by the statute, which only requires a lookout to be kept, and on the ground that it assumed the existence of the fact that plaintiff's intestate was rightfully on the track; there being some testimony to show that a guard was maintained near by, who warned persons, and the question as to deceased's right on the track having been covered by specific instructions.

3. SAME—CONSTRUING INSTRUCTIONS TOGETHER.

Plaintiff's intestate accompanied a passenger needing assistance to a coach placed on a side track adjacent to the main track, and across from the station, and was killed on his return by an engine backing on the main track. The evidence was conflicting as to whether intestate had enveloped his head in his cape, so that he could neither see nor hear the approaching engine, or whether he merely held it so as to keep off the rain without obstructing his hearing or vision. The court instructed that the fact alone that plaintiff pulled his cape over his head in such manner as only partially to obstruct his ability to see or hear an approaching train, or both, and in that condition went in front of an approaching engine, did not necessarily render him guilty of contributory negligence, but that the question was whether he exercised ordinary care and prudence under the circumstances. The court also instructed that if deceased, in order to keep off rain, enveloped his head in his cape, so as to obstruct his vision or hearing, and so went in front of an engine, and was immediately killed, when he would have seen or heard it if his hearing or vision was not obstructed, he was guilty of contributory negligence. *Held*, that the first instruction was not erroneous.

4. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action for the death of one killed by being struck by a locomotive while crossing a railroad track, *held* a question for the jury whether he had exercised ordinary care and prudence under the circumstances.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1402.]

5. ACTION FOR DEATH—WIDOW AS ADMINISTRATRIX—REMARriage OF WIDOW—INSTRUCTIONS.

Where, after the commencement of an action by a widow, as administratrix of her deceased husband, to recover damages for his death, she remarried, it was proper to instruct that the jury should not consider the remarriage of the widow as affecting the assessment of damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 99.]

6. APPEAL—REVERSAL—EFFECT—SUFFICIENCY OF EVIDENCE.

Where, on appeal, the evidence is found sufficient to support the verdict, but the cause is reversed because of erroneous instructions, the finding as to the sufficiency of the evidence is not conclusive on the next appeal after a retrial.

7. CARRIERS—PERSON ASSISTING PASSENGER—RIGHT TO BE ON TRACKS.

One passing over tracks between the platform of a station and a coach which is open to receive passengers, he being engaged in assisting an embarking passenger, or in looking about and after the passenger's welfare, has a right to rely on an implied assurance that the way is clear.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1365.]

8. DEATH—DAMAGES—EXCESSIVE DAMAGES.

Where, in an action for death, it appeared that deceased was 29 years old, vigorous and healthy, a practical printer, receiving a salary of \$2,000 a year, in addition to which he earned \$180 a year by giving certain instruction in a college, that he sometimes did night work, for which he received extra pay, and that he contributed most of his income to the support of his wife and infant child, a verdict for \$13,190 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 125, 129.]

9. SAME—INTEREST.

In an action for death plaintiff was entitled to interest at the rate of 6 per cent. per annum on the amount of damages from the date of deceased's death to the date of recovery.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 102.]

Appeal from Circuit Court, Hot Spring County; Alexander M. Duffie, Judge.

Action by Regina Tomlinson, afterwards Regina Cleere, as administratrix of the estate of Arthur Tomlinson, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

This action was brought by the widow and administratrix of the estate of Arthur Tomlinson, deceased, against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for his death. The case has been here on a former appeal, and the facts are fully stated in the former opinion. St. Louis, I. M. & S. Ry. Co. v. Tomlinson, 69 Ark. 489, 64 S. W. 347. After the case was remanded, a change of venue was taken to Hot Spring county, where a trial was had, which resulted in a verdict and judgment in favor of the plaintiff for \$20,000 damages. Before the trial the defendant filed a plea in abatement as an amendment to its answer, setting forth the intermarriage of the plaintiff with one Martin J. Cleere since the com-

mencement of the action. The plaintiff responded, admitting such intermarriage, and asked that the cause proceed in her name, Regina Tomlinson Cleere, as administratrix, and that her husband be joined with her in the suit. She asked that she, in her own interest as widow, and Arthur T. Tomlinson, the infant son and only heir at law of said decedent as the next of kin, be also made parties plaintiff. These requests of the plaintiff were granted by the court, and the cause proceeded accordingly. The final judgment of the court awarding damages was rendered only in favor of the administratrix.

B. S. Johnson, for appellant. Ashley Cockrill and Murphy & Mehafty, for appellee.

McCULLOCH, J. (after stating the facts).

1. The initial question presented for our consideration is, should the action have been abated on account of the remarriage of the administratrix? In passing upon that point we waive the question whether, conceding that the remarriage of the administratrix *ipso facto* revoked her letters, and left no administration pending, the widow and heir at law could properly be made parties plaintiff, and the cause allowed to proceed in their names. This was done, and the cause proceeded in their names, as well as in the name of the administratrix, though the final judgment was rendered in favor of the administratrix. The statute provides that "every such action shall be brought by and in the name of the personal representative of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person." Kirby's Dig. § 6290. But we uphold the ruling of the court upon a different ground from that of the right of the widow and heir to be substituted as parties plaintiff. The plaintiff derived her powers from letters of administration issued to her from the proper court exercising probate jurisdiction in the state of New York, where the decedent lived and claimed his citizenship at the time of his death, and where the plaintiff also resided. A foreign executor or administrator is permitted, by the statutes of this state, to sue here. Kirby's Dig. § 6003. Under the laws of that state, which must control us in determining the question, and of which we take judicial knowledge (Act April 11, 1901, Kirby's Dig. § 7823), married women are legally capable of acting as administratrices, and, that being true, it necessarily follows that the marriage of an administratrix did not revoke her letters. The course of legislation in that state on the subject is reviewed in the case of *Re Benj. Curser Estate*, 89 N. Y. 401. See, also, *Hamilton v. Levy*, 41 S. C. 374, 19 S. E. 610; *Moss v. Rowland*, 3 Bush, 505; *Railway Co. v. Cutter*, Adm'x, 16 Kan. 568. No error was committed in refusing to sustain the plea in abatement.

2. Numerous errors are assigned in the giv-

ing of instructions asked by plaintiff and in refusing to give certain instructions and modifying others asked by the defendant. Nine separate instructions were given at the request of the plaintiff and 15 at the request of the defendant, some of which were modified. All of them need not be copied here, but only such as we deem it important to discuss. Instruction No. 3 given at plaintiff's request is as follows: "(3) If you find from a preponderance of the evidence that the defendant railway backed one of its engines over a track between the coaches and the platform, without a guard or lookout, or not having such guard or lookout, without signal or warning which, under the circumstances, would reasonably attract the attention of a man of ordinary care and prudence, who was rightfully engaged in passing between the coaches and the station platform, the railway was guilty of negligence, and you should so find." Error is alleged in that the word "guard" is used in the instruction, though the statute only requires a lookout to be kept; and that the instruction assumes the existence of the fact that plaintiff's intestate was rightfully upon the track. We do not think that the instruction is open to either of the objections named. The court was there telling the jury what would constitute negligence on the part of the railway company. It is true the statute only requires that a lookout be kept, but the court in effect said that if either a guard or lookout was kept, or if, in the absence of such guard or lookout, such signals or warnings were given as would, under the circumstances, reasonably attract the attention of a man of ordinary care and prudence rightfully engaged in passing between the coaches and station, then the company was guilty of no negligence. An instruction on that subject which omitted the word "guard" would have been erroneous and prejudicial to appellant's interest, as there was some testimony tending to show that a guard was maintained near by, who warned persons about the tracks, and in the face of that testimony it would have been improper to instruct the jury that the failure to keep a lookout was negligence. On the other hand, if the servants of the company kept neither a guard nor lookout, nor gave signals or warnings such as would reasonably attract the attention of a man of ordinary care and prudence rightfully engaged in passing between the station and the coaches, then open for the reception of passengers, then they were guilty of negligence, and the jury were properly so instructed. This instruction must, of course, be considered in connection with the others, and particularly the following, given at the instance of the defendant: "(17) The court instructs the jury that defendant's only duty in running said engine was to use ordinary care with reference to speed of same, to keep a lookout while passing through the station, and to give signals by

ringing the bell; and if the proof shows that these things were done, then there was no negligence, and your verdict should be for defendant." The two, when read together, constitute a correct and complete exposition of the law on the question of negligence as applicable to the facts of this case, and were quite as favorable to appellant as the facts warranted. No higher degree of care was exacted of appellant's servants by the instruction complained of than is done by the following language contained in the fourteenth instruction asked by appellant's counsel, viz.: "Although it is the duty of the railway company by lookout, by bell signals, and by such other means as ordinary prudence may dictate, to endeavor to protect him, it has the right to assume that he has knowledge of his surroundings, and knows that the engines and trains may pass, and that he will use ordinary care to protect himself," etc. Nor does the instruction involve an assumption by the court of the fact that Tomlinson was rightfully upon the track. The question whether he was, at the time he was killed, crossing the tracks upon the invitation of the railway company, was the chief point at issue in the case, and the proof and instructions were directed specifically to it. All the instructions must be considered together, and the question was plainly submitted to the jury for determination upon instructions given at the instance of each party, and the jury could not possibly have understood that the existence of that fact was assumed by the court. *Brinkley Car Works v. Cooper* (Ark.) 87 S. W. 645; *Fort v. State*, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163. The eighth instruction, given at the request of the defendant, is an example of the manner in which the question was submitted: "One who, after having escorted a passenger to his coach, leaves the coach, and then returns without any necessity therefor, and for his own pleasure merely, is a licensee, and cannot be said to have returned upon an implied invitation of the carrier, and the carrier owes him no duty save to keep a lookout, and not to wantonly injure him."

The next assignment of error is in the giving of instruction No. 7 asked by the plaintiff, which is as follows: "(7) You are instructed that the fact alone, if proved, that Tomlinson pulled his cape over his head in such manner as only partially to obstruct his ability to see or hear an approaching train, or both, and in that condition stepped or walked in front of an approaching engine, does not necessarily render him guilty of contributory negligence; the question for you to determine being then whether Tomlinson exercised ordinary care and prudence under the circumstances." The court also gave, in the following modified form, instructions on the subject of contributory negligence, asked by appellant, viz.: "(7) The court charges the jury that if they

find from the evidence that Tomlinson, in order to keep the rain off, enveloped his head in the cape or hood of his coat just before he passed upon the track, so as to obstruct his vision or hearing, and in this condition stepped, ran, or walked upon defendant's track immediately in front of a backing engine, and was immediately struck and killed by it, when he would have seen or heard the engine approaching had his vision or hearing not been obstructed, then he was guilty of contributory negligence, and your verdict should be for the defendant." "(9) If the jury find from the evidence that the deceased attempted to cross over one of defendant's tracks during a heavy rain, with his head and ears so muffled up as to obstruct his hearing or seeing an approaching engine, and in making such an attempt stepped in front of a moving engine, was struck, and killed, then the court tells you that he was guilty of contributory negligence, and there can be no recovery against the defendant." And the following in the form asked by appellant, viz.: "(15) If the jury find from the evidence that Tomlinson pulled his cape or hood over his head, covering his eyes and ears so that he could only see directly in front, and in this condition plunged on the track just before the tender of the backing engine, then he was guilty of contributory negligence, and your verdict should be for the defendant." This court, on the former appeal of this case, said: "While it cannot be said as a matter of law that a person crossing a track of a railroad by invitation of the company should, under all circumstances, look and listen for approaching trains, neither, on the other hand, can it be said that they should not do so; the question, as before stated, being usually one for the jury to determine. Yet certainly a person in such situation should not lose sight of the fact that he is in a place of danger to a careless person. He should not close his eyes or stop his ears so that warning of danger would not reach him." It will be observed that the court did not hold that a partial obstruction to the sight or hearing would necessarily be contributory negligence, but said that, if Tomlinson "pulled his cape over his head, covering his eyes and ears, so that he could see directly in front only, and plunged, in this condition, on the track, just before the tender of a backing engine," he was guilty of such negligence as would bar a recovery. In other words, it was held that Tomlinson's failure to look and listen was not necessarily negligence, but that if he obstructed his vision and hearing so as to put it beyond his power to see or hear, he was, as a matter of law, guilty of contributory negligence. It follows from this that if, in crossing the track, he pulled his cape over his head in such manner as only partially to obstruct his vision or hearing, and not to put it beyond his power reasonably to hear the approach-

ing engine, then it cannot be said, as a matter of law, that he was guilty of negligence, but it was a question for the jury to determine whether or not he exercised ordinary care and prudence under the circumstances. To hold that, as a matter of law, he could not with prudence even slightly or partially obstruct his vision or hearing, would be to declare that he must have looked or listened—the very thing which the court in the former opinion in this case would not declare, but said that it should be submitted to the jury as a question of fact. The court said: "If, then, a passenger or his escort is injured while attempting to pass an intervening track to reach a depot or train, when the circumstances justify him in believing that he is invited by the company to pass over the track, it becomes a question for the jury, after considering all the circumstances, to say whether or not he is guilty of ordinary care. In determining that question the jury should, no doubt, consider whether he did or did not look and listen, along with the other circumstances in proof; but the mere fact, if proved, that he did not look or listen, does not, under such circumstances, conclusively establish negligence, it being for the jury to say whether he should have looked or listened, and whether, under all the circumstances, he was guilty of negligence or not." We do not think there was any error in giving the instruction complained of, especially in connection with those herein quoted on the same subject. They were entirely harmonious, and in no wise inconsistent with each other or with the former opinion of the court, which is established as the law of this case.

Appellant also complained on account of the giving of an instruction asked by the plaintiff to the effect that the jury should not consider the remarriage of the widow as affecting the assessment of damages. This was a correct instruction, as it was not proper for the jury to consider the remarriage of the widow to reduce the amount of the damage. The defendant alleged the remarriage in its amended answer, and the fact was brought out in the proof; hence it was not improper for the court to tell the jury that they could not consider it in assessing the damages. In *Railway Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472, this court said: "The reason is that a right of action arises at the time of the death to recover just what was lost by it, and that the loss thus occasioned is none the less, even though the injured party thereafter acquire, through his own skill or industry, or the charity or affection of another, more than he lost." The precise question was passed upon in *Davis v. Ganarneri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548, and it was held that damages to the husband for the loss of his wife could not be reduced by proof that he has married a second wife,

who performed the services for him formerly performed by his first wife. We cannot agree with learned counsel that "the pecuniary loss of the wife by the death of her husband was in a manner recouped by her second marriage, and her loss could and should extend only up to such time as she married the second time, and not up to the probable life of her deceased husband." To so hold could but lead to an inquiry as to the comparative earning capacity of the two husbands and the amounts of their respective contributions to the support of the wife.

We find no error in the refusal and modification of certain other instructions asked by the defendant. The fifth instruction withdrew from the consideration of the jury the question whether there should have been lights upon the moving engine and tender, and was properly refused, as there was some testimony tending to show that it was dark enough to require lights so as to enable those passing over the tracks to observe the approach of the engine. The other refused instructions involved a declaration that the failure to "look and listen" on the part of Tomlinson was negligence, when the court in the former opinion in this case held that such failure was a question of care and prudence to be submitted to the jury. The instructions were contrary to the law of the case announced in the former opinion, and were properly refused.

3. Counsel for appellant strenuously urge that the testimony was insufficient to support the verdict. We do not agree with the contention of counsel for appellee that the decision of this court on the former appeal, reversing the case for a new trial, is conclusive of the question of the sufficiency of the evidence in support of the verdict of the jury on the retrial. We have recently held to the contrary. *Heard v. Ewan* (Ark.) 85 S. W. 240. But we think the testimony on the trial anew, as upon the former trial, was sufficient to sustain the verdict. The jury were warranted in finding, and before returning the verdict under the instructions they received from the court must have found, that the servants of the railway company backed the engine and tender at a rapid speed between the coaches and depot without keeping an efficient lookout, and without giving warning of its approach by bell or whistle. This, the court has said, was negligence under the circumstances, the coaches being then open for the reception of passengers, and passengers and their friends passing to and fro, as the evidence tended to show. They were warranted in finding that Tomlinson was killed either on his return from a trip to the coach made by him to assist an embarking passenger, or on his return from a second trip, made to look after the comfort and welfare of the passenger; and this court has said that, if that be true, his entry upon the premises of the railway company was upon its implied invitation, and

that he had the right to rely upon an implied assurance that the way was clear. They were warranted in finding, and must have found in order to reach a verdict under the instructions given them, that he did not, when he went upon the track, have his head so enveloped in the cape or hood of his coat as to prevent his seeing or hearing the signals from an approaching engine. This court said that under those circumstances it could not be said as a matter of law that he was guilty of contributory negligence, but it became a question for the jury, after considering all the circumstances, to say whether or not he failed to exercise ordinary care.

It is claimed that the verdict is excessive. Tomlinson was at the time of his death 29 years old, a vigorous, healthy man, and, according to the mortality table introduced in evidence, had an expectancy of 35 years. He was possessed of a good education, had at the age of 18 become a practical printer, and advanced rapidly in his trade. At the time of his death he was chief of the stationery division in the Department of the Interior at Washington, receiving a salary of \$2,000 per annum, and in addition to this he was earning a salary of \$180 per annum as professor of military tactics in a college in the city of Washington. It is also shown that he sometimes did night work in the government department, for which he received extra pay. There was sufficient evidence to base a finding of his gross earning capacity at the time of his death, to say nothing of the probability that a man of his character and ability, as shown by the evidence, would increase his earning capacity, at the sum of \$2,500 per annum; and the plaintiff testified that he spent a small portion of it on himself, the remainder being contributed to the support of his wife and child. Putting the net earning contributed to plaintiff and the child at one-half of the gross earnings, \$1,250, it would require the sum of \$18,125 to purchase an annuity, calculating at 6 per cent. interest, for that sum. This leaves out of account the other element of damages, viz., the loss of the physical and moral training by the father to the child. It is shown that he was an affectionate father, and was qualified and would probably have bestowed great care and attention upon the training of his child, who was two years old at the time of his death.

The plaintiff was entitled to interest at the rate of 6 per cent. per annum on the amount of the damages from the date of Tomlinson's death, when the cause of action arose, to date of recovery. Computing interest at that rate on an estimate of damages at \$13,180 from July 8, 1894, the date of Tomlinson's death, up to February 14, 1903, the date of the judgment, would make a total of \$20,000, principal and interest. The evidence warranted the amount assessed by the jury.

The judgment is affirmed.

HILL, C. J., not participating.

BENDY et al. v. MUDFORD.

(Supreme Court of Arkansas. July 29, 1906.)

TRUSTS—EVIDENCE—SUPPORT OF FINDINGS.

On an issue as to whether a father, in whose name title to property was taken, or his daughter, was the actual purchaser of the property, evidence held to support a finding of the chancellor that the father was the purchaser.

Appeal from Miller Chancery Court; James D. Shaver, Chancellor.

Foreclosure suit by Emma L. Nash against R. S. Mudford and Ellen Bendy. Mudford answered, and Bendy filed a cross-complaint against him, whereupon he answered the same, and made his answer a cross-complaint against A. M. Garrison, who answered accordingly. A decree of foreclosure was rendered, and subsequently the court rendered a decree on the issues raised by the cross-pleadings, finding said issues in favor of Mudford, and Bendy and Garrison appeal. Affirmed.

A. M. Garrison, Joe E. Cook, and W. V. Tompkins, for appellants. W. H. Arnold and John N. Cook, for appellee.

HILL, C. J. R. S. Mudford owned the realty in question, and conveyed it to Hamilton, and Hamilton conveyed it to Julia C. Mudford, wife of R. S. Mudford. This was evidently a fraudulent scheme to shield the property from Mudford's creditors. Subsequently Mrs. Mudford deeded the property to her husband in 1888, but he did not record the deed till 1902. Mrs. Mudford died in 1894, leaving the appellant Mrs. Bendy her sole heir at law. Mudford made several mortgages on the property after his wife conveyed to him, in which his wife joined, relinquishing dower and homestead rights. The last one of these mortgages was made to Attaway, and upon its nonpayment Mrs. Attaway, his administratrix, foreclosed, obtained judgment, and bought it in. When the sale was reported, Mrs. Bendy (then Miss Mudford), at the instigation and under the direction of her father, filed an intervention claiming the property as hers through inheritance from her mother, and denying that it was her father's and that it passed under the mortgage. This intervention was filed in 1899, three years before Mrs. Mudford's deed to her husband was recorded, and eleven years after it was executed. This was evidently another scheme of Mudford's to swindle his creditors; this time Mrs. Attaway. It was unsuccessful. The intervention was refused, and Mrs. Attaway's purchase confirmed, and deed made to her. Subsequently she agreed to compromise the judgment against Mudford, and accepted \$350 in satisfaction of it, and reconveyed the property to him. To obtain the money to settle with Mrs. Attaway, Mudford borrowed \$400 of Mrs. Nash, and gave his note and that of his daughter, this appellant, for it, and secured it by a mortgage on this property, executed by both of them. Upon non-

payment of the debt Mrs. Nash brought a foreclosure suit. Mrs. Bendy filed a cross-complaint against her father in that suit, alleging that he had fraudulently taken the deed from Mrs. Attaway to himself, instead of taking it to her; that it was with her money, procured on her note and mortgage from Mrs. Nash, that the Attaway judgment was compromised and title obtained from her; and that she had only recently learned of her father's fraud, and praying that the land be deeded to her subject to the Nash mortgage. Mudford denied all the material allegations of the cross-complaint, and the issues were found in his favor by the chancellor. Mrs. Bendy supported her contentions as to the deed being fraudulently taken in her father's name instead of her own by her own testimony alone. Mudford positively denied all of these statements, and he is corroborated by several witnesses to this extent. When the compromise was consummated with Mrs. Attaway and the deed delivered, Mrs. Bendy was present, and signed and acknowledged the mortgage to Mrs. Nash, and the transaction was fully discussed. Mudford accounts for his daughter's signing the note and mortgage by the fact that the deed to him from his wife had not been recorded, and the title was incomplete, and she did it as an accommodation to him. Mrs. Bendy also procured a subsequent deed from Mrs. Attaway, and she conveyed one-half interest in the land to Mr. Garrison. Mrs. Bendy has deeded her interest to her father since this appeal was taken, and asks that the decree be affirmed.

The rights of Garrison remain to be determined, and they depend upon the rights of his grantor at the time of the conveyance to him. Mrs. Bendy testifies positively that she knew nothing of her mother's deed to her father, and relied on her father's statements that it was her mother's property, inherited by her, when she swore to the intervention in his presence and at his request, which contained such allegations. Mudford swore his daughter knew of the deed, but makes lame and impotent explanations of the intervention. It is evident he was guilty of subornation of perjury, if his present statements are true, when he procured his daughter to make this oath, and ought to be prosecuted therefor; but that does not affect the title to the property. The title unquestionably passed to Mrs. Attaway, and this intervention did not prevent it, as he sought it to do, and the only issue here is one of fact whether Mudford was the purchaser from her or whether the daughter was. Mudford's statements are corroborated by several witnesses who were present when the transaction took place, and are reputable and disinterested, and their account of Mrs. Bendy's conduct and acquiescence in the proceeding is wholly inconsistent with her present contention. The chancellor has found in his favor on this

state of the evidence, and the court cannot say that finding is against the preponderance of the evidence. The daughter's testimony is wholly without support, and he is supported by these witnesses who were present when the transfer was made. A great deal of corroboration is needed to give any credence to any testimony of Mudford's, in view of his reprehensible conduct disclosed in this record; but it is possible for him to tell the truth, and from the testimony of the other witnesses it appears that he did on this occasion, and the chancellor's finding adding persuasive weight to that side necessarily calls for an affirmance, and it is so ordered.

BATTLE, J., absent.

TOWN OF BENTON v. WILLIS.

(Supreme Court of Arkansas. July 29, 1905.)

1. STATUTES—CONSTRUCTION—PRESUMPTIONS.

The Legislature must be presumed to have known of a prior statute, and to have had reference thereto in enacting a subsequent one on the same subject.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 303.]

2. SAME—REPEAL BY IMPLICATION.

Repeals by implication are not favored, and to work such a repeal there must be a repugnance between the earlier and later law, or the latter must clearly cover the whole subject-matter of the former.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 228-230.]

3. ANIMALS—IMPOUNDING—STATUTES—REPEAL.

Act May 23, 1901 (Kirby's Dig. § 5450), authorizing cities of the first and second classes and incorporated towns to prevent the running at large of certain animals within their corporate limits, and to restrain and impound such animals when running at large in violation of ordinance, does not repeal Act April 20, 1895 (Kirby's Dig. § 5451), prescribing the procedure in case animals are impounded, and requiring the giving of notice to the owner, if known, and the publication of notice if the owner is not known, and providing for the redemption of the animal by the owner.

Appeal from Circuit Court, Saline County; Alexander M. Duffie, Judge.

Replevin by E. S. Willis against the incorporated town of Benton. From a judgment for plaintiff, defendant appeals. Affirmed.

The case was submitted on the following agreed statement of facts, to wit: That plaintiff is the owner of the 11 hogs sued for; that plaintiff resides outside the incorporated town of Benton; that the hogs were taken up by the poundmaster while running at large within the incorporated town of Benton, and by him put in the town pound; that plaintiff, within 24 hours after they were impounded, made demand for said hogs, but did not pay the impounding charges, nor offer to pay them; that defendant refused to deliver up said hogs; and that this occurred on the 28th day of March, 1903. The

ordinance under which the town was proceeding was in conflict with Kirby's Dig. § 5451. The following was given by the court as the law of the case at the instance of the plaintiff, to wit: That a person living outside of the town limits having stock taken up under the ordinance has the right to the possession of same upon demand made within 24 hours, without paying any fee for impounding same; and that the act approved May 23, 1901 (Kirby's Dig. § 5450), does not repeal section 1 of the act approved April 20, 1895 (Kirby's Dig. § 5451). The defendant asked the court to declare the law to be that by virtue of the ordinance of the town of Benton introduced in evidence the town had the right to take up the hogs sued for if the said hogs were found running at large within the town limits of said town, and impound them, and charge a fee for impounding them; and before the owner could take said hogs out of pound he must pay the cost incurred by reason of said impounding; and that, unless the evidence shows that plaintiff paid said cost before the commencement of this action, then he cannot recover, and the court should so hold.

W. R. Donham and D. M. Cloud, for appellant. J. W. Westbrook, for appellee.

WOOD, J. The only question presented by this record is, does the act of May 23, 1901 (Kirby's Dig. § 5450) repeal the act of April 20, 1895 (Kirby's Dig. § 5451), with reference to the impounding of stock in cities and towns? The act of 1901 does not expressly repeal the act of 1895, and there is no repeal by necessary implication, for the two acts may stand together. There is no irreconcilable conflict between them. The act of 1901 expressly confers upon cities and towns power to prevent the running at large of the animals designated within their corporate limits, and prescribes impounding, in general, as a method which they are authorized to adopt in order to carry out the purpose of preventing such animals from running at large. But in this act the Legislature does not undertake to prescribe the manner of such impounding. That had already been done by the act of 1895. The Legislature of 1901 did not take up the whole subject-matter, for, if so, it is hardly probable that they would in such general terms have repealed the former law. The Legislature must be presumed to have known the prior statute, and to have enacted with reference thereto. This being true, it is hardly probable, since they did not expressly repeal the prior law, that they intended to do so; and the language used does not have that effect. Repeals by implication are not favored. There must be repugnance, or it must be clear that the whole subject-matter of the prior law is covered by the last enactment. *Collier v. Lumber Co.* (Ark.) 88 S. W. 295; *Same v. Railway Co.*, Id. 296; 26 Am. & Eng. Enc. Law, p. 721; Eng-

lish v. Oliver, 28 Ark. 317; *McPherson v. State*, 29 Ark. 225. The statutes construed together present the complete system for impounding the animals named. The last statute in express terms confers the power of impounding, and the prior limits and prescribes the exact manner of its exercise. It follows that the court did not err, under the facts of this case, in giving the instruction asked for by the plaintiff and in refusing the prayer of appellant. There was no question raised in the case as to the right of the town to collect the expense in the taking care of the animals. The town was proceeding under an ordinance in conflict with section 5451, and it must fail.

Affirm.

BATTLE, J., absent.

KANSAS CITY SOUTHERN RY. CO. v. MCGINTY et al.

(Supreme Court of Arkansas. July 22, 1905.)

1. VENUE—TRANSITORY ACTIONS—ACTION FOR DEATH BY WRONGFUL ACT.

An action for death by wrongful act is transitory.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 51.]

2. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.

An action by a citizen and resident of the Indian Territory against a citizen of a state is not removable to the federal court on the ground of diversity of citizenship.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 60, 62.]

3. SAME—TIME FOR FILING APPLICATION.

An amended petition for removal of a cause to the federal court was filed too late when filed after the time allowed by the statute for the filing of answers to complaints.

4. CARRIERS—INJURIES TO PASSENGER BOARDING A TRAIN—EVIDENCE—INSTRUCTIONS.

Where, in an action against a railway company for the death of a passenger, it was shown that decedent stood with one foot on the step of a car and with the other on the platform for a few minutes, that the train was moved back suddenly, throwing him under it, an instruction that, if the position of decedent contributed to his death he was guilty of contributory negligence, precluding a recovery, unless defendant discovered, or in the exercise of ordinary care ought to have discovered, his dangerous position, was erroneous.

5. TRIAL—CONDUCT OF COUNSEL—ARGUMENT—PREJUDICIAL ERROR.

The court erred in permitting counsel for plaintiff to state to the jury, over defendant's objection, that under the evidence, if the employees of the company saw, or by the exercise of ordinary care could have seen, him in that position, the company should have warned him, however negligent he was, was prejudicial error.

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Styles T. Rowe, Judge.

Action by Ida L. McGinty in her own right and as next friend of Lucretia A. McGinty and others against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

This action was brought by Ida L. McGinty, in her own right, and as next friend of Lu-

cretia A. McGinty, Bernice W. McGinty, and Lois L. McGinty, against the Kansas City Southern Railway Company, to recover judgment for the damages to them caused by the killing of Joseph W. McGinty by the negligent operation of defendant's railway. Ida L. is the widow of the deceased, and Lucretia A., Bernice W., and Lois L. McGinty are minors and the children of Joseph W. and Ida L. McGinty. The widow and children are residents and citizens of the Indian Territory, and the defendant is a corporation created and existing by virtue of the laws of the state of Missouri, and operates a railway from the city of Ft. Smith, Ark., to the town of Spiro, in the Indian Territory, and from thence to the town of Panama, in the same territory, and elsewhere. The action was brought in the Sebastian circuit court for the Ft. Smith district. Plaintiffs alleged in their complaint the foregoing facts and as follows:

"That upon the 9th day of October, 1900, the said Joseph W. McGinty was at the station of Spiro, Indian Territory, and desired to take passage upon the train of the defendant railway company from said station of Spiro to the station of Panama, Indian Territory.

"That the defendant railway company was operating a passenger train from said station of Spiro to the station of Panama, and inviting the public to take passage upon said train, which was what is commonly designated a local freight, and which said local freight carried passengers for hire.

"That the said Joseph W. McGinty went to the station of the defendant railway company at Spiro, Indian Territory, to take passage upon said train to the station of Panama, Indian Territory, at the time when the said train was about to leave said station at Spiro for said station of Panama, and at the usual place of taking passage upon said train; and that he was in the act of embarking thereon as a passenger, when the defendant, carelessly, negligently, and without due regard for the safety of said passenger caused said train to be suddenly and violently jerked backwards, thereby causing the said Joseph W. McGinty to be thrown under the wheels of said train, whereby he was instantly killed. That the employees of the defendant railway company did see, or by the exercise of ordinary care and caution could have seen, the said Joseph W. McGinty was in the act of taking passage upon said train when said employees caused the same to be violently and suddenly jerked backward.

"That the plaintiff as widow, and the said minor children, have been damaged by the loss of the life of the said husband and father in the sum of twenty-five thousand dollars."

The defendant, on September 9, 1901, it being the first day of the Sebastian county circuit court for the Ft. Smith district held after the commencement of the action, filed

a petition and bond asking for the removal of the action to the United States Circuit Court for the Western District of Arkansas.

The first ground of removal is the parties are citizens of different states, the plaintiffs being citizens and residents of the Indian Territory and the defendant a citizen and resident of the state of Missouri, it being organized under the laws of that state; and the second ground is stated as follows in the petition: "The property of the defendant against which this action is leveled is located in the county of Sebastian, Ft. Smith district, and state of Arkansas, in which county this suit is brought and is now pending. Under the laws of the state of Arkansas, * * * judgment, if obtained, will be a lien on property of the defendant located in the Ft. Smith district of Sebastian county. The plaintiffs in their complaint ask for judgment against your petitioner for the sum of twenty-five thousand dollars, and also pray other and general relief; and part of the relief to which the plaintiffs are entitled under that prayer is that said judgment, if obtained, can be declared a lien on all the property of your petitioner located in the Ft. Smith district of Sebastian county and state of Arkansas. And therefore the plaintiffs seek to have judgment declared a lien against defendant's property located in said county and district."

This petition was denied. Thereafter an amended petition was filed, and, it being filed out of time, was also denied; the time to plead or answer plaintiff's complaint allowed by the statutes having expired. The defendant then answered, denying the allegations of the complaint and alleging contributory negligence. Evidence was adduced in the trial in the case, which tended to prove the following facts:

On the 9th day of October, 1900, a freight train of the defendant, with caboose attached, in which passengers for hire were carried, stood upon the track at the station of Spiro, in the Indian Territory. The caboose was a little north of the door of the station. The defendant's employees rearranged the train, taking out and putting cars in. When this work was about completed, Joseph W. McGinty approached the caboose, put one foot on its step as if in the act of entering it, and stood with his foot in that position, with the other on the platform, and one hand on the shoulder of a friend, and so stood for a few minutes, talking to the friend; and while he was standing in this position the train was moved back suddenly for the purpose of coupling cars. He was knocked down by the movement, jerked under the train, and killed.

Mrs. Ida L. McGinty was his wife, and the other plaintiffs were his children.

The court gave the following, among other, instructions, over the objections of the defendant, to the jury:

"(12) If the position in which deceased

was standing with one foot on the platform of the station and one foot on the step of the caboose in any manner contributed to his death, then he was guilty of contributory negligence, and the plaintiffs, in that event, are not entitled to recover in this action, unless the defendant discovered, or in the exercise of ordinary care and caution ought to have discovered, the dangerous position of deceased, if he was in a dangerous position."

And the defendant asked the following instruction:

"(12) If the position in which deceased was standing with one foot on the platform of the station and one foot on the steps of the caboose in any manner contributed to his death, then he was guilty of contributory negligence, and the plaintiffs, in that event, are not entitled to recover in this action." And the court modified it by adding the following words: "Unless the defendant discovered, or in the exercise of ordinary care and caution ought to have discovered, the dangerous position of deceased, if he was in a dangerous position;" and, over the objection of the defendant, gave it as modified.

The attorney for the plaintiffs, in his opening argument before the jury, said:

"And I say to you, gentlemen of the jury, that, even if you should find that Mr. McGinty's position, as described to you by the witness in this case, was the most negligent position on earth, still you should not find for the defendant."

The defendant objected, and plaintiffs' attorney further said: "You did not wait until I had finished. I was going to say further that it was the duty of the employes of the railroad company to warn him. My argument is this: * * * I want the court to hear it. My argument is this: I do not care, for the purposes of this suit, whether McGinty was guilty of the most negligent act possible in having his hand upon the railing and his foot upon the step; for, under the evidence in this case, and under the instructions of the court, if the employes of the railway company saw him in that position, or by the exercise of ordinary care could have seen him in that position, then the railroad company should have warned him, and they were guilty of negligence. I ask the court if there is anything wrong in that argument."

The defendant objected, and the court said, "I think he can argue that," and the defendant excepted.

The plaintiffs recovered judgment, and the defendant appealed.

S. W. Moore and Read & McDonough, for appellant. James Brizzolara, for appellee.

BATTLE, J. (after stating the facts). The appellant has abandoned the first ground for removal set out in its petition. It has no right to removal on the second ground. *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201, cited by it to sustain its petition

as to the second ground, does not apply. That was a suit in equity, brought by a citizen of Ohio against a citizen of Illinois in the Circuit Court of the United States for the Eastern District of Arkansas, to remove the cloud from a title of real estate situated in that district. The jurisdiction was sustained upon the ground that the suit was local, and had to be brought in the district where the real estate is situated. That is not the case in the action before us. It is transitory. And there is not that diversity of the citizenship of the parties that is necessary to give the United States Circuit Court jurisdiction in such actions; "a citizen of one of the territories of the United States" not being "a citizen of a state within the meaning of the Constitution and judiciary acts." *Hooe v. Jamison*, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049; *Railroad v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Snead v. Sellers*, 66 Fed. 372, 13 C. C. A. 518.

The amended petition for removal was filed too late, it being filed after the time allowed by the statutes of this state for the filing of answers to complaints. *Kansas City, Fort Scott & Memphis Railway Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 983.

The instructions of the court and the remarks of counsel, which we have copied herein, are erroneous and prejudicial. "It is well settled that one who is injured by the mere negligence of another cannot recover at law or in equity any compensation for the injury if he, by his own negligence or willful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him, except when the direct cause of his injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." This rule applies to passengers as well as to other persons. *Little Rock & Fort Smith Railway Company v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. 329; *Little Rock & Fort Smith Railway Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; *Little Rock & Fort Smith Railway Co. v. Pankhurst*, 36 Ark. 371; *St. Louis, Iron Mountain & Southern Railway Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070.

This court has held that it applies and is in force in cases when the employes of a railroad are required by statute to keep a lookout, and when obedience to the statute would have avoided the result of the contributory negligence. *St. Louis, I. M. & S. Ry. Co. v. Leathers*, 62 Ark. 235, 35 S. W. 216; *St. Louis Southwestern Ry. Co. v. Dingman*, 62 Ark. 245, 35 S. W. 219; *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 64 Ark. 364, 42 S. W. 831.

In *Little Rock Traction & Electric Com-*

pany v. Kimbro, 87 S. W. 644, this court held that a conductor on a street railway, seeing the acts of a passenger on a street car, would not be in duty bound to interfere to protect him, unless he could have reasonably anticipated that he would be injured without such interference. He was not bound to do a useless act, or unnecessarily interfere with the freedom of the passenger. No such rule was embodied in the instructions of the court and the remarks of counsel. The facts and principles involved in the two cases are different.

Reversed, and remanded for new trial.

HILL, C. J., being disqualified, did not participate.

CASTEEL v. STATE.

(Supreme Court of Arkansas. July 22, 1905.)

1. HOMICIDE—EVIDENCE OF KILLING—SUFFICIENCY.

Evidence on trial for murder held to show that the death of decedent resulted from the act of defendant.

2. SAME—DENIAL OF KILLING—QUESTIONS ASSUMING THE KILLING—FAILURE TO OBJECT—EFFECT.

Where, on a trial for murder, defendant did not object to the form of the questions of the state, which assumed that he killed decedent, he will be deemed not to have denied the killing.

3. HARMLESS ERROR—EVIDENCE—CONTRADICTION OF WITNESS—IMMATERIAL MATTER.

Where, on a trial for murder, the position of a witness with reference to a third person at the time of the killing was immaterial because of his proximity to defendant, the error, if any, in excluding evidence contradicting the testimony of the witness given before the examining magistrate with regard to his position with reference to the third person, was not prejudicial, as it could not have affected the credibility of the witness.

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

"Not to be officially reported."

Gordon Casteel was convicted of murder in the second degree, and he appeals. Affirmed.

At the March term, 1904, of the St. Francis circuit court the grand jury returned an indictment against the appellant charging him with murder in the first degree, and at the March term, 1905, he was tried upon the plea of not guilty, found guilty of murder in the second degree, and given 10 years in the penitentiary. His motion for a new trial having been overruled, he appealed to this court.

R. J. Williams, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

WOOD, J. (after stating the facts). This is the second appeal in this case. The facts will be found fully stated in 73 Ark. 152, 83 S. W. 953. They are substantially the same

here as they were before, except it is contended now that the evidence failed to show that the death of Sanders was the result of the shooting by appellant. There was abundant evidence to justify the conclusion that deceased was killed by appellant. One witness said he "saw the flash, heard the report, and Hall [deceased] fell to the ground" and said, "I am shot through the stomach." "The pistol was not over six inches from Sanders' [deceased's] body." "Casteel pulled his pistol and shot him." Sanders (deceased) was shot by appellant on the night of 25th December, 1903, was taken to a hospital in Memphis, and died the following Sunday. Witnesses testify that when appellant fired deceased dropped, exclaiming, "He has shot me through and through!" The pistol was a 38 Smith & Wesson. Christmas day was Friday, and deceased was shot at 7:30 p. m., "through and through," was carried to a hospital in Memphis, and brought back Sunday thereafter, dead. There is in the record a note in the examination of one of the witnesses, which recites, "The witness here goes into detail, with Mr. Andrews, the prosecuting attorney, showing the relative position of the deceased at the time of the fatal shot." It appears also from the form of the question by counsel for the state asked some of the witnesses, to wit, "Tell the jury what was said to him, and all the circumstances leading up to this killing," etc., that the fact of the killing by appellant was not denied. The state assumed, without objection from appellant, that the killing was done by him. The record warrants the conclusion that appellant raised no issue as to the fact of the killing in the court below. Inasmuch as he did not object to the form of the questions on the part of the state that assumed such to be the fact, we take it he did not deny the killing. The refusal of the court to permit the defendant to prove by Paris Gorman, who heard Guy Eldridge testify before the magistrate at the examining trial of the defendant, on this same charge, that Eldridge testified before the magistrate that at the time the shot was fired by the defendant he was standing north of Rainbolt, against the fence; that defendant was south of Rainbolt against the fence, and deceased was southeast of defendant, and close to him—was not prejudicial error, if error at all, for, considering the proximity of the witness Eldridge to the appellant, the deceased, and Rainbolt, it was wholly immaterial whether the witness was standing "north of Rainbolt against the fence" or not. This is the only point on which the foundation was properly laid for the introduction of the evidence of Gorman, and it could not, as we see it, have possibly affected the credibility of the witness Eldridge. It did not tend in any manner to contradict him on a material point.

The judgment is affirmed.

COVINGTON v. BERRY.

(Supreme Court of Arkansas. July 29, 1905.)

1. LIMITATIONS—ACTION AFTER NONSUIT—ACQUISITION OF NEW TITLE.

Where a second action of ejectment, instituted after suffering a nonsuit in the first action, is based on a title acquired by plaintiff subsequent to the commencement of the first action, limitations do not cease to run against the second action until the commencement thereof.

2. EVIDENCE—SECONDARY EVIDENCE—LOSS OF ORIGINAL.

A transcript of the record of the state land office is inadmissible to prove a conveyance from the state, in the absence of a showing that the original patent is lost, or cannot be produced.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1302, 1303.]

3. PUBLIC LANDS—SWAMP LAND—CONVEYANCE TO CITIZEN.

A conveyance of land as swamp land by the state to a citizen shows prima facie title in the citizen.

4. TAXATION—DEEDS—SUFFICIENCY OF DESCRIPTION.

A deed executed by a commissioner under a decree to enforce the payment of a levee tax, describing the land as "E. pt. S. E. $\frac{1}{4}$ Sec. 30, 5 N. 4 E., containing 63 acres," is not sufficiently certain to pass title, and is void.

5. SAME.

A tax deed describing the land as the "east part of southeast quarter of section 30, 5 N. 4 E. containing 60 $\frac{30}{100}$," is not sufficiently certain to pass title, and is void.

Appeal from Circuit Court, Lee County; Hance N. Hutton, Judge.

Ejectment by Ed Berry against Lucy Covington. From a judgment for plaintiff, defendant appeals. Reversed.

Ed Berry brought an action of ejectment against Lucy Covington to recover $6\frac{1}{2}$ acres of land in St. Francis county. This land was a part of the east half of the southeast quarter of section 30, township 5 north, range 4 east, that was east of the St. Francis river. The Choctaw Railroad crosses this tract, and the $6\frac{1}{2}$ acres in controversy lay with the railroad. The plaintiff claimed to be the owner of that part of the east one-half of the southeast quarter of section 30 that lay east of the river, containing 60.70 acres, which included the $6\frac{1}{2}$ acres in controversy. The defendant pleaded the statute of limitations of seven years, and also denied that plaintiff was the owner of the 60.30 acres east of the river. The first action brought by the plaintiff against defendant to recover the land was begun in August, 1898. The chain of title set up in this action was as follows: Conveyance from the United States to the state of Arkansas by the swamp land act of 1850 (Act Sept. 28, 1850, c. 84; 9 Stat. 519), from the state to R. C. Brinkley in 1853, from R. C. Brinkley to Hugh McMurray in 1872; that subsequently, in 1898, the heirs of Brinkley executed a deed to McMurray correcting a mistake made in a former deed of R. C. Brinkley; and that A. E. Ketchum, the only heir of McMurray, afterwards con-

veyed the land to plaintiff, Berry. A nonsuit was taken in the action in March, 1900, and a new action commenced in August, 1900. The chain of title in this new action is a grant from the United States to the state, from the state to R. C. Brinkley, and conveyances from the heirs of R. C. Brinkley to plaintiff, Berry, dated January 13, 1898, and June 29, 1899. The complaint also set out that he was the owner of the land by virtue of a sale under a decree of court for nonpayment of levee taxes, and also by purchase at a sale for nonpayment of state and county taxes. On the trial objection was made to the introduction of these tax deeds on the ground that they were void on account of an insufficient description of the land, but the objection was overruled. The court permitted the plaintiff to prove the conveyance from the state to R. C. Brinkley by a transcript of the record of the state land office without any showing that the patent from the state could not be produced. The court, among other instructions given at request of plaintiff, told the jury, in substance, that they should find for the plaintiff unless there was seven years' continuous adverse possession by the defendant before August 22, 1898, the time of the bringing of the first suit, and refused the request of the defendant that the statute of limitations did not stop until the 25th of August, 1900, the date of the bringing of the last action. There was a verdict and judgment in favor of the plaintiff, and defendant appealed.

W. Gorman and N. W. Norton, for appellant. John Gatling, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal by the defendant from a judgment rendered against her in an action of ejectment for the recovery of $6\frac{1}{2}$ acres of land. There had been a prior action for the same land, which was commenced on the 22d of August, 1900, and in which a nonsuit was taken in March, 1900. Afterwards the present action was begun on the 25th of August, 1900. In the first action plaintiff relied on a conveyance from Brinkley to McMurray and one from the heir of McMurray to plaintiff. After the commencement of the first action plaintiff procured deeds from the heirs of Brinkley to himself. In the second action he does not refer to the conveyance from Brinkley to McMurray, but relies on the conveyance from the heirs of Brinkley to himself. Defendant pleaded the statute of limitations, and her counsel contend that the two suits above referred to were based on different causes of action, and that the statute of limitations did not stop running until the commencement of the last action. The mere fact that plaintiff did not set out his chain of title in one or the other of these suits would, we think, on this point, be immaterial if he was in fact the owner of and seeking to sustain the same title in each action. But the contention of defendant is

sound if plaintiff in the second action is seeking to maintain a title acquired subsequent to the commencement of the first action, for such title gave plaintiff a new cause of action, and the fact that plaintiff brought a former action against defendant did not stop the statute from running against plaintiff on a cause of action acquired after the commencement of such suit. That is to say, if plaintiff held the title to this land, or any part of it, at the time of the commencement of the first action to recover the land, the statute of limitations stopped, as to the land he then owned, on the bringing of such action; but if he acquired title to it, or to part of it, subsequent to that time, then as to that part he had no right of action at the time the first suit was brought, and the statute did not stop running against his right to recover until he acquired title and began the new action. It takes a right on the part of plaintiff, and a violation of that right on the part of defendant, to make a cause of action, and until plaintiff acquired title to the land the possession of the defendant did him no injury, and gave him no right of action against her. Plaintiff did not set out or read in evidence the deed from Brinkley to McMurray or from McMurray to him, and we are not able to pass on those deeds. But as the chain of title set out by plaintiff and the evidence tends to show that the title to at least a portion of the land was acquired by plaintiff subsequent to the commencement of the first action, we are of the opinion that the court erred in holding generally that the statute of limitations stopped running on the commencement of the first action. *Union Pacific Ry. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983; *Sicard v. Davis*, 6 Pet. 124, 59 L. Ed. 342; *Whalen v. Gordon*, 95 Fed. 305, 37 C. C. A. 70.

The objection to the introduction of the transcript of the record of the state land office should have been sustained, in the absence of a showing that the original patent was lost, or could not be produced. *Carpenter v. Dressler*.¹

As to the question as to whether the land was sufficiently described in the various deeds submitted by plaintiff: It is not material to notice the description of the land contained in the deed from the United States to the state for the reason that the title to the swamp land of the state does not depend alone upon that deed, but upon the grant contained in the statute of 1850 (Act Sept. 28, 1850, c. 84; 9 Stat. 519). The fact that the state afterwards conveyed this land to Brinkley as swamp land makes out, we think, at least a fair showing of title in him. The deed of the state describes the land as the east half of the southeast quarter, giving section, range, and township, which is sufficiently certain. The deed from Folber, by which Folber, as commissioner, to enforce a decree for the payment of levee tax-

es, sold and conveyed the land to plaintiff described the land as "E. pt. S. E. $\frac{1}{4}$ Sec. 3, 5 N. 4 E., containing 63 acres," and the tax deed from the clerk of St. Francis county conveying land to Reeves, under which deed plaintiff also claims, described it as the "east part of southeast quarter of section 30. 5 N. 4 E. containing 60 $\frac{30}{100}$." These descriptions might possibly be construed to describe a tract in the shape of a parallelogram taken from the east side of the quarter section described, but the evidence shows that it was not the intention to sell a tract in that shape. Under former decisions of this court these descriptions are not sufficiently certain to pass title in a proceeding to collect taxes, and these deeds are void, and the exceptions to them should have been sustained. *Rhodes v. Covington*, 69 Ark. 357, 63 S. W. 799; *Texas Water Co. v. State*, 62 Ark. 183, 3 S. W. 788; *Schattler v. Cassinelli*, 56 Ark. 178, 19 S. W. 746.

For the reasons stated, the judgment is reversed, and the cause remanded for a new trial, with leave for either party to amend pleadings.

HOT SPRINGS ST. R. CO. v. CHARLTON. (Supreme Court of Arkansas. July 22, 1905.) STREET RAILWAYS—COLLISION WITH VEHICLE —NEGLIGENCE—QUESTION FOR JURY.

In an action against a street railroad company for personal injuries caused by a collision of defendant's car with plaintiff's vehicle, evidence held to justify submission to the jury of the question of defendant's negligence.

[Ed. Note.—For cases in point, see vol. 44 Cent. Dig. Street Railroads, § 251.]

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by John Charlton against the Hot Springs Street Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Charlton recovered a judgment against appellant street railway company for \$150 for personal injuries, and the street car company appeals. There was a conflict in the evidence as to whether there was a settlement of the action immediately after the injury. There are material conflicts throughout the testimony, but this statement of the evidence which the jury had a right to believe, made by the appellee, the court finds to be substantially the facts fairly to be deduced from the testimony most favorable to the appellee:

"Appellee, John Charlton, on the 12th day of March, 1901, was driving a wagon, loaded with wood, along Park avenue, in the city of Hot Springs, upon and along which is located a line of street railroad, owned by the Hot Springs Street Railroad Company. On the side of the railroad track where appellee was driving there was a ditch at the edge of, and running parallel with, the street, and so close to the street as to make it a close drive for a wagon to pass along between the

¹ Rehearing pending.

ditch and the car track. The ditch was from 2 to 4 feet deep, and from 4 to 6 feet wide. One of the mules to appellee's wagon was afraid of the cars, and would shy or turn from them whenever he saw them. One of appellant's cars came, meeting appellee, and was from 50 to 75 yards from him when he observed it. Being afraid that his mule would take fright at the car and throw him and his wagon into the ditch, and believing that he had ample time to cross over the railroad track to the other side of the street to a place of safety, he turned his team and drove across the track. The team and front part of the wagon passed over the track, but the back end of the wagon was struck by the car just before it got out of reach. The motorman in charge of the car saw appellee and his wagon about the time the wagon turned to cross the track, and sounded his gong; the wagon being at that time from 150 to 175 feet away from the car. The usual speed of the car was 10 or 12 miles per hour, but at that time it was traveling about half speed, and was going upgrade. A passenger on the car attracted the attention of the motorman about the time he first saw appellee 150 or 175 feet away, and handed him some money for tickets, and words were passing between the passenger and motorman, and the motorman paid no further attention to appellee or his wagon until the passenger warned him to look out or he would run into the wagon. The motorman then looked, and saw appellee crossing the track about 20 or 30 feet in front of him. The team and front part of the wagon had crossed over the track, and the back end of the wagon was still on the track. The motorman then undertook to reverse the power of the car, but made a mistake in manipulating the appliance, and did not check the speed of the car, and struck the back end of the wagon just before it left the track. The force of the collision threw appellee to the ground and inflicted on him personal injuries. The brakes to the car were in bad condition; there was too much slack in the chain, and the shoes to the brakes were worn so that sufficient pressure could not be brought against the wheels of the car to properly control the speed. The motorman discovered the defective condition of the brakes on the first trip out with the car that day, and had made seven or eight trips with the car before the accident, passing by the shops of the company on each trip. The evidence also tended to show that direct notice had been brought to the company of the defective condition of the brakes, by complaint being made by the motorman who had charge of the car the day before the accident, to the employés of the company whose duty it is to repair the cars. The motorman in charge of the car at the time of the accident did not try to apply the brakes, because he knew they were not in condition to be of use under the

circumstances, and he tried to stop the car by reversing the power. He stated that, if the brakes had been in good condition, he could and would have stopped the car before striking the wagon. The reverse lever which the motorman tried to use had also been worn until it was loose, and the motorman thought that had something to do with his not being able to properly apply the reverse lever."

E. W. Rector, for appellant. Wood & Henderson, for appellee.

HILL, C. J. (after stating the facts). The respective rights and duties of street car companies operating on public streets and persons using those streets with vehicles are fully and elaborately set forth in *Hot Springs Street Railroad Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245. It is wholly unnecessary—in fact, an idle task—to reiterate those principles.

The first contention made by appellant is that the evidence fails to show negligence on the part of the appellant, and that it does show contributory negligence on the part of the appellee, and consequently the court erred in not withdrawing the case from the jury. It is insisted that appellant was entitled to judgment on either of these grounds. The court is of opinion, following the *Hildreth Case* that there was sufficient evidence of negligence on part of the company to submit the question to the jury, particularly the negligence of the motorman, having his attention detracted from watching ahead, and in having defective braking appliances, rendering an earlier stopping of the car impossible. If the action of Charlton in not properly estimating his chance of crossing in safety be held to be contributory negligence, then the subsequent action of the motorman, especially knowing the condition of the car, presented the question of want of proper care after discovering the negligence of Charlton.

It is also insisted that the evidence establishes a settlement and payment of the amount agreed upon in satisfaction of the damages. If Charlton's testimony be true, there was no settlement binding upon him. It is true that he is contradicted, and his testimony somewhat discredited, by his admissions, yet these were all questions of fact determinable by a jury. The case should have gone to the jury, and the question remains: Was it properly sent to the jury?

The instructions are assailed upon the same grounds that similar instructions were assailed in the *Hildreth Case*, and the court is asked to re-examine that case, and follow the rule of the Georgia court there presented for consideration. The *Hildreth Case* is in accord with many previous and well-considered decisions of this court, and the Georgia rule shown to be contrary to the settled practice in this state. The court is

of the opinion that the issues were properly sent to the jury upon facts legally sufficient to sustain the verdict.

The judgment is affirmed.

WEIERMUELLER v. SCULLIN.

(St. Louis Court of Appeals. Missouri. Nov. 17, 1903.)

WITNESSES—COMPETENCY—CONTRACTS WITH DECEDENTS.

Rev. St. 1899, § 4652, providing that, in actions where one of the original parties to the contract or cause of action in issue is dead, the other party to such contract or cause of action shall not be admitted to testify, does not preclude the surviving party to a contract from testifying to transactions and conversations had with the other party to the suit, who claims as assignee or donee of the deceased party to the contract, and is attempting to enforce the contract for his own benefit.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 630, 654.]

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by one Weiermueller against James Scullin. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff is the widow of Samuel Weiermueller. The evidence of plaintiff tends to show that on his deathbed Samuel Weiermueller handed plaintiff a piece of paper, on which was written the following: "St. Louis, Mo., August, 1889. James Scullin, Debtor to Samuel Weiermueller. To money loaned, \$250.00." He said to her: "I will give this to you. You make the collection of it, and keep it yourself." Plaintiff testified that some time after the death of her husband she presented the account to Scullin, and he said that he owed it and would pay it to her as soon as he was able, and on May 6, 1897, he paid her \$5 on the account, and thereafter, from time to time, up to and including September 14, 1901, he made small payments to her, ranging from \$1 to \$10, and aggregating the sum of \$167.75; that after September 14, 1901, he refused to make any more payments on the account. Scullin testified over the objection of plaintiff as follows: "The first time she came she said, 'I understand that you have promised.' In the first place she said that she was very hard up, and said she did not have any money, and that she understood her husband to say that I have promised to pay him back some money that he had paid me for those teams, and I told her that that was right—that I had done that. She asked me how much it was, and I told her that it was \$140, and I told her that I had promised him just before he died that I would do that, and that I would just as soon as I was able, and I did do it. I paid her from time to time \$5 until I had it more than paid up. In fact, I kept giving her money until she came to me with her husband, and then I told her that that settled it; I wouldn't pay her any more; that I had more than paid her what I had prom-

ised to pay her." He further testified that plaintiff never presented any account to him, and that he had never promised to pay her any more than \$140, and that he had paid her over that amount; that he paid her more than he owed her husband, for the reason that her husband had been a particular friend of his, and that he had been in his employ for over 13 years, and he wanted to help his widow along; that in September, 1901, she came to him and told him that she was married again, and after learning this fact he refused to give her any more money. The verdict and judgment were for the defendant. Plaintiff appealed.

John J. O'Connor, for appellant. Scullin & Chopin, for respondent.

BLAND, P. J. (after stating the facts). Appellant's contention is that Scullin was an incompetent witness for any purpose, and cites section 4652, Rev. St. 1899, as sustaining this contention. Counsel misconceives the scope of that clause in the section which declares that "in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor," etc. Some of the earlier cases construing this clause of the section seem to lend some support to appellant's construction, but the later ones have given it a more equitable construction, and hold that the surviving party is not absolutely cut off from testifying at all, but is a competent witness to conversations, transactions, etc., had with and testified to by a living witness, in respect to the contract or cause of action in issue and on trial. *Kirton v. Bull*, 168 Mo. 622, 68 S. W. 927, and cases cited on page 631 of 168 Mo., page 929 of 68 S. W.; *Eyer-mann v. Piron*, 151 Mo. 107, 52 S. W. 229. As was said in *Henry v. Buddecke*, 81 Mo. App. 360: "The spirit of the statute is not to close the mouth of the living party to a contract, where the other party is dead, under all conditions and in every circumstance, but to close his mouth where to permit him to speak would give him an advantage which he would not have were the other party living." The transactions and conversation to which Scullin was admitted to testify were had with the appellant, a living person: and it would be a hard rule to admit plaintiff to testify to conversations and promises made to her by Scullin, and then deny him the right to contradict such conversations and agreements, if not true. This view of the competency of Scullin to give testimony was admitted to give disposes of appellant's objection to the instructions given and refused by the court. The instructions given are supported by the evidence, and fairly and fully submitted all the issues to the jury.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

MAXEY v. STATE.

(Supreme Court of Arkansas. July 8, 1905.)

1. MISDEMEANORS—PROSECUTION ON AFFIDAVIT—APPEAL—CIRCUIT COURT—JURISDICTION.

The circuit court has jurisdiction of an appeal from a conviction before a justice of the peace on an affidavit charging violation of Kirby's Dig. § 1680, declaring that every person who shall convey into any jail anything useful to aid any prisoner in his escape shall be punished, etc.

2. CRIMINAL LAW—CHANGE OF VENUE—GROUND FOR REFUSAL.

Where, on application for change of venue in a criminal case on the ground of prejudice of the inhabitants, three of the witnesses who signed affidavits were examined by the court and found not to be informed as to the condition of the minds of the inhabitants, the action of the court in overruling the motion was not arbitrary.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 252, 253.]

3. SAME—CIRCUIT COURT RULE.

Failure to comply with a circuit court rule that, before a change of venue shall be granted in any criminal cause, written notice of the application therefor shall be given to the state's attorney three days prior to the application, is not of itself sufficient reason for denying a motion for a change of venue.

4. SAME—EVIDENCE—SUPPRESSION OF TESTIMONY.

In a criminal prosecution, evidence that on the day before the trial defendant had assaulted one of the witnesses for the prosecution was admissible, as showing an effort to suppress testimony.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 782.]

5. SAME—APPEAL—FAILURE TO EXCEPT AT TRIAL.

On appeal in a criminal case, objections to evidence which was not excepted to in the trial court will not be considered.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2962.]

6. SAME—HARMLESS ERROR.

The admission of incompetent evidence over objection is harmless, where the same facts are shown by other evidence not objected to.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3138.]

7. SAME—AIDING PRISONER TO ESCAPE.

On a prosecution for violation of Kirby's Dig. § 1690, punishing the conveying to a prisoner of any article designed to aid him in escaping, evidence that the prisoner whom it was charged defendant aided to escape was tried and acquitted was irrelevant, but harmless to defendant.

8. SAME—GENERAL EXCEPTION.

A general exception to evidence, not pointing out any specific objection, is insufficient to raise the question of error in its admission.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2671.]

9. SAME—ELEMENTS OF OFFENSE.

Under Kirby's Dig. § 1680, declaring that every person who shall convey into any jail any instrument proper or useful to aid any prisoner in his escape shall be guilty of a misdemeanor, whether such escape shall be effected or attempted, or not, the conveying to a prisoner of an instrument designed to aid him in escaping, with intent so to do, makes the crime complete, whether there is an acquiescence or co-operation on the part of the prisoner or not.

10. SAME—ARGUMENT TO JURY.

In a criminal prosecution, remarks of a prosecuting attorney, merely drawing inferences from testimony before the jury, are not prejudicial.

Appeal from Circuit Court, Independence County; Frederick D. Feetherson, Judge.

R. L. Maxey was convicted of a misdemeanor, and appeals. Affirmed.

The amended record brought here by the Attorney General shows that appellant was convicted before a justice of the peace of Independence county on a charge made by the affidavit of the prosecuting attorney under the following statute: "Every person who shall convey into any jail or place of confinement any disguised instrument, arms or other thing proper or useful to aid any prisoner in his escape, with the intent thereby to facilitate the escape of any prisoner lawfully committed to or detained in such jail or place of confinement, for felony or other criminal offense, or detained therein for any violation of any penal statute, or any civil action, whether such an escape shall be effected or attempted or not, shall be deemed guilty of a misdemeanor, and on conviction be fined in any sum not less than one hundred dollars and be imprisoned not less than six months." Section 1680, Kirby's Dig. He appealed to the circuit court, was tried by jury, again convicted, and fined in the sum of \$100 and six months in jail, and appealed to this court. In the circuit court appellant moved for change of venue, supporting his motion by the affidavits of himself and four others to the effect that the minds of the inhabitants of Independence county were so prejudiced against him that he could not obtain a fair and impartial trial. The prosecuting attorney objected to the hearing of the motion for change of venue because no written notice of such motion had been served upon him, as provided by the rules of the circuit court, as follows: "That before a change of venue shall be granted in any cause pending on the criminal docket of this court, written notice of the application therefor shall be given to the attorney for the state at least three days prior to the day upon which the application is made. Upon hearing of any application for a change of venue, the defendant will be required to produce in court the persons making the supporting affidavits. The court, after examining three of the witnesses who signed the supporting affidavit for change of venue, called upon appellant to produce the fourth, but appellant was unable to do so. The court then overruled the motion for change of venue, reciting in the order "that the court, after hearing the cross-examination of the supporting affiants, is of the opinion that such affiants were not informed as to the condition of the minds of the inhabitants upon the matter, except about the city of Batesville, and for this reason, and that no notice of this application had been served

upon the prosecuting attorney, as provided by the rule of this court, the court is of the opinion that the said motion be, and the same is hereby, overruled." Other facts will be stated in the opinion.

Horton & South, for appellant. Robt. L. Roger, Atty. Gen., for the State.

WOOD, J. (after stating the facts). 1. The record brought here by certiorari on motion of the Attorney General shows that an appeal was taken by appellant from a judgment of conviction before the magistrate. The circuit court therefore had no jurisdiction.

2. The circuit court did not arbitrarily overrule appellant's motion for change of venue, but examined three of the witnesses signing the supporting affidavit, and found that they were not informed as to the condition of the minds of the inhabitants about the matter, except about the city of Batesville. This alone was sufficient to justify the court in refusing the motion for change of venue. The court gave as an additional reason for refusing the change noncompliance by the appellant with its rules. This was no legal reason for refusing a motion for change of venue, where the statute had been complied with; and, had this been the only reason for the court's ruling, it would have been error. But, having examined the witnesses and ascertained the facts, as found in the court's order overruling the motion, which finding is sustained by the evidence, the court's ruling in refusing the motion cannot be considered arbitrary, and therefore erroneous.

3. The court permitted the state's witness Hall to testify that the appellant had, on the day previous to the trial, assaulted him and used abusive language towards him. The appellant's testimony shows that the assault on and abusive language to Hall was because of what Hall had sworn before concerning appellant's connection with the crime charged. Hall was to testify, and did testify the next day. The testimony tended to show the animus of appellant toward the prosecuting witness, Hall, on account of the testimony he had previously given, and which he might be expected to give again on the morrow. It tended to show a disposition on the part of appellant to browbeat or intimidate the witness Hall on account of his testimony, and in that sense might be regarded as an effort on the part of appellant to suppress testimony against him.

4. Appellant urges that it was error for the court to permit witnesses to testify in the absence of appellant to conversations with Hall, in which he made statements damaging to appellant; but appellant failed to reserve exceptions to the ruling of the court in admitting this testimony, and the objection made here for the first time cannot avail.

5. The testimony of J. W. Six that he examined the charge of incest against W. J. Hall and committed him to jail, without producing the commitment or record, or accounting for same, if erroneous, was not prejudicial; for the witness W. J. Hall had already testified, without objection, that he had been committed to jail on a charge of incest, and appellant himself testified that witness Hall had been in jail on that charge.

6. The fact that W. J. Hall, whom appellant is alleged to have intended to assist in escaping from jail, had been tried and acquitted, was irrelevant to the charge against appellant; but we do not consider it prejudicial. However, if it was relevant and prejudicial, appellant saved only a general exception to it, failing to point out the specified reason for its rejection. This was not sufficient. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

7. The offense is complete under the statute when any person shall have conveyed into the jail or place of confinement anything proper or useful to aid any prisoner in his escape with the intent to facilitate the escape of any prisoner, whether such escape be effected or attempted, or not. The acquiescence or co-operation of the prisoner, which appellant contends is necessary, does not seem to be contemplated by the act. The express language is to the contrary.

8. The bill of exceptions contains the following: "Be it remembered that upon the trial of the above-entitled cause J. C. Yancy, attorney for the state, made the following improper and prejudicial remarks: 'Bob Maxey knew that dead men tell no lies,' and saying that 'Maxey, the defendant, intended to kill Hall on his escape,' and saying 'They,' meaning the defendant's attorneys, 'ask you to believe that Morgan would be guilty of such a scheme as this, and you must believe that Morgan would stoop to instigate a scheme of this kind of that Bob Maxey is guilty'—to which remarks the defendant at the time excepted, and asked the court to instruct the same from the jury, which was by the court overruled, which ruling of the court he at the time excepted and asked that his exceptions be noted of record, which was accordingly done." The above record shows that the circuit court regarded the remarks of the attorney as "improper and prejudicial," but, notwithstanding this, he overruled the motion for a new trial, setting up such remarks as the fifteenth ground in such motion. This record presents the somewhat anomalous condition of the circuit judge expressing an opinion as to the effect of the remarks objected to, but failing to give the appellant the benefit of his opinion by granting his motion for a new trial. As the learned trial judge, notwithstanding his declaration that the remarks of the attorney set out above were "improper and prejudicial," refused the appellant's motion for a new trial, the ques-

tion is presented to us as to whether the remarks were really "improper and prejudicial," the declaration of the circuit judge to the contrary notwithstanding. The witness Hall had testified that the appellant had hit him on the head and knocked him down, and that from the effect of such blow he was in bad condition and suffering from nervousness at the time of giving his testimony. There was nothing beyond this to indicate the character of the assault that was made by the appellant on the witness Hall, and this was hardly sufficient to justify the attorney in reaching the conclusion that it was the intention of the appellant, by this assault, to kill the witness Hall, in order to get rid of his testimony, as indicated by the language which the attorney used. Still the facts upon which he predicated his opinion were before the jury, and as sensible men we must assume that they gave the opinion of the attorney as to these facts no more or greater consideration than the facts themselves justified. In this view, we do not see how the remarks concerning the assault could have been prejudicial. Likewise as to what was said as to Sheriff Morgan. The facts were all before the jury, upon which the attorney was expressing his opinion. It was no more than an opinion which he was expressing. The learned counsel for appellant say "that the proof on the part of the state showed conclusively that the sheriff was a party to the scheme to induce the defendant to violate the law by committing the act for which he was tried in this case." This being the opinion of counsel for appellant as to the conduct of Sheriff Morgan in connection with the transaction, it was certainly legitimate argument for counsel for the state to express the opinion that what the sheriff did in connection with the matter must be attributed to innocent and proper motives, and, if so, the appellant was guilty. We do not find the remarks complained of prejudicial to appellant.

Having considered all the assignments of error in the order presented in appellant's brief, and finding no reversible error, the judgment is affirmed.

BOYNTON v. ASHABRANER.

(Supreme Court of Arkansas. July 29, 1905.)

1. SECONDARY EVIDENCE—CERTIFIED TRANSCRIPT OF RECORD.

A certified transcript from the Land Office, showing the record of the issuance of a patent, is not admissible in evidence, in the absence of any proof of the loss of the original.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1302, 1303.]

2. DOCUMENTARY EVIDENCE—TIME FOR EXCEPTIONS.

Under the express provisions of Kirby's Dig. §§ 2743, 3190, exceptions to depositions and documentary evidence are to be determined before final submission.

3. APPEAL—AFFIRMANCE ON MERITS—NEW TRIAL.

In an action to recover land, plaintiff offered in evidence a certified transcript of a record from the General Land Office to prove title. This was admitted over objection on the ground that it was secondary evidence and no foundation had been laid, but the court decided for defendant on other grounds. *Held*, that on appeal a determination that the transcript was not admissible as original evidence did not require an affirmance on the merits, despite intervening errors, in favor of defendant, but that plaintiff was entitled to a new trial, in order to give him an opportunity to render his evidence competent by laying proper foundation.

Supplemental opinion. For former opinion, see 88 S. W. 563.

HILL, C. J. This case was decided at this term, and is yet within control of the court, and the court has concluded that it erred in its ruling on a question of evidence, and of its own motion has decided to recall the mandate and insert this additional opinion therein for the guidance of the chancery court, and to modify the decree heretofore entered, so as to remand for further proceedings, instead of remanding with peremptory directions to enter judgment for appellant. The appellant, to prove his chain of title, offered a duly certified transcript from the Land Office showing the record of the issuance of a patent to Cross. The appellee objected to its introduction on the ground that it was not the best evidence, the loss of the original not having been proved. The court overruled this objection, and the appellee duly excepted to the ruling. The court decided the case in favor of the appellee, Ashabraner, upon a totally different proposition. Upon the hearing in this court appellee insisted that its exception was well taken, and appellant's title not properly proved, and on the whole record the case ought to be affirmed, even if the court did not sustain his other contentions. The court held that the transcript was original evidence and properly admitted. Two other cases have come here where the same point has been fully discussed, and the court has concluded that it erred in this case in holding the certified copy of the transcript to be original evidence, and sufficient to prove the transfer without laying proper foundation for its introduction as secondary evidence. The question is fully discussed in *Carpenter v. Dressler*, this day decided,¹ and the opinion therein will be made a part hereof in the mandate.

It does not follow, from this change of the opinion of the court on this question, that the case should be affirmed. The chancellor held the evidence competent, and based his adverse decision on other grounds, and thereby did not give the appellant an opportunity to render this evidence competent by laying the proper foundation then, or suffering a nonsuit and bringing his action anew, where in he could have his evidence in proper shape to be admissible. The practice contemplates that exceptions to depositions and

¹ Rehearing pending.

documentary evidence be determined before final submission. See sections 2743, 3190, Kirby's Dig. This enables a party to nonsuit when he has mistaken the competency of his evidence and otherwise protect his rights. It would be manifestly unjust, and contrary to the better practice, to permit a defeat in an appellate court on an exception to evidence ruled in favor of the appellant, thereby throwing him off his guard and preventing him from properly protecting his rights, when the decision is against him on totally different grounds. Such a case is not one for the application of the rule to affirm when on the whole record the judgment is right, although wrong reasons are given for it, but rather is a case calling for a remand for further proceedings wherein it is shown that the case is not fully developed on account of an error of the court or a mistake of the party as to his remedy, when the interests of justice require the whole case to be more fully developed.

The judgment is modified to the extent that the cause is reversed and remanded for further proceedings not inconsistent herewith.

MCKINNEY v. STATE.

(Court of Criminal Appeals of Texas. June 14, 1905.)

1. CRIMINAL LAW—INSTRUCTIONS AFTER RETIREMENT OF JURY—TESTIMONY OF WITNESS.

Under White's Ann. Code Cr. Proc. art. 734, providing that if the jury, after retiring, ask further instructions, the court may give them in writing, it is proper, where they, after retirement, ask that the testimony of a witness be read to them, for the court to inform them in writing that they cannot have the testimony read to them, but that, if there is a disagreement among them as to his testimony, they can request the court to have him brought back on the stand, and have him detail that part of his testimony about which they disagree; such proceedings being authorized by article 735.

2. SAME—HARMLESS ERROR—TESTIMONY AS TO DEFENDANT'S MENTAL CAPACITY.

Defendant is not prejudiced by testimony of witnesses that in their opinion he had sufficient mental capacity to know it was wrong to attempt to kill prosecutor, this being admitted when the court was of the opinion that the evidence made an issue whether defendant at the time of offense was under the age of 13 years, and having been withdrawn when the court was satisfied that no such issue was raised.

3. SAME—CONFESSIONS—INSTRUCTIONS.

A charge that, where the state puts a confession in evidence, the whole of it is to be taken together, and the state bound by it, unless it is shown to be untrue in whole or part, though unnecessary, there being other testimony than the confession, is in proper form, even if the confession was relied on alone for conviction.

4. SAME—ACCOMPLICE TESTIMONY—CORROBORATION—INSTRUCTIONS.

Though it is better practice to follow White's Ann. Code Cr. Proc. art. 781, providing that a conviction cannot be had on accomplice testimony, "unless corroborated by other

evidence tending to connect defendant with the offense committed," a charge is not erroneous because merely requiring corroboration by evidence tending in "some degree" to connect defendant with the offense.

5. SAME—CIRCUMSTANTIAL EVIDENCE.

A case is not one of circumstantial evidence, where there is a confession of defendant and testimony of an accomplice that defendant did the act.

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Will McKinney was convicted of assault to murder, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault to murder, and, being under 14 years of age, his punishment was fixed at confinement in the state reformatory and house of correction for a term of five years. The testimony shows substantially that A. Thomas, the assaulted party, a vender of fruits and chile, was shot by appellant, who was accompanied by Marvin Rhodes at the time of the shooting; Rhodes being a small boy. Prosecutor at the time of the shooting was in bed at his place of business. The shooting occurred between 5 and 6 o'clock in the morning. Prosecutor testified that upon hearing a noise at the door he partly opened it, and a shot was fired, wounding him. The state's testimony shows that the wound was inflicted with a 22-caliber target rifle. The state introduced appellant's confession. However, in this confession appellant states that his companion, Marvin Rhodes, did the shooting; that he and Marvin had agreed to shoot the old man (prosecutor) because he had sold them some chile the day before of an inferior grade. The state introduced Marvin Rhodes, and he testified that appellant did the shooting. The first bill of exceptions relates to the refusal of the court to instruct the jury peremptorily to find a verdict of not guilty. We do not think there was any error in this, since both the confession of appellant and the testimony of the accomplice, with the other evidence in the case, support the verdict of the jury.

Bill of exceptions No. 2 shows that, after the jury had retired to consider their verdict, they propounded to the court the following question: "The jury desires to hear the testimony of W. S. Russell read to them. W. W. Parks, Foreman." The court informed the jury in writing that under the law they could not have the testimony read to them; but, if there was any disagreement among them as to the testimony of any of the witnesses, they could request the court to have the witness brought back on the stand and have him detail that part of the testimony about which the jury disagreed. This instruction was clearly correct, under article 734, §§ 875-877, White's Ann. Code Cr. Proc.; Conn v. State, 11 Tex. App. 390.

Bills 3 and 5 relate to the action of the

court permitting the witness Russell to be recalled at the instance of the jury and again detail his testimony. In this there was no error. White's Ann. Code Cr. Proc. art. 735.

Bill No. 6 shows that the state was permitted to prove by Sheriff Russell and Bud Roberts, city marshal, that in their opinion appellant had sufficient mental capacity to know it was wrong to attempt to kill prosecutor. Appended to the bill is this explanation: "That at the time the question was asked with reference to the mental capacity of defendant the court was of the opinion that the evidence as to defendant's age made an issue as to whether defendant was under the age of 13 years when it was alleged he committed the offense, but after investigation of the record the court became satisfied no such issue was raised and then withdrew the testimony." The record before us shows that defendant was 13 years of age. We see no reason for holding that this testimony, and especially its subsequent exclusion, could have injured appellant. The mere admission of the testimony would indicate some doubt as to the mental condition of appellant, and to that extent redounded to his benefit.

Appellant complains of the following portion of the court's charge: "You are further instructed that, where the state puts a confession in evidence, the whole of said confession is to be taken together, and the state bound by it, unless it is shown by the evidence to be untrue in whole or in part." It was not necessary for the court to have given this charge, since there was other testimony than the confession. However, the charge of the court was in proper form, if the confession was relied upon alone for conviction. Pharr v. State, 7 Tex. App. 472; Jones v. State, 29 Tex. Cr. App. 20, 13 S. W. 990, 25 Am. St. Rep. 715; Slade v. State (Tex. App.) 16 S. W. 253.

On the question of accomplice, the court charged the jury as follows: "You are instructed that under the law of this state a person charged with a crime cannot be convicted upon the evidence of an accomplice, unless the testimony of such accomplice is corroborated by other evidence tending to connect the defendant with the commission of the offense charged; and the corroboration is not sufficient if it merely shows the commission of the crime. An 'accomplice,' as the word is here used, means any one connected with the crime committed, either as principal, an accomplice, an accessory, or

otherwise. It means a person who is connected with the crime by unlawful act or omission on his part, transpiring either before, at the time of, or after the commission of the crime, and whether or not he was present and participated in the commission of the crime. The corroborative evidence must be such as of itself, and without the aid of the testimony of the accomplice, tends in some degree to show that the defendant was engaged in the commission of the crime. And where circumstances are relied upon as corroboration, these circumstances must be criminative; that is, these circumstances, if the accomplice had not testified at all, must to some extent be inconsistent with the innocence of defendant of the crime charged. So, if you believe from the evidence that the witness Marvin Rhodes, who has testified before you, is an 'accomplice,' within the meaning of that word as used in this charge, then you cannot convict the defendant on his testimony, even though you should believe his testimony, unless you believe his testimony has been corroborated by other evidence in the case, outside of his testimony, and outside of any evidence that may merely show the commission of the crime, that tends in some degree to connect defendant with the commission of the offense charged; and you must further believe from the evidence that the facts and circumstances relied upon by the state as corroboration are criminative—that is, inconsistent to some extent with the innocence of defendant of such unlawful killing." Appellant criticises said charge, as we understand, because the court says the evidence must tend in some degree to connect defendant with the commission of the offense, and that by the use of the words "some degree" the court required less corroboration than the statute. Article 781, White's Ann. Code Cr. Proc., reads, "Unless corroborated by other evidence tending to connect defendant with the offense committed." For decisions on this question, see section 997, White's Ann. Code Cr. Proc. In Jones v. State, 3 Tex. App. 575, a charge containing the language here criticised on the question of corroboration was approved. However, we believe that it is better practice to follow the statute. This is not a case of circumstantial evidence. Appellant's confession takes it out of the rule; and, besides, the testimony of Marvin Rhodes clearly does so.

The evidence is sufficient to support the verdict of the jury, and the judgment is affirmed.

**CITY OF SEDALIA ex rel. GILSONITE
CONST. CO. v. MONTGOMERY et al.**

(St. Louis Court of Appeals. Missouri. March 15, 1904.)

**1. STREET IMPROVEMENTS—CITY COUNCIL—
ADOPTION OF REPORT OF COMMITTEE.**

A city council, authorized by Laws 1892-93, p. 92, § 110, to make a street improvement for which a special tax bill is to be issued only where a majority of resident property owners liable for the tax do not file their protest against the improvement, adopts the report of a committee that a remonstrance was insufficient by introducing and passing an ordinance for the improvement after the report was received and placed on file, though this is not in strict accord with a parliamentary code adopted by its rules for guidance of its deliberations.

**2. SAME—JURISDICTION—CONCLUSIVENESS OF
COUNCIL'S FINDING.**

Under Laws 1892-93, p. 92, § 110, providing that if, within 10 days after publication of a resolution by a city council declaring necessary a street improvement for which a special tax is to be levied, a majority of the resident owners of the property liable for the tax shall not file their protest, the council shall have power to cause the improvements to be made, no jurisdiction to make the improvements vests in the council, except on assent of the majority of the property owners manifested by failure to dissent; and the council's finding of such assent is not conclusive.

3. SAME—WITHDRAWAL FROM PROTEST.

Under Laws 1892-93, p. 92, § 110, giving a city council jurisdiction to make street improvements for which a special tax bill is to be issued only if a majority of the resident owners of the property liable for the tax shall not, within 10 days after publication of the council's resolution that the improvement is necessary, file their protest against the improvement, signers of a protest filed may withdraw therefrom within the 10 days.

4. SAME—ACTION ON SPECIAL TAX BILL—EVIDENCE.

Under Laws 1892-93, p. 93, § 113, providing that special tax bills for a street improvement shall in an action thereon be prima facie evidence of the regularity of the proceedings, defendants, while having the burden of proof, may show the absence of material steps therein.

5. SAME—IMPEACHING PROTEST.

A protest, which, under Laws 1892-93, p. 92, § 110, if signed by a majority of property owners, deprives a city council of jurisdiction to make a street improvement, may, in an action on a special tax bill for the improvement, be impeached by evidence controverting the ownership and authority of the signers.

6. SAME—WITHDRAWAL FROM PROTEST.

One who, before the filing of a protest, under Laws 1892-93, p. 92, § 110, against the improvement of a street at the expense of property owners, files a letter withdrawing therefrom, is not to be counted as protesting.

7. SAME—PROTEST BY ADMINISTRATOR.

The administrator of a deceased owner of land is not the owner of the land, so as to be entitled, under Laws 1892-93, p. 92, § 110, to protest against the improvement of a street.

8. SAME—OFFICERS OF CORPORATION.

Officers of a corporation owning land may not, unless specially authorized by the directors, make the protest provided by Laws 1892-93, p. 92, § 110, against improvement of a street at the expense of the property owners.

Appeal from Circuit Court, Franklin County; Wm. A. Davidson, Judge.

Action by the city of Sedalia, on the relation of the Gilsonite Construction Company, against John Montgomery, Jr., and others. Judgment for defendants. Plaintiff appeals. Reversed.

This, an action on special tax bills, part of the issue in payment for paving West Sixth street in the city of Sedalia, originated January, 1902, in the circuit court of Pettis county, primarily against John Montgomery, Jr., and the Rollingsford Savings Bank, as joint defendants. The petition was subdivided into three counts upon a like number of tax bills, each count, with appropriate modification and passing by the formal statements, averring that on the 10th of February, 1898, the authorized officers, as officials of the city of Sedalia, issued the bill under the ordinance referred to, against the realty described, to the Gilsonite Roofing & Paving Company, assignor of the relator, describing the interests of defendants in the realty and asking judgment. The defendants entered their appearances to the action on the day it was brought, and filed a stipulation signed by them for judgment at the ensuing December term, if prior payment of the bills had not been made, and in event of payment before such December term the case was to be dismissed. In April, 1902, by consent the stipulation was withdrawn, and defendants, by attorney, filed a joint answer admitting the usual conventional affirmations of the petition, but averred that within the period provided by law a majority of the resident owners of property on the street liable for taxation for the proposed improvement duly filed their remonstrance against it, whereby the city council of Sedalia had no power to cause such improvement to be made; that, notwithstanding such protest and want of authority, the council unlawfully passed Ordinance No. 207 July 19, 1897, providing for the pavement of the street, and the contract was awarded to relator and the work completed by it at the contract price and accepted by the city council, which passed an ordinance directing the issuance of special tax bills in payment and against the parcels of realty abutting on the street improved. The answer proceeded to set out the respective interests of defendants severally, as owner and mortgagor and mortgagee of the realty, and terminated with apt allegations of the invalidity of the tax bills and prayer for their cancellation. The reply of plaintiff specifically denied the remonstrance by a majority of the resident owners of property on Sixth street liable for taxation for the improvement against such improvement, and the consequent absence of power in the city council to cause the improvement, and averred that the pretended remonstrance was not signed by such majority; that many of the signers were not owners of abutting property at the time of signing such remon-

strance or when it was filed; that within the period legally fixed, and before the remonstrance was filed, after the remonstrance was filed, and before the expiration of the time appointed, six of the parties signing, by writing filed with the city clerk, withdrew their names and petitioned to have the street improved as provided by the resolution of the council. At the same time there were filed a stipulation for change of venue to the circuit court of Franklin county, and also, by the attorney of various other owners of parcels of realty fronting on the reconstructed street against which similar tax bills had issued, a verified suggestion and motion as *amicus curiæ*, averring and charging that there were no adverse interests involved in such action, but the interests of the opposite parties were identical, and the plaintiff and defendants had conspired to impose upon the court a pretended controversy; that the action was a fictitious proceeding in which the parties collusively sought, by medium of removal of the cause to a county within the jurisdiction of the St. Louis Court of Appeals, to obtain a decision of the latter court, overturning the decision of the Kansas City Court of Appeals adjudging the same special tax bills invalid, and thereby ultimately secure a certification of the case to the Supreme Court, wherein defendants would seek to insure judgments against themselves, thus defeating defendants in other cases affecting the validity of like bills. The motion and suggestion concluded with a prayer to have the cause stricken from the docket, or a refusal to transfer the cause to any court outside of the jurisdiction of the Kansas City Court of Appeals. The court withheld any immediate action, and in the interim W. E. Bard, Jr., by attorney, interposed for leave to become a party as successor to interest of the defendant Montgomery. January, 1908, the court overruled the motion of the *amicus curiæ* and awarded a change of venue to the circuit court of Franklin county, where, in July, 1908, Bard was made party and entered his appearance as defendant, and on the same day Lee Montgomery, alleging he had succeeded Bard in interest in lot numbered 3 described in the petition, was admitted as defendant, and with Bard adopted the answer of the original defendants, and a nonjury trial resulted in judgment for defendants, from which this appeal followed.

The improvement was made and the tax bills were issued under sections 108, 109, and 110 of an act of the Thirty-Seventh General Assembly, repealing article 4, c. 30, Rev. St. 1889, and substituting a new article providing for the government of cities of the third class (Laws 1892-93, p. 85), especially section 110, providing that "when the council shall deem it necessary to pave, etc., any street within the limits of the city for which a special tax is to be levied, as herein pro-

vided, the council shall, by resolution, declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days thereafter, file with the clerk of the city their protest against such improvements, then the council shall have power to cause such improvements to be made and to contract therefor and to levy the tax as herein provided." The publication of the resolution of the council was completed June 6, 1897, thus confining the 10-day limit within which the remonstrance should be presented to June 16th, and June 14th such instrument was filed with the city clerk, to which names of owners of 41 parcels of realty appeared to be subscribed. It was admitted that one signer, Fannie Hartshorn, withdrew her name from the remonstrance before it was filed, and that six of those remaining had filed with the clerk, the day following its filing, their written withdrawals and request for erasure of their names from the protest before its consideration by the council. At regular session, June 21st, the remonstrance, together with the communications of withdrawal of signers, was read, referred to a special committee composed of the city counselor, the city engineer, and the street and alley committee of the council, whose report, signed by the city engineer and two of the three members of the street and alley committee, with opinion of the city counselor attached, was returned June 28th, received, and placed on file. The ordinance for the reconstruction was thereupon introduced and subsequently duly passed. The report of the committee announced that the total number of resident property owners was 61, and the number of signers to the remonstrance 32, but deducting names withdrawn, 5, left 27 counted on the remonstrance, and number left in favor 34, and further embodied that the names of the parties competent to be counted for or against the paving had been determined upon the advice of the city counselor, as shown in the letter appended. The opinion of the city counselor addressed to the city engineer in reply to the questions pertinent hereto, particularly what constituted a resident owner of property, whether a person signing a remonstrance could change the effect of his signature, so as to be counted for, instead of against, the pavement, when made in form of a written request, signed and filed before the time for the remonstrance expired, and whether an administrator could sign a remonstrance and be counted where property of the estate fronted on the street, contained his opinion defining resident ownership, replying in the affirmative to the second inquiry, and expressing the conclusion that an administrator, for reasons assigned, was without au-

thority to sign in favor of or remonstrate against such improvement.

At trial plaintiff rested, after tender in evidence of the special tax bills, their assignment to plaintiff being admitted, and defendants introduced the testimony following: The resolution of the council to improve the street; proof that the two weeks' publication terminated June 6, 1897; the minutes of the council to the effect that a remonstrance against paving Sixth street was read, also communications from Fannie Hartshorn and other property owners named, six in number, asking that their names be erased from the remonstrance, were read and on motion referred to the city counselor, the street and alley committee, and city engineer for investigation, and the remonstrance bearing names of 43 subscribers; the report of the above-named committee; the letter or opinion of the city counselor; the letters of withdrawal from the remonstrance, one of Fannie Hartshorn and one with six signatures, dated June 14th and filed June 15th; the minutes of the council of June 28, 1897, showing report of the committee and that on motion of its nonsigning member the report was received and placed on file; and, finally, the ordinance itself. Plaintiff in rebuttal tendered the testimony of the city engineer that various subscribers, including Fannie Hartshorn, had been included in estimate of total signers, and that some of the names of the remonstrants out of the 32 counted were not signatures of such parties, and that they did not authorize any one to sign for them; but, at objection of defendants, all such testimony was excluded. Plaintiff offered further testimony impeaching other signatures to the remonstrance as illegal and unauthorized, and that in lieu of 61 resident owners of property liable to taxation on the part of the street improved, there were 82 such owners entitled to remonstrate, all of which was excluded as incompetent in tending to contradict the findings of the council. Plaintiff further introduced the rules of the city council then in force, particularly that section adopting Cushing's Manual and designated sections of Cushing's Manual, and concluded with part of the minutes of the council of June 28th indicative of the fact that after the above motion was carried a tardy member appeared, took his seat, and the council assumed consideration of a measure of grave importance to the city, namely an ordinance authorizing the issue of refunding bonds in a substantial amount, which was put upon its first reading.

Geo. P. B. Jackson, for appellant. Barnett & Barnett, for respondents. G. W. Barnett, amicus curiæ.

REYBURN, J. (after stating the facts).

1. At the portal of the cause we are faced with a revival and reiteration of the charges of collusion between the parties confront-

ing each other as plaintiff and defendants. While it is indisputable that legal tribunals are not created to hear and decide moot cases, and that lawsuits contemplate adverse parties and hostile interests, and courts will refuse to entertain proceedings inaugurated and designed to affect the rights of third parties, strangers thereto, whereby such actions cease to be antagonistic and are rendered collusive (*Meeker v. Straat*, Adm'r, 38 Mo. App. 239; *State ex rel. v. Westport*, 135 Mo. 120, 36 S. W. 663), yet this record is devoid of any evidence sustaining such arraignment, and, being largely an issue of fact, the denial of the motion by the circuit court of Pettis county, where the action was commenced, will go far in controlling such question, and no reason has been exhibited to overthrow its discretionary action, or requiring any disturbance of its ruling in this regard.

2. The contention of respondents, summarized in the language of their counsel, is that, when the remonstrance was filed and thereafter, certain withdrawals were made therefrom, and the council referred the matter to a committee for investigation, which reported that it found 61 resident property owners, of whom 32 had by remonstrance filed a protest against the proposed improvement, but of the qualified parties signing the remonstrance 5 had withdrawn, thus leaving but 27 remonstrating, and further reporting that the committee had determined the qualification of those remonstrating upon the opinion of the city counselor filed with the report, and which report of the committee was received and placed on file; that such report became part of the record, when the council contemporaneously passed an ordinance directing the improvement, and the passage of such ordinance constituted in legal effect the adoption of the report, and disclosed the theory of the council upon which the latter ascertained and determined the remonstrance insufficient, and constituted a conclusive declaration by the record that it had acquired jurisdiction to enact the ordinance by reason of the withdrawals attempted after the protest had been filed; that the law made imperative and essential that the record should disclose lawful authority to make the improvement, and such record evinced that the council had found that a majority filing the remonstrance had been converted into a minority by the withdrawals, and thereupon, as the record itself displayed a want of power and jurisdiction, neither the city nor the owners of the tax bills could contradict such record, but the latter upon its face must disclose jurisdiction. Respondents further contended that a remonstrance, containing a majority of the resident property owners, when filed with the city clerk, conclusively ousted the jurisdiction of the city council to continue with the contem-

plated improvement, and the power could not be restored by withdrawal of names thereafter, and the council therefore was debarred from progressing except by proceedings anew. The situation, therefore, may be elucidated into the simple inquiries whether defendants established by competent proof that a remonstrance over the signatures of the requisite majority of the qualified owners of property subject to assessment for the improvement was filed, and, if such duly signed protest was presented, then whether plaintiff should have been accorded the right of impeaching or assailing the signatures thereto, or was such protest, thus executed and tendered, final and conclusive?

It is urged by appellant that the disposition of the report of the committee employed was ambiguous and indefinite, and its mere reception did not constitute an adoption, because not fixed upon by resolution. By putting the ordinance for the paving upon its passage after such action upon the report, the council adopted the latter in as effective a manner as if by formal resolution and motion, and, if such action was not in strict accord with the sections of the parliamentary code adopted for guidance of the council's deliberations, that body, as every deliberative body, reserved the discretionary right to exercise, formally or informally, at its pleasure, the power of suspension, waiver, or modification of such rules. *Holt v. City of Somerville*, 127 Mass. 411; *Bennett v. New Bedford*, 110 Mass. 433. The result of the action of the council was in effect a finding that under the law a majority of the qualified owners had not executed the remonstrance, and this conclusion of the council, illustrated by putting the ordinance upon its passage, was assailed, not by proof that in fact a legal majority of such qualified owners had remonstrated, but by endeavor to indicate a fatal infirmity and legal defect in the process by which such conclusion was attained. To sustain such contention it was made essential for respondents to concede that the committee found that a legal majority did not protest, but arrogating the right to reject, as not conclusive, such decision of the committee, and affirm that the record itself attested that such majority did remonstrate and the council was shorn of power to proceed with the improvement. The inquiry whether the conclusion of the council upon the validity and sufficiency of a petition in favor of or in protest against the performance of such public work is a final adjudication, involving decision of a jurisdictional fact, has received opposing answers, and has been solved at variance in different jurisdictions.

The view expressed in an earlier case by this court appears to negative the conclusiveness of such decision, in the absence of express legislative power. In *Fruin-Bambrick*

Const. Co. v. Geist, 37 Mo. App. 509, an action upon a special tax bill issued for improvement of an alley in the city of St. Louis, the defendants resisted recovery upon the ground, among others, that a remonstrance against the proposed improvement of the alley had been signed by the owners of more than the requisite major part of the owners of the property in the block intersected by the alley, and the court pertinently says: "It appears inferentially from the record that the board of public improvements decided that the remonstrance was not signed by the owners of a major part of the block, and the appellant contends that the finding of this fact by the board of public improvements was conclusive. We cannot consent to this. This was a jurisdictional fact, and the decision of the board, in the absence of an express legislative provision to that effect, would not be conclusive." A like rule obtains in the state of New York, announced in *Miller v. City of Amsterdam*, 149 N. Y. 288, 43 N. E. 632. *City of Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278; *Cummings v. Com'rs*, 181 Ill. 136, 54 N. E. 941.

An eminent commentator, in his admirable treatise on the law of taxation, in the chapter devoted to taxation by special assessment, under heading "Municipal Action," expressed the following view: "Municipalities having no inherent power in these cases, it is necessary to the validity of their action that they keep closely to the authority conferred. Their ordinances and resolutions must be adopted in due form of law, and they must keep within them afterwards. They can bind the taxpayers only in the mode prescribed and can substitute no other. Their legislative action, if properly taken, is conclusive of the propriety of the proposed improvement, and of the benefits that will result if it covers that subject; but it will not conclude as to the preliminary conditions to any action at all, such, for example, as that there shall be in fact such a street as they undertake to provide for the improvement of, or that the particular improvement shall be petitioned for or assented to by a majority or other defined proportion of the parties concerned. This last provision is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage in the proceedings; and any decision or certificate of the proper authorities that the requisite application or consent had been made would not be conclusive, but might be disproved." 2 *Cooley on Taxation* (3d Ed.) p. 1243.

In a venerable decision from the state of New York, being ejectionment for land to which title was asserted by virtue of an assessment and sale for improvement in the then village of Brooklyn, the court says: "The defendant insists that the petition conferred jurisdiction on the trustees to lay out a well and pump district, etc., provided they should

judge that a majority of the persons intended to be benefited had signed; that by granting the petition and proceeding with the work the trustees adjudicated upon the question, and determined that a majority had petitioned; and that this judgment of the trustees is conclusive upon all persons so long as it remains unreversed. It is impossible to maintain that in this matter the trustees were sitting as a court of justice, with power to conclude any one by their determination. True, they were called upon to decide for themselves whether a case had arisen in which it was proper for them to act; but they acted at their peril. They could not make the occasion by resolving that it existed. They had power to proceed if a majority petitioned, but without such a petition they had no authority whatever. They could not create a power by resolving they had it." *Sharpe v. Speir*, 4 Hill (N. Y.) 76. The same conclusion is given expression in *Allen v. City of Portland*, 35 Or. 420, 58 Pac. 509, the court therein stating: "But the question as to its [i. e., the common council's] jurisdiction to act in any given case, like courts of limited, special, and inferior jurisdiction, is always open to inquiry; and in any event its decision or determination may be attacked collaterally for want of such jurisdiction. It cannot legally assume to act until the facts exist upon which its jurisdiction depends, and no decision or determination that it has can avail in the absence of such facts. By the express charter provisions it is not to give notice, or act in the exercise of the power delegated, until the requisite petition is filed; and its judgment that it conforms to the requirements of the charter could not make it so, if it was otherwise, or give it validity in invitum. *Cagwin v. Town of Hancock*, 84 N. Y. 532. Notwithstanding the council is bound to exercise its judgment in determining whether a valid petition has been presented, and this it does for the purpose of ascertaining whether it is warranted in taking further action under it, yet its judgment is not conclusive unless made so by express legislation, and such is not the case under the charter. Inquiry may be made, therefore, with respect to the fact of jurisdiction, in a proceeding to enjoin the collection of an assessment purporting to have been made by and through the authority of the council." *Aplin v. Fisher*, 84 Mich. 128, 47 N. W. 574; *Ogden City v. Armstrong*, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444.

The sounder and better sustained view would seem that the ex parte decision of the council in such matters is but prima facie and presumptive, in absence of direct conclusive power clearly conferred by the Legislature, and if such conclusions be not merely legislative or ministerial in their character, and even if treated as of a quasi judicial nature, they are not final, and the

council record or journal is merely evidence of the action of the body, not absolute proof of the verity and correctness of the decision itself; for upon the fact respecting the remonstrance the jurisdiction or power of the council to act is made dependent. This authority of the city council is not a continuous power, subsisting, but subject to be divested by the filing of a protest containing the prescribed quota of qualified objectors, but more properly it may be defined as a right, dormant and inert, until animated by the will of the majority of the resident property owners liable to be assessed for the intended improvement, whose assent is implied from absence of majority protest; and such power by tacit assent, implied of those not affirmatively expressing their dissent by protest, is awakened to set in motion and render operative the legal machinery of the statute empowering the improvement. The language employed in the act of 1893 is appropriate for such construction. Section 110 recites: "And if a majority of the resident owners of the property liable to taxation therefor shall not within ten days thereafter file with the clerk of the city their protest against such improvements, then the council shall have power to cause such improvement to be made," etc. The Supreme Court of the United States, in explicit terms, has given weight to the proposition that under such conditions no jurisdiction exists to construct the improvements until the implied approval of a majority of the property owners is had through their failure to object. In *Armstrong v. Ogden*, first found reported in 12 Utah, 476, 43 Pac. 119, and on final appeal in 168 U. S. 232, 18 Sup. Ct. 98, 42 L. Ed. 444, the ruling of the court was invited upon a bill against the municipal corporation and its mayor and members of its common council to restrain the city and its officers from levying assessments upon the realty of plaintiff and others in like situation for the purpose of paving a street of the city. The act under which the tax bills were sought to be issued provided for public notice of the improvement to be advertised in manner and form defined, and proceeding embodied: "If, at or before the time so fixed, written objections to such improvements signed by the owners of one-half of the front feet abutting upon that portion of the street, avenue, or alley to be so improved be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvements." Judge Shiras, expressing the opinion of the court, said: "We agree with the courts below in thinking no jurisdiction vested in the city council to make an assessment or to levy a tax for such an improvement, until and unless the assent of the requisite proportion of the owners of the property to be affected had been obtained, and that the

action of the city council in finding the fact of such assent was not conclusive, as against those who duly protested. The fact of consent by the requisite number, in this case to be manifested by failure to object, is jurisdictional, and in the nature of a condition precedent to the exercise of the power." In the state of California, the statute governing public work of like character was decided to necessarily import that, if such protest had been filed, jurisdiction shall not be deemed to have been acquired. *City Street Improvement Co. v. Babcock*, 123 Cal. 205, 55 Pac. 762. The Supreme Court of Oregon, in *Clinton v. City of Portland*, 38 Pac. 407, says: "Section 27 of said article 6 authorizes the common council to improve a street, without giving notice of its intention to do so, when the owners of two-thirds of the adjacent property petition therefor, and section 3, supra, authorizes an improvement, if no remonstrance by the owners of a majority of the property adjacent thereto be filed within 10 days after the final publication of the council's notice of intention to make the improvement. The charter thus provides two methods of acquiring jurisdiction to improve a street," etc.

While not interpreting words identical with those of the act under consideration, but construing language of similar purport, the above authorities strongly incline to the conclusion that the conferring or withholding of power or authority, and not the ousting of jurisdiction pre-existing, is involved in the filing of the remonstrance under the provisions of such statutory enactments. This section established a time limit of 10 days within which objection to the improvement might be announced, and until the expiration of such period the power of the council did not become fixed or defined, and no sufficient reason has been assigned why a party in interest, who in the first instance joined the protestants by attaching his name to the remonstrance thereafter for reasons satisfactory to himself, might not recede from such position and ratify or assent to the proposed work. It would seem but logical and reasonable to permit qualified names to be subscribed to the remonstrance, until it was matured for action by the council, and it is difficult to perceive why right of more positive change of purpose should not be permitted a signer of the protest within the period appointed. No direct authority, other than hereinbefore alluded to, has been produced upon this branch of the controversy, but judicial rulings under analogous conditions are not lacking. The practical answer to the possible difficulties ensuing from the various situations so easily conceivable under such construction is that to all parties, whether favorable or hostile to the contemplated improvements, notice is imputed that until the expiration of the statutory interval the intention of the qualified property owners

is not finally expressed, but until the 10 days have ended may vary, and is subject to reversal on reconsideration.

Decisions which may be of guidance, while not express authority, may be found in proceedings under the laws of the various states to secure liquor licenses, establish drainage districts, and locate county seats or public roads. In *Sauntman v. Maxwell*, 154 Ind. 114, 54 N. E. 397, a proceeding under a drainage act allowing 10 days after docketing of the petition for landowners to object, the remonstrance against the proposed drain was likened to a remonstrance against the granting of a liquor license, and it was therein ruled that any remonstrant had the right to withdraw within the period fixed, whether the remonstrance had been filed or not, and after the 10 days had elapsed the question for determination on the petition and remonstrance was whether or not the required number of qualified landowners were remonstrants at the expiration of such period. *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313. In Ohio it has been held that resident landholders, who have subscribed a petition for road improvement, may, at any time prior to such improvement being finally ordered, withdraw their assent by remonstrance or have their names stricken from the petition. *Hays v. Jones*, 27 Ohio St. 218. In Iowa, in *Green v. Smith*, 111 Iowa, 183, 82 N. W. 448, distinguishing the earlier cases of *Loomis v. Bailey*, 45 Iowa, 400, and *Jamison v. Board of Supervisors*, 47 Iowa, 390, it was held that a voter, signing a statement of consent to the sale of liquors under the statute, could withdraw his consent after it is filed and before it was acted on by the board of supervisors, upon which was imposed the duty of a public canvass of such statement after 10 days' notice had been given of such intended canvass. In other states the same principle has obtained recognition and has been applied. *State v. Nemaha County*, 10 Neb. 32, 4 N. W. 373; *State ex rel. v. Geib* (Minn.) 68 N. W. 1081; *Perkins v. Henderson*, 68 Miss. 631, 9 South. 397. The following apt language justifies its citation: "A remonstrance is defined to be a petition to a court or deliberative body, in which those who have signed it request that something which it is in contemplation to perform shall not be done. There would seem to be nothing irrevocable in the signing of a petition. We conclude that when the petitioners signed and presented to the council the remonstrance, protesting against that for which they have petitioned, and withdrawing their names from the petition, it stood, so far as they were concerned, as though they had never signed it. Was the remonstrance in time to counteract the effect of the petition? We think it was. The petition had been presented to the council, and it had been referred to a committee of the council

when the remonstrance was filed. No other steps had been taken by the council until the petitioners had withdrawn their names from the petition. In our opinion there had not been, at that time, any binding and conclusive action of the council upon the petition. No right had accrued in favor of any one or which could be enforced by any one." *Noble v. Vincennes*, 42 Ind. 125. Also the following discussion of the question taken from *People v. Sawyer*, 52 N. Y. 296: "The question in the present case is, can a petitioner, after signing a petition and becoming an applicant by its presentation to the judge, thereafter and before the testimony is closed withdraw as an applicant and have his name and taxable property excluded from the computation of the applicants? It is said that he cannot, for the reason * * * that signing the petition is equivalent to casting a ballot in the affirmative, and that a signer is concluded by signing, the same as a voter at an election, by actually handing and having his ballot deposited in the box. I am unable to see any analogy in the cases. No one has any interest in the petition except the signers. * * * It is further urged that a taxpayer, by signing the petition, is estopped by the relation thus entered into with the other signers, from thereafter withdrawing therefrom. * * * The signer of the petition acquired no right and conferred none upon any other thereby. * * * It is also stated that to permit him to withdraw would be a fraud upon the other signers. But * * * all the right that any one has is to have his own name counted and his taxable property computed by the judge in determining the case. It is argued that the right given to appear upon the hearing and request to unite in the petition, while the statute makes no provision for the withdrawal therefrom by those who have signed, shows that the Legislature did not intend that the latter should have any such right. * * * It was not necessary that the statute should give the right to withdraw. This right the law gives petitioners, unless prohibited by the statute. It is said that the others may have been induced to incur expense upon the faith of his signature in the further prosecution of the proceeding. The answer to that is that, if any of them have incurred expense, it was on their own account and in furtherance of their own purposes. Signing the petition conferred no right upon another to expend money on the faith of his signature. No such inference can fairly be made. A signer cannot be estopped from withdrawing upon the ground that he had induced another to act upon the faith of his signature, who will be prejudiced thereby. Besides, signing the petition is only a representation that he is then in favor. * * * It is not a promise that he will not exercise his right to withdraw in case he changes his

mind upon further information. The allowance of the right to withdraw will tend to prevent fraud in procuring signatures, as signatures so procured will be almost certain to become useless by the exercise of the right by the person induced to sign."

Appealing again to the provisions of the statute under which the bills were issued, section 113 declares: "Such special tax bills shall in any action thereon be prima facie evidence of the regularity of the proceeding for such special assessments, of the validity of the bill, of the doing of the work and furnishing of the materials charged for, and of the liability of the property to the charge stated in the bills." Upon the introduction of the bills in evidence, they constituted presumptive proof of all essentials to recovery, and the burden devolved upon defendant to establish the omission of some material step or disprove some substantial element in the proceedings.

From the foregoing premises, we derive the conclusions: That the journal of the council kept by the clerk in obedience to the statute (Rev. St. 1899, §§ 5772-5774), inclusive of the report of its committee, was competent proof of the proceedings of the council, but did not prohibit disproof of, or inquiry into, the existence of the facts prerequisite to exercise of the power to cause the improvement to be made, and the validity of the protest was subject to impeachment by evidence controverting the ownership and authority of the subscribers thereto. That the name of the subscriber to the remonstrance, who had filed her letter of withdrawal before the protest was filed, should have been excluded from computation among the remonstrants. That the signature of the administrator, the mere personal representative of his intestate, was not the owner of realty of the estate within the statute, and could not bind the heirs, the true owners of the realty liable to the charge, and be acted without authority and beyond his powers in so attempting by signing. *Mulligan v. Smith*, 59 Cal. 206; *Rector v. Board*, 50 Ark. 116, 6 S. W. 519; *Batty v. City of Hastings*, 63 Neb. 26, 88 N. W. 139. The conveyance in the firm name vested sole title only in the party named, and he alone should have been counted as a single remonstrant. *Reinhard v. Lead, etc., Co.*, 107 Mo. 616, 18 S. W. 17, 28 Am. St. Rep. 441. The officers of the corporate landowners, unless specially authorized by the board of directors, were without power to bind the corporations by their signatures. *Morse v. City of Omaha (Neb.)* 98 N. W. 734. That remonstrants had right of withdrawing their signatures until the expiration of the period prescribed; and from the record as introduced by defendant less than a majority of legally qualified remonstrants remained subscribers of the protest at the expiration of the time limit. The council, therefore, had the power

to proceed with the improvement, the issue of tax bills in payment therefor was valid, and the judgment of the circuit court of Franklin county should be reversed.

As these conclusions are at war with the opinion of the Kansas City Court of Appeals, expressed in *Knopf v. Roofing, etc., Co.*, 92 Mo. App. 279, and *City of Sedalia ex rel. v. Scott*, 104 Mo. App. 595, 78 S. W. 276, the cause must be certified to the Supreme Court, which is accordingly ordered.

BLAND, P. J., and GOODE, J., concur.

LLEWELLYN v. SPANGLER.

(St. Louis Court of Appeals. Missouri. Jan. 10, 1903.)

1. APPEAL—PRESERVATION OF ERRORS—MOTION FOR NEW TRIAL.

Instructions, not assigned as grounds for new trial in the motion therefor, are not reviewable on appeal.

2. CLERKS OF COURT—LIABILITY TO LITIGANTS—NEGLECT OF SUCCESSOR.

Under Rev. St. 1899, § 825, providing that, when an order is made for change of venue, the clerk shall immediately make out a full transcript of the record and transmit the same to the clerk of the court to which the removal is ordered, and for failure to do so shall forfeit \$100 to the party aggrieved, a clerk who, on retiring from office, delivers to his successor the papers in a suit in which a change of venue has been ordered, is not responsible for the negligence of his successor in failing to transmit the papers to the clerk of the court to which the cause has been removed in time to have the same docketed for the next term of such court.

3. SAME—CHANGE OF VENUE—TRANSMISSION OF RECORD—CONSTRUCTION OF STATUTE.

Under Rev. St. 1899, § 825, providing that, when an order for change of venue has been made, the clerk shall "immediately" make out a transcript of the record and transmit the same to the clerk of the court to which the removal is ordered, the transcript should be made out and transmitted in such convenient time as is reasonably necessary for the performance of such duties; the purpose of the statute being to prevent unreasonable delay or negligence in the transmission of the transcript, and to secure an early opportunity for the trial of the cause in the court to which the venue has been changed.

4. SAME—FAILURE TO TRANSMIT TRANSCRIPT—EXCUSES.

Rev. St. 1899, § 825, provides that, when an order for a change of venue has been made, the clerk shall immediately make out a transcript of the record and transmit the same to the clerk of the court to which the removal is ordered, and for failure to do so shall forfeit \$100 to the party aggrieved. An order for a change of venue was made in a suit, and thereafter defendant's attorney, acting in good faith, but without authority from plaintiff, requested the clerk to withhold the transmission of the transcript until a pending proposition to arbitrate should be finally settled. The clerk acceded to this request, and subsequently the proposition to arbitrate was declared off, and the clerk's term of office expired without the transcript having been transmitted. The clerk's successor had ample time to transmit the transcript to the court to which the change of venue was ordered before the ensuing term of such

court, but nevertheless failed to do so. *Held*, that the first clerk was justified in holding the transcript under the circumstances, and was not liable to plaintiff for having failed to immediately transmit the same.

Appeal from Circuit Court, Clark County; E. R. McKee, Judge.

Action by Charles T. Llewellyn against Edward P. Spangler. From a judgment for defendant, plaintiff appeals. *Affirmed*.

The petition, omitting caption, is as follows: "Plaintiff for cause of action states: That he was plaintiff in an action against George E. Llewellyn and others, No. 10,143, in the circuit court of Clark county, Missouri, which said action was pending and for trial at the October term of said court. That said action was instituted by plaintiff for the purpose of partitioning certain real estate belonging to the parties to the said action. That on the 10th day of November, 1902, it being the second day of said October term of the Clark county circuit court, one of the defendants in said action, George E. Llewellyn, made application for a change of venue of such action, filing his affidavit therefor, and thereupon Hon. E. R. McKee, presiding judge of said court, granted a change of venue of such action, and made an order of removal of such action to the circuit court of Schuyler county, Missouri. Defendant, George E. Llewellyn, having paid into the court the \$10 required by law, such change was made to the circuit court of Schuyler county, Missouri, which court convened at Lancaster, in said Schuyler county, on the 4th day of May, 1903. Plaintiff states that defendant, Edward P. Spangler, was at the time the change of venue was taken in such action, and so continued to be up to January 1, 1903, the circuit clerk of Clark county, Missouri, and that he failed, neglected, and refused to make out a full and complete transcript of the record and proceedings in such cause and transmit them, together with the original papers in the cause, to the clerk of the circuit court of Schuyler county, Missouri, as required by such order of removal and by section 825 of the Revised Statutes of Missouri, 1899. Wherefore this plaintiff says he is damaged, injured, and aggrieved by the failure, refusal, and neglect of defendant, Edward P. Spangler, to make up a full and complete transcript of the record and proceedings in the cause in which such change of venue was taken, and transmit the same, with the original papers, in order to perfect such change of venue, so that such case would have been for trial at the May term of the circuit court of Schuyler county, 1903, and respectfully asks judgment against defendant for the statutory penalty of \$100, with costs of suit."

Omitting caption, the answer is as follows: "Now comes the defendant, and for his answer and defense to the petition of plaintiff denies each and every allegation in

said petition contained, except those herein-after specifically admitted. Defendant, further answering, admits that at the October term, 1902, of this court, and on the 10th day of November, 1902, as stated in said petition, a change of venue was granted by said court of the suit described in said petition to the circuit court of Schuyler county, Missouri, on the application of one George Llewellyn, one of the defendants therein, and that the first term of said court thereafter convened on the 4th day of May, 1903, and also admits that defendant was the clerk of the circuit court of Clark county, as stated in the petition, that his said term expired on the 1st day of January, 1903, and that he did not, while such clerk, transmit to the circuit clerk of said Schuyler county the transcript and original papers of said cause. But defendant says that, immediately upon the entry of said order of change of venue upon the records of said court, he made out a full transcript of the proceedings in said cause before said court, and prepared the same, together with the original papers in said cause, for immediate transmission to the clerk of said Schuyler county circuit court, but that such transmission was withheld by the orders and directions of the attorneys of record in said cause, upon their assurance and representation that a compromise of said suit was then pending, and that the matters involved in said suit would all be settled and adjusted between said parties long before the said May term, 1903, of said Schuyler county circuit court, and that the making of additional costs and expense therein was unnecessary; that defendant's term as clerk of said Clark county circuit court ended on the 31st day of December, 1902, and he was succeeded in said office by F. M. Harr, the present incumbent, to whom said transcript and original papers in said cause were delivered by defendant on the 1st day of January, 1903, nearly four months prior to the time when the said transcript and papers could have been filed with the clerk of said circuit court of Schuyler county, in time for the said May term, 1903, of said court; that during the remainder of said term of defendant as such clerk no further notice or instruction was given him concerning said cause by said parties, or either of them, or their attorneys of record. Defendant states that at the time aforesaid a compromise of said cause was being considered by said parties, and that said parties did not reach a determination therein until in January, 1903, after defendant's said term of office had expired; whereas, defendant is informed and believes by mutual consent all propositions of compromise between said parties were then withdrawn. Wherefore defendant, having fully answered, prays to be dismissed, with his costs."

There was a reply denying the new matter in the answer. The issues were submit-

ted to a jury, who found for defendant. Plaintiff appealed in the ordinary way.

Defendant assumed the burden of proof on the trial. It was admitted that after November, 1902, the first regular term of the Schuyler circuit court would convene on May 4, 1903. Defendant offered evidence showing that immediately after the adjournment of the November term, 1902, of the Clark circuit court, he made out a full and complete transcript of the record in the cause of Charles T. Llewellyn v. George E. Llewellyn et al., No. 10,143, and had the same, with the papers not forming a part of the record in the case, ready for transmission to the clerk of the Schuyler circuit court, when he was informed by defendants' attorney of record in the case that the parties to the suit had under consideration a proposition to submit the cause, with six or eight other pending suits between the parties, to arbitration, and that the parties did not want to incur additional costs, and for these reasons asked him as a favor to hold up the transcript until the pending proposition for arbitration should be settled one way or the other; that in compliance with this request he (defendant) did not transmit the transcript, but held the same until January 1, 1903, when he was succeeded in office by F. M. Harr, to whom he turned over the transcript and papers in the case. J. A. Whiteside, Esq., the attorney of George Llewellyn, testified that he was requested by his client to see Charles Llewellyn (plaintiff herein) and find out if he would not agree to submit the partition suit and other suits then pending to arbitration; that he saw him about the matter, but got no definite answer from him at the time, nor until about the last of December, 1902, when plaintiff said he would agree to the proposed arbitration. After having the first conversation with Charles Llewellyn about the arbitration, but before he had received a definite answer from him as to whether or not he would agree to submit to arbitration, Whiteside told the defendant of the proposition to arbitrate the case, and asked him as a favor to the parties to withhold the transcript. The evidence shows that the proposition to arbitrate was held under advisement until about January 15, 1903, when Charles Llewellyn called it off. The transcript did not reach the Schuyler circuit court until April 29, 1903, too late to appear on the following May term docket. Plaintiff's evidence shows that neither he nor any one authorized to represent him at any time requested or instructed the defendant to withhold the transcript. Plaintiff testified that the proposition to arbitrate was never submitted to him until December 29, 1902, and that he was not aware that the transcript had been withheld until April 29, 1903.

The court refused to give a peremptory instruction to find for plaintiff, asked by him at the close of defendant's evidence.

but gave the following instructions for plaintiff: "(1) The court instructs the jury that it was the duty of the defendant, as circuit clerk, when the change of venue was taken to Schuyler county, to immediately make out a transcript of the record and proceedings in the cause, including the petition and affidavit and order of removal, and transmit the same, duly certified, together with all the original papers filed in the cause and not forming a part of the record, to the clerk of the circuit court of Schuyler county; and unless you believe that plaintiff, Charles T. Llewellyn, authorized or agreed for the defendant to withhold sending said transcript and papers, then your verdict will be for the plaintiff. (2) The court instructs the jury that it makes no difference that the transcript and papers could have been sent after defendant went out of office and in time for the case to be tried at the next term of circuit court of Schuyler county. Still, if you believe defendant, without any authority from plaintiff and without plaintiff's knowledge and consent, withheld said transcript and papers, and failed to send them before he did go out of office, then you will find for plaintiff. (3) The court instructs the jury that it was the duty of the defendant to immediately transmit the record and papers in the case of Llewellyn v. Llewellyn to the Schuyler county circuit clerk, unless he was notified by both the plaintiff and the defendants in said cause, or their attorneys, not to send said papers and transcript immediately. (4) The court instructs the jury that the plaintiff does not have to prove any pecuniary loss or damage, or that he is aggrieved; but the law presumes that he is aggrieved if you find that the clerk did withhold the transcript and papers on change of venue without the plaintiff's authority or consent." The court refused instructions asked by plaintiff, which, if given, would have cut out the defense, root and branch.

The court gave the following instructions for defendant: "(1) The court instructs the jury that unless they believe from the evidence that the holding up of the transcript until the expiration of Spangler's term as circuit clerk prevented the said plaintiff from securing a speedy trial, and that he was thus aggrieved thereby, you will find for the defendant. (2) If you believe from the greater weight of evidence that an arbitration of the case of Charles T. Llewellyn v. George Llewellyn et al., which had been removed to circuit court of Schuyler county by change of venue, was contemplated and pending by the parties, and on account thereof at the knowledge or consent of plaintiff defendant withheld the transcript until his term of office expired, your verdict should be for defendant. (3) In passing upon the question as to whether or not plaintiff authorized or agreed to the withholding of the transcript, you may take into consideration all the facts and circum-

stances proven, and, if you find he did so agree, your verdict should be for the defendant. If you believe the plaintiff consented to the withholding of the papers, or had knowledge of the same being withheld, to await the contemplated or proposed arbitration, and did not object to such withholding, your verdict should be for the defendant."

O. T. Llewellyn, for appellant. O. S. & G. M. Callihan, for respondent.

BLAND, P. J. (after stating the facts). 1. The statute on which this suit is bottomed reads as follows: Section 825, Rev. St. 1899: "After Change, Clerk to Transmit Record. When any such order shall be made by the court or judge, the clerk shall immediately make out a full transcript of the record and proceedings in the cause, including the petition and affidavit and order of removal, and transmit the same, duly certified, together with all the original papers filed in the cause, and not forming a part of the record, to the clerk of the court to which the removal is ordered, and for failure to do so shall forfeit one hundred dollars to the party aggrieved, to be recovered by civil action." If the court was correct in refusing plaintiff's peremptory instruction, then the judgment should be affirmed, as the giving of instructions for the defendant is not assigned as one of the grounds for new trial in the motion therefor, and for this reason they are not reviewable. *State v. Headrick*, 149 Mo., loc. cit. 404, 51 S. W. 99; *Fullerton v. Carpenter*, 97 Mo. App., loc. cit. 201, 71 S. W. 98.

The uncontradicted evidence shows that the Schuyler circuit court did not convene, after November, 1902, until May 4, 1903, and the defendant went out of office on January 1, 1903, at which time he turned over his office and delivered the transcript and papers in the partition suit to his successor. Thereafter it became the duty of his successor to make the transmission, and if he negligently failed to do so in time to have the cause docketed for the May term, 1903, of the Schuyler circuit court, the defendant is not responsible for such negligence. I think the evidence shows that the transcript was negligently withheld; but the question in the case is, should that negligence be ascribed to defendant? He admits in his answer and in his testimony that he withheld the transcript, after he had it ready for transmission, for something like a month, and until after the expiration of his term of office. He thereby tacitly confesses that he violated the letter of the statute, but offers to justify his conduct by showing that he did not violate the spirit of the statute by what transpired between himself, and Mr. Whiteside, the attorney representing plaintiff's adversary in the partition suit. I think the evidence shows that both Whiteside and the defendant acted in perfect good faith. I think it also shows that, while the plaintiff did not

accede to the proposition to arbitrate the suit when first made to him by Whiteside, he did not refuse to consider it, but did consider it, and afterwards agreed to it. This evidence not only shows that Whiteside acted in good faith in requesting defendant to withhold the transcript, but that the plaintiff's conduct warranted Whiteside to believe the matters in dispute between plaintiff and his brother, George Llewellyn, including the partition suit, would be submitted to arbitration. In these circumstances, Whiteside was justified in taking steps to prevent the further accumulation of costs in the suit, and in asking that the transmission of the transcript be withheld until the proposition to arbitrate should be finally settled, especially in view of the fact that the Schuyler circuit court would not convene for more than four months, and withholding of the transcript was, apparently, as much to the interest of the plaintiff as to the interest of Whiteside's client. The evidence also shows that there was ample time, after the proposition to arbitrate was declared off by plaintiff, to have transmitted the transcript to the clerk of the Schuyler circuit court in time to have had it docketed for the May term, 1903.

But it is contended by plaintiff that, as the defendant was not instructed by him, or by any one for him or representing him, to withhold the transcript, what Whiteside told defendant furnished no justification to him for withholding the transcript. The purpose of the statute is to prevent unreasonable delay or negligence in the making out and transmission of transcripts of causes in which a change of venue has been awarded, and to secure an early opportunity for the trial of such causes in the courts to which the venue has been changed. What is meant by the term "immediately," as used in the statute, is that the transcript shall be made out and transmitted in such convenient time

as is reasonably necessary for performing these duties. *State v. Clevenger*, 20 Mo. App. 626; *City of De Soto v. Merciel*, 53 Mo. App., loc. cit. 60. If due regard is given to the nature and circumstances of the things to be done and the purposes to be accomplished, I do not think it can be said, as a matter of law, that the defendant was negligent, or that he violated the spirit of the statute, in withholding the transcript under the circumstances shown in evidence, especially in view of the fact that he did not withhold it beyond a day when it could reasonably have been transmitted to the clerk of the Schuyler circuit court in time to have been placed upon the May term, 1903, docket of that court. The evidence shows that defendant's successor might have transmitted the transcript at any time within two or three months after he took charge of the office and of the papers in the case, in time for the case to have appeared on the May term, 1903, docket of the Schuyler circuit court. If this had been done, plaintiff would not have had any ground to complain of the delay in the transmission, and certainly no cause of action against this defendant, based on the statute; for the purpose of the statute—to secure a speedy hearing—would have been as fully performed as if the transcript and papers had been transmitted by defendant in December, 1902. For these reasons, I do not think the court committed error in refusing the pre-emptory instruction to find for plaintiff, nor in refusing such of plaintiff's instructions as would have practically withdrawn the case from the consideration of the jury.

2. Objections were made to the introduction of some of the evidence. The grounds of these objections are not specifically stated, and I do not discover that any inadmissible evidence was admitted at the trial.

Discovering no reversible error in the record, the judgment is affirmed. All concur.

HARKNESS et al. v. JARVIS et al.

(Kansas City Court of Appeals. Missouri.
Jan. 20, 1902.)

1. JUDGMENT—DEFAULT—VACATION—TIME.

Where a motion to set aside a default judgment was filed at the same term at which the judgment was entered, but more than four days thereafter, and the motion was undisposed of at that term, the court had jurisdiction to grant the same at the succeeding term, though no general or special order of continuance was entered.

2. APPEAL—OPENING DEFAULT JUDGMENT—DISCRETION—REVIEW.

An application to set aside a default judgment being within the discretion of the court, an order granting the same will not be interfered with on appeal, in the absence of a clear showing of abuse of such discretion.

Appeal from Circuit Court, Jackson County; John W. Henry, Judge.

Action by L. V. Harkness and others against Frank Jarvis and others. From an order setting aside a default judgment after the term, plaintiffs appeal. Reversed, and certified to the Supreme Court.

See 81 S. W. 446.

J. C. Williams and L. A. Laughlin, for appellants. H. S. Hadley, for respondents.

ELLISON, J. Plaintiff brought this action, returnable to the January, 1901, term, to recover judgment on a promissory note. There was personal service on defendants; but, when the case was called for trial at said January term, defendants did not appear, neither did they file an answer. Judgment was rendered for plaintiff by default. After the expiration of the four days' time allowed for motions for new trial and in arrest of judgment, but at the same term, the defendants filed a motion to set aside the judgment for reasons therein alleged. The motion was not acted on by the court at that term, but went over to the following April term without any special order of continuance. At the latter term the motion was sustained, and plaintiffs have appealed.

The plaintiffs challenge the power of the circuit court to set aside the judgment on the motion aforesaid, made at a subsequent term. They agree that the court had the power to do so at any time during the term, and that, though the motion was filed more than four days after the judgment, if the court had taken it up during the term and continued it, such action would have carried it over to the succeeding term, with power in the court to act upon it. But they contend that, not having been taken up and continued, the court's power ended with the term. They are sustained in this view by the majority opinion of the St. Louis Court of Appeals in *Head v. Randolph*, 83 Mo. App. 284; Judge Biggs, dissenting. We find ourselves in disagreement with that court. The Supreme Court held that a motion to set aside a judgment, filed more than four days after it was rendered, but at the same term, may be continued to a succeeding term, and then

decided. *Childs v. Railroad*, 117 Mo. 414, 425, 23 S. W. 373. So, therefore, the only question for us to decide is whether a motion filed during the term, but more than four days after the judgment, and not reached or acted on, is continued over to the next term of court, in the absence of its being called up and continued over, or of a general order of continuance. It is undeniable that the legal right exists to file the motion during the term after the four-days limit. It becomes a part of the proceeding in the case, and the fact that it remains undisposed of at the end of the term must show that it was intended to be carried over to the next term. If pending cases are not continued by special order, and no general order is made, no one would suppose that such actions would abate. The practice in this state has been to continue docketing such cases in such instances until disposed of. So a motion for new trial which is undisposed of is continued over to succeeding terms without either a special or general order. *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421; *St. Francis Mill Co. v. Sugg*, 142 Mo. 364, 44 S. W. 249. It being clear that a cause undisposed of, and a motion for new trial filed within four days and undisposed of, are each continued to the succeeding term without an order, it ought to be equally clear that no order is necessary to carry over an undisposed of motion for new trial, filed without the four days. The court has no power to pass on either motion at a subsequent term, except by force of the continuance, and we cannot see why a continuance would be allowed without an order in the one and denied in the other. If it be conceded that the court has the power to continue a motion filed after the four days, by taking it under advisement until the next term, it must follow that the motion can be continued without being under advisement; for, if it is a question of power, the court cannot, of course, hold a matter under advisement beyond the period in which it has the power to act. The whole matter, it seems to us, is this: The continuance to a subsequent term carries along the power to act at that term, and such continuance, is had when the motion is undisposed of, without an order either general or special. Authorities *supra*.

There need be little said on the merits of the motion. The Supreme Court has many times stated and enforced the proposition that large discretion rests with the trial court in acting on motions to set aside judgments by default. *Bank v. Armstrong*, 92 Mo. 265, 280, 4 S. W. 720, and authorities cited. And it has been said that it is less apt to interfere with such discretion, where the judgment is set aside, than when it is not. This for the reason that, when set aside, the case is yet open, and that justice will yet be done. *Helm v. Bassett*, 9 Mo. 55. And the courts of appeals have followed this view. *Longdon v. Kelly*, 51 Mo. App.

572; *Ensor v. Smith*, 57 Mo. App. 584. The record in this case does not disclose anything whereby we can be justified in saying that the discretion was abused.

But, our decision on the first point, being contrary to that of the St. Louis Court of Appeals in *Head v. Randolph* aforesaid, we order the case certified to the Supreme Court as required by the Constitution. All concur.

LITTLE ROCK RY. & ELECTRIC CO. v. CITY OF NORTH LITTLE ROCK.

(Supreme Court of Arkansas. Sept. 30, 1905.)

1. STREET RAILWAY FRANCHISE—AUTHORITY TO REVOKE—PRESENTATION OF QUESTION.

Where, in a suit to annul a street railway franchise conferred by ordinance providing that, before the franchise should be enjoyed, the company should obtain from the county court a confirmation of the right of way over a bridge, the complaint alleged that application to the county court to confirm the right of way had never been made, and the answer admitted the allegation, and the only proof was the testimony of the company's manager that no application was made to the county court, and that he had believed that permission to cross the bridge would not be granted, the question of the authority to revoke the franchise on the refusal of the county court to grant permission was not presented.

2. APPEAL—SUPREME COURT—INJUNCTION—POWER TO GRANT—PROVISIONAL RELIEF.

The Supreme Court, on appeal from a decree annulling a street railway franchise, has no authority to restrain the city from interfering with the tracks constructed under the franchise before the commencement of the suit, pending further proceedings by the company to test its rights under a municipal ordinance; that being a provisional relief to be awarded by the court in which the further proceedings are instituted, subject to review on appeal.

On petitions for rehearing. Overruled. For former opinion, see 88 S. W. 826.

Rose, Hemingway & Rose, for appellant. James P. Clarke, for appellee.

MCCULLOCH, J. Both parties seek a rehearing of the cause. Appellant asks that we set aside that part of the decision holding that Ordinance No. 1019, passed August 10, 1903, is void, and that appellant acquired no rights thereunder, and appellee asks that we set aside that part of the decision holding that Ordinance No. 1002, passed June 25, 1903, conferred a valid franchise. Upon consideration we adhere to the conclusion heretofore announced, and both petitions for rehearing will be overruled.

Counsel for appellee insists that, when the disannexation of territory was accomplished, the power reserved in Ordinance No. 1002 by the city of Little Rock to revoke the franchise upon the refusal of the county court to confirm the right of way over the free bridge, as well as all other rights and powers reserved to that municipality, passed to the city of North Little Rock, and that the latter could then properly exercise the power of revocation. He contends that we should, for

that reason, hold that appellant has no existent rights in the franchise conferred by that ordinance. It is sufficient to say, in response to that contention, that the condition upon which the power of revocation rests—i. e., the refusal of the county court to confirm the right of way over the free bridge—is not shown either in the pleadings or proof in this case to exist. Appellee's complaint alleges that application to the county court to confirm the right of way had never been made, and appellant's answer expressly admits this to be true. J. A. Trawick, the manager of appellant company, testified (which was all the testimony on the subject) that no application was made to the county court, though he had reason to believe, he says, from information received, that permission to cross the bridge would not be granted. The question of revocation is therefore not presented to us in this record, and we cannot properly pass upon it.

We merely held in the former opinion that Ordinance No. 1002 conferred a valid franchise, and that at the time of the commencement of this suit an unreasonable time for the performance by the grantee of the conditions precedent therein named had not elapsed. Whether or not it is now too late for appellant, under the circumstances, to perform them and preserve the granted rights; whether the power of revocation passed to appellee upon the disannexation of territory, and, if so, under what circumstances it may be exercised; and whether or not appellant may proceed to the enjoyment of the franchise without obtaining from the county court the right of way over the bridge—are all questions which we have not decided, and do not deem it necessary or proper upon the record in this case to decide. They must be brought before us in proper proceedings and upon appropriate allegations and proof before a determination can be reached.

Appellant asks, further, that the judgment of this court be modified, so as to permit the tracks constructed under the franchise by appellant before the commencement of this suit to remain in the streets of North Little Rock pending further proceeding by appellant to test and secure enjoyment of its alleged rights under Ordinance No. 1002, and to restrain said city from disturbing said tracks during such further proceedings. This, however, is provisional relief, which must be granted, if at all, by the court of original jurisdiction in which such further proceeding is instituted, subject to review on appeal. We cannot grant it in this suit. Nothing in this decision will bar such relief, if appellant be shown in other respects to be entitled to it. Following the decree of the chancellor, appellant has in the original judgment here been allowed 60 days in which to dispose of or remove the tracks and material now on the streets of North Little Rock, and said period will run from this date.

To that extent the judgment heretofore entered here will be modified. In all other respects it will stand.

CRACRAFT v. MEYER et al.

(Supreme Court of Arkansas. July 29, 1905.)

1. TAXATION—DEEDS—EFFECT AS EVIDENCE.

Rev. St. 1837, c. 128, §§ 133, 134, required the auditor to execute deeds to purchasers of lands forfeited to the state for nonpayment of taxes, and provided that such deeds should vest title in the grantee, and should be received in all courts as evidence of good title. Act July 15, 1868 (Laws 1868, p. 62, § 1), created the office of Commissioner of Immigration and State Lands, and gave the control and disposition of forfeited lands to the commissioner. Kirby's Dig. § 4807, provides that all deeds issued by the State Land Commissioner to forfeited land shall convey to the purchaser all the title of the state to the land, and shall be received as evidence in any court of the state. *Held*, that commissioner's deeds to lands forfeited for nonpayment of taxes need not recite the taking of the steps which vested title in the state, but the deed itself is prima facie evidence that all preliminary steps necessary to title have been taken, and the burden is on the one attacking the same to show that some one of the prerequisites of the transmission of title was omitted.

2. SAME—OVERTHROW OF PRESUMPTION.

The fact that the record of deeds discloses no record of a deed to land which belonged to the state as Real Estate Bank lands, and which was not subject to forfeiture and sale for taxes, does not show that such land was not sold and afterwards forfeited to the state for nonpayment of taxes, nor overthrow the presumption of sale which arises from the issuance of a tax deed by the State Land Commissioner.

3. SAME—EXEMPTIONS—SALE OF EXEMPT LANDS—EVIDENCE.

Under section 3, p. 97, Acts 1866-67, which exempted lands of the Real Estate Bank from taxation while in the hands of the receiver, and required the receiver, upon sale by him of any of such lands, to furnish the assessor with a correct list of the land sold for assessment in the name of the purchaser, the listing of such land for taxation is evidence of the sale thereof by the receiver.

4. SAME.

An act of 1867 exempted lands of the Real Estate Bank from taxation while in the hands of a receiver. In a proceeding to wind up the affairs of the bank the receiver was directed to make a list of all the lands in his hands, so that the same might be offered for sale. He accordingly made such list, and in his report of sale stated that he omitted from sale certain lands, as he was fully convinced by conclusive evidence that the bank had disposed of its interest therein. The sale and the report were confirmed by the court. *Held*, that such report of the receiver and confirmation thereof by the court constituted evidence which tended to strengthen the presumption which arose from the subsequent issuance of a tax deed by the State Land Commissioner to land omitted from the sale that such land had been sold.

Appeal from Circuit Court, Chicot County; Zachariah T. Wood, Judge.

Action by George K. Cracraft against Carrie Meyer and others. From a judgment for defendants, plaintiff appeals. Affirmed.

B. F. Merritt, Robinson & Beadel, and Rose, Hemingway & Rose, for appellants.

N. B. Scott, E. A. Bolton, Garland Street, and James P. Clarke, for appellees. P. C. Dooley, for appellees W. H. Graves and B. F. Merritt.

WOOD, J. Appellee is in possession of certain tracts of land in Chicot county, Ark., under deeds from the State Land Commissioner, based upon a forfeiture of the land for the nonpayment of taxes. Her deeds are dated December 24, 1891, and July 23, 1897, respectively. She has made valuable improvements, and has been in the adverse possession of the lands since the deeds were executed. Appellant brought ejectment against appellee for the lands in controversy, claiming title by deed of the State Land Commissioner dated July 14, 1902, based upon alleged Real Estate Bank foreclosure.

1. As early as March 5, 1838, our Legislature passed an act requiring the auditor to execute deeds to purchaser of lands forfeited to the state for the nonpayment of taxes, and prescribing that such deeds "shall convey to the purchaser all the right, title, interest, and claim of the state thereto"; also that the deeds "shall vest in the grantee, his heirs or assigns, a good and valid title both in law and equity, and shall be received in all courts of this state, as evidence of good and valid title in such grantee, his heirs or assigns, and shall be evidence that all things required by law to be done, to make good and valid sale, were done both by the collector and the auditor." Rev. St. 1837, c. 128, §§ 133, 134. In *Steadman v. Planters' Bank*, 7 Ark. 427, this court, passing upon this statute, said: "Our statutes have changed the rule of law that it is incumbent upon the purchaser of lands sold for taxes to show that the sale was regular, and that the prerequisites to the sale existed, and were strictly complied with. The auditor's deed executed in accordance with the provisions of the statute vests in the purchaser all the right, title, interest, and estate of the former owner in and to such lands, and also all right, title, interest, and claim of the state thereto, and is declared to be evidence in all courts of this state of a good and valid title in such grantee, his heirs and assigns, and that all things required by law to make a good and valid sale were done both by the collector and auditor." In *Merrick and Fenno v. Hutt*, 15 Ark. 331, this court, speaking of this statute, said: "A more comprehensive provision could hardly be found, and it might seem at first view to make the tax title derived from the auditor valid against all objections. But that was not the design. The evil to be remedied was that the entire burden of proof was cast on the purchaser to show that every requisite of the law had been complied with, and the deed of the officer was not even prima facie evidence of the facts therein stated. The intention and scope of the statute was to change this rule so far as to cast the onus

probandi upon the assailant of the tax title, by making the deed prima facie evidence of title in the purchaser, subject to be overthrown by proof of noncompliance with the substantial requisites of the law." In *Patrick v. Davis*, 15 Ark. 363-366, it is said: "In the same category may be included that capital provision of the statute, according to the legislation of several of the states, which, when the deed is regular upon its face, reverses the onus probandi, and subjects the tax title, when thus sustained, to be overthrown only by proof of a nonconformity in the proceedings to some one of the substantial prerequisites to the sale." In *Biscoe et al. v. Coulter et al.*, 18 Ark. 423, it is held "that the auditor's deed for land forfeited for the nonpayment of taxes and sold under the statute is to be treated in the courts as prima facie evidence that all things required by law to be done to make a good and valid sale were done by the collector and auditor; and it is incumbent upon the party assailing the title of the purchaser to show affirmatively a noncompliance with some substantial requisite of the law"; citing cases just quoted in 15 Ark. When the office of Commissioner of Immigration and State Lands was created (July 15, 1868, Laws 1868, p. 62, § 1; Sched. Const. 1874, § 3), and the control and disposition of forfeited lands was given to the land commissioner (section 9, p. 65, Acts 1868), ipso facto the laws applicable to the deed of the auditor for these lands became applicable to the deed of the land commissioner. *Helena v. Horner*, 58 Ark. 151, 23 S. W. 966. And section 4 of the act of December 18, 1875 (Laws 1875, p. 94 [erroneously digested as section 4 of the act of March 10, 1879, Kirby's Dig. § 4807]), continues in substance and legal effect the act of March 5, 1838, with reference to deeds to forfeited lands. That section provides that all deeds issued by the State Land Commissioner to forfeited land "shall convey to the purchaser, his heirs and assigns, all the right, title, and interest of the state to said land, * * * and that such deed shall be received as evidence in any court in the state." It will be observed that under the statutes deeds to forfeited lands are not required to contain recitals showing that the requisite steps have been taken to give the state title. "It is sufficient, to give prima facie evidence of title in the purchaser, if the deed names the purchaser, describes the property sold, states a consideration, and contains apt words conveying all the right, title, and interest of the state." *Merrick and Fenno v. Hutt*, 15 Ark. 331; *Walker v. Taylor*, 43 Ark. 543. See, also, *Thornton v. Smith*, 36 Ark. 508. In *Scott v. Mills*, 49 Ark. 266, 4 S. W. 912, Judge Battle, speaking for the court, said: "The statute having provided that the title to the land forfeited shall vest in the state upon the performance of certain acts by the clerk, it is clear that the object of the commissioner's deed is to con-

vey that title to the purchaser from the state, and that the deed was intended to be prima facie evidence of that title. Such has been the policy of the state, as a general rule, in respect to tax deeds, long prior to and at all times since the enactment of the statutes under which appellants' deed was executed. It was in pursuance of this favorite policy that the deed of the Commissioner of State Lands to lands forfeited for taxes was made prima facie evidence of title in the purchaser to the lands conveyed. As of all such legislation, the object is to relieve the grantee and those holding under him from making proof until evidence is introduced showing or tending to show that the deed conveyed no title. It was not, therefore, necessary for appellants to have proved that all things necessary to vest title in the state was done. Their deed was prima facie evidence of that fact." "Generally, when an official act has been done, which can only be lawful and valid by the doing of certain preliminary acts, it will be presumed that these preliminary acts have also been done." 1 Gr. Ev. p. 135, § 38a. But the almost universal rule, in the absence of an express statute to the contrary, was to treat the acts of officers in connection with tax deeds as an exception to the general rule. Thus, one claiming under such a deed was required to show affirmatively that every step necessary to establish the regularity of the proceedings had been taken. Tax deeds, in the absence of a statute, did not furnish prima facie proof that all the requirements of the law had been complied with. 3 Elliott on Ev. § 2053, and many authorities cited in notes; *Hogins v. Brashears*, 13 Ark. 242. Now, as I have shown, our lawmakers, almost from the beginning of our history as a state, changed this prevailing doctrine with reference to tax deeds, and in concrete form applied to the deeds of the auditor, and, later, of the State Land Commissioner, the rule applicable to official acts in general, making the deeds of these officers to forfeited lands prima facie evidence that all preliminary steps necessary to title had been taken. I have quoted liberally from our decisions, showing the significance of the rule, that it has been consistently followed, and that the policy, whether wise or otherwise, has become firmly imbedded in our real estate law, and is a settled rule of property, upon which many titles are based. Appellee invokes the rule to protect her possession and all other rights under her deed. In this defense alone she is secure, unless appellant, having the burden of proof, has shown that some one of the prerequisites to title in appellee was omitted.

2. Appellant, having a land commissioner's deed to the lands as Real Estate Bank lands, assails appellee's title, contending that at the time of the alleged forfeiture to the state the lands belonged to the state as Real Estate Bank lands, and were not subject to

forfeiture and sale for taxes. To support his contention he shows that the lands passed into the hands of the receiver of the Real Estate Bank by foreclosure proceedings, and that from that time, to wit, October 23, 1867, to the date of appellant's deed, June 14, 1902, the records of deeds of Chicot county do not show that there had been recorded in the recorder's office of such county any deed of conveyance to any person for the land in suit from the receiver of the Real Estate Bank or any of his successors. But this evidence falls far short of showing that the lands were not sold. Purchasers of land often fail to place their deeds of record. If any presumption of nonsale follows from a failure to find a deed on record showing a sale, then such a presumption at most is but a weak and disputable one of fact. The finding such deed of record was not an essential in the proceedings by which the lands were forfeited, and title was vested in the state. Appellee might rest here, and upon conflicting presumptions alone she would prevail, because her deeds are prior in time, and the presumptions attending them are of equal dignity and cogency with those of appellant's deed, and it is incumbent upon appellant to overcome her title.

But if evidence of an affirmative character were required of appellee, "to make assurance doubly sure," certain facts in the record would fully warrant the finding of the lower court in her favor:

First. The act of 1867 exempting lands of the Real Estate Bank from taxation while in the hands of the receiver required such receiver "upon sale by him of any of said lands to furnish the assessor of the county in which the same are situated with the correct list thereof for assessment thereon in the name of the purchaser." Section 3, p. 97, Acts 1866-67. The lands in suit were listed for taxation as early as 1873. This tends strongly to show that the lands were sold by the receiver after he acquired them by foreclosure of the vendor's lien in 1867.

Second. In a proceeding by the state instituted in the chancery court of Pulaski county to wind up the affairs of the Real Estate Bank the receiver was directed to make a list of all the lands in his hands or subject to his control as receiver, to the end that the same might be offered for sale preliminary to closing the trusts. He accordingly made such list, and on the 26th day of October, 1880, he, as receiver of the court, was directed to offer the same at public sale on the 8th day of January, 1881. In making his report of the sale conducted by him as receiver, Worthen included therein this statement: "Your receiver found before sale that the following land had been disposed of by his predecessor, but no mention of the fact has been made in or upon the records, and he, being fully convinced that the bank had disposed of its interest, by exhibition to him of the original deeds

from the receiver in some instances, and by conclusive evidence in all cases, did, under instructions from your honorable court, omit the same from sale." Then follows a list of 13 tracts, in which is included the land in controversy. On the 17th of January, 1881, the sale and the report thereof were in all things confirmed by the Pulaski chancery court. After that, the estate of the Real Estate Bank having been fully administered, the receiver was directed to "turn over to the Commissioner of State Lands all the accounts, books of said Real Estate Bank now in his possession, and the mortgages given to the said bank now in his possession, and all papers and assets in his possession pertaining to his receivership, and take a receipt for same." While this finding by the receiver and confirmation by the court may not be conclusive of the facts found, and binding upon the state or her grantees as an adjudication, yet it is evidence of a high probative character. It was received and acted upon by the lower court without objection and tends to strengthen the presumption that the land was sold.

3. Thus far we all agree, and I have voiced the opinion of the court. I shall now express my own views of another phase of the case, in which Judge RIDDICK concurs.

The deed of the State Land Commissioner, under the express terms of the statute, and in express words, conveyed "all the right, title, and interest of the state to said lands." In my opinion, after the execution of the deed to the appellee by the duly authorized and only agent of the state for conveying title to her lands, this same agent could not convey to another purchaser the same lands without first canceling the first purchaser's deed. It is the duty of the land commissioner, before executing deeds to the state's lands, to investigate the sources of her title. He is presumed to do so, and when he executes his deed he conveys all the right, title, and interest that the state has, provided he has made no mistake, and no fraud has been perpetrated by the purchaser. And, if a mistake has been made, as the state is not bound by the mistakes of her agents, she may take advantage of it, and cancel and set aside the deed made by her agent. But there is no authority for her to sell this right, or transfer by her deed to another the right to cancel the outstanding deed of another purchaser. The state can do no wrong, and her agents have no power for her and in her name to speculate in lawsuits to the injury of her citizens. If she has sold her lands for too much or too little, or her agents have made a mistake as to the lands sold or as to her title, she may correct the mistake of her officers. But she has no power, with or without consideration, to transfer this right to another. Section 759 of Kirby's Digest provides: "Where by law the Commissioner of State Lands, is required to execute any deed of conveyance or patent for

any lands sold, or granted by the state, such deed of conveyance or patent when executed by such commissioner under his official seal, shall convey all the right and title of the state in and to said lands to the purchaser, and may be recorded in the office of the recorder of the proper county, and the original, or a duly certified copy of the same, taken from the record thereof, shall have the same effect as evidence as if such deed or patent had been acknowledged and recorded under the existing laws of this state." Act Dec. 31, 1850 (Acts 1850-51, p. 65). This statute settles this controversy in favor of appellee. It is in harmony with section 4807, supra, under which appellant claims the deed was executed. Neither of these statutes makes any exceptions, or places any limitations upon the interest conveyed. And the land commissioner and the courts can make none. The words "all the right, title, and interest of the state" say what they mean, and mean what they say. They are plain words. Appellant invokes the following statute: "No tax title shall be valid or binding against the equitable or legal interest of this state in or to any real estate whatever; but such tax titles are and shall be void, so far as the same shall conflict with the interest of the state, and shall be treated and considered as null and void in all courts." It is obvious from what I have said that such statute has no application here. It had no reference whatever to titles conveyed by the State Land Commissioner, or, if so, it is only the interest of the state in the land that can be affected by it. The state has parted with all her interest in this land. At least she is not here attempting to assert any interest.

The judgment is affirmed.

BATTLE, J., not participating.

WELLS et al. v. CHASE et al.

(Supreme Court of Arkansas. July 29, 1905.)

DEEDS—AFTER-ACQUIRED TITLE—QUITCLAIM.

Under Kirby's Dig. § 734, declaring that if persons shall convey any real estate by deed purporting to convey the same in fee simple, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire it, the estate so acquired shall pass to the grantee, etc., a deed reciting that the grantors sold, released, and quitclaimed an undivided one-tenth interest in certain mineral lands held by the grantors as a lode mining location did not convey the interest acquired by the grantors after abandoning the lode location and relocating the land as a placer claim.

Appeal from Circuit Court, Marion County, in Chancery; Elbridge G. Mitchell, Judge.

Action by H. Wells and another against George W. Chase and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. C. Floyd, for appellants. G. J. Crump, for appellees.

McCULLOCH, J. This suit was brought in equity by appellants, H. Wells and Fannie A. Gray, as executrix of the last will of Chas. S. Gray, deceased, against appellees Geo. W. Chase and Estella E. Chase, alleging that appellees had, on December 4, 1889, sold and by deed conveyed to said H. Wells and O. S. Gray an undivided one-tenth interest in the Red Cloud mining claim and the Mt. Ida mining claim, and had thereafter acquired title to said claims from the United States, which said subsequent acquisitions appellants say inured to the benefit of Wells and Gray under said deed executed to them by appellees. The prayer of the complaint is that the title to one-tenth interest in said claim be decreed to appellants. The Red Cloud Mining Company, a corporation which had acquired title to said claim under conveyance from appellees, was made a party defendant and filed its answer, claiming to be an innocent purchaser without notice of appellants' rights. Appellees answered, admitting the execution of their said deed, but alleging that said Wells and Gray had failed to pay their proportionate part of the cost of the annual assessment work on said mining claims, and had thereby forfeited their rights therein, and that appellees and their co-owners had subsequently abandoned said mining claims as lode claims and relocated the same as placer claims and obtained patents therefor. It is shown that the mining claims in controversy had been located as lode claims, and were held by appellees and others at the time of the conveyance of the one-tenth interest therein to Wells and Gray. Subsequently the claims were found not to be in fact lode claims, and were abandoned and forfeited as such, and appellees and other parties located the same as placer mining claims.

It is urged in behalf of appellants that the title subsequently acquired by appellees in the placer mining claim inured to their benefit by operation of Kirby's Dig. § 734, which is as follows: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance." The deed in question is somewhat peculiar in its terms. It recites that the grantors "have sold and released and quitclaimed" to the grantees, Wells and Gray, an undivided one-tenth interest in "the following mining and mineral lands and claims," describing the claims in controversy and others. The habendum clause contains a stipulation that the grantors will "forever defend the title aforesaid against

all parties who hold under or through" the said grantors. The effect of the deed was to convey to the grantees whatever title the grantors then had to the undivided one-tenth interest, and to warrant against any prior conveyances or incumbrances made or suffered by the grantors; but it did not purport to convey any title except what the grantors then had. They then had title to a lode claim, which was subsequently abandoned and forfeited. This is all that passed by the deed, and another title subsequently acquired did not pass. As said by this court in *Blanks v. Craig*, 72 Ark. 80, 78 S. W. 764: "The statute only affects interests in land which the grantor has conveyed or which his deed purports to convey. It does not affect interests afterwards acquired by the grantor, which he has not previously conveyed or attempted to convey."

Where one has title or interest in land which he conveys by deed, and the deed purports to convey no more, another title or interest subsequently acquired by him does not pass to his grantee under the deed. Appellant Wells testified that he paid G. W. Chase part of the expense of assessment work, and that Chase was indebted to him and promised to pay the remainder of the expense. It is urged by counsel for appellants that Chase wrongfully allowed the forfeiture of the interest of Wells and Gray, and cannot take advantage of it to acquire another title to the claim. No such issue is raised by the pleadings; but, if we treat the issue as properly raised, the burden is upon appellants to prove, at least by a preponderance of the testimony, the bad faith and misconduct of Chase, and, as the latter denies that he was indebted to Wells, or ever promised to pay for the assessment work, or that Wells ever sent him any money for that purpose, we cannot say that there was a preponderance in appellants' favor. There was no testimony, except that of Wells and Chase, and they positively contradict each other on every material matter. We are not justified by the record in overturning the finding of the chancellor, and his decree must be affirmed. It is so ordered.

BATTLE, J., absent.

FAYETTEVILLE WAGON, WOOD & LUMBER CO. v. KENEFICK CONST. CO. et al.

(Supreme Court of Arkansas. July 29, 1905.)

1. PAYMENT—DELIVERY OF CHECK TO CREDIT-OR'S AGENT—FAILURE OF AGENT TO PAY OVER.

Defendant ordered materials from a third person, who procured plaintiff to fill the order. Plaintiff requested the third person to collect therefor, by getting a check for it, and bring it, if he could get the money on it. Defendant delivered its check to the third person, who cashed it, but failed to deliver the money to plaintiff. *Held* a payment by defendant to plaintiff.

2. RAILROADS—STIPULATION IN BONUS NOTE—MAINTAINING DEPOT IN TOWN—COMPLIANCE—EVIDENCE.

A note given as a bonus to a railway company stipulated that a part of the consideration was the continuous maintaining of a depot within a town by the company. The company maintained for some months a freight and passenger depot in the town. Subsequently the passenger traffic was transferred to the depot of another company in the town, and the former depot was maintained as a freight depot. *Held* a compliance with the stipulation.

3. SAME—VIOLATION—EVIDENCE.

In an action on a note given as a bonus to a railway company, which stipulated that, if its road passed into the control of another company within a specified time, it would refund the sums paid on the note, the evidence showed that the railway company operated its road under a traffic arrangement with the other company. *Held*, that the withdrawal of evidence to the effect that the railroad company paid the other company for the work done by a ticket agent, and the latter company paid him for his services, and that he reported to each road the tickets sold, was not erroneous; it being insufficient to show a violation of the stipulation.

Appeal from Circuit Court, Washington County; John N. Tillman, Judge.

"Not to be officially reported."

Action by the Fayetteville Wagon, Wood & Lumber Company against the Kenefick Construction Company and another. From a judgment for defendant construction company, plaintiff appeals. Affirmed.

E. B. Wall, for appellant. W. L. Stuckey and E. S. McDaniel, for appellees.

HILL, C. J. The Lumber Company, as the appellant will be designated, sued the Construction Company, as the appellee will be designated, and the Ozark & Cherokee Central Railroad Company, seeking a judgment and lien for various material furnished in the construction by the Construction Company of the railroad company. The Construction Company denied the account sued upon, admitted owing \$95.30, tendered that amount and accrued costs to date of tender, and filed a cross-complaint setting up a note of \$800 of the Lumber Company given as a bonus or subsidy, as it is called in the record, for the construction of the Ozark & Cherokee Central Railroad Company from Fayetteville to a connection with the Kansas City, Pittsburg & Gulf Railway Company. The Construction Company prevailed, and the Lumber Company has appealed.

1. The only matter presented on the original cause of action relates to an item of \$42.86. The facts were that the Construction Company ordered 75 bridle bars of P. Barringer, who did business under the style of Fayetteville Iron Works, and Barringer, not having the material, ordered it of the Lumber Company. It is unnecessary to go into the conflicts in the evidence, or detail any of it as to the original liability of the Construction Company, for the uncontroverted evidence renders the defense of payment good. The facts regarding the payment were these:

After a difference arose between the Lumber Company and the Construction Company, the secretary and treasurer of the Lumber Company took the account to Barringer, and asked him to explain the matter to the Construction Company, and told him "to get a check for it, and bring it there, if he could get the money on it." Barringer explained the matter to the Construction Company, which agreed to pay the bill, and it did later give Barringer a check for it, and Barringer receipted for the account of the Lumber Company and cashed the check. He was doing considerable work for the Construction Company, and receiving various checks and signing vouchers therefor, and overlooked the fact that this item was paid, and did not report it to the Lumber Company, and, in fact, his oversight was not discovered by him until after this suit was brought. He collected the account strictly in accordance with his agency, and the payment to him was good, and therefore it is unnecessary to discuss the instructions or evidence as to the liability of the Construction Company for this bill.

2. The other matter presented on this appeal is the right of the Construction Company as assignee of the subsidy note to recover. The note had various conditions in it, and was payable in installments when the road was constructed given distances west of Fayetteville, and the balance payable when the road was put in connection with the Kansas City, Pittsburg & Gulf Railway, and in operation from Fayetteville to said railroad. The question of completion within time stipulated and within the extensions granted was submitted to the jury, and found for the Construction Company. The possession of the note by the Construction Company was prima facie evidence of its ownership, and that was strengthened by other testimony, and not overcome by the appellee. The principal points made against recovery on the note are alleged violations of two clauses in it:

(a) A part of the consideration for it is "the continuously maintaining a depot within the corporate limits of Fayetteville, by the Arkansas Construction Company, its successors or assigns." The facts were that a depot was constructed and maintained within the corporate limits for about seven months, where freight and passengers were accommodated. After that time the passenger traffic was transferred to the St. Louis & San Francisco Railroad Company's depot (also in the corporate limits), and the other depot maintained as a freight depot and for the accommodation of passengers on the local freight trains. The passenger trains were run from the Frisco depot, as appellant charges, because the road had passed into Frisco control, and, as appellee contends, for the accommodation of the public and in response to public demands. In *Railway v. Smith*, 71 Ark. 189, 71 S. W. 947, the court

said: "The term 'depot' may mean one thing or another, under different circumstances. It may mean a house for the storage of freight and the accommodation of passengers, or it may mean a place where railroad trains regularly come to a stop for the convenience of passengers and for the purpose of receiving and discharging freight, or it may include all of these things. Its meaning must be determined in each instance from the contract and the circumstances under which it is used." In the first instruction the court told the jury that they must find from the evidence, before they could find for the Construction Company, that it "has continuously maintained a depot within the corporate limits of the city of Fayetteville." The appellant asked an instruction to the same point, but it added nothing to what was told the jury in the first instruction, but it might well have been given. However, the facts of this case so clearly show a compliance with the terms of the contract on that point that no prejudice was done the appellant. If the maintenance of a joint passenger depot with the Frisco was due to control of the road by the Frisco, that would be in violation of another clause of the contract, not of this one, and that brings into consideration the next question.

(b) The other clause claimed to have been violated is this: "If said road passes into the control of the St. Louis & San Francisco Railway Company within two years from October 1, 1899, then it binds itself, its successors and assigns, to refund to the subscribers of this note all amounts that may have been paid on this note, with interest at the rate of 8 per cent. per annum from the date of such payment until the same is repaid to the maker hereof." The court excluded all the testimony introduced to sustain the charge that the road had passed into the control of the Frisco. The appellee introduced testimony to the effect that it was not under the control of the Frisco, but was operating under a close traffic arrangement with it. The testimony was not the best evidence of the facts testified to, as it came from parties not in a position to have definite knowledge personally; but their relations with the company and knowledge of its affairs would render their evidence competent for what it was worth. The appellant introduced the Frisco ticket agent, who testified he acted as ticket agent for the Ozark & Cherokee Central, that the said road paid the Frisco for that work, and the Frisco paid him for his services, and he reported to each road separately all tickets sold. The appellant offered a good deal of evidence showing the intimate, and probably overintimate, relations between the companies, and offered some statements of officials of the Frisco, made in casual conversations and in other connections, indicating that the road was a "Frisco proposition." All the testimony was reconcilable with the traffic contract between

the roads, and did not tend to prove more. The court was right in excluding this evidence. It was legally insufficient to sustain a verdict upon, and hence the court properly withdrew it.

On the whole case no reversible error is discovered, and the judgment is affirmed.

BATTLE, J., absent.

ST. LOUIS & S. F. R. CO. v. BOWMAN.

(Supreme Court of Arkansas. June 10, 1903.)

1. GARNISHMENT—REPEAL OF STATUTE.

Act Feb. 27, 1867 (Laws 1866-67, p. 157; Kirby's Dig. § 3707), providing that, when a judgment before a justice exceeds \$100 and plaintiff desires the benefit of garnishment thereon, he may file in the office of the circuit court clerk a transcript of the judgment, which the clerk shall enter on the judgment docket and on which he shall issue to any county a writ of garnishment, is repealed by implication by Act 1889, entitled "An act to provide the procedure in judicial garnishment" (Acts 1889, p. 168), which omits any provision similar to section 2 of the act of 1867, but re-enacts section 8 thereof, providing that a judgment obtained before a justice in one county may be filed with a justice in another county and a writ of garnishment issued thereon.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 242.]

2. SAME—JUSTICE'S JUDGMENT—WRIT TO ANOTHER COUNTY.

Under Kirby's Dig. §§ 4631-4633, providing that the certified copy of a justice's judgment for more than \$10 may be filed in the office of the clerk of the circuit court of the county and entered on the judgment docket of said court, and that every such judgment, from the time of filing the transcript, shall be a lien on real estate in the county to the same extent as a judgment of the circuit court, and shall be carried into execution in the same manner and with like effect as judgments of such circuit court, and section 4634, providing that, after the filing in the office of the clerk of the circuit court of the transcript of a justice's judgment, execution cannot be issued by the justice, and section 3705, providing that writs of garnishment may be issued from the circuit court of one county to any other county, a writ of garnishment may issue to another county from a circuit court on a justice's judgment filed therein.

Appeal from Circuit Court, Pike County; James S. Steele, Judge.

Garnishment proceedings by one Bowman against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Garnishee appeals. Affirmed.

Appellee recovered judgment against John R. Probst for \$125 before a justice of the peace of Polk county, and later filed a certified transcript of the same in the office of the clerk of the circuit court of that county, and the clerk entered such judgment on the docket of that court for judgments and decrees, as provided by statute. Thereafter appellee filed proper allegations and interrogatories, and sued out a writ of garnishment directed to the sheriff of Sebastian county summoning appellant to answer as garnishee. Appellant appeared on the return

day, and filed a special plea to the jurisdiction of the court on the ground that a writ of garnishment cannot be issued to another county from a judgment rendered by a justice of the peace. The court sustained a demurrer to this plea. The garnishee failed to make further answer, and judgment was rendered for the full amount of the plaintiff's judgment, and an appeal was taken by the garnishee to this court.

L. F. Parker and B. R. Davidson, for appellant. S. A. Downs, for appellee.

McCULLOCH, J. (after stating the facts). The General Assembly passed an act, approved February 27, 1867 (Laws 1866-67, p. 157), amendatory of the then existing garnishment statute, section 2 of which act is as follows: "When a judgment before a justice of the peace in any county, together with the interest accrued on the same and the costs, amounts to more than \$100, and the plaintiff, or any other person having the right to collect the said judgment, may desire to have the benefit of garnishment thereon, it shall be lawful for such person to file in the office of the clerk of the circuit court a transcript of such judgment, certified by such justice of the peace, and the clerk shall enter the same on the judgment docket in his office, and, at the request of such person so filing the same, shall issue to any county in the state a writ or writs of garnishment thereon." This section has been brought forward in subsequent digests of the laws of the state, and is found in Kirby's Dig. § 3707.

Appellant contends that this section has been repealed and is no longer in force. The General Assembly of 1889 enacted a statute, the title of which is "An act to provide the procedure in judicial garnishment" (Acts 1889, p. 168), omitting any provision similar to section 2 of the act of February 27, 1867, but re-enacting section 3 of that act, providing that a judgment obtained before a justice of the peace in one county may be filed with some justice of the peace in another county, and a writ of garnishment or execution issued thereon. Repeals by implication are not favored. But, where the later of two statutes covers the whole subject-matter of the former, and it is evident that the Legislature intends it as a substitute, the prior act will be held to have been repealed thereby, although there may be no express words to that effect, and there be in the old act provisions not in the new. *Pulaski County v. Downer*, 10 Ark. 588; *State v. Jennings*, 27 Ark. 419; *Mears v. Stewart*, 31 Ark. 19; *Davies v. Holland*, 43 Ark. 425; *Dowell v. Tucker*, 46 Ark. 438; *Wood v. State*, 47 Ark. 488, 1 S. W. 709; *St. Louis, I. M. & S. Ry. Co. v. Richter*, 48 Ark. 849, 8 S. W. 56; *Inman v. State*, 65 Ark. 508, 47 S. W. 558; *Wilson v. Massie*, 70 Ark. 25, 65 S. W. 942.

Applying the doctrine established by these decisions, it must be held that section 3707, Kirby's Dig., has been repealed. It does not follow, however, that there is no provision in the law for the issuance of writs of garnishment to another county from the circuit court upon a judgment of a justice of the peace filed therein. On the contrary, we hold that under section 3705 of the garnishment statute the writ can be issued upon such judgment filed in the circuit court; and this view of the law makes the repeal of section 3707 all the more obvious, for the reason that the same method of enforcement is provided in the latter statute. Kirby's Dig. §§ 4631-4633, provide that the certified copy of a judgment for more than \$10, exclusive of cost, recovered before a justice of the peace, may be filed in the office of the clerk of the circuit court of the county, and entered on the judgment docket of said court, and that "every such judgment, from the time of filing the transcript thereof, shall be a lien on the real estate of the defendant in the county, to the same extent as a judgment of the circuit court of the same county, and shall be carried into execution in the same manner and with like effect as the judgments of such circuit courts." The effect of this provision is to completely transfer the judgment from the inferior to the superior court, and give it the same force and effect and the same remedies for enforcement as if the judgment had been originally rendered by the latter court. Section 10 of the act of 1889 (Kirby's Dig. § 3705) provides that "writs of garnishment may be issued from the circuit court of one county to any other county of the state"; thus authorizing the issuance of such writs upon all judgments of the circuit court, those rendered by justices of the peace and certified copies of which have been properly filed and docketed in the office of the circuit court, as well as judgments originally rendered by that court.

We do not overlook the decision of this court in *Thompson v. Kirkpatrick*, 18 Ark. 580, where it was held that under sections 184, 185, c. 87, of the Revised Statutes of 1838, which are identical in terms with sections 4631-4633 of Kirby's Digest, a writ of garnishment could not be issued from the circuit court upon a judgment of a justice of the peace filed in the circuit court. Chief Justice English there said: "The object of this statute was to enable the plaintiff in a justice's judgment to obtain satisfaction thereof by a sale of the real estate of the debtor, which cannot be done by an execution issuing from the justice. Neither this nor any other statute authorizes the issuance of a garnishment from the clerk's office upon such judgment, nor the determination of such garnishment in the circuit court." This was tantamount to holding that no remedy was afforded by this

statute, except for the creation and enforcement of a lien of the judgment rendered by a justice of the peace upon real estate owned by the defendant, and that the judgment still remained upon the docket of the justice as a judgment of his court, with all the statutory methods of enforcement by execution or garnishment intact. The next succeeding section (136) provided that execution might be issued at any time (without exception) by the justice who rendered same. Section 53 of the act of April 29, 1873, "to define the jurisdiction, and regulate the course of proceeding in the courts of justices of peace in civil actions" (Laws 1873, p. 443; Kirby's Dig. § 4634), wrought a radical change with respect to judgments of justices after the same have been filed and docketed in the office of the clerk. It provides, in effect, that thereafter an execution cannot be issued by the justice. Clearly, the effect of sections 4631-4633, in connection with this section (4634), is to provide a complete transfer of such judgments from justices to the circuit court, with all the remedies for enforcement thereof given to judgments rendered by the latter court. This change in the law brought about a more harmonious condition, and prevents any conflict from arising, by reason of the judgment being in force in the circuit court for the purpose of enforcement by one method, and in force with the justice who rendered it for the purpose of enforcement by other methods. No such conflict can arise now, since it becomes fully and for all purposes the judgment of the circuit court. This view is also in harmony with sections 10 and 11 of the garnishment statute (Kirby's Dig. §§ 3705, 3706), which give the plaintiff in a judgment rendered by a justice the choice of two methods of reaching by garnishment a debtor of the defendant residing in another county. He can either file a transcript of his judgment in the office of the clerk of the circuit court, and sue out a writ of garnishment from that court under section 3705, or file it before some justice in the county where the garnishee resides, and sue out the garnishment there under section 3706. When the judgment does not exceed \$10, only the latter method of enforcement against a garnishee in another county is open.

Learned counsel for appellant urge the hardship which this construction of the statute entails upon a garnishee, especially a railroad corporation, in being required to answer in a garnishment proceeding in a distant county; but this should be addressed to the lawmakers as a reason for a change in the law, so as to ameliorate the alleged hardship. The same reason might be urged against the provision of the statute allowing the issuance of a writ of garnishment to another county upon a judgment rendered by any court.

The court did not err in overruling the special plea of the appellant, and the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. KNIGHT.

(Supreme Court of Arkansas. July 22, 1905.)

CARRIERS—CARRYING PASSENGER PAST STATION—DAMAGES—HUMILIATION.

In an action against a railroad company for injuries alleged to have been sustained by a passenger, who, boarding a train that did not stop at the station to which he wished to go, voluntarily left the same after it had passed the station about a mile and a half, and walked back, there was nothing to indicate that plaintiff had suffered any humiliation; and hence an instruction authorizing the jury to award damages for humiliation was erroneous.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1082.]

Appeal from Circuit Court, Prairie County; Geo. M. Chapline, Judge.

Action by S. H. Knight against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action by S. H. Knight against the St. Louis Southwestern Railway Company for being put off of the train a way from the station to which he wished to go. The facts are briefly as follows: On the 4th day of March, 1902, S. H. Knight purchased a ticket from the St. Louis Southwestern Railway Company to go from Stuttgart to Ulm, a station on the railroad of the company seven miles north of Stuttgart. He paid 21 cents for the ticket and boarded the northbound passenger train about 3 o'clock in the afternoon. By some mistake the train did not stop at Ulm; but, so soon as Knight discovered that the train was passing by the station to which he desired to go, he notified the conductor and brakeman, who stopped the train about a mile and a half north of Ulm. Knight asked the conductor to take him back to the station. The conductor refused to do so, but told him he would carry him on and let him come back on the next train. The conductor testified that he notified Knight that this next train would bring him back to Ulm in about two hours, but Knight says that he did not do so, and that he declined to be carried to the next station for the reason that, as the time for the other train to have gone south was already past, he supposed that it had already gone, and that if he went farther he would not get to Ulm until the next day. He stated that he was not in good health, and that it was raining, but that, as his horse and buggy were at Ulm waiting for him, he chose to get off the train and walk back. He testified that he got wet and was made sick with la grippe, and suffered several days from the effect of the exposure. The court gave the jury the following instruction on the measure of damages: "If

you find for the plaintiff, you may consider, in estimating his damages, the delay caused by being carried by his station; the time and trouble or inconvenience of walking back to the station; exposure to the weather, if you find it was bad, and injury to his health, if any, caused by such exposure; medical expense, if any, caused thereby; and humiliation he might have undergone by such treatment, caused by such wrongful acts of defendant's agents in carrying him by his station." To the giving of which exceptions were at the time saved. The jury returned a verdict in favor of plaintiff for the sum of \$150, and the court gave judgment accordingly. Defendant appealed.

Sam'l H. West and J. C. Hawthorne, for appellant.

RIDDICK, J. (after stating the facts). This is an appeal by the railway company from a judgment against it for \$150 for damages caused a passenger for carrying him a mile and a half beyond his station. It is admitted that the train overshot the station and carried the plaintiff some distance beyond it. According to witnesses for plaintiff he was carried a mile and a half or two miles beyond his station, while the testimony for the defendant tends to show that the distance beyond the station at which he was put off was only half a mile. The defendant does not deny that plaintiff is entitled to some damages, but contends that the court erred in instructing the jury as to the measure of damages, and that the verdict is excessive.

The court told the jury that, among other elements of damages, they might allow plaintiff damages for the "humiliation he might have undergone by such treatment caused by the wrongful acts of defendant's agents in carrying him by his station." Now, the defect in this instruction is that it gave the jury the authority to allow damages to plaintiff for humiliation, if they saw proper to do so, when there was no evidence to sustain such a finding. The mere fact that a passenger is accidentally or carelessly carried by his station, while it may cause him inconvenience and annoyance, involves no reflection or insult to him, and furnishes no reason why he should feel humiliated. But this is all that is shown here; for the employees in charge, while they may have been careless, were guilty of no rude or offensive conduct, and this instruction should not have submitted the matter of humiliation to the jury as a possible element in the case.

Counsel for appellee contends that this instruction was not erroneous, because it does not assume that the appellee was humiliated, but submits that question to the jury for them to determine. But it is improper to submit a question to the jury that has no evidence to support it. The instruction does not assume that the plaintiff was humiliated, but it assumes that there were facts in

evidence tending to show that he was humiliated. As before stated, there were no such facts, and as, under this instruction, the jury may have allowed a sum for the humiliation of plaintiff, and thus increased the damages, the judgment must be reversed and a new trial granted.

It is so ordered.

FORD et al. v. H. C. BROWN & CO. et al.
(Supreme Court of Tennessee. March 31, 1905.)

1. CERTIFICATE OF DEPOSIT—INDORSEMENT—
BONA FIDE INDORSEE—NOTICE.

Two certificates of deposit were drawn, payable, one to C., "trustee," and the other to C., "trustee of B. F." At the time they were wrongfully indorsed by the trustee in the same form, one of them had almost 12 months to run, and the other 6 months before maturity, and both drew interest to maturity only, and were not subject to check. *Held*, that the certificates themselves gave actual notice to the indorsee that the paper represented a trust fund, and obligated such indorsee to inquire into the right of the trustee to dispose of it, within Negotiable Instruments Law, § 56 (Acts 1899, p. 150, c. 94), providing that to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 842-846.]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Bill by Betty Ford and others against H. C. Brown & Co. and others. From a judgment in favor of plaintiffs, affirmed by the Court of Chancery Appeals, defendants appeal. Affirmed.

John Ruhm, for complainants. Wheeler & Trimble and Jas. A. Ryan, for defendants. Walter Stokes, for defendant First National Bank.

McALISTER, J. Complainant exhibited this bill against the defendants, Henry C. Brown, Fred Laitenberger, and Jesse Trinum, as individuals and as a partnership using the firm name of H. C. Brown & Co., against the First National Bank of Nashville, Tenn., and the Chattanooga Savings Bank. The principal object of the bill was to enjoin the Chattanooga Savings Bank against the payment of two certificates of deposit which that bank had issued to Woodworth as trustee for complainant Betty Ford, and which certificates of deposit had been indorsed and transferred by Woodworth to H. C. Brown & Co. in payment of a gambling indebtedness. H. C. Brown & Co. indorsed said certificates of deposit to the First National Bank of Nashville, and that bank had forwarded the certificates to Chattanooga, and was seeking to collect them from the Chattanooga Savings Bank at the time the original bill herein was filed. It is alleged that these two certificates of de-

posit represented the earnings of the complainant Betty Ford as a domestic in the family of D. Woodworth, Jr., of Chattanooga, during a period of 18 or 20 years. D. Woodworth, Jr., had died, and the certificates of deposit which had been issued to him were changed, and issued in the name of C. N. Woodworth, trustee.

These certificates of deposit were as follows:

"Chattanooga Savings Bank.

"No. 13,493.

Chattanooga, Tenn.,

Oct. 7th, 1902.

"C. N. Woodworth, trustee, has deposited in this bank \$904.97, payable to the order of same, twelve months after date, with interest to maturity only at the rate of 4½ per cent. per annum, upon the return of this certificate properly indorsed. Not subject to check.

"R. W. Barr, Cashier."

"Chattanooga Savings Bank.

"No. 13704.

Chattanooga, Tenn.,

March 21st, 1903.

"C. N. Woodworth, trustee for Betty Ford, has deposited in this bank thirteen hundred and seventy-five & 55/100 dollars (\$1,375.55), payable to the order of same twelve months after date, with interest to maturity only at the rate of 4½ per cent. per annum upon the return of this certificate properly indorsed. Not subject to check.

"R. W. Barr, Cashier."

The Chattanooga Savings Bank answered the bill, and averred that it had issued the certificates, but had refused to pay the same, because they were not due, and because it had received notice from Betty Ford not to pay them; that it had no interest in the controversy, but was willing to pay the certificates to whomsoever the court might adjudicate they should belong.

The defendants H. C. Brown & Co. also answered the bill, denying all of its material allegations.

The First National Bank of Nashville also answered, denying all knowledge upon its part of the gambling transactions, and all knowledge of the relations between Woodworth and Betty Ford, and denied any knowledge that its codefendants had conducted any gambling establishment or rooms; denied all knowledge of the intoxication of Woodworth, or of his transaction with H. C. Brown & Co. with regard to said certificate. It admitted, however, that on April 24, 1903, these certificates of deposit were presented by H. C. Brown & Co. to the First National Bank at Nashville for discount, and avers that it purchased said certificates from H. C. Brown & Co., and paid their face value in cash, and then sent the certificates to Chattanooga for collection. It avers that it took these certificates in due course of trade for a valuable consideration, and without any notice of the rights and equities of Betty Ford, or of any one else, and avers that it is

an innocent holder for value in due course of trade and without notice.

The Court of Chancery Appeals finds that C. N. Woodworth, having possession of those certificates, brought them to Nashville, Tenn., and on or about the 22d or 23d, or, possibly, the 24th or 25th, of April, 1903, he went to the gambling house located over the Climax Saloon on Cherry street, in Nashville, Tenn., and there engaged in gambling. It is shown he drank heavily and lost large sums. While thus drinking and gambling, he not only lost a large amount of his own money, but he also indorsed and transferred these certificates of deposit belonging to the complainant, upon which he obtained money and chips to be used in gambling. He lost and gambled away all of the money and chips so obtained, except about the sum of \$600 or \$700, which the gamblers in charge of the place offered to repay him, but which he at the time declined.

That court further finds that H. C. Brown & Co. came into possession of these certificates, and on the 25th of April, 1903, took them to the First National Bank of Nashville, and there sold and disposed of them to the First National Bank for cash. The bank, overlooking the fact that the certificates were not due, took them for cash, as H. C. Brown & Co. were among their regular customers. They paid cash for them, and sent them to Chattanooga, through their correspondent at that place, for collection. In the meantime, C. N. Woodworth, having become to some extent rational, telegraphed the Chattanooga Savings Bank at Chattanooga not to pay these certificates. The Bank at once notified the mother of C. N. Woodworth and Betty Ford, who immediately advised the bank not to pay or recognize these certificates.

It further appears that when these certificates were first presented to the First National Bank, they bore the indorsement of complainant C. N. Woodworth and the indorsement of H. C. Brown & Co., but at that time the First National Bank refused to take the certificates, because one of them was not properly indorsed; that is to say, it was simply indorsed by C. N. Woodworth, when it should have been indorsed, as it was payable on its face, by "C. N. Woodworth, Trustee for Betty Ford." Thereupon H. C. Brown & Co. took the certificates back, and returned with them in a short time properly indorsed.

The Court of Chancery Appeals finds as a matter of fact that this new indorsement was made by C. N. Woodworth. After the indorsement was corrected, the certificates were taken back to the First National Bank, and on the 25th of April the teller of the bank bought the certificates in question from H. C. Brown or H. C. Brown & Co., paying cash therefor, overlooking the fact that the certificates were not due. The officers of the First National Bank denied all knowledge as to how H. C. Brown & Co. acquired these certificates, and all knowledge of the transaction

between Woodworth and H. C. Brown & Co. and their employees, or of any person who obtained these certificates of C. N. Woodworth, and the Court of Chancery Appeals finds there is nothing in the record to indicate that these officers had any knowledge of the transactions mentioned.

The Court of Chancery Appeals further finds there is no evidence in the record from which we are justified in finding that the officers of the bank had any knowledge in regard to the gambling carried on over the Climax Saloon.

The Court of Chancery Appeals finds that H. C. Brown & Co. was affected with full notice and had knowledge of this embezzlement on the part of Mr. Woodworth, and of this violation of his trust, and had full knowledge of his want of legal right and capacity to transfer this property. They must have known, and did know, that they were taking the certificates in violation of this trust, and taking funds which Woodworth was practically embezzling. As to the First National Bank, there is no proof to show that the officers of the bank had any knowledge of these transactions, or even that H. C. Brown & Co. conducted gambling rooms over the Climax Saloon, and hence the rights of the First National Bank must depend upon the facts disclosed upon the face of the paper itself and the indorsements thereon.

As already stated, one of these certificates was payable to C. N. Woodworth, trustee for Betty Ford, and the other simply to C. N. Woodworth, trustee. One of them was dated March 21, 1903, due 12 months after date, and the other was dated October 7, 1902, and due 12 months after that date. Each of them bears interest to maturity only at the rate of $4\frac{1}{2}$ per cent. per annum. It is disclosed on the face of each certificate that it is not subject to check, but is an interest-bearing certificate of deposit. The first certificate, which was made payable to C. N. Woodworth, trustee for Betty Ford, was indorsed by C. N. Woodworth, trustee, and afterwards the words, "for Betty Ford" were added by him. The other certificate was simply indorsed "C. N. Woodworth, Trustee."

That court further finds that these certificates were sold and transferred by H. C. Brown to the First National Bank of Nashville on the 25th day of April, 1903. On the 24th of April, 1903, at 7:45 a. m., C. N. Woodworth had telegraphed the cashier of the Chattanooga Savings Bank, which had issued these certificates, not to pay them. So when the certificates were sent to Chattanooga for collection, the Chattanooga Savings Bank refused to pay them, on the ground that they were not due and on the further ground that Betty Ford contested the right of the First National Bank to them. It appears, therefore, that before the First National Bank took these certificates, all the authority

which C. N. Woodworth had, if any, to transfer them had been revoked by Mrs. Ford. It does not, of course, appear that he ever had authority to transfer them, especially for his own benefit.

The Court of Chancery Appeals was of opinion that these certificates, not being due, and being made payable to C. N. Woodworth, trustee, in the one instance, and to C. N. Woodworth, Trustee for Betty Ford, in the other, and so indorsed, destroyed the negotiability of the paper to the extent of giving notice that they constituted trust funds, and that the purchaser must inquire into the right of the trustee to dispose of them.

We have no doubt of the correctness of the conclusion of law reached by the Court of Chancery Appeals upon the predicate of facts found by them.

In the case of *Bank v. Looney*, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837, 63 Am. St. Rep. 830, this question was considered by this court, and it was said by the Chief Justice, who delivered the opinion, that in a controversy between a beneficiary of a trust fund and the holder of a paper disposed of by a trustee in violation of his trust, the word "trustee," appearing upon the face of the paper, is sufficient to put any taker upon notice. The court in that case referred to the authority of *Duncan v. Jordan*, 15 Wall. 175, in which it was held that the word "trustee" gave notice of the existence of a trust, and that the party taking the paper was charged with the duty of ascertaining what, if any, restrictions were imposed upon the trustee.

The court also cited the case of *Third Nat. Bank of Baltimore v. Lange*, 51 Md. 138, 34 Am. Rep. 304.

This court further remarked that the correctness of these holdings is now conceded by the courts with practical unanimity. The effect of them is that, if the trustee, Sykes, disposed of this paper in violation of his trust, then the word "trustee" would convert any one who so obtained it into a constructive trustee at the instance of the cestui que trust.

To the same effect is *Fox v. Bank*, decided by the Court of Chancery Appeals, and reported in 35 L. R. A. 678, in which Judge Wilson stated as follows:

"In the contest between the beneficiary of these notes (assuming that Anderson was not their real owner) and the transferee of Anderson, the fact that the notes, on their face, appeared to be payable to him as trustee would put the transferee on notice, and the claims of the beneficiaries would be superior." *Alexander v. Alderson*, 7 Baxt. 403; *Covington v. Anderson*, 16 Lea, 310; *Caulkins v. Gaslight Co.*, 85 Tenn. 684, 4 S. W. 287, 4 Am. St. Rep. 786.

It is insisted, however, on behalf of the appellants that the rule announced in *Bank v. Looney* and the other Tennessee cases on

this subject has been modified and entirely superseded by what is known as the "Negotiable Instrument Law," which provides in section 56 as follows:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." *Actu* 1899, p. 150, c. 94.

This section of the negotiable instrument law was construed by this court in the case of *Unaka National Bank v. Butler*, reported in 83 S. W. 655. The court held that the effect of this section of the statute was to embody the majority rule upon the subject of notice as it has been held and administered by the courts of New York and other states and the federal courts for many years, and to discard the doctrine of constructive notice, which had prevailed for many years in this state. The rule as administered in this state was that, if a purchaser of negotiable paper had implied notice of prior equities or infirmities of any nature whatever in the title of the holder from whom he purchased—that is, if anything appeared upon the face of the paper, or from the facts and circumstances attending its possession or sale, which would put one of ordinary prudence upon inquiry that would lead to actual knowledge of the equities or infirmities—he was bound to pursue such inquiries, and was charged with notice of the facts he could have learned; citing the Tennessee cases on the subject.

It is then stated in the opinion that the rule of constructive or implied notice had been abrogated by the negotiable instrument law, enacted in April, 1899, and what may be called the majority rule was adopted by the enactment of section 56, which has already been quoted.

It will be observed that this section provides that a party "must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

In *Unaka Bank v. Butler*, supra, the court was dealing with a check which did not carry on its face any notice of defective title, but notice of the infirmity was sought to be fixed by the surrounding facts and circumstances. It will be observed that in the present case each of these certificates of deposit was indorsed by C. N. Woodworth as trustee, and we are of opinion that such an indorsement prima facie and presumptively fixed the purchaser with actual knowledge of want of authority in the trustee to dispose of the paper for his own benefit.

In *Third National Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304, the note was payable to a trustee, and indorsed in the same style by the trustee. The court said:

"In the case of the present note, it cannot be read understandingly without seeing on its face that it is connected with a trust and is part of a trust fund. It was the duty of the bank before purchasing to have made inquiry into the rights of the trustee to dispose of it. This it wholly failed to do, and as it turned out he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed."

In *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, the court, in speaking of the effect of the word "trustee," says it means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed cestui que trust than the property of one who is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word "trustee" alone has no meaning or legal effect.

It has already been seen that one of the certificates of deposit in the case at bar was payable to C. N. Woodworth, trustee for Betty Ford, and indorsed in the same style, but actual notice to a purchaser of the fiduciary character of a paper is no more effective in the one case than in the other.

In the case of *Swift v. Smith*, 102 U. S. 442, 26 L. Ed. 193, it is said:

"There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note nor anything in the indorsement thereon to notify him that it did not belong to Jackson both legally and equitably. It was a mercantile paper, and not due. * * * It is true that if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner, and its purchase will not be held to be bona fide."

These authorities sustain our position that the word "trustee" in an indorsement of this character is express notice to a purchaser that there is a cestui que trust or beneficiary, and that his rights may not be sacrificed by the trustee in the sale or pledge of the note for his own benefit; in other words, our holding distinctly is that such an indorsement is actual knowledge to the purchaser of such paper, within the meaning of section 56 of the negotiable instrument law, supra.

Now it is very true, as said by Mr. Perry in his work on Trusts (volume 1, § 225):

"The mere fact that the word 'trustee' is on the face of the securities cannot put a purchaser to any inquiry beyond ascertaining whether the trustee has power to vary the securities. If he has such power, a purchaser in good faith will be protected, although the trustee use the money for his private purposes. But if a purchaser takes securities from a trustee with the word 'trustee' upon

their face, in payment of a private debt due from the trustee, the sale may be avoided by the cestui que trust, or the purchaser may be held as trustee."

As stated in *Looney v. Bank*, supra, the rule is that he who takes a security from a trustee with the fiduciary character displayed upon its face is bound to inquire of his right to dispose of it; but if upon inquiry it is found that there is no restriction upon the trustee's power of disposition, or, it may be added, there is nothing in the nature of the transaction to indicate any abuse of his trust, then the title of a purchaser in good faith for value and before maturity will be protected.

It appears that our negotiable instrument law is a substantial reproduction of a similar law enacted by the state of New York in the year 1896. In the year 1903, with that law on the statute books, the Court of Appeals of New York decided the case of *Cohnfeld v. Tannenbaum*, reported in 176 N. Y. 126, 68 N. E. 141, 98 Am. St. Rep. 653. The court said in the midst of the opinion that the signature to the check, "Isidore Cohnfeld, Guardian," gave the defendant notice that presumptively the funds being paid to him were not those either of the Cohnfeld Manufacturing Company or of Isidore Cohnfeld personally, and he was put upon inquiry to ascertain the authority of Cohnfeld to apply the money in payment of the company's debts. This proposition is conceded by both the courts below. Had he made the inquiry, he would have learned the facts which have already been stated. He is therefore chargeable with all that those facts import, or which is fairly to be inferred from them.

Again in West Virginia, where a negotiable instrument law similar to our own prevails, the Supreme Court of that state held, in the case of *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953, that a negotiable note, payable on its face to a payee, with the word "attorney" suffixed to his name, indicates an interest in other parties, and puts the purchaser upon inquiry as to their rights and the right of the payee to sell the note.

In addition to all this, the certificates show on their face that they bear interest to maturity only at the rate of 4½ per cent. per annum, and further that they are not subject to check, but are interest-bearing certificates of deposit; one of them having almost 12 months to run and the other 6 months at the time they were transferred. It is admitted by the officers of the First National Bank that they overlooked this fact when they bought these certificates for cash, but we agree with the Court of Chancery Appeals that the fact that the bank overlooked these things will not relieve them of responsibility as to any notice the paper itself gives.

All these facts disclosed on the face of the paper, including the express indorsement of C. N. Woodworth, trustee, etc., gave actual

notice to the bank that this paper represented a trust fund, and obliged the bank to inquire into the right of the trustee to dispose of it. If the bank had made such inquiry, it could easily have ascertained that the paper had been embezzled and the money lost in a gambling transaction by the trustee; and further, the bank would have discovered that, before the paper had been purchased by it, all right and authority of the trustee to act had been withdrawn.

We are therefore of opinion that the indorsements and recitals of these certificates communicated actual knowledge to the bank that they represented a trust fund, and, even under the negotiable instrument act, no title was acquired by the bank to the paper.

PHELAN v. STATE.

(Supreme Court of Tennessee. Dec. 30, 1904.)

1. CRIMINAL LAW—STATEMENTS IN ACCUSED'S PRESENCE—WEIGHT—INSTRUCTIONS.

Where, in a prosecution for homicide, there was evidence that immediately after the killing defendant's daughter stated to him that, if he had not dared deceased to come out of the house, there would have been no trouble, to which defendant made no reply, and the court did not charge as to the weight of such evidence, but charged that if the jury believed that defendant dared or invited deceased to come out of his room, and defendant at the time had prepared himself with a loaded shotgun and had a purpose to provoke a difficulty and kill deceased, etc., his subsequent acts would not be justifiable, the refusal of a requested instruction that the accusation of his daughter, if allowed to pass unchallenged, could only be considered as a circumstance tending to show defendant's guilt, and as such was only entitled to such weight as the jury might give it as proof in the case, was reversible error.

2. SAME.

Where defendant did not claim that he had denied the accusation of his daughter immediately after he had killed deceased, and there was no fact relied on by him as amounting to such a denial, the refusal of a request to charge that if the defendant denied the statement of his daughter, or if what he said at the time under all the circumstances of the case in effect amounted to a denial, then the statement claimed to have been made by her was incompetent, and should not be considered for any purpose, was properly refused.

3. SAME—NECESSITY OF DENIAL.

Where defendant's daughter, immediately after the killing of her husband made an accusation against defendant, to which he made no response, it was error to charge that, if the daughter's statement was made in defendant's presence and he failed to make any response thereon, the jury could consider whether under the surrounding circumstances, considering the daughter's grief and distress, a denial of her statement was demanded.

4. SAME—EVIDENCE—CHARACTER OF ACCUSED.

Where, in a prosecution for homicide, defendant introduced evidence establishing an excellent character for peaceableness, etc., he was entitled to a charge that such proof should be considered in weighing the credibility of the witnesses and as strengthening the presumption of defendant's innocence.

Error to Criminal Court, Davidson County; W. M. Hart, Judge

W. H. Phelan was convicted of murder in the second degree, and he appeals in error. Reversed.

Robert Vaughn and J. M. Anderson, for plaintiff in error. Atty. Gen. Cates, K. T. McConnico, and J. H. Zarecor, for the State.

McALISTER, J. The plaintiff in error was convicted in the criminal court of Davidson county of murder in the second degree for the killing of R. T. Townes, and his punishment fixed by the jury at confinement in the state prison for a period of 10 years. He has appealed in error.

The record reveals that deceased and defendant were men over 60 years of age. The deceased, Townes, was the son-in-law of defendant, Phelan, having married the daughter of the latter about two years before the homicide. The deceased at that time was about 64 years of age, and the daughter of defendant only about 24 years of age. On account of the disparity in their ages, the defendant and probably his family objected to the marriage, but it was consummated despite their opposition. It appears, however, that all the domestic differences growing out of this union had become reconciled, so that, in January, 1904, the defendant, upon the invitation of deceased and his wife, moved his family into the home of deceased, where the two families resided up to the time of this tragedy. The deceased had owned this farm for 25 years prior to his marriage with defendant's daughter, but before defendant and his family came to live upon the place the deceased had conveyed the farm to his wife, the daughter of the defendant. This conveyance was made in March, 1903, a few months prior to the institution of a damage suit against Townes by one J. B. Jones.

The defendant is shown to have been a man of excellent character, his neighbors testifying with singular unanimity to his reputation as a truthful and peaceable man. It appears that for some time after defendant took up his residence at the home of his son-in-law the relations existing between the families were most harmonious. It is probable from this record that the enmity between the parties grew out of a business transaction, when some timber ties were hauled by Jim Phelan, son of defendant, from the place to the city of Nashville to be sold, and in dividing the proceeds of the sale, the parties differed in their respective calculations. It turned out that the calculation made by deceased was correct, whereupon defendant acknowledged his mistake, and paid over to Townes the sum in dispute, to wit, \$3.75. Deceased did not seem satisfied, and manifested a special unfriendliness to Jim Phelan, who, on account thereof, finally left the place and established a home elsewhere.

Another cause of disturbance in this family was a remark Mrs. Phelan overheard the de-

ceased make to his wife, to the effect that she was furnishing more than her share of the provisions. It appears that each family had been furnishing their own provisions, and all of them would eat together at Mr. Phelan's table. After this remark, the families established their own kitchen and dining room and maintained separate housekeeping.

There is also proof tending to show that another cause of unpleasantness was the intemperance at times of the deceased, who frequently drank too much on visiting the city, and when he returned home at night would become disagreeable to his family. The defendant testifies that on two occasions Mrs. Townes ran screaming from her husband's room to her parents' room at night, saying that her husband was going to kill her and asking protection. There is proof also tending to show that on one occasion the deceased fired off his pistol while in the house, probably while under the influence of liquor. The defendant also testifies that on another occasion he had been notified by his daughter that her husband, the deceased, had become angry with her while they were on a visit near Mt. Juliet, and had kicked her.

The record also reveals that, after these antagonisms arose, defendant contemplated moving his family away, and made one or two ineffectual efforts to rent another house. There was also proof on behalf of the state tending to show that during this time the defendant expressed unfriendliness to the deceased, complaining that he could stand as much as he could stand, and to one H. B. Carter, on the day before the killing, stated that he had a notion two or three times of killing deceased. Witness said to defendant: "Don't do that." Defendant replied: "I won't say that I will. I have tried to get him to fight me." Witness advised defendant, if he could not get along with him, to get off the place. Defendant replied, "We did think of moving down to a little place across the road," but added, "Annie [his daughter] wants me to stay here to protect her." Another witness testified that defendant told him about the trouble he was having in getting along with the deceased, and finally said to witness: "About the only way I can get along with Bob [the deceased] is to take a double-barrel gun and blow his head off his shoulders." In this same conversation defendant said to witness that deceased, on one occasion, had gone into his room, closed the door, and fired off his gun. Defendant asked the witness: "Ain't that threats? I think that's threats. Ain't that, threats?" Defendant then asked the witness if he thought deceased had shot off his gun to terrorize defendant's family, remarking: "If he's doing it for that, I'll not take it off of him. I'll shoot his head off."

These latter threats are proven by one

Tom Williams, a negro, and they seem to have been made while defendant was laboring under some excitement from either real or imaginary insults heaped upon him or his family by deceased. Further it appears that, while defendant protested he was not afraid of deceased, he yet manifested great uneasiness lest deceased should do him or his family some hurt. This is shown by the following evidence:

Tom Williams (colored), on cross-examination, deposed as follows:

"Q. You say the first time Mr. Phelan was down at your house talking with Mr. Townes, he asked you how you got along with him?

"A. Yes, sir.

"Q. And then he said he believed Mr. Townes was going to kill him or some member of his family?

"A. Yes, sir; he asked me somehow or another in that direction.

"Q. It was along that line?

"A. Yes, sir.

"Q. 'And before he shall do it, I will get my gun and shoot him'?

"A. 'Blow his head off.' He seemed to be uneasy or afraid or badly scared.

"Q. When he first came down there he seemed to be uneasy and frightened?

"A. Yes, sir.

"Q. And asked how you got along?

"A. Yes, sir.

"Q. And said he could not get along, and believed he intended to hurt him and his family?

"A. Yes, sir.

"Q. And before he would permit him to hurt them, he would take his gun and shoot him?

"A. Take his gun and blow his head off his shoulders.

"Q. That was in the same connection in which he told you he was afraid he would hurt him or some member of his family?

"A. Yes, sir."

Witness Carter testified that Phelan said he had a notion of shooting Townes, and that Carter said to him: "I would not do that."

"Q. And when you said, 'I wouldn't do that if I was you,' what was it he said?

"A. I didn't mean to say that I will."

The next witness on the alleged threats was Alex. Hines, who testified as follows:

"Q. What, if anything, did he say he [Phelan] was going to make?

"A. As well as I remember, he said he was going to make his crop there—that he had went there for that business, and was going to tend to that business, and was going to stay there and make his crop.

"Q. Now, what was it, as near as you recall?

"A. The best I recall he said he was going

to make his crop, no matter what the consequences were."

The tragedy occurred late in the afternoon of June 24, 1904. There were no eye-witnesses excepting the immediate participants and Miss Mamie Phelan, the daughter of the defendant.

An incident immediately preceding the killing, and which is supposed to have infuriated the deceased, is detailed by Enoch Phelan, a son of the defendant. According to the testimony of this witness, on that afternoon he and George Hunter, a young employé on the place, had been gathering fruit preparatory to coming to Nashville to sell it, and had taken the ladder from the barn to the orchard, and had left it there. About 6 o'clock the deceased went to the barn for the purpose of feeding his stock, and, discovering that the ladder was not in the barn, he became very angry. Enoch Phelan testifies that he was in his mother's room reading the paper when the deceased came around from the barn, cursing and complaining that the ladder was not at the barn, and hence he could not get up there to feed his horses. Enoch got up and explained to deceased how he came to leave the ladder in the orchard, telling him he would go after it. While this witness was at the orchard, procuring the ladder, the killing occurred. At this time the defendant was seated on the back porch of the Phelan home, leaning against the hall door. This back porch is 10 feet long and 10 feet wide. Defendant testifies that he tried to pacify deceased about the ladder, telling him he would make a new ladder for them to gather fruit with, and would not bother the ladder any more. The deceased, in an angry mood, passed over this little back porch, through the dining room, into his bedroom, distant about six or seven steps from where the defendant was sitting. The defendant testified that he heard his daughter exclaim: "Mr. Townes, every time you get mad, you come in here for your whisky bottle, and then for your pistol." To which he replied: "What in hell have you got to do with it?" Defendant states that his daughter then made an outcry, saying: "Don't, Mr. Townes. You hurt." That she was making a gurgling noise as if being choked. In this defendant is corroborated by his daughter, Miss Mamie Phelan, who at the time was in the back yard, and claims to have seen through the dining room window, near which she was standing, the deceased choking her sister, saw her scuffling to get away from him, and heard her scream repeatedly, and saw her running from where she was being choked, through the dining room out to the little porch, where the defendant was seated. The defendant exclaimed: "Bob, I can't stand everything." To which deceased replied, "By G——, you will stand it, and more too," and immediately

came out through the dining room towards the little back porch with his pistol in his hand, as testified to by defendant, Miss Mamie Phelan, and Miss Willie Phelan. Defendant immediately arose, went to his room, procured his double-barrel shotgun, and stepped from the porch into the back yard just as Townes came out on the porch with his pistol in his hand. Defendant, with his face towards deceased, continued to back 20 or 25 feet away, when he said, "Bob, you had better go back," and deceased replied, "By G——, I am ready for you." Deceased continued to advance with his pistol presented at defendant. Defendant had backed out into the yard towards the garden gate, and when about 46 feet from the porch he fired, and deceased with his pistol in his hand, fell to the ground a few feet from the back porch, in the direction of the garden gate near which defendant was standing. Deceased was shot with small bird shot, No. 6, delivered from a double-barrel shotgun. It is claimed by defendant that the other barrel was accidentally discharged, and took effect in the guttering and boxing and shingles of the house.

The state introduced no witness to contradict the defendant's account of the shooting, but seeks to do so by circumstantial evidence.

The first witnesses outside the family who reached the body were W. T. Burns and his son James Burns, who lived probably 100 yards from the Townes house, and who were attracted there by the firing. These witnesses testify that when they reached the rear of the house defendant was standing about 30 or 35 feet northeast of the back porch, and deceased was lying on the ground about 4 feet from the back porch—lying on his breast with his feet towards the porch. These witnesses also testify that no pistol was seen about the body of deceased, nor was the defendant's gun to be seen. The defendant explains why the gun and pistol were not seen by these witnesses. He states that immediately after the shooting he carried the gun to the porch where his wife was standing and handed it to her. He further states that he picked up the pistol and carried it into his bedroom and deposited it in the corner drawer of a sideboard. As a reason for putting the pistol away, defendant states that he was afraid that, in the excitement, some one might pick it up and use it on him. Defendant was further asked why he put one shell in his shotgun after the shooting, and stated in reply that deceased had relatives and friends around there, and he did not know but they might come in and do him some violence.

The sheriff testified that after the shooting, when he had arrested defendant, and brought him to the jail, the latter told him he had left

deceased's pistol on the ground. It is also true defendant did not in his testimony deny making this statement to the sheriff.

Deputy Sheriff Kiger, after the shooting, went out to the Townes' residence. He met Phelan on his way to Nashville, coming to surrender to the sheriff, and, after getting to the Townes home, he took charge of Townes' pistol. He was asked by the counsel for the state and replied:

"Q. Where was the gun?

"A. It was behind the door that leads off of the little porch into the side where Phelan was said to have lived.

"Q. You mean there, behind that door?

"A. Yes, sir.

"Q. Where was the pistol?

"A. In the top bureau drawer.

"Q. Where was it standing?

"A. Right there, in the corner."

He was asked for counsel for defendant as follows:

"Q. You got it out of the bureau in Mr. Phelan's room?

"A. I didn't get it out myself.

"Q. Who did get it out?

"A. Some young man; I don't know whether it was his son or not."

Enoch Phelan, son of the defendant, testified as follows about the pistol:

"Q. Did your father make any statement to you as to the whereabouts of Mr. Townes' pistol?

"A. Well, when I got there, I asked him.

"Q. Did he or not tell you where the pistol was—where he had put it?

"A. He didn't until I asked him.

"Q. However, you asked him?

"A. Yes, sir; he told me.

"Q. When the officers came out that night, Mr. Kiger, Sheriff Cartwright, and others, who was it gave them the pistol?

"A. Myself.

"Q. Is that the pistol, or one like it?

"A. Yes, sir; that is Mr. Townes' pistol, and the one I gave Deputy Sheriff Kiger.

"Q. Where did you get it?

"A. I got it out of the sideboard, right in my mother's room, right by the side of where the gun stayed."

The Burns witnesses testify that when they reached the scene of the tragedy the wife of deceased was bending over his body, crying and moaning. Witness Burns was endeavoring to console Mrs. Townes, when defendant spoke up and said: "I told Annie there was no use going on that way. I told her he was dead." Mrs. Townes replied: "Papa, there was no occasion for this." Defendant said: "Annie, I thought he was abusing you or choking you." Mrs. Townes replied: "No, sir; he was not doing anything of the kind." Defendant further remarked to witness: "Mr. Burns, I can't take everything. This man has abused me, and I have taken his abuse as long as I can. I can't stand it no longer.

You know me well enough to know I am not afraid of anybody." Mrs. Townes in that conversation also said to the defendant: "Papa, if you had not dared him out there two or three times, there wouldn't have been no harm done"—or something to that effect. In the same conversation the defendant said to witness Burns that the deceased was coming at him with a pistol. The language of the witness is: "Mr. Phelan said he could not stand it. Mr. Townes was coming at him with a pistol."

Several witnesses testified that they heard no denial by defendant of the accusation of his daughter that he had called or dared deceased out of the house two or three times, nor did the defendant testify that he had denied said statement at the time it was made. He did testify, however, that he did not dare the deceased to come out of his room.

On this subject counsel for defendant requested the court to charge three several propositions. The first instruction was properly rejected, for the reason it contained a statement to the effect that the witness James Burns had said that defendant replied to the accusing statement of his daughter: "No, daughter, I had to kill him; he was advancing on me with a pistol at the time." As a matter of fact, James Burns had not so testified, and for this reason it was vicious, and should not have been charged.

The third request was as follows:

"The statement claimed to have been made by Mrs. Townes to the effect that the defendant invited or dared the deceased to come out of the house is not competent evidence of the fact that any such invitation or dare was made by the defendant. Such statement, made by her, and if permitted by the defendant to pass unchallenged, is not to be received or considered in the same light that it would be entitled to be considered if Mrs. Townes had appeared upon the witness stand and testified to this. Such statement, at most, can only be looked to as a circumstance tending to show the guilt of the defendant, and, as such, is entitled only to such weight as you think it is entitled under all the facts in this case.

"Refused; the law on this subject has been substantially charged. W. M. B.

Refusal to grant this request is not an error.

Request No. 4:

"If, from the proof in this case, it appears that the defendant denied the claim that he [the defendant] invited the deceased, or dared the deceased, to come out of the house, or if what he said at that time in response to the statement made by Mrs. Townes, under all the circumstances, in effect amounted to a denial of the statement, as aforesaid, then the law requires you that the statement claimed to have been made by Mrs. Townes is not competent evidence of the fact that any such invitation or dare was made by the defendant. Such statement, made by her, and if permitted by the defendant to pass unchallenged, is not to be received or considered in the same light that it would be entitled to be considered if Mrs. Townes had appeared upon the witness stand and testified to this. Such statement, at most, can only be looked to as a circumstance tending to show the guilt of the defendant, and, as such, is entitled only to such weight as you think it is entitled under all the facts in this case.

been made by Mrs. Townes is incompetent, and should not be considered by you as evidence for any purpose.

"Refused; the law on the subject having been substantially charged. W. M. Hart, Judge."

Refusal to charge this request is assigned as error.

Request No. 5:

"If you believe, from the evidence in this case, that Mrs. Townes said, in the presence of this defendant, immediately after the shooting of her husband, 'that you ought not to have invited him out or dared him out of the house,' and that defendant failed to make any response to such statement, then you will consider whether, under all the surrounding circumstances, considering the grief and distress of Mrs. Townes at the time, and the defendant's relation to her, etc. it was natural to be expected that he would go into any discussion or make any denial of her statements at such a time, and if you believe that it would not have been natural for him under those circumstances to have gone into any discussion or made any denial of her statements, then no importance or significance can be attached to the fact that defendant made no denial of her statement.

"Refused; the law on this subject having been substantially charged. W. M. Hart, Judge."

Refusal to charge this request is assigned as error.

The trial judge, as stated, declined to submit these instructions, for the reason that he had sufficiently or substantially charged them. We have carefully examined the charge of the court, and fail to find any instructions on the weight to be given to the accusation of Mrs. Townes or how this character of testimony should be received by the jury. On the contrary, the jury were left to infer from the instructions given that the accusation of Mrs. Townes against the defendant was to be considered as direct testimony that the defendant had dared the deceased to come out of his room. In stating the theory of the state, the court said, among other things, as follows:

"That a controversy arose between the deceased and the defendant above explained, and that the defendant procured a shotgun and then dared or invited the deceased to come out."

Again, in charging a request submitted by the state, the court said:

"If you believe from the proof that the defendant dared or invited the deceased to come out of his room, and defendant at the time had prepared himself with a loaded shotgun, and the purpose of the defendant was to provoke a difficulty with deceased for the purpose of securing an opportunity to kill deceased, and in response to his dare

or invitation deceased came out, and if, when deceased appeared, defendant was in a hostile attitude toward deceased, or in the act of firing upon him, defendant's assault on deceased, under such circumstances, would not, under the law, be justifiable, and the justification of self-defense would not, under such circumstances, be available to defendant, although you may believe that deceased appeared with a pistol in his hand at the time."

The question then presented for our determination is whether or not the supplemental requests submitted on behalf of the defendant should have been charged.

A review of the law on this subject will be useful at this point. In *Kendrick v. State*, 9 Humph. 723, this court said:

"If a man be charged with the commission of an offense, and he neither deny or admit it; if the facts in relation thereto, of which, if true, he must be cognizant, be charged in his presence and hearing to exist and he do not controvert them, proof of such charge having been made is legitimate. But if he deny the charge of his guilt, if he controvert the truth of the fact, proof of such charges cannot be made, because they are mere charges unsupported by oath, and lack that confirmation, which is supposed to be given to them by the implied admission of the person charged in not denying them."

In *Deathridge v. State*, 1 Sneed, 80, it appeared that certain persons had accused the prisoner in his presence, saying that he had sent for them and advised them that "a good haul could be made." This charge the prisoner denied, yet it was permitted to go in evidence against him. The court adjudged this to be error, saying:

"If the prisoner had remained silent under the charge, it was competent to go to the jury as a circumstance for such inference, as the facts attending it might reasonably warrant. But the denial reduced it to a mere charge, and certainly that is no evidence of guilt"—citing *Kendrick v. State*, 9 Humph. 723.

In *Daugherty and Wife v. H. C. Marcum et al.*, 8 Head, 323, a civil case, this court said:

"All persons being sui juris are required to speak out when an assertion is made, or an act done in their presence or with knowledge on their part, incompatible with their legal rights; and the failure to do so is taken as a tacit admission of the truth of the fact so asserted, or of the right of the person to do the act. This cogent principle applies as much between relatives as it does to strangers."

In *Queener v. Morrow*, 1 Cold. 123, also a civil case, this court said:

"The general rule is that an admission may be presumed not only from the declaration of a party, but even from his acqui-

escence or silence. The force and effect of such an admission must, of course, depend upon the circumstances under which it is made. In some cases, if clearly proved, it will be evidence of the most convincing kind. In others, it may be of very little force and perhaps entitled to no consideration, and it is always to be borne in mind that it is the most dangerous kind of evidence. In order that a party may be affected by the statement of another on the ground of his implied admission of its truth by silent acquiescence, it must distinctly appear that he heard and fully understood such statement. The occasion must also have been such that the party sought to be affected was at liberty to interpose a denial of the statement, and he must not only have had opportunity to speak, but the statement must have been in respect to some matter directly affecting his rights, so as properly and naturally to demand a contradiction, if untrue."

Mr. Elliott, in his recent work on Evidence, vol. 1, § 221, says as follows:

"But in order that admissions may be inferred from silence or acquiescence, it must usually appear that the language or conduct in question were known and understood by the party claimed to have acquiesced therein, and that he was naturally called upon to take some action or make some response thereto. Such evidence should be received with caution; but if it is uncertain whether the party claimed to have acquiesced therein heard and understood the statements, the question is usually one for the jury to determine."

Again, at section 230, the same author says:

"The general rules governing the subject of this section have already been stated, and it has been shown that silence and apparent acquiescence to be effective as an admission, must be such, or under such circumstances as to 'exhibit some act of voluntary demeanor or conduct,' of the party sought to be charged with the admission."

This question arose and was considered by this court in *Green v. State*, 97 Tenn. 59, 36 S. W. 700.

The court in that case instructed the jury that:

"Such evidence should be carefully and cautiously scrutinized, as it is considered of a dangerous character, and, before any inference of an implied admission or acquiescence in the truthfulness of the statement can be drawn by the jury against the defendant, it must appear affirmatively that the defendant heard and fully understood the statements; that they were made under such circumstances as afforded the defendant opportunity to speak or act, or the circumstances did not naturally, properly, or reasonably call for a denial on his part, or the peculiar circumstances prevented a denial,

you would not give any weight whatever to defendant's silence or failure to contradict the same. But if it appears that any such statements are proven and defendant heard and understood the same, and had the opportunity to act and speak, and the statement naturally and reasonably called for a denial on the part of the defendant and was such as reasonably permitted a denial, and he did not contradict or deny the same, then the jury may consider the same as proven for the purposes aforesaid, not as proof or evidence of the circumstances detailed in the statements, but to draw such inference as they think right. It is a rule of law that when a prisoner is accused of crime, and remains silent under the charge, such fact may go to the jury as a circumstance for such inference as it may reasonably warrant. But acquiescence to a statement, to have the effect of an admission, must exhibit the same act of the mind and amount to voluntary demeanor or conduct of the party. And where it is acquiescence in the conduct or language of others, it must plainly appear that such conduct was fully known and the language fully understood by the party before any inference can be drawn from his passiveness or silence. The circumstances, too, must not only be such as afforded him an opportunity to act or to speak, but such, also, as would properly and naturally call for some action in reply from men similarly situated, and you, as jurors, should look to all the surroundings and circumstances confronting the prisoner, and his explanation of same."

This court, in speaking of that charge, said:

"In view of the strong admonition delivered by the court to the jury, in respect of the dangerous character of this evidence, and the very circumscribed limits within which they are permitted to consider it at all, we are unable to perceive any error in the admission of this testimony of which the prisoner can complain."

This court further said:

"It is admitted that such evidence should always be received with much caution. In some cases it may be equivocal and of the lightest possible value; in others, it may be entitled to much weight. Its value, of necessity, must be estimated by the jury. If it is doubtful whether the defendant heard or understood the proposition, to which his silent assent is claimed, the jury may determine it. The degree of credit due to such tacit admissions is to be estimated by the jury, under the circumstances of each case."

See, also, *Rice on Evidence*, vol. 3, p. 501.

Mr. Wharton in his work on Criminal Law, § 696, says:

"Where a man had full liberty to speak, and not in the course of a judicial inquiry is charged with a crime, and remains silent—that is, makes no denial of the accusation by

word or gesture—his silence is a circumstance which may be left to the jury."

In *Commonwealth v. Kenney*, 12 Metc. 235, 46 Am. Dec. 872, it was said that, if the statement is not heard by the accused, or if, being heard, he denied it, or if circumstances existed at the moment which prevented a reply or rendered a reply inexpedient or improper, the evidence certainly is of no value. *Riley* Low v. State, 108 Tenn. 127, 65 S. W. 401.

An analysis of these cases will show (1) that when the accusation is denied, it is not admissible at all as an evidential fact and has no probative effect whatever; (2) when the defendant stands mute in the face of the charge, that fact is interpreted as a circumstance tending to show guilt, provided the defendant heard and understood the charge and the situation of the parties demanded a denial—all of which must be left to the determination of the jury; (3) that evidence of silent acquiescence is of a dangerous character and must be received with great caution.

There is not one line in the charge of the trial judge instructing the jury how they should weigh and determine the statement of Mrs. Townes, nor was there any admonition to the jury of the dangerous character of this evidence, and that it should be received with great caution. It is the province of the jury to interpret such silence and determine whether defendant's silence was, under the circumstances, excused or explained. In the absence of any instructions on this subject, counsel for defendants submitted the supplemental requests marked 3, 4, and 5.

The third request was to the effect that such an accusation, if allowed to pass unchallenged, can only be looked to as a circumstance tending to show the guilt of defendant, and, as such, is entitled only to such weight as the jury might give it, in view of all the proof in the case. The refusal of the court to give this request was prejudicial to defendant and is reversible error.

The fourth request was to the effect that if defendant denied the statement of Mrs. Townes, or if what he said at the time, under all the circumstances of the case, in effect amounted to a denial, then the statement claimed to have been made by Mrs. Townes is incompetent, and should not be considered by you as evidence for any purpose.

We do not think this instruction should have been given, for the reason defendant did not claim that he had denied the statement of Mrs. Townes, nor was any fact relied on by him as amounting to a denial of such charge.

The fifth request was to the effect that, if the statement was made in the presence of the defendant, and he failed to make any response to such statement, then the jury should consider whether, under all the surrounding circumstances, considering the grief and distress of his daughter, a denial of her statement was demanded.

This instruction should have been submitted to the jury under the authorities already cited.

It is also assigned as error that the trial judge failed to instruct the jury as to the effect of defendant's proof as to his good character.

It is certainly true that the court should have given the jury some instructions on this subject, especially in view of the excellent character proven by defendant. The court correctly told the jury that proof of good character should be looked to in weighing the credibility of witnesses, and that defendant's testimony should be weighed as that of other witnesses; but he failed to charge that proof of good character would strengthen the presumption of defendant's innocence, as frequently held by this court. We find, however, there was no request for further instructions on this subject.

Reversed and remanded.

EWELL & SMITH v. JACKSON'S ADM'R.*
(Court of Appeals of Kentucky. Sept. 20, 1905.)

VENDOR AND PURCHASER—PURCHASE PRICE—INTEREST.

A purchaser under an agreement that the purchase price should be paid when the number of acres was ascertained and deed executed, who obtained bond for title and took possession of the land, was properly charged with interest on the price from the time he received possession.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 350, 351.]

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

Action by Ewell & Smith against J. O. Jackson's administrator. From a judgment granting insufficient relief, plaintiffs appeal. Reversed.

Greene & Van Winkle and R. L. Ewell, for appellants. Henry C. Hazlewood, for appellee.

NUNN, J. The record in this case is very imperfect. It appears, however, that one Jarvis Jackson was the owner of large bodies of land lying in Laurel county, Ky., and that prior to his death, which occurred in 1883, he sold to appellants several surveys and executed to them bonds for title. Some of these lands he sold for 50 cents per acre and some at 75 cents per acre. It was agreed that the purchase price was to be paid when the number of acres in each tract was ascertained and deeds executed therefor. Jarvis Jackson died, leaving one son, J. C. Jackson, as his only heir, who inherited all his property, and he executed to the appellants a bond for title, agreeing to convey to them a tract of land supposed to contain 1,500 or 1,800 acres at the price of \$1 per acre. Soon after this J. C. Jackson died, leaving surviving him his widow and only two children as his only heirs at law. In the month of March, 1889, the appellants filed a petition in the Laurel circuit court against J. O. Jackson's widow and his two children, who were then infants under the age of 14 years, by which they sought to have the land surveyed for the purpose of ascertaining the number of acres in each of the several tracts and to obtain a conveyance therefor. Within a few days thereafter they filed an amended petition, in which they stated that at the time of their purchase from J. C. Jackson they had been put in possession of all the lands referred to, and had the actual possession thereof, and had so been in the actual possession, and had paid the taxes thereon for more than 15 years. No answer was ever filed to the petition or amended petition, except the formal answer of the guardian ad litem representing the infant defendants. This case remained on the docket undisposed of until the month of December, 1903, when the court rendered a judgment fixing the amount due from the appellants for the

respective surveys of land purchased by them, and from which they have appealed.

It appears that the court erred to the prejudice of appellants, in that two of the surveys, one of 100 acres and the other of 30, were to be sold for 50 cents per acre, and another survey containing 300 acres was to sell for 75 cents per acre, while the court, by its judgment, made appellants pay \$1 per acre for each and all of them. The 30-acre piece should be eliminated, for the reason that it was included in the calculation of the larger boundary. It appears that the court in its judgment fixed the number of acres in the tract known as the "Helton Survey" at 687 acres, and charged appellants therefor at the price named. It appears, however, but not very satisfactorily, that Jarvis Jackson in his lifetime sold and conveyed 350 acres of this survey to the appellant R. L. Ewell. If this be true, it would be wrong to make them pay for it again. For the errors hereinbefore stated the judgment is reversed, and the cause remanded; and, if it should be made to appear that the appellant R. L. Ewell had previously bought and paid for the 350 acres referred to, then the appellant should not be charged therewith.

The court did not err in charging appellants interest on the amount found due from the time they alleged in their pleadings that they had received the actual possession of the land purchased by them.

McQUEEN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 22, 1905.)

1. CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES—PROOF OF DILIGENCE—SUFFICIENCY.

An affidavit for a continuance of a criminal case on the ground of the absence of witnesses, which avers that subpoenas were issued and placed in the hands of proper officers, and that the subpoenas cannot be found with the papers in the case, does not show that diligence was used to subpoena the witnesses, essential to a continuance under Cr. Code Prac. § 189, and Civ. Code Prac. § 315.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1859-1861.]

2. SAME.

An affidavit for a continuance on the ground of the absence of a witness, which avers that the witness was recognized to appear and that he was temporarily outside of the state, is insufficient to show diligence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1853-1860.]

3. SAME—READING AFFIDAVIT AS TESTIMONY—HARMLESS ERROR.

The refusal to allow an affidavit to be read as the testimony of an absent witness was not error, where the averments therein were of a general character and could not have had any substantial effect on the jury.

[Ed. Note.—For cases in point see vol. 14, Cent. Dig. Criminal Law, §§ 1355, 1356; vol. 15, Cent. Dig. Criminal Law, § 3146.]

4. WITNESSES—RECALL FOR EXAMINATION.

It was not an abuse of discretion to permit the commonwealth, on the trial of a criminal

*For modification, see 88 S. W. 1135.

case, to recall defendant and prove by him that he had been in the penitentiary.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 899-905, 1006, 1007.]

5. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.

On a trial for homicide, an instruction that, if defendant had reasonable grounds to believe that he or his brother were in immediate danger of death at the hands of decedent, he should be acquitted on the ground of necessity, properly gave defendant the same right to defend his brother as himself.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 177-181, 633.]

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Abner McQueen was convicted of manslaughter and he appeals. Affirmed.

Sutton & Hurst, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

HOBSON, C. J. Appellant, Abner McQueen, was indicted jointly with his brother John for the murder of Arthur Lambert, and was found guilty of manslaughter; his punishment being fixed at nine years in the penitentiary.

He filed an affidavit for a continuance, but the court refused to continue the case or allow the affidavit to be read as the testimony of the absent witnesses, and of this he complains. The statute requires that the affidavit must show that due diligence was used to obtain the presence of the witnesses. Cr. Code Prac. § 189; Civ. Code Prac. § 315. The only statement in the affidavit as to diligence is in these words, following the names of the witnesses: "For whom he has had subpoenas issued and placed in the hands of proper officers, and that said subpoenas cannot now be found with the papers in this case." It is not shown when the subpoenas were issued, or when they were placed in the hands of the officers, or what officers, and for all that appears no diligence may have been used to obtain the presence of the witnesses. The affidavit was therefore insufficient as to the witnesses for whom the subpoenas were issued.

It is stated in the affidavit that one of the witnesses, Robert Calmes, was recognized at the last term of the court to appear on that day, and that he was in Indian Territory on temporary business; but it is not shown when he left the state and went to Indian Territory, or when he was expected to return, and for all that appears the defendant might by ordinary diligence have taken Calmes' deposition. In addition to this a number of witnesses who were present at the homicide were introduced on behalf of the commonwealth and the defendant, and it is by no means clear that, if the affidavit had been read as the testimony of Calmes, it would have had any substantial effect upon the jury; for every fact referred to in the affidavit was stated on the trial by a number of other persons who were present at the homicide, and the statements of

Calmes as contained in the affidavit were of such a general character as to throw little light on the case.

The demurrer to the indictment was properly overruled.

The ruling of the court in allowing the commonwealth attorney to recall the appellant and prove by him that he had been in the penitentiary was not an abuse of discretion. The court has a wide discretion in allowing a witness to be recalled.

The court distinctly instructed the jury that if they believed from the evidence that the defendant believed, and had reasonable grounds to believe, that he or his brother were then in immediate danger of death or great bodily harm at the hands of Lambert, or that this reasonably so appeared to him at the time he cut Lambert, they should find him not guilty on the ground of apparent necessity. The instructions gave him the same right to defend his brother as himself. While the proof is conflicting, we cannot say that the verdict of the jury is not supported by the weight of the evidence. The jury seems to have concluded from the evidence that while Lambert and John Morgan were engaged in a difficulty, and John was getting out of the way of Lambert, Abner ran up behind Lambert and cut his throat with his knife, when Lambert did not know that appellant was approaching him; and they seem also to have concluded from all the evidence that at the time of the cutting there was no reasonable ground for the appellant to believe that his brother was in danger of death or great bodily harm at the hands of Lambert, as John McQueen was at the time some 15 feet from Lambert, and a bystander by the name of Hubbard was then standing between Lambert and John McQueen and had his hand on Lambert's shoulder, interposing between him and John, whom Lambert was pursuing.

Judgment affirmed.

AYLES v. SOUTHERN RY. CO. et al.

(Court of Appeals of Kentucky. Sept. 22, 1905.)

REMOVAL OF ACTIONS—DIVERSITY OF CITIZENSHIP—JOINT ACTIONS AGAINST RESIDENTS AND NONRESIDENTS—RIGHT OF REMOVAL TO FEDERAL COURTS.

A complaint in an action against a foreign railway corporation and a domestic corporation and individuals, citizens and residents of Kentucky, brought by a resident and citizen of the state, which alleges that the foreign corporation was the owner of a railroad and its equipments, that the domestic corporation and the individuals were its agents to keep the same in safe condition, and had undertaken to perform such duty, and had assured plaintiff, an engineer, that they had put an engine in good repair, when they knew that it was out of repair, thereby causing injury to plaintiff, states a cause of action jointly against the foreign and domestic corporations and the individuals, and the foreign corporation cannot remove the cause to the federal courts on the ground of diversity of citizenship.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "To be officially reported."

Action by George Ayles against the Southern Railway Company and others. From an order removing the action to a federal court, plaintiff appeals. Reversed.

W. M. Smith and B. H. Young, for appellant. Humphrey, Hines & Humphrey, for appellees.

NUNN, J. On the 15th of July, 1904, the appellant filed a petition in the Jefferson circuit court against the appellees, Southern Railway Company, Southern Railway Company in Kentucky, Henry Snyder, and John A. McDermott. He alleged that the Southern Railway Company was a corporation organized under the laws of the state of Virginia; that it owned and operated a railroad, with its equipment, passing through the city of Louisville, the state of Indiana, and on to the city of St. Louis, Mo.; that the Southern Railway Company in Kentucky was a Kentucky corporation; that it had the power and authority to construct, maintain, and operate railroads in and through the city of Louisville, and to construct, operate, and maintain repair shops in that city, both for the cleaning and repairing of its own machinery, engines, and rolling stock, and that of other railroads, and particularly the Southern Railway Company; and at the time named it was so operating its roads and shops, and had entered into and was then under a contract of agreement with the Southern Railway Company by which it contracted and agreed, for a valuable consideration, to inspect, clean, and keep in good repair the machinery, engines, and rolling stock of the Southern Railway Company which might need cleaning, repairing, or overhauling in the city of Louisville, Ky., and the machinery, engines, and rolling stock that was to go out of the city of Louisville, Ky., to the city of St. Louis, Mo., along the route known as the "St. Louis Division of the Southern Railway Company." The petition continued as follows: "That defendants Snyder and McDermott and each of them were on that date and are now residents and citizens of the county of Jefferson and state of Kentucky, and that they and each of them on said date were officers, agents, employes, and servants of the defendant the Southern Railway Company in Kentucky and the Southern Railway Company, and that on said date it was the duty of them and each of them, as such officers, agents, employes, and servants, to inspect, clean, and keep in good repair the machinery, engines, and rolling stock of said Southern Railway Company to be sent over said line from Louisville, Ky., to St. Louis, Mo., and to see that the machinery, engines, and rolling stock of the Southern Railway Company was in good and safe repair and condition before same was permitted to go out over said line, and it was the duty of the said

Snyder and McDermott and each of them, and they had authority, to designate, assign, and direct what particular engineer was to pull any such train so sent out over said line. Plaintiff says that on said date he was in the employ of the Southern Railway Company as engineer, and was then designated, assigned, and directed by said Snyder and McDermott and each of them to pull as such engineer a passenger train so sent out over said line from Louisville, Ky., to Evansville, Ind., along the line of the St. Louis Division of the Southern Railway Company, with engine known as 'No. 2,002,' and that said Snyder and McDermott and each of them then informed and assured plaintiff that said machinery, engine, and rolling stock of said train had been inspected, cleaned, and repaired, as it was their duty to do, and was in good and safe repair and condition to make said trip. That plaintiff relying on said information and assurances given him by said Snyder and McDermott and each of them, and their superior skill and knowledge, he, as it was his duty to do under his employment, took charge as engineer of said engine and began to pull said train as directed." He then continued, giving the particulars of his injuries and the cause thereof by reason of the defective engine and coupling, and then proceeded as follows: "He charges that said injuries were caused by the joint gross negligence of the Southern Railway Company, said Southern Railway Company in Kentucky, and said Henry Snyder and John A. McDermott, and other of its servants then and there in its employ, as he says that, when they started said engine No. 2,002 and said train of cars over said route, said coupling and the engine and cars were defective, out of repair, and in an unsafe condition, of all of which all of said defendants knew at the time, or could have known by the use of ordinary diligence; but they and all of them failed to inspect, clean, and repair said machinery, engine, and rolling stock, or to put it in a good and safe condition, as it was their duty to do before said train was sent out, and by reason thereof the plaintiff sustained the injuries aforesaid."

On the 29th of the same month the Southern Railway Company, the Virginia corporation, filed its petition, with a bond, and sought to remove the cause to the United States Circuit Court for trial, upon the ground that it and the plaintiff were residents of different states and that the amount in controversy was more than \$5,000. It was alleged in the petition for removal that no cause of action was set forth in plaintiff's petition against its co-defendants, Henry Snyder, J. A. McDermott, or the Southern Railway Company in Kentucky, or any of them, and also that the controversy between the plaintiff and the petitioner was a separable one, which was wholly between citizens of different states and could be fully determined as between them without the pres-

ence of any of the other defendants. It was further alleged, in substance, that the allegation made by the plaintiff that his injuries were the result of the joint negligence of the petitioner and its codefendants was untrue and was known by the plaintiff to be untrue when he instituted the action, and that he did not expect to prove the allegation, or to obtain a verdict or judgment against any of the petitioner's codefendants, and that his reason for joining its codefendants with the petitioner as defendants was for the sole and only purpose of depriving the petitioner of its rights guaranteed by the Constitution and laws of the United States to remove the action to the United States Circuit Court. Upon the filing of this petition and bond, the court made an order removing the action to the United States Circuit Court, and from this order appellant has appealed.

In the cases of *I. C. R. Co. v. Jones' Adm'r*, 80 S. W. 484, 28 Ky. Law Rep. 81, and *Rutherford v. I. C. R. Co.*, 85 S. W. 199, 27 Ky. Law Rep. 397, it was in effect decided that the question of the purpose of one party to avoid the federal court or the other to avoid the state court is immaterial. The averments of the petition for the removal of the cause of action from a state to federal court must be restricted to matters of fact relating to the jurisdiction of the court, and all allegations concerning the merits of the case are superfluous and immaterial. In view of these cases and the authorities therein referred to, the appellee concedes that the last paragraph in its petition does not set forth any cause for removal. The contention of appellee's counsel to uphold the removal by the lower court is based upon the proposition that no cause of action is alleged against any of appellee's codefendants, and in support of this they refer to the case of *C., N. O. & T. P. R. R. v. Robertson*, 74 S. W. 1061, 25 Ky. Law Rep. 266. Appellee's proposition is correct, if no cause of action were stated in the petition against its codefendants. In the case referred to it was nowhere alleged that Brown was supplied by the master with any other or better tubes than the one actually furnished to appellee, nor that Brown was supplied at all with a shield or shields by the master, so that he could in turn furnish them to the enginemen. His sole duty in this regard was to furnish such tubes and shields as furnished by his master, and it was not alleged or shown in the proof that he was guilty of any wrongful act whatever. In the case at bar it is alleged that the Kentucky corporation, Snyder, and McDermott were the agents and servants of the appellee, the Virginia corporation, the owner of the road and its equipments, and they were its agents and servants whose duty it was, under contract and employment, to clean, repair, and put in good, safe condition its engines, cars, and appliances, and they had undertaken to perform this duty, and had assured the appellant

that they had put engine No. 2,002 and its appliances in good repair and safe condition, and placed the appellant in charge thereof, when at the time they knew, or by the exercise of ordinary diligence could have known, that the engine and its appliances were not in good repair and safe condition, and that by reason thereof he sustained the injuries complained of. Here the appellee's codefendants had a positive duty to perform, and they failed to perform it, and they misrepresented the facts to appellant, showing, not only negligent acts and omissions on their part, but a positive wrong, for which they and their master are jointly liable; and, under the authority of the case of *Chesapeake & Ohio Railroad Co. v. Dixon*, 179 U. S. 181, 21 Sup. Ct. 67, 45 L. Ed. 123 and the many cases therein cited, and other cases which it is unnecessary to cite, appellant's cause of action against the appellee was not separable.

For these reasons the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

NEWTON v. NEWTON.

(Court of Appeals of Kentucky. Sept. 21, 1905.)

DIVORCE—ALIMONY—EXCESSIVE AMOUNT.

In a suit for divorce, it appeared that the husband was unable to do any manual labor and was dependent for support on his occupation as teacher in colored schools, earning \$125 a year. The wife was able to take care of herself by washing and ironing. Two children of the marriage were placed in her custody, and all of the household effects were awarded to her pending the suit. *Held*, that awarding \$400 to the wife as alimony in the decree of divorce was excessive, and should be reduced to \$150.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 675-680.]

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Action by R. D. Newton against Dollie Newton. From so much of a judgment of divorce as awards alimony to the defendant, plaintiff appeals. Modified.

C. E. Smith, W. H. Barnes, and S. A. Anderson, for appellant.

BARKER, J. The parties to this litigation are negroes, who, prior to the judgment of the trial court divorcing them from the bonds of matrimony, were husband and wife. The judgment of divorce awards the wife alimony in the sum of \$400, payable in installments at stipulated times until the whole is paid, and, in case of default by the husband, the wife is entitled to execution for the sums due. The judgment also awards the wife's attorney a fee of \$25, to be paid by the husband. To reverse this judgment, in so far as the alimony is concerned, the husband prosecutes this appeal.

The evidence shows, without contradiction, that appellant has been a cripple all of his life, and has never been able to walk with-

out the aid of crutches; that he is unable to do any manual labor; that he is entirely dependent upon his occupation as a teacher in colored schools for support, making about \$25 per month for five months in the year, and has no other means or property by which to maintain himself. The wife appears to be able to take care of herself by washing and ironing. Two little girls, the fruit of the marriage, are in the custody and control of the mother. All of the household effects were awarded to the wife, by order of court, pending the litigation. It seems to us that under all the circumstances of this case, the judgment is excessive. The wife is as able to earn money as is the husband, and can, perhaps, make more in the year than he. Neither has anything, except the ability to work.

In the case of *Fletcher v. Fletcher*, 54 S. W. 953, 21 Ky. Law Rep. 1302, the husband was a small farmer, worth, perhaps, \$300 after payment of his debts. The judgment awarded the wife as alimony the sum of \$400, with an attorney's fee of \$100. On appeal this court said: "The judgment against the husband, outside of the cost of the action, which must be considerable from the size of the record, is for more than his entire estate, and, including the allowance to the attorney, as well as the cost, must be nearly double the amount he is worth. We know of no case in which such a judgment has been sustained where the husband was without an income. He turned over to his wife all the household and kitchen furniture, and under all the facts of the case we think an allowance to the wife of \$150 outside of this is as much as should be allowed." The substantial facts in the case cited are not materially different from those in the case at bar, and upon the authority of the former adjudication we think \$150 is as much as the appellee should have received.

Wherefore the judgment is reversed, with directions that a judgment be entered in accordance herewith.

PHOENIX BREWING CO.'S ASSIGNEE et al. v. CENTRAL CONSUMERS' CO.

(Court of Appeals of Kentucky. Sept. 20, 1905.)

1. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—PAYMENTS TO MORTGAGE CREDITORS FROM PROFITS—RIGHTS OF GENERAL CREDITORS.

A mortgage securing corporate bonds provided that on default the trustee in the mortgage might take possession of the property and apply the profits thereof to the debt. The assignee of the mortgagor for the benefit of creditors continued in possession of the property, and under orders of the court paid the profits to the trustee, who had consented to the setting aside of a judgment for the foreclosure of the mortgage, with a direction of a sale of the property. Held, that the bondholders were not required to account for the profits, in order to share in the proceeds of a sale of the property, though the orders directing their payment stipulated that the payment should be made without prejudice to the rights of any creditor.

2. TAXATION—REAL PROPERTY—PAYMENT FROM PROCEEDS OF PERSONALITY.

The personal property received by an assignee for the benefit of creditors is subject to the unpaid taxes on the assignor's real and personal property before the real estate can be subjected thereto, and an order of the court directing the assignee to pay the taxes out of the proceeds derived from the personality is proper.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by the Phoenix Brewing Company's assignee against the Central Consumers' Company and others. From a judgment for the Central Consumers' Company, plaintiff and the other defendants appeal. Affirmed.

Gibson, Marshall & Gibson, for appellants. Kohn, Bald & Spindle, S. E. Sloss, and R. L. Greene, for appellee.

HOBSON, C. J. The Phoenix Brewing Company made an assignment for the benefit of its creditors on October 4, 1897. It then owned and operated a large brewery in Louisville. The assignee immediately instituted an action in the Jefferson circuit court against the company and its creditors for the direction of the court in the settlement of his trust, and was directed to continue the operation of the brewery, which he did until the property was sold under the judgment of court in October, 1901. The brewery property, when turned over to the assignee, was incumbered by back city taxes amounting to a considerable sum, and in addition by a mortgage to secure three series of bonds, one for \$50,000, and two others of \$100,000 each. The company had previously made two other mortgages, one for \$50,000 and one for \$100,000, and the first two classes of bonds in the last mortgage were to take the place of the bonds in the two existing mortgages. On December 11, 1897, the trustee under the mortgage filed his answer and cross-petition, setting up his mortgage and asserting a right to the rents and profits from the operation of the brewery. On June 20, 1898, a judgment was entered enforcing the mortgage and directing a sale of the property; but on June 1, 1899, this judgment was by consent set aside and held for naught, and so it need not be further noticed. During the progress of the case, on the 9th of December, 1898, the assignee filed an amended petition, asking advice, in which he set up that it would be ruinous to the creditors to sell the property at that time, and alleged that none of the creditors, except the first mortgage bondholders, were desirous of making the sale for that reason, and that these bondholders were willing to defer the sale indefinitely, if the past-due interest was paid. He also alleged that there was an accumulation of state and city taxes which might be settled at less than their face, and thus stop the further accumulation of interest and penalties. He also showed that he had

on hand the sum of about \$15,000, which he had made in the operation of the plant. On the same day the court ordered him to compromise and settle the taxes on the best terms he could secure, and to pay the past-due coupons of the first mortgage bonds, "without prejudice to the rights of any of the creditors of the Phoenix Brewing Company in and to the fund in the hands of the plaintiff, which rights shall hereafter be determined and protected, out of the proceeds of sale of the property assigned to plaintiff." From time to time similar orders were made as to the payment of the interest on the first mortgage bonds; the other orders providing that they should be "without prejudice to the rights of any other creditor of the Phoenix Brewing Company which may be hereafter asserted." On May 1, 1900, a judgment was entered for the sale of the property, which was held, and the sale was confirmed on November 2, 1901. After the sale was confirmed this controversy arose between the first mortgage bondholders and the other creditors as to the interest which had been paid them by the assignee out of the earnings of the plant while in his hands, and as to the taxes which he had paid under the orders of court above referred to. It is insisted for the other creditors that the first mortgage bondholders had no lien upon the earnings of the plant in the hands of the assignee, and that, the moneys earned by the assignee having been paid to them under the orders above referred to without prejudice, they should be made to account for it before receiving anything further from the proceeds of the sale. The circuit court held otherwise, and the assignee and general creditors appeal.

It is evident from the orders, as well as from the report of the assignee, that the first mortgage bondholders waited, and that by their waiting a sale of the property at a ruinous sacrifice was averted. It is also reasonably apparent that they thought that they were getting their interest by waiting. In fact, the payment of the interest would seem to have been the consideration of the indulgence on their part. But, however this may be, in all the mortgages it was provided that upon the default of the mortgagor to pay the debt the mortgagees might take possession of the property and apply the rents and profits to their debt. When the property was in the hands of the court, and the court directed the assignee to continue the operation of the plant, and also directed him to pay the first mortgage bondholders their past-due interest out of the earnings, they were not required to take further affirmative steps themselves to secure the rents and profits, if they were satisfied with what the court ordered the assignee to pay them. It is evident that they had a right to believe that for their indulgence they were to get their interest, and that they were not required to take other action to secure themselves. They

got nothing they were not entitled to under the mortgage, and the mere fact that they did not apply for a receiver under the circumstances cannot prejudice their claim; for the conduct of all the parties was certainly calculated to make them understand that this was unnecessary. When the court came at the end of the litigation to determine the rights of the parties, he had a right to look to the real merits of their claims. The original judgment, having been by consent set aside, was not a bar to the merits of the claim being considered, and the second judgment must be read in connection with the previous orders in the case under which the money had been paid to the first mortgage bondholders. The bondholders in their original cross-petition had set up their right to the rents and profits, and the court upon final hearing might consider the whole case, because, if the orders mean that the payments are without prejudice to the court's settling the rights of the parties on final hearing, they must necessarily mean that the court was then to hear all the facts and determine the matter on the merits.

As to the taxes, the assignee received a large amount of personal property when he took charge. Under the law it was subject to the taxes before the real estate could be subjected, and therefore the order of the court directing him to pay the taxes out of the funds in his hands, which had accrued from this personal property in a large measure, was proper.

Judgment affirmed.

CAREY v. W. B. SAMUELS & CO.

(Court of Appeals of Kentucky. Sept. 20, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

An experienced machinist, skilled in the work, repaired, set up, and operated a mill. While testing the work of the mill, his hand was caught in rollers and injured. He could have made the required test without risk, and he admitted that the manner of making the test as he did was dangerous. *Held*, as a matter of law, that he assumed the risk.

[Ed. Note.—For cases in point, see vol. 34. Cent. Dig. Master and Servant, §§ 651, 692, 735.]

2. SAME—INJURY TO SERVANT—NEGLECT.

Where a skilled machinist knew that the danger he encountered in testing the work of a mill was increased by want of sufficient light, but there was no less light in the millroom when he was injured than when he repaired, set up, and put the mill in operation, the absence of sufficient light was not evidence of actionable negligence on the master's part, but imposed on the servant the duty of exercising greater care.

[Ed. Note.—For cases in point, see vol. 34. Cent. Dig. Master and Servant, §§ 179, 200.]

Appeal from Circuit Court, Nelson County.

"Not to be officially reported."

Action by F. P. Carey against W. B. Samuels & Co. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

Nat W. Halstead and Morgan Yewell, for appellant. Eli H. Brown, Jr., and O'Neal & O'Neal, for appellee.

SETTLE, J. Appellee is a corporation owning and operating a distillery in Nelson county. Connected with the distillery are two mills, run by steam, in which meal is made for the manufacture of whisky. One of these mills is known as the "Noy Patent," and the other as the "Gray Patent." Appellant is a skilled machinist of many years' experience, a large part of which had been passed in appellee's service. Both mills were set up and put in operation by appellant as an employé of appellee; the Gray mill last. This mill was an old one, and had not been in use for some time, for which reason it was taken apart and repaired by appellant before he set it up and started it to running. After starting the mill, appellant, in attempting to test the quality of the meal it was producing, had the misfortune to get his hand caught between the rollers and greatly mangled, which necessitated its amputation. For the injuries thus sustained he sued appellee in the circuit court, laying his damages at \$10,000.

It was charged in the petition that appellant's injuries were caused by the gross negligence of appellee in having and using in its distillery an unsafe and defective mill, dangerous to operate, which fact was known to it, but unknown to appellant, and that he was required to test the work of this mill without warning from appellee of the danger of doing so. The answer of appellee specifically denied the negligence complained of and averred the skill and experience of appellant as a mill machinist; that the mill in question was repaired, set up, and put in operation by him under appellee's employment; that by the terms of such employment it was his duty to keep it in repair and test its work; that he was familiar with the mill in all its parts and whatever danger there was in operating it; and, finally, that in receiving his injuries appellant was himself guilty of negligence, but for which he would not have been injured. The trial resulted in a verdict for appellee; the jury having so found under a peremptory instruction given by the court at the conclusion of appellant's evidence. Consequently judgment was entered dismissing the petition at appellant's cost.

It was contended by appellant in his motion and grounds for a new trial, and is now urged in his behalf, that the peremptory instruction was authorized, for the reason that it was the duty of appellee to furnish appellant, while in its service, with reasonably safe machinery and place for the performance of the work required of him, and that appellant was himself under no legal duty to examine or discover defects or danger in the machinery or place of work, unless they were patent and obvious to a person of his understanding and experience. Such is undoubtedly the rule of law where examination and inspection is not in the line of the servant's employment or duty. So, in determining

whether the rule contended for by learned counsel for appellant should apply to this case, we must look to the facts presented by the evidence introduced in his behalf. The facts, in brief, are: That appellant was and is an experienced machinist, skilled in the work of repairing, setting up, and operating such mills as those of appellee; that he had shortly before he was injured, taken apart, repaired, set up, and put into operation the mill by which he was injured; that there was no defect in the mill or any of its parts at the time appellant was injured, and no obstruction to or change in the mill had occurred between the time of his starting it and the receiving of his injuries. Appellant was, therefore, thoroughly familiar with the mill and all its parts, and he, above all others, knew the dangers that were likely to exist or arise in operating it. It was his duty to test the quality of the meal the mill produced, which duty could be performed only by inserting his hand in the meal and pressing or sifting it with the fingers. In testing the meal it was likewise his duty to use ordinary care to protect himself from injury. According to his own testimony, there was but one way in which appellant could have been injured by the mill, and that was to get his fingers caught between the rollers, as was done. As he attempted with his hand to catch the meal falling from the meal board, which conducts it from the upper rollers and drops it into those below, with the slight vibratory motion necessary to prevent its adhering to the meal board, his hand struck against the meal board, which in turn knocked his fingers against the rollers below, causing them to be caught therein and greatly mangled. By getting the meal from the receptacle designed for it after leaving the rollers, appellant might have made the required test without risk or injury to himself; but, in attempting it as he did, he admitted upon the witness stand that he undertook a risk that he at the time knew was attended with great danger. He therefore assumed the risk with full knowledge of the danger. Consequently the injury which followed resulted solely from his own negligence. It is idle to say that one who possesses the skill necessary to make a machine, or to repair, put together, and operate it, needs to be told how to approach or run it, or to be protected or even warned against the probable dangers that might occur from its use.

It is, however, insisted for appellant that the danger he encountered in making the examination of the meal was increased by the want of sufficient light in the room where the mill was situated and the dust arising from the mill. If these conditions existed, they were necessarily known to appellant when and before his injuries were received, and should have deterred him from the attempt to test the work of the mill under such unfavorable circumstances, or at any rate im-

pelled him to exercise the greater care in making it. It does not, however, appear from the evidence that there was any less light in the millroom when appellant was injured than usual, or when the mill was set up and put in operation by him. We conclude, therefore, that the evidence disclosed by the record presented no ground for fastening upon appellee responsibility for appellant's injuries; but, upon the other hand, it shows that they resulted from his own negligence.

In many cases decided by this court the master has been held liable for injuries resulting to the servant from the negligence of the former in failing to provide him with reasonably safe tools, machinery, or place to work; but in no case has such liability been held to exist where, notwithstanding the negligence of the master, the servant knew of the defect or danger in tool, machinery, or place of work, or such defect or danger was so obvious as to be readily discernible, or where examination and inspection was in the line of the servant's duty. *L. & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 886; *McCormick Harvesting Machine Co. v. Lister*, 66 S. W. 761, 23 Ky. Law Rep. 2154; *Wilson, Adm'r. v. Chess & Wymond*, 78 S. W. 453, 25 Ky. Law Rep. 1655; *Pfisterer v. Peter & Co.*, 78 S. W. 450, 25 Ky. Law Rep. 1608; *Champion Ice Mfg. Co. v. Carter*, 51 S. W. 16, 21 Ky. Law Rep. 211; *Weidemann Brewing Co. v. Wood*, 87 S. W. 772, 27 Ky. Law Rep. 1012. In the case at bar appellant, according to the proof, knew and voluntarily encountered the danger of testing the quality of the meal in the manner in which it was attempted by him, and, in addition, it was his duty, under his employment by appellee, to examine and know that the machinery of the mill was in proper condition, reasonably safe for use, and free from defects.

There was no error, therefore, in the giving of the peremptory instruction. Wherefore the judgment is affirmed.

ILLINOIS CENT. R. CO. v. MERCER.

(Court of Appeals of Kentucky. Sept. 20, 1905.)

MASTER AND SERVANT — LOCOMOTIVE FIREMEN — INJURIES — BREAKING OF BELL CORD — ASSUMPTION OF RISK.

A railroad company is not liable for injury to its firemen, who, while ringing the bell, lost his balance because of a lurch of the locomotive in going round a curve, one of the ordinary risks of the service assumed by him, thereby throwing his weight on the bell cord, which broke, causing him to fall; the company being required to furnish a bell cord strong enough only for the purpose for which it was intended, the ringing of the bell, and not the supporting of the fireman.

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by J. W. Mercer against the Illinois Central Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

H. P. Taylor, Pirtle & Trabue, and J. M. Dickinson, for appellant. E. P. Neal and W. H. Barnes, for appellee.

HOBSON, C. J. Appellee, Mercer, was a fireman in the service of appellant on one of its locomotives running between Paducah and Louisville. On August 6, 1899, while serving as fireman, he fell from the engine as it was running rapidly near Rosine, Ky., sustaining serious injuries, to recover for which he filed this suit. The boiler of the engine extended back to the gangway in front of the tender; the cab being made on both sides of the boiler. The engineer occupied the seat on the right side of the boiler, and the appellee on the left. The boiler so obstructed the view that they could not see each other when in the cab. It was a part of appellee's duty to fire the engine and ring the bell. The bell was rung by means of a small rope, one end of which was fastened to the bell and the other end to the top of the cab. The sole use for which the rope was intended was to ring the bell, which required very little force. Appellee testified that the rope was an old one, and not in good condition; that before starting from Paducah he called the attention of the engineer to it, and the engineer said it was sufficient. The engineer could not see the appellee at the time he fell, and the appellee himself is the only witness as to how the accident occurred. The case has been heretofore before us (70 S. W. 287), and in disposing of it on the former appeal the court, referring to the testimony of the appellee, said: "In response to a request from his attorney to detail to the jury exactly how the accident occurred, he said: 'On the 6th of August, 1899, I left Paducah on the train No. 202, engine 373, on its way from Paducah to Louisville. When I came near the Rosine tunnel, I put in a fire, and was starting to my seat, taking hold of the handhold with my right hand, and putting my right foot upon the step, and then my left foot upon the platform of the cab. I then turned loose the handhold with my right hand, and reached to get the bell cord to ring the bell. The cord broke with me, and I went backwards. I struck something, and that was the last I remembered.' In other words, appellee admits that, while standing with his right foot on the step leading from the gangway to his cab and his left foot on the cab floor, he let go the handhold, a permanent and secure brace, and seized the bell cord, as the train was running around the curve at the rate of 25 miles an hour, which threw his whole weight on the bell cord—a purpose for which it was never intended—and it gave way. It seems to us that from appellee's own testimony there can be no escape from the conclusion that his fall was due to his own negligence in releasing his hold upon the brace and seizing the bell cord. One step more would have carried him into the cab, where

he could have, with perfect safety, rung the bell, as his duty required; but, instead of doing this, when occupying the most precarious position possible, he let go the safe stay provided, and in consequence fell off the train. It was the duty of appellee, when he accepted employment from the defendant, to exercise ordinary care for his own safety, and not knowingly to expose himself to unnecessary risks or dangers connected with his employment; and, having done so, he is not entitled to recover. We are of the opinion that under this state of fact a peremptory instruction to find for appellant should have been given. Judgment reversed, and cause remanded for proceedings consistent with this opinion." *I. O. R. R. v. Mercer*, 70 S. W. 287, 24 Ky. Law. Rep. 908.

On the return of the case to the circuit court it was tried again, and the court, being of the opinion that the evidence introduced on that trial was not the same as shown in the transcript on file when the above opinion was delivered, overruled the defendant's motion to instruct the jury peremptorily to find for the defendant; and, the jury having again found for the plaintiff, the defendant appeals. On the second trial of the case, the appellee, in response to his own counsel, stated as follows: "A. After putting in the fire I took hold with my right hand, caught hold of the right handhold—that is, the handhold here—pulled myself up in the cab, first put my foot on the step and my left foot on the platform, and turned loose with my right foot in the act of ringing the bell, when the cord broke, and I fell backward. That is the last I remember. If I did not make that statement on the other time of court, I aimed to tell about my foot coming away from there." Further on he also made these statements: "A. After putting in the fire near the Rosine tunnel, I turned and caught hold of the handhold with my right hand, right foot on the step about 18 inches up, and put my left foot on the platform and turned loose of the handhold with my right hand, and fetched the other foot up in the act of getting in the seat. The cord broke, and I fell backwards and struck something. That is the last I remember. Q. 158. At the moment the cord broke, where were you at that time—at the moment the cord broke? A. Just in the act of getting in the seat when the cord broke. Q. 159. Inside of the cab, on the gangway, or where? A. Inside of the cab. Q. 160. Inside of the cab? A. Inside of the cab. Q. 161. State whether or not any portion of your body was outside of the cab at the time the cord broke. A. No, sir. Q. 162. With which hand did you take hold of the bell cord to ring the bell? A. Right hand. Q. 163. How far is the seat on which you set from the door, or rear of the cab? A. In the neighborhood of five feet from where you step up."

The only difference that we can see between this testimony and the testimony as given in

the transcript on the former trial is that here the appellee states that he was not in the gangway when he fell, but five feet within the cab; but we cannot see that the place from which he fell is material or that it is material whether he was in the act of taking his seat, or in the act of getting upon the step when he fell. No witness testifies to the occurrence but himself. The case must be determined upon his evidence. He assumed, when he entered the service of the railroad company as fireman, all the risks of the service which are fairly incidental to it. The railroad company undertook to furnish appliances for the service reasonably safe for the purposes for which they were intended, but it did not undertake to furnish appliances which should be safe for purposes for which they were not intended. The bell cord was placed upon the engine to ring the bell. It was not placed there to secure the fireman in case he lost his balance. If, while appellee was throwing coal into the firebox, he had lost his balance, and in attempting to recover himself had caught the bell cord, and it had broken, it would not be maintained that he could recover because the bell cord was not sufficient to sustain his weight when he had thus lost his balance. The fact that he lost his balance while attempting to ring the bell does not alter the case. The bell cord was not intended for his security in one case more than in the other, in case he lost his balance. The use of the bell cord to prevent himself from falling off the seat, or falling down as he was getting into the seat, was not one of the things which the master had a right to anticipate or was required to guard against. It required very slight force to ring the bell, and did not require that appellee should put his weight upon the rope. He lost his balance, not because he was ringing the bell, but because of the lurch of the engine in going around the curve; but this is one of the ordinary risks of the service, which he was required to guard against. To hold the railroad company responsible under the facts of this case would be to hold it liable for the breaking of the bell cord when put to a use for which it was not intended, although it was entirely sufficient for the purpose for which it was intended. Under the evidence the court should have peremptorily instructed the jury to find for the defendant.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

FLINT v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. Sept. 20, 1905.)

1. APPEAL—RECORD—QUESTIONS REVIEWABLE.

Refusal to allow a deposition to go to the jury cannot be reviewed; the bill of exceptions not containing the deposition, nor showing that the court passed on the exceptions filed to it.

2. BILL OF EXCEPTIONS—SUPPLEMENTAL BILL.

An instrument cannot be considered as a supplemental bill of exceptions; it not having the signature or approval of the trial judge.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 95.]

3. RAILROADS — TRESPASSERS ON TRACK — DUTY OF COMPANY.

All that a railroad company owes to a trespasser on its track is that, after the trainmen discover him, they exercise reasonable care and all reasonable means at their command to stop the train in time to prevent accident.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1288, 1276-1280.]

4. APPEAL—CONFLICTING EVIDENCE.

A verdict cannot be disturbed on appeal as against the weight of evidence, but only where there is no evidence to support it.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Lena Maud Flint, an infant, by next friend, against the Illinois Central Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Taylor & Lucas, for appellant. Wheeler, Hughes & Berry, J. M. Dickinson, and Tra-bue, Doolan & Cox, for appellee.

SETTLE, J. The appellant, Lena Maud Flint, an infant, and her next friend, by this action sought to recover of appellee, Illinois Central Railroad Company, \$2,000 in damages for injuries to her person, alleged to have been received by the negligence of its servants in charge of a freight train which overtook her while crossing appellee's trestle at Dawson Springs, and to avoid collision with which she was compelled to jump from the trestle, a distance of 22 feet, to the ground, whereby she broke her wrist, wrenched her back, and received other injuries of a permanent character. Appellant's cause of action was based upon the theory that her peril while upon the trestle was known to the engineer of appellee's approaching freight train in time for him to have stopped the train before it reached her, which, if done, would have prevented her injuries. The defense interposed by appellee's answer was that in going upon the trestle appellant was a trespasser; that those in charge of the approaching train were under no duty to keep a lookout for a mere trespasser, such as appellant, or to give her warning of the coming of the train, but only to exercise reasonable care to avoid injury to her after discovering her peril; that such care was used when and as soon as her presence on the track became known to those in charge of the train, but that, there not being time to stop the train after their discovery of her peril, her jumping from the trestle and consequent injuries were unavoidable as far as appellee was concerned; and, finally, that in the matter of receiving her injuries appellant was herself guilty of negligence, but for which they would not have been received. The trial resulted in a verdict and judgment for appellee, of which, and the refusal of the lower court to grant her a new trial, appellant now complains.

It is contended by counsel for appellant that the trial court erred to her prej-

udice in refusing to her the right to read upon the trial the deposition of Ben Dame, and also erred in giving and refusing instructions. As to the deposition of Dame, it is sufficient to say that the bill of exceptions signed and approved by the circuit judge does not show that the exceptions filed to the deposition were ever passed upon by the court, nor does it contain the deposition in question. Consequently we are unable to say whether it should have been allowed to go to the jury as competent evidence or not. We are not at liberty, either, to consider the alleged supplemental bill of exceptions, purporting to contain a copy of Dame's deposition, which appellant has offered to file in this court. As it does not contain the signature or approval of the circuit judge in whose court the trial was had, it is in no sense to be treated as a part of the record upon this appeal, and can therefore have no effect upon the decision of the appeal by this court.

A careful examination of the instructions given by this court convinces us that they are free from error. By them the jury were in substance told that, unless they believed from the evidence that appellee's engineer, in charge of the locomotive of the train by which appellant was forced to jump from the trestle, after discovering her peril, could by the exercise of reasonable care and all reasonable means at his command have stopped the train in time to have prevented her injuries, they should find for appellee. This was certainly a correct statement of the law, and presented the only hypothesis upon which a recovery would have been allowed. Nor was it error for the instructions to state that in going upon the trestle appellant was a trespasser, and that appellant's servants in charge of the train were under no duty to keep a lookout for trespassers, or to give them warning of the approach of the train by the sounding of the engine and whistle or ringing of the bell. Neither was it improper for the instructions to advise the jury in substance that appellant was not entitled to recover because of the defective whistle upon appellee's engine, as no issue was made, or could properly have been made, by the pleadings on that score, in view of appellant's attitude as a trespasser upon appellee's right of way. We are further of opinion that the instructions asked by appellant were properly refused by the trial court, for they ignored the fact that appellant was a trespasser, and held appellee and its trainmen to the same degree of care in respect to her safety that would legally be required of them toward one rightfully upon appellee's trestle or track. In brief, we think the instructions given by the court were on the whole reasonably accurate and explicit in their statement of the law applicable to the state of case presented by the pleadings and proof, and left nothing unsaid that was required for the guidance of the jury.

It is not for us to say whether or not the

verdict of the jury is in accord with the weight of the evidence. In the absence of error on the part of the trial court, we are without authority to disturb the verdict of a jury, unless convinced that it is wholly unsupported by evidence, or is the result of passion or prejudice on the part of the jury, neither of which grounds exist in this case. We have, however, found the evidence conflicting; that of appellant conducing to prove that her presence upon the trestle and consequent peril were known to appellee's engineer in sufficient time for him to have stopped the train before it reached her. Upon the other hand, appellee's evidence tended to prove that the train could not have been stopped after the discovery of her peril by the trainmen in time to have prevented her injuries. It was, however, the province of the jury to weigh the evidence and determine in whose favor it preponderated, and as, in arriving at a verdict, they were properly guided by the instructions given by the trial judge, their decision of the case must be accepted by this court and submitted to by the parties. Wherefore the judgment is affirmed.

BRADFORD v. HUFFMAN.

(Court of Appeals of Kentucky. Sept. 21, 1906.)

1. LOGS AND LOGGING—TIMBER TO BE CUT—CONTRACT OF SALE—AMBIGUITY.

A contract of sale of "a certain lot of timber situated on Rhodes Branch, about three miles from Williamsburg," is practically demonstrated by the acts of the parties to be sufficiently definite and certain as to the timber sold; 200,000 feet being delivered and received.

2. SAME—AMOUNT SOLD.

A contract of sale of "a certain lot of timber situated on" a certain tract, the kinds and dimensions being specified, and the prices per 1000 feet being given, the seller to continue hauling till all the timber is delivered, he "further agreeing to deliver not less than 200,000 feet," is a sale of all the timber of the specified kinds and dimensions on the tract; the reference to the 200,000 feet being merely a guaranty that there will be at least that amount.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Logs and Logging, §§ 8, 9.]

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Action by Joseph Bradford against C. G. Huffman. Judgment for defendant. Plaintiff appeals. Reversed.

Tye & Denham, for appellant. Sharp & Siler, for appellee.

BARKER, J. The appellant, Joseph Bradford, instituted this action in the Whitley circuit court to recover of the appellee, C. G. Huffman, damages for breach of a written contract for the sale and delivery of timber. The contract in question is as follows:

"This article of agreement, made this 8d day of July, 1899, between Joe Bradford, of Whitley county, Ky., of the first part, and C. G. Huffman, of the second part, witness-

eth: That the said Joe Bradford has this day sold to said Huffman a certain lot of timber situated on Rhodes Branch, about 3 miles from Williamsburg, at the following prices, delivered to a point suitable for a millyard:

First-class poplar logs, 20 inches and up in diameter, 12, 14, and 16 feet long...	\$8 00
Second-class logs, 12 inches and up.....	5 00
Ash, first-class, 20 up.....	8 00
Ash, second-class, 14 up.....	5 00
Chestnut, 12 up, sound logs.....	6 00
Oak, first-class, 20 and up.....	7 50
Oak, common, 14 and up.....	5 00
Pine, 2 inches and up, 10, 12, 14, 16, 18, and 20 feet.....	4 50

"All of the above timber to be delivered at the above stated prices to a suitable yard. Said Bradford to furnish right of way over any lands nearest for the hauling of said lumber to the county road free of charge, and deliver all of it by May 15, 1900. This time is not extended to May 15 for any poplar, oak, and pine, but for the benefit of hauling in chestnut oak after peeling of tanbark is done. Said C. G. Huffman agrees to furnish merchandise from time to time for the convenience of men employed to do the work, and measure up once a month after 1st of October, and pay cash for all amounts due after deducting the amount furnished in merchandise. Said Bradford shall commence work hauling logs not later than September 1, 1899, and continue regular until all the timber is delivered. Said Bradford further agrees to deliver not less than 200,000 feet of all classes of timber above specified.

"In witness whereof the parties hereto have signed their names this 8d day of July, 1899.

Joseph Bradford.
"C. G. Huffman."

The petition, after setting out substantially the terms of the contract, alleges that appellant cut, hauled, and delivered to the appellee, under its terms, 200,000 feet of lumber; that there were as many as 200,000 additional feet of timber of the grades, kind, and quality mentioned in the contract on the boundary of land contemplated by its terms, which appellant was ready and willing to cut, haul, and deliver to the appellee, but which he was prevented from doing by the appellee's breach of his part of the contract in refusing to measure and pay cash for the timber monthly, as he had agreed to do, and by ordering the appellant to desist from hauling any more after the 1st of May, 1900; that of the 200,000 feet of timber which the appellee refused to permit the appellant to cut and deliver there was as much as 50,000 feet of "first-class oak logs, 20 inches and up," for which he would be entitled to \$7.50 per 1,000 feet when delivered at the millyard, and as much as one hundred and fifty thousand feet of "common oak logs, 14 inches and up," for which he would be entitled to \$5 per 1,000 feet when delivered at the mill-

yard; that these logs were worth, standing in the woods, at the time the appellee failed and refused to measure up and pay for them, not more than \$2 per 1,000 feet; that he could have cut and delivered the logs to the millyard at a cost not to exceed \$2.50 per 1,000 feet; that he would have realized a profit of \$3 per 1,000 feet on the 50,000 feet of "first-class oak logs, 20 inches and up," amounting to \$150; that he would have realized a profit of \$.50 per 1,000 feet on the 150 feet of "common oak logs, 14 inches and up," amounting to \$75; and that by reason of the appellee's breach of his contract appellant has been damaged in the sum of \$225, for which he prays judgment. The contract is filed with and made a part of the petition. To this pleading the appellee interposed a general demurrer, which was sustained by the court; and, the appellant declining to plead further, his petition was dismissed, from which judgment he prosecutes this appeal.

We cannot agree to the contention of counsel for the appellee that the contract under consideration is void because of its vagueness and uncertainty. It is true the description of the timber sold is somewhat loosely and vaguely given as "a certain lot of timber situate on Rhodes Branch, about three miles from Williamsburg"; but this was sufficiently definite and certain to enable the parties to effectuate it to the extent of 200,000 feet of timber, which was delivered by the appellant and received by the appellee. The acts of the parties constitute a practical demonstration that the description of the timber comes within the maxim, "*Id certum est, quod certum reddi potest.*"

Nor do we think appellee's position is sound that under the terms of the contract appellant was only bound to deliver 200,000 feet of timber, and appellee only bound to receive that number of feet. The expression, "said Bradford further agrees to deliver not less than 200,000 feet of all classes of timber above specified," does not fix the maximum amount of timber to be delivered. On the contrary, it clearly establishes the minimum. It practically makes Bradford guaranty that there was at least 200,000 feet of timber on the boundary in question, to be cut and delivered by him under the terms of the agreement. The contract is for the sale of all the timber of the given kind, quality, and dimensions on the boundary contemplated by the parties. All of this timber appellant was bound to cut and deliver, and appellee was bound to receive and pay for it. This being true, the petition states a good cause of action, and the trial court erred in sustaining the general demurrer to it.

Wherefore the judgment is reversed, with directions to overrule the demurrer.

PHILLIPS v. BEATTYVILLE MINERAL & TIMBER CO.

(Court of Appeals of Kentucky. Sept. 21, 1905.)

1. TRESPASS—TITLE—EVIDENCE.

One cannot maintain an action for trespass; his showing no title from the commonwealth, but only a sheriff's deed on sale under execution against one not shown to have had title.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Trespas, §§ 18, 19.]

2. ADVERSE POSSESSION—INTERRUPTION—EVIDENCE.

Interruption of plaintiff's adverse possession, so that it will date only from recommencement of possession, is shown; plaintiff, while testifying that his tenant was on the premises all the time after he went there, also stating that he thought he moved away, and the tenant, testifying for him, stating that he did move away after he had been on the premises nine or ten years, that he was away two years, and that the place was vacant while he was away, and this not being controverted by any other testimony.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 278.]

3. SAME—DIFFERENT POSSESSIONS.

One entering on a tract on which there are others claiming it as their own, and who so continue thereon, acquires no right by adverse possession beyond his close.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 590, 591.]

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Action by T. J. Phillips against the Beattyville Mineral & Timber Company. Judgment for defendant. Plaintiff appeals. Affirmed.

J. B. White, Gourley & Redwine, C. A. Gourley, and J. K. Roberts, for appellant. J. M. Beatty, and Beckner & Jouett, for appellee.

HOBSON, C. J. Appellant, T. J. Phillips, instituted this action against the appellee, Beattyville Mineral & Timber Company, alleging, in substance, that he was the owner and in the possession of a large body of land on the waters of Contrary and Miller's creeks in Lee county, and that the defendant had entered on the land and cut from it timber belonging to him of the value of \$5,000. He alleged that he and those under whom he claimed had been in adverse possession of the land for more than 20 years next before the trespasses complained of. The suit was filed on February 28, 1897, and the trespasses were alleged to have been committed between the preceding June and that date. The defendant by its answer denied that Phillips owned the land or was in the possession of it, or that he or those under whom he claimed had held it in adverse possession, but alleged that the land was in its possession and had been held by it and its vendors for 50 years in adverse possession. It set up its title to the land, and pleaded in bar of the action a judgment of the Lee cir-

cuit court, rendered in a suit which Phillips had instituted against L. F. Mann, who had entered under appellee and cut the timber complained of. The affirmative allegations of the answer were denied by a reply, and, the case having been submitted to a jury, the court at the conclusion of the plaintiff's evidence refused to instruct the jury peremptorily to find for the defendant. The defendant then introduced its evidence, and at its conclusion the court peremptorily instructed the jury to find for the defendant. The jury having found a verdict as directed by the court, and judgment having been entered upon it, the plaintiff appeals.

The only question we deem it necessary to consider is whether the plaintiff made out a case, that is, whether the court should have peremptorily instructed the jury to find for the defendant at the conclusion of the plaintiff's evidence. The plaintiff showed no title to the land from the commonwealth. The only evidence of title which he introduced was a sheriff's deed, made to him on April 18, 1873, by E. B. Treadway, as sheriff of Owsley county, from which it appears that in April, 1870, an execution from the Madison circuit court against B. F. Phillips, the father of T. J. Phillips, came to the hands of the sheriff and was levied by him on B. F. Phillips' undivided interest in a survey of 29,000 acres, known as the "Haggins Survey," which undivided interest was said to contain 1,500 acres, and that T. J. Phillips became the purchaser at \$234.21. The tract of land in controversy consists of about 5,000 acres, and no title was shown in B. F. Phillips. The sheriff's deed only passed such title as B. F. Phillips had, and as the plaintiff, T. J. Phillips, showed no title from the commonwealth, he failed to establish any title to the land, unless the proof offered by him to show adverse possession was sufficient to show an adverse possession of 15 years. There was no proof of adverse possession by B. F. Phillips, at least none that need be considered. The plaintiff introduced in evidence a lease made by him on October 7, 1872, to Aaron Warner, his brother-in-law which covered the land. He testified that Aaron Warner was then living on the land, and continued to live on it, claiming it under the lease. The possession by Aaron Warner is the only possession which he showed to the land.

On this subject the testimony of T. J. Phillips is as follows: "Q. How long did he continue to live there under that lease? A. I don't know. Not more than one or two years. Q. Now, during that time how did he claim? A. He claimed under me—under my lease. Q. Did that lease cover the boundary where this timber was cut? A. Yes, sir. (Court overruled objection of defendant to reading of said lease, and lease read to jury, to all of which defendant excepted.) Q. About how many years did Mr. Warner

live at that place before he finally moved away? A. He moved away about two years or over. He was there all the time after he went there. He has been away for three years, maybe; about three years. Q. You said he moved there a year before the lease was made? A. Yes, sir; maybe a little more; a year anyhow. Q. And when did he move away? A. About two years ago, or about three years. He was there, I know, a year before the lease, and I think he moved away. It has been over two years. Q. At the time this timber was cut out here, where did Warner live? A. On the property in the same house. Q. Is that inside this lease? A. Yes, sir."

The only other testimony is that of Warner, who was introduced on behalf of the plaintiff, and whose testimony was not sought to be overthrown in any way. His testimony is as follows: "Q. How long did you remain, Mr. Warner, after you first went there in October, 1872, before you moved away? A. I don't reckon. Well, I never—I still hold it myself. Q. I don't want any explanations. How long did you stay there before you moved away? A. Nine or ten years, somewhere along there, I stayed away. Q. Where did you move to? A. (Didn't hear witness.) Q. How long did you stay away? A. I stayed away two years, I reckon. Q. And then where did you move to? A. I moved here to Miry Branch. Q. That was not on the land then? A. I had a tenant on the land. Q. I am not talking about your tenants. Where was it that you moved to? Was it on or off of this lease? A. Off of this leased boundary. Q. How far away from it? A. About two miles. Q. You moved back to Judge Phillips', here about the river? A. Yes, sir. Q. Well, I will ask you if it is not a fact that, after you moved away, the house that you moved out of, if it was not vacant for two or three years—nobody lived in it? A. It had a lock on it all the same. Q. Was not the door open? A. Yes; it was broke open, and I found it. Q. And it was vacant three or four years? A. When I moved to it, the lock was broke open and gone. Q. How long, Mr. Warner, had it been in that way—being vacant, without anybody in it? A. I couldn't tell you."

As Warner stayed there 9 or 10 years, and then moved back after 3 or 4 years, it is evident that he could not have moved back before something like 1884 or 1885. When he moved away, and the place was left vacant, the continuity of possession was broken, and when he moved back the time of adverse possession must be counted from the date of his return. The trespasses complained of were committed in 1896, which was within less than 15 years after his return. While Phillips does state that Warner was there all the time after he went there, it will be observed that he also states that he thinks he moved away, and the explicit statement of Warner that he

did move away after he had been there 9 or 10 years, and that the place was vacant while he was away, is not controverted by any other testimony in the record. We regard the vague statement of Phillips as not sufficient to overthrow the testimony of his own witness, which is definite and certain and uncontroverted. In addition to this, B. F. Phillips only owned an interest in the 29,000-acre survey. Those under whom appellee claims owned other interests in this survey. When a man without title enters upon the land of another, he acquires no right by adverse possession beyond his close against the true owner, unless the possession is then vacant. The plaintiff introduced no proof to show that the land was vacant when Warner entered or when Warner returned, and the proof introduced by the defendants, uncontradicted, showed that the defendant and those under whom it claims had tenants on the land, claiming it as their own, at the time he so entered. So, at most, under the evidence, any possession by Warner would be confined to his close. On the whole case, we are satisfied that the plaintiff showed no right to the land, and that the judgment dismissing his petition should not be disturbed.

Judgment affirmed.

DARRELL v. COMMONWEALTH

(Court of Appeals of Kentucky. Sept. 22, 1905.)

1. CRIMINAL LAW—AFFIDAVITS FOR CONTINUANCE—ABSENCE OF WITNESSES—EFFECT AS EVIDENCE.

Where the court allowed the affidavit for a continuance of a criminal case to be read as the deposition of the absent witness, it was error to permit the commonwealth to prove that the absent witness had been dead for over a year, and that the statement that he would testify as alleged was false.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1364, 1365.]

2. RAPE—EVIDENCE—INSTRUCTIONS.

Where, on a trial for rape, there was no evidence of threats of violence by the accused toward the prosecutrix, except that immediately after the act accused told the prosecutrix that he would kill her father if she told him, an instruction that force necessary in rape need not be physical force applied to the person of the prosecutrix, but that force was used if she yielded through fear caused by threats of injury, was misleading.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Estill Darrell was convicted of rape, and appeals. Reversed.

See 82 S. W. 289.

Watkins & Birkhead, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

O'REAR, J. This appeal is prosecuted from a judgment convicting appellant of rape. When the case was called for trial the indictment had been misplaced and could not then be produced. The case was passed indefinite-

ly, and a rule issued against the clerk to produce the lost indictment. It was found later in the day, and the case assigned for trial the following day. Appellant claims that all the witnesses had been discharged when it was discovered that the indictment was lost. But, however that was, on the next day, when the case was called again for trial, appellant asked for a continuance on account of the absence of his witnesses. His affidavit gave their names and stated that they all resided in Daviess county, Ky., about 18 miles from the courthouse. The attorney for the commonwealth consented that the affidavit might be read as the depositions of the absent witnesses, whereupon the trial was ordered to proceed; the defendant still protesting. One of his absent witnesses, the affidavit stated, would testify that, shortly before the date of the alleged rape, he had sexually known the prosecutrix with her consent, and that she was a woman whose reputation for chastity was then bad. After this affidavit had been read to the jury as the deposition of the absent witness, the commonwealth was allowed to prove over appellant's objections that the absent witness was dead, and had been for more than a year. The Constitution, confirming the very spirit of our regard for human liberty, guarantees to every one accused of crime that he shall have compulsory process to procure the attendance of his witnesses; that his accusation shall not be tried upon one-sided evidence without his having an equal chance to produce the other side. To facilitate trials, while preserving this ancient and invaluable guaranty of process to the accused, it is provided that the court may, in its discretion, after the first term, allow the defendant's affidavit to be used as the deposition of his absent witnesses, where otherwise the presence of the witness could not be promptly had. When the affidavit is so admitted, its authenticity is beyond question in that trial. It must be accepted as if it were the duly signed and certified deposition of the identical witness named. It was error to have admitted evidence tending to show that the affidavit was false in its statement that the witness was there living within the jurisdiction of the court and would testify as stated.

There was no evidence of threats of violence by the accused towards the prosecutrix, or any one else, made in her presence before the criminal act. There was evidence, however, that immediately afterward, and before their separation, accused said to the prosecutrix, if she told her father, "he would kill him," evidently meaning that accused would kill her father. This evidence was admitted to explain the silence of prosecutrix for some three months afterward. In instructing the jury the court said, in part: "The court further instructs the jury that force, as used in this instruction, does not

mean exclusively physical force applied to the person of the prosecutrix; but that force was used, if the prosecutrix was made to yield through fear caused by threats of violence and injury then made." The threats proven were not claimed by the prosecution to have been made to induce her submission. No threats of violence to her to coerce her will were made before the act. In view of the evidence, we think the language of the instruction was misleading, and prejudicial error. Undoubtedly it is the law that, if the rapist coerces the female into yielding through fear caused by what he threatens or does, her will is as completely subdued by force as if he violently took hold of her and held her against her will. The use of the word "force" has reference solely to the will of the female. Though force was used, if she does not object, being conscious of the act and purpose, or finally consent without coercion, it is not criminal. If she declared "she'll ne'er consent, yet consenting," no force or threats being used to override her own will, the act is not rape.

The judgment must be reversed, and the cause is remanded for another trial, under proceedings not inconsistent herewith.

COMMONWEALTH v. WOELFEL.

(Court of Appeals of Kentucky. Sept. 22, 1905.)

1. WITNESSES—HUSBAND AND WIFE—COMPETENCY.

On a trial under Cr. Code Prac. § 156, on the issue of the sanity of one indicted for crime, the wife of the accused is not a competent witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 124.]

2. CRIMINAL LAW — APPEAL — HARMLESS ERROR.

Where, on a trial under Cr. Code of Prac. § 156, on the issue of the sanity of one indicted for crime, every fact testified to by the wife of the accused was shown by witnesses whose testimony was uncontroverted, the error in permitting the wife to testify was not prejudicial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 8138.]

3. SAME—TRIAL OF DEFENDANT'S SANITY—TESTIMONY OF PHYSICIANS—COMPETENCY.

On a trial under Cr. Code Prac. § 156, on the issue of the sanity of one indicted for crime, physicians who had examined or treated the accused, or who had sufficient facts before them to make their opinion of any value, were competent witnesses.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1069.]

4. SAME — TRIAL OF ISSUE OF DEFENDANT'S SANITY.

The inquiry on a trial under Cr. Code Prac. § 156, on the issue of the sanity of one indicted for crime, is whether he is sane enough to appreciate his situation, to act advisedly in informing his counsel, and to rationally conduct his case.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

George Woelfel was indicted for crime, and

from a judgment adjudging him insane the commonwealth appeals. Affirmed.

M. L. Galvin, N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

HOBSON, C. J. Appellee was indicted for the crime of malicious shooting with intent to kill; and, an affidavit being filed by a physician to the effect that he was of unsound mind, the court ordered a jury impaneled to inquire as to his sanity under section 156 of the Criminal Code of Practice, which is as follows: "If the court shall be of opinion that there are reasonable grounds to believe that the defendant is insane, all proceedings in the trial shall be postponed until a jury be empanelled to inquire whether the defendant is of unsound mind, and if the jury find that he is of unsound mind, the court shall direct that he be kept in prison or conveyed by the sheriff to the nearest lunatic asylum, and there kept in custody by the officers thereof until he be restored, when he shall be returned to the sheriff on demand, to be received by him to the jail of the county."

The rule governing this proceeding is thus stated in Bishop on Criminal Procedure, §§ 666-668:

"Sec. 666. Present insanity implies a disability to employ, control, or discharge counsel. And the doctrine is believed to be that, when the court sees a reasonable ground to institute or persevere in this defense, it will take care that the prisoner has suitable counsel therein, whom it will not permit him to reject, restrain, or dismiss. An insane man cannot even plead to an indictment. Therefore, if, at the arraignment, counsel have reason to suppose their client too insane properly to take his trial, they should make the objection. This, it is believed, can be adequately done orally to the court. Or the objection may proceed from a third person on affidavit. Or the court may take it on its own observations. * * *

"Sec. 667. The time to which this inquiry relates is, it is perceived, the present—what is the mental condition now, not what it was when the offense was committed. And the test of insanity is not precisely the same as on the main issue, but it is whether the prisoner is competent to make a rational defense.

"Sec. 668. The object of this inquiry being, in the main, to inform the judge, it seems that he need not limit the evidence by strict rules. The prisoner, for example, may be permitted to make statements and observations to the court and the jury, and what the latter see and hear of him they may take into the account. * * * The jury's finding, on this preliminary question, that the prisoner is not insane, is not to be received as evidence against him on the trial of the main issue."

On the trial before the jury the court, over the objection of the commonwealth, allowed

the defendant's wife to testify in his behalf, and at the conclusion of the evidence on behalf of the defendant the court refused to allow the commonwealth to prove by three physicians that the defendant could on that day make a rational defense to the criminal charge against him. At the conclusion of the evidence the court instructed the jury that, if they believed from all the evidence that the defendant was a person of unsound mind at that time, they should so find, and refused instructions asked by the commonwealth to the effect that unsoundness of mind in a trial of this sort is that condition of mind where the defendant is incapable of remembering the past events of his life and presenting them to his counsel, or of appreciating what is going on about him, or of making a rational defense to the criminal charge against him. The jury found the defendant of unsound mind, and the commonwealth appeals.

A wife is not a competent witness for her husband, and, while the inquiry here is not limited by the strict rules of evidence, the result of it is to protect the defendant from trial and punishment if found of unsound mind, and his wife can no more testify for him on this issue than on any other. But every fact testified to by the wife was in effect proved by other witnesses, whose testimony was uncontroverted, and we do not see that the commonwealth was prejudiced by the admission of the wife as a witness.

The testimony of the three physicians offered on behalf of the commonwealth should have been admitted, if a proper foundation had been laid; but it is not shown that they had ever examined or treated the defendant, or that they in any way had sufficient facts before them to make their opinion of any value to the jury. The jury had before them the conduct of the defendant, and he was also before them.

The rule in a proceeding of this kind is that the inquiry is whether the accused is sane enough to appreciate his situation, to act advisedly in informing his counsel, and to rationally and intelligently conduct his case, so as to secure him a fair and impartial trial. 1 Robinson on Criminal Law, p. 33; Carr on Trial of Lunatics, p. 92; Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216; Guagando v. State, 41 Tex. 626. The principle governing where the defendant's mind is diseased is not different from that where he is suffering from disease from some other organ. He must be in a condition to conduct his case rationally and intelligently, so that he may have a fair trial. The court should have instructed the jury as above indicated; but under all the evidence we have great doubt that the instruction, if given, would have affected the result.

Under the facts shown by the record we are satisfied that the ends of justice will not be promoted by a new trial. The defendant is in an insane asylum, and when he is re-

stored to his mind may be tried for the offense charged against him.

Judgment affirmed.

McLEMORE et al. v. SEBREE COAL & MINING CO. et al.

(Court of Appeals of Kentucky. Sept. 22, 1905.)

1. DEATH BY WRONGFUL ACT—REFUSAL OF ADMINISTRATOR TO SUE—RIGHT OF WIDOW AND CHILDREN.

Where an administrator and one responsible for the negligent death of another conspire together to prevent a suit for the negligent death, the widow and children of decedent may sue, though Const. § 241, and Civ. Code, § 21, provide that an action for wrongful death shall be prosecuted by the personal representative for the benefit of the widow and children of the decedent, and though Ky. St. 1903, § 3882, authorizes the administrator to settle any claim for damages for a wrongful death; Civ. Code, § 24, providing that, if the consent of one who should be joined as plaintiff cannot be obtained, he may be made defendant.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 35-46; vol. 22, Cent. Dig. Executors and Administrators, § 1600.]

Appeal from Circuit Court, Webster County.

"To be officially reported."

Action by Nancy B. McLeMore and others against the Sebree Coal & Mining Company and another. From a judgment dismissing the petition, plaintiffs appeal. Reversed.

R. L. Greene, Bourland & Hunt, Proctor & Herdman, and Jno. L. Dorsey, for appellants. C. W. Bennett, Barker & Barker, and Gordon, Gordon & Cox, for appellees.

SETTLE, J. This action was instituted in the Webster circuit court against appellee the Sebree Coal & Mining Company by the appellant Nancy B. McLeMore, widow of Thomas J. McLeMore, deceased, and their eight children (six of them infants, suing by their mother as next friend), to recover \$25,000 damages for the death of the husband and father from a fall in appellee's mine shaft, alleged in the petition to have been caused by its gross negligence; the decedent being at the time an employé of appellee. In addition to stating a cause of action for the death of Thomas J. McLeMore, the petition further avers in substance that after his death appellee R. L. Claxton was appointed, gave bond, and duly qualified as administrator of his estate; that his appointment and qualification as administrator were procured by appellee with the wrongful and fraudulent intent to protect itself from liability for damages for its negligence in causing the death of Thomas J. McLeMore; that Claxton was at the time of his appointment and qualification, and is now, in the employment of appellee, and has entered into collusion with it to prevent suit against it for the death of the decedent, and has refused to sue appellee for his death, though requested by appellants to do so; that he also re-

fused to resign his administratorship with the fraudulent intent to defeat appellants' claim and obstruct their suit, for which reasons he was made a party to the action, and joined with appellee the Seebree Coal & Mining Company as a defendant. The appellees filed a special demurrer to the petition upon the ground of alleged misjoinder of parties, want of capacity in the appellants to sue, and want of jurisdiction of the parties by the court. The demurrer was sustained by the lower court. Appellants failing to plead further, the petition was dismissed, and of that judgment they now complain.

The demurrer was sustained upon the ground that the action could not be maintained by the widow and children of the decedent, but should have been brought, if at all, by the administrator alone. It is insisted for appellees that the right to recover damages for the death of a person resulting from the negligence of another is confined by section 241, Const., section 6, Ky. St. 1903, and section 21, Civ. Code, to the personal representative of the decedent, and that by the provisions of section 3882, Ky. St. 1903, he alone may "compromise and settle any claim or demand for damages growing out of injury to or the death of the decedent," and that inasmuch as appellants have elected to sue under the statute—that is, for the death of decedent—instead of at the common law, to recover for his sufferings, they are attempting to assert a demand for which only the administrator may sue. Undoubtedly the right of action in such a case as this is in the personal representative, but the statute which gives him the right of action as clearly makes the widow and children of the decedent the beneficiaries, for they take the damages recovered. The personal property of an intestate does not pass to or vest in the heir at law, but the personal representative appointed as provided by law. If suit be necessary for the recovery of a demand due the estate of an intestate, it must be brought by the personal representative; but if he fail to sue the debtor, and refuse on demand of the heir at law to do so, the latter may bring the action by making the administrator a defendant. The same is true as to guardian and ward, trustee and cestui que trust. This doctrine is supported by numerous authorities. *Brunk v. Means*, 11 B. Mon. 216; *McChord v. Fisher*, 13 B. Mon. 194; *Roberts' Adm'r v. Eales*, 10 Ky. Law Rep. 860; *Loyd v. Loyd*, 48 S. W. 485, 20 Ky. Law Rep. 347. The same rule obtains where an administrator or guardian refuses to defend an action against the estate of the intestate or ward, in which event the heir or ward may interpose and be permitted by the court to defend. Indeed, this rule is recognized by the Civil Code, section 24 of which provides: "But if consent of one who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition."

No reason is perceived for not applying the foregoing wise and salutary rule to the case at bar. Indeed, a greater reason exists for doing so than in any of the cases cited, for here the averment is made, not only that the administrator has refused to comply with the demand made upon him by the widow and children of the intestate to sue appellee Seebree Coal & Mining Company, but that he has entered into a fraudulent collusion with it to prevent the bringing of the action, that it may escape liability for the death of the intestate alleged to have been caused by its negligence, and, further, that the fraudulent collusion also went to the extent of procuring the appointment of the administrator for the purpose of preventing the bringing of the action. The demurrer admits the truth of the averments of fraud and collusion contained in the petition, and also the alleged facts manifesting the appellants' cause of action. The reason of the rule allowing the appellants to maintain this action by making the administrator a defendant is as manifest as would be the injustice of refusing them the right to do so. A wrongdoer should not be permitted by collusion and fraud to procure the appointment of an administrator and control him, to defeat an action and recovery for the death of his intestate caused by the negligence of such wrongdoer, as here charged, and admitted by the demurrer.

Judgment reversed, and cause remanded, with directions to the lower court to overrule the demurrer to the petition, and for further proceedings consistent with this opinion.

FOX v. COMMERCIAL PRESS CO.

(Court of Appeals of Kentucky. Sept. 26, 1905.)

1. ESTOPPEL—GROUNDS.

A third person represented to plaintiff that he had a contract with a newspaper company to sell all copies of the paper within a certain territory. Plaintiff relied on the representations and paid the third person a specified sum for his rights. Thereafter the company recognized plaintiff as the owner of the third person's rights. *Held* insufficient to estop the company from asserting that the third person had no contractual rights; it not being shown that it knew the terms of the contract between plaintiff and the person.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 128-132, 242-246.]

2. CONTRACTS—TERMINATION.

A contract whereby a company agrees to give a person the exclusive right to sell its newspaper in a territory described so long as the company should publish it terminates on the company going out of business.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Joseph Fox against the Commercial Press Company. From judgment dismissing the petition, plaintiff appeals. Affirmed.

Wirgman & Underwood and Baird & Rich-

ardson, for appellant. Bodley, Baskin & Flexner and C. R. Robinson, for appellee.

HOBSON, C. J. Appellant complains of the judgment of the circuit court dismissing on demurrer his petition seeking the recovery of \$300 damages of appellee. The material part of his petition is as follows: "That about eight years ago, one Charles Herrman represented to plaintiff that he was the sole owner of a certain exclusive right and privilege to sell and deliver any and all copies of the newspaper published by the Louisville Press Company within the following bounded territory in the city of Louisville, to-wit: [Here follows boundary.] That said Herrman further represented to plaintiff that he [said Herrman] was under a corresponding liability to faithfully and promptly deliver said newspapers in said boundaries, and that said Louisville Press Company was bound to sell to said Herrman, from time to time, as many copies of said newspaper as might be necessary to supply subscribers in said boundaries, so long as said Louisville Press Company should publish such newspapers, and so long as he [said Herrman] should faithfully and promptly deliver said newspapers in said boundaries and promptly pay said Louisville Press Company for said newspapers. That said Herrman further represented to plaintiff that, should he [said Herrman] fail to faithfully and promptly deliver said newspapers in said boundaries, or fail to promptly pay said Louisville Press Company for said newspapers, then said Louisville Press Company should have the right to require said Herrman to relinquish said right to it upon paying him the reasonable value thereof, and after having notified him that he was not delivering said papers promptly and faithfully in said boundaries, or that he was not promptly paying said Louisville Press Company for said papers, and after having given him a reasonable time within which to sell or dispose of said right himself to a competent person who would perform all of said obligations. That said Herrman further represented to plaintiff that he [said Herrman] had been authorized by said Louisville Press Company to sell and dispose of said right, with all of its emoluments and obligations, to any responsible and reliable person, and said Herrman offered to sell said right to plaintiff for the sum of \$300. That plaintiff relied on the representations thus made by said Herrman, and paid said Herrman \$300 for said right. The said Louisville Press Company thereupon accepted the plaintiff in the place and stead of said Herrman in the exercise and ownership of said right, and recognized and admitted the ownership of plaintiff of such right as represented by said Herrman. That, had not said Louisville Press Company thus accepted him in the place and stead of said Herrman, he would have demanded and recovered from said Herrman said \$300. That at the time said representa-

tions were made to plaintiff by said Herrman, and at the time plaintiff was accepted in the place and stead of said Herrman by said Louisville Press Company, and for a long time subsequent thereto, said Louisville Press Company was a corporation organized under and existing by virtue of the laws of the state of Kentucky, with power to make contracts and to sue and be sued in its corporate name. That plaintiff continually exercised and held said right, and continuously, faithfully, and promptly delivered said newspapers in said boundaries, and promptly paid said Louisville Press Company for said newspapers until the ——— day of ———, 1902, at which date the defendant, Commercial Press Company, purchased from said Louisville Press Company the business and good will of said Louisville Press Company. That at said time plaintiff's right was very valuable to him, and the obligation of plaintiff to faithfully and promptly deliver said newspapers in said boundaries and to promptly pay said Louisville Press Company for said newspapers was a valuable asset of said Louisville Press Company, and was so considered by the defendant, Commercial Press Company, in making said purchase. That upon said purchase being made the defendant continued the publication of said newspapers, but gradually changed the name of said publication. That defendant recognized the plaintiff's exclusive right to sell and deliver its newspapers in said boundaries, and that defendant also exercised its right to require plaintiff to deliver said newspapers in said boundaries promptly and faithfully and to pay defendant promptly for said newspapers; and plaintiff says that he did promptly and faithfully deliver in said boundaries the newspapers published by the defendant, and did promptly pay defendant for same, until February 14, 1903. That a short time before this date, and after defendant had succeeded in establishing itself in the good will sold by the aforesaid Louisville Press Company, defendant demanded that plaintiff sell to it plaintiff's said right for the sum of \$75. That plaintiff refused to accede to said demands, and thereupon, on February 14, 1903, defendant did, without any fault on the part of the plaintiff, wrongfully refuse thereafter to sell the plaintiff any of its newspapers to be sold by plaintiff in the aforesaid boundaries, and informed plaintiff that it would no longer recognize plaintiff's said exclusive right and privilege to sell and deliver said newspapers in said boundaries, and converted said right and privilege to its own use, thus depriving plaintiff thereof. That said right was reasonably worth the sum of \$300 at said time. Wherefore plaintiff prays judgment against the defendant for \$300, with interest thereon at the rate of 6 per cent. per annum from the 14th day of February, 1903, for his costs herein expended, and for all other proper relief."

It will be observed that it is simply charged in the petition that Herrman represented to the plaintiff that he (Herrman) had a certain contract with the Louisville Press Company. It is nowhere averred that Herrman in fact had the contract with that company which is set up in the petition. All that is stated in the petition may be true, and Herrman may have had no contract at all with the Louisville Press Company. It is not averred that the plaintiff paid Herrman \$300 upon the faith of any representations made to him by the Louisville Press Company, or that plaintiff was in any manner induced by the Louisville Press Company to make the contract with Herrman and pay him \$300. It is simply averred that the plaintiff relied upon the representations made by Herrman and paid Herrman \$300 for his rights, and thereupon the Louisville Press Company accepted plaintiff in place of Herrman and recognized and admitted the ownership of plaintiff of such rights as represented by Herrman, and but for this he would have demanded and recovered from Herrman his \$300. This is not sufficient to create an estoppel, for the plaintiff had already parted with his money, and it is not even shown that the Press Company, in accepting plaintiff, knew what representations Herrman had made, or knew that plaintiff was relying on its action in any way when it admitted that he owned the rights of Herrman. There is nothing in the petition to show that the Louisville Press Company authorized Herrman to make the contract with plaintiff, or that he was its agent in making it. No principle of agency therefore applies, and the estoppel fails, because it is not shown that the Press Company knew what was the contract between the plaintiff and Herrman, or that it should have known that its conduct was misleading the plaintiff in any way. An agent's authority cannot be shown by his own representations.

The plaintiff enjoyed his contract for eight years. The contract was represented by Herrman to be that he was to sell the paper as long as the Louisville Press Company should publish it. This the plaintiff did. The Louisville Press Company sold out to the appellee and no longer publishes the paper. We do not think that the contract, fairly construed, can mean that appellant was bound to sell the newspaper in the district named if it was published by another, or that he would have been liable to an action by the Commercial Press Company if he had been sued by it for refusing to sell its papers after it bought out the old company. It was a personal contract between the plaintiff and the old company. The purchasing corporation did not assume the obligations of the old company simply by buying its paper, plant, and good will. Such a contract as the plaintiff alleges did not run with the property. The rule is that contracts indefinite as to duration may be terminated

by either party at will. A contract to furnish a certain man with newspapers to sell as long as the company published the newspaper must be presumed to have been intended as simply the company's obligation, and to cease when the company went out of business.

Judgment affirmed.

BOARD OF TRUSTEES OF FORDSVILLE
et al. v. POSTEL et al.

(Court of Appeals of Kentucky. Sept. 26, 1905.)

1. TRUSTS—FOLLOWING TRUST FUNDS—SALE OF VOID BONDS—RIGHT OF BONDHOLDERS.

The holders of void bonds issued by a school district in violation of Const. § 157, may obtain relief, under the doctrine that equity follows a fund, on showing that the proceeds of the bonds were used exclusively in procuring a lot, schoolhouse thereon, and school furniture.

2. SAME—STATUTORY PROVISIONS.

Ky. St. 1903, § 2353, providing that, when a deed shall be made to one person and the consideration shall be paid by another, no trust shall result, but this shall not apply to a case where a grantee takes a deed in his name without the consent of the person paying the consideration, does not affect the equitable doctrine that equity follows a fund and compels a restitution, as long as it can be identified.

3. APPEAL—HARMLESS ERROR—JUDGMENT.

Where bonds issued by a school district are void, and the proceeds are used in the erection of a schoolhouse, that the judgment in favor of the holders of the bonds in a suit to follow the proceeds thereof provides for a conveyance to them of the property, instead of a sale thereof, is not prejudicial, where the property is not of more value than the fund derived from the bonds.

4. PARTIES—REAL PARTY IN INTEREST.

The holders of bonds illegally issued by a school district stand in the place of the original purchasers of the bonds, and may maintain a suit in their name as the real party in interest to recover from the proceeds of the property purchased by the proceeds of the sale of the bonds the amount due them.

Appeal from Circuit Court, Ohio County.
"To be officially reported."

Action by John Philip Postel and others against the board of trustees of Fordsville and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Glenn & Ringo, for appellants. E. B. Anderson, Geo. W. Jolly, and G. B. Likens, for appellees.

HOBSON, C. J. In the year 1897 the trustees of the Fordsville graded common school district issued bonds to the amount of \$4,000 on behalf of the district for the purpose of providing it with a lot, schoolhouse, and suitable furniture. The bonds were sold, and the trustees used the proceeds of the sale in buying a lot, building a schoolhouse, and furnishing it. But no vote of the legal voters of the district was taken before the issuance of the bonds, and they were adjudged void under section 157 of the state Constitution: "No county, city, town, taxing district, or

other municipality shall be authorized or permitted to become indebted in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same." The holders of the bonds, being in part the original purchasers and in part persons who had bought the bonds from them, instituted this action in equity asking that the lot, house and furniture which was purchased with the proceeds of the bonds be transferred to them; and, the court having adjudged them the relief sought, the school district appeals.

Appellant relies on *Grady v. Pruitt* (Ky.) 63 S. W., 283, and *Grady v. Landram*, Id. 284. In these cases the contractor who had built the schoolhouse, and to whom a balance of \$604 was due, sought in the first case to hold the trustees personally liable, and in the second to remove the house or such part of it as would be of value \$604, or place the house in the hands of the receiver. The district had paid him \$2,173 on the contract. It was held in the first case that the trustees were not personally liable, and in the second that, the building being a single structure, a part of it could not be removed without injury to the remainder, and, the district having paid \$2,173 on the building, the chancellor could not destroy \$2,173 worth of property belonging to the district to give the contractor \$604. It was also held in these cases that the contract, being void under the Constitution, could not be enforced directly or indirectly, and therefore that the property could not be placed in the hands of a receiver. To the same effect is the opinion of the Supreme Court of the United States in *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132. In that case the city of Litchfield had issued bonds which were void under the Constitution and with a part of the proceeds of the bonds and other funds had constructed a system of waterworks for the city. The land on which the works were constructed was bought before the bonds were issued. The streets through which the pipes were laid were public property then owned by the city, and much of the expense of the construction of the waterworks was paid by taxation or other resources of the city. The plaintiffs were unable to identify the property which represented the money they had paid, so that it could be reclaimed and delivered without taking other property or injuring other persons or interfering with their rights. The bill was dismissed.

The case before us is distinguishable from these cases. The money which the plaintiffs

paid is distinctly traced into the schoolhouse, the lot, and furniture, and no other money went into them. This property can be reclaimed, without taking any other property with it or injuring any other person or interfering with his rights. In *Chapman v. Douglas County*, 107 U. S. 848, 2 Sup. Ct. 62, 27 L. Ed. 373, land was conveyed to a county for a poorhouse. The county had no authority under the law to buy the land. It was held that the county must give up the land to the vendor, when it failed to comply with its contract; in other words, that it could not keep the land which it had received under the illegal contract. In *Geer v. School District*, 111 Fed. 682, 49 C. C. A. 539, it was held by the Circuit Court of Appeals of the United States of the Eighth Circuit, that, where a school district issued bonds without authority and used the proceeds to pay a debt which it owed, the bondholders were entitled to be subrogated to the rights of the creditors whose debts their money had paid; the bonds being void. The same principle was followed by the same court in *Kearny County v. Irvine*, 126 Fed. 689, 81 C. C. A. 607, where a county issued bonds and used the proceeds to pay off the outstanding county warrants which it was authorized to issue. The bonds being void under a constitutional provision similar to ours, it was held that the bondholders were entitled by subrogation to the rights of the holders of the county warrants which had been paid off with the proceeds of the bonds.

No liability, direct or indirect, may be imposed upon the school district under the bonds in question. It is not liable on the bonds, nor can it be made liable by indirection in any way. But, if we ignore the bond transaction altogether, what have we? The district received \$4,000 from the bondholders. The bonds being void, the district should have returned the money to the bondholders. If the bondholders had learned of the invalidity of the bonds while the district still had the \$4,000 in its treasury which they had paid to it, manifestly a court of equity would have required the district to pay back their money to them. It was money obtained by a mutual mistake. While under the Constitution no liability would attach to the district for the money if it had lost it, or if it had spent it and the fund could not be identified and followed, where it may be followed and identified, there is no more reason why property which represents the fund should not be returned than there would be for not returning the money, if it had been placed in a bag and the district had the bag locked up in its safe. The purpose of the Constitution is not to enrich municipalities at the expense of innocent people who deal with them, and when they repudiate their bonds they must act honestly. A loss must not be placed upon the district; but, when justice may be done

without inflicting any loss upon the district, equity will lay hold of the conscience of the parties and make them do what is just and right. To illustrate: If, while the common-law disability of coverture was in force, a married woman had borrowed \$400 and given her note for it, and, when sued on the note, had pleaded her coverture, if she still had the \$400 in bank, equity would have required her to surrender the money, or if she had invested the \$400 in a horse, and the fund could be clearly identified, equity would compel her to surrender the horse. In other words, as has been held, coverture is a shield, not a sword, and a married woman is never allowed to use her coverture to enrich herself at the expense of others. *Chilton v. Braiden*, 2 Black, 458, 17 L. Ed. 304. The same rule has been applied in the case of infants. *Ison v. Cornett*, 75 S. W. 204, 25 Ky. Law Rep. 386, and cases cited.

Section 2353, Ky. St. 1903, is relied on for appellants: "When a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person." This statute was not intended to affect the equitable doctrine that equity would follow a fund and compel restitution as long as it could be identified and followed. It was not the aim of the statute to enable one person to keep the money of another, and thus be enriched at his expense, simply because, instead of holding the money in specie, he has invested it in a tract of land. The true owner of a fund may in equity pursue it, where it is clearly identified, equally whether it has been transmuted by the holder into personalty or realty. Properly, under the statute, he should not be adjudged the land, but a sale of it to satisfy his claim. But in this case appellants are not prejudiced by the form of the judgment, as the property is not of value more than the fund. We see no reason why the right to follow a fund should not be applied against municipalities under the clause of the Constitution above quoted, just as it is against other persons obtaining the property of another under a void contract, where the fund may be identified and is separated from other property of the municipality. The present holders of the bonds stand by subrogation in the shoes of the original purchasers from whom they bought, and under the Code the action may be maintained in the name of the real party in interest. The judgment complained of does justice between the parties, and we see no reason for disturbing it. Judgment affirmed.

CAMPBELL et al. v. ASHER.

(Court of Appeals of Kentucky. Sept. 23, 1905.)

1. CONVEYANCES — HUSBAND AND WIFE — RIGHTS OF HER CHILDREN AS HEIRS.

A deed executed to a husband and wife subsequent to the statute abolishing resulting trusts gives to each an undivided half interest in the land as tenants in common, without reference to what part of the consideration each of them paid, and without reference to the understanding of the husband accepting the deed; and their children take an undivided half as heirs of the wife on her death, and share with the children of the husband by a second wife on his death in the other half.

2. HOMESTEAD—PARTITION — DETERMINATION OF INTEREST OF INFANTS.

In partition, the fee-simple interest of infants should be laid off with respect to their rights, given by Ky. St. 1903, § 1707, to occupy the homestead of their deceased father during their minority, and if the homestead is less than their fee-simple interest the latter should be made to include the former, and if the homestead is of greater value the fee-simple interest should be included in the homestead interest.

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by T. J. Asher against Milburn Campbell and others. From a judgment for plaintiff, defendants appeal. Reversed.

Logan & Jeffries, for appellant Milburn Campbell. Calvin Hurst, for appellants Adeline and Clementine Campbell.

O'REAR, J. Prior to September 3, 1857, Mount Pursfull, who owned a considerable quantity of land on the Cumberland river in what was then Harlan county, this state, placed his son, H. C. Pursfull, in possession of a portion of it, under some kind of an arrangement not clearly disclosed by the record, whether it was a gift or a sale. Afterward Mount Pursfull also placed in possession of an adjoining tract his son-in-law, Wilkerson Campbell, and the latter's wife, Martha Campbell. Wilkerson Campbell having bought the tract of H. C. Pursfull, Mount Pursfull on September 8, 1857, made a conveyance of both tracts by the following writing:

"Know all men to these presents shall come greeting that I Mount Pursfull and Mary his wife both of the county of Harlan and state of Kentucky, have this day given and bequeathed unto Wilkerson Campbell and Martha his wife a certain tract or parcel of land supposed to be 500 A., be the same more or less, and lying and being in the Co. and state aforesaid on the waters of Cumberland river and bounded as follows, to wit: Beginning near the head of a branch about a quarter of a mile below said Camp's house, thence down the branch to Cumberland river, thence up the river with the meanders thereof so as to include the island to the lower end of Mount Pursfull field below the mill, thence south to Mount

Pursifull's back line, thence with the same to the beginning. The condition of the above obligation is such that the aforesaid Wilkerson Campbell bought a part of this boundary from Henry C. Pursifull for the sum of \$350, and the said Henry C. Pursifull paid \$100 back to Mount Pursifull and I the said Mount Pursifull do charge the said Campbell \$300, to be discounted out of their part of my estate at my death, and I the said Mount Pursifull and Mary my wife do make to the said Wilk Campbell and Martha his wife a good lawful deed to said tract of land and will forever warrant and defend the same against all persons claiming or to claim the same unto the said Campbell and Martha his wife their heirs forever. In testimony whereof we have here unto set our hands and affixed our seals this the 8th day of September, 1857.

"[Signed]

Mount Pursifull.
"Mary Pursifull."

Martha Campbell had born to her four children, two of whom died in infancy. She died before her husband, Wilkerson Campbell, leaving two children, one of whom, Milburn Campbell, is an appellant herein. Wilkerson Campbell married again, and had issue to the number of eight living children. After his death some of those children conveyed their interest in the land above described to T. J. Asher, who has conveyed his interest to appellant Miracle. This suit was brought by Asher against Milburn Campbell (who bought out the interest of his whole brother James) and two infants, children of Wilkerson Campbell by his last wife (Asher having bought the interest of all the other heirs, and receiving conveyances therefor), for a partition of the land. Asher claimed in the petition that each heir was entitled to an undivided one-tenth of the whole tract. Milburn Campbell contended, on the contrary, that his mother, Martha Campbell, took one moiety of the tract embraced by the deed above set out, and her husband, Wilkerson Campbell, took the other; that he, Milburn Campbell, and his whole brother, inherited the whole of their mother's moiety upon her death, subject to their father's estate as tenant by the curtesy, and that as heirs at law of the father they took an undivided one-tenth each in the latter's moiety of the land.

The court heard extraneous evidence as to how the land was paid for and claimed, but we think this was all beside the issue in the case. Whatever may have been Wilkerson Campbell's intention, or whatever may have been his understanding concerning what he was buying, the fact remains that he accepted a deed and put it to record, which conveyed the land to him and to his wife jointly in fee as tenants in common. After nearly 50 years it is too late to attack this deed for the first time. Nor does it matter that Wilkerson Campbell paid more than half of the consideration. Resulting trusts hav-

ing been abolished by statute prior to the making of this deed, the grantees took each an undivided one-half interest in the land conveyed by it. The judgment of the circuit court was to the effect that the whole of the land descended to the heirs of Wilkerson Campbell in equal parts, which, as will be seen from the foregoing, was an erroneous conclusion. Milburn Campbell's interest was six-tenths of the whole tract, subject to the right of the infants to occupy the homestead during their minority.

It is complained that the judgment was furthermore erroneous in directing the commissioners to partition the land to allot the dwelling house and curtilage to the infants, without respect to their value. Under the statute (section 1707, Ky. St. 1903), the infant children of Wilkerson Campbell were entitled to occupy his homestead during their minority. Their fee simple interest should have been laid off with respect to this right; that is to say, if the homestead was less than their fee simple interest, the latter should have been made to include the former. On the other hand, if the homestead was of greater value than that fee-simple interest, the latter should have been included in the former.

The judgment of the circuit court is reversed, and cause remanded, with directions to enter a judgment in conformity with this opinion.

KERR et al. v. LONG'S EX'RS.

(Court of Appeals of Kentucky. Sept. 26, 1905.)

EXECUTORS—CONVEYANCE OF REALTY—POWER UNDER WILL.

A conveyance in fee by the widow and children of a testator devising all his property to the widow, and declaring that she shall apply so much thereof as in her discretion she may deem necessary to the maintenance of the family, and that the residue shall be divided among the children, and constituting her executrix, with full power to convey in as full a manner "as I could do myself, if living," made to a creditor of the testator in settlement of his claim, passes a good title in fee to the creditor.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by Dennis Long's executor against R. C. Kerr and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Pirtle & Trabue and C. H. Shield, for appellee.

NUNN, J. In 1892 Erasmus Gripp died in the city of Louisville, Ky., and left a will dated April, 1871. This will was duly probated. We copy those provisions of the will necessary for a solution of the questions involved on this appeal: "(1) I give, devise, and bequeath unto my beloved wife, Henrietta, all my property, real, personal, and mixed, whatsoever. (2) That she shall ap-

ply so much thereof as in her discretion she may deem necessary to the maintainance of my family, and at her death the residue, if any, shall be equally divided amongst my children or their heirs. And to effectuate this my intention, I do hereby trust my said wife, whom I do hereby constitute and appoint executrix of this my last will and testament, full power to dispose of my real estate in fee simple or otherwise in as full and large a manner in every respect as I could do myself, if living."

It appears that Gripp at his death was indebted to one Dennis Long in the sum of near \$59,000. Long died in 1893. His son, George J. Long, became his executor, and he instituted an action for the settlement of Gripp's estate, and another action on the claims, in which he sought a personal judgment against the personal representative of Gripp, in which he obtained an attachment against the property. Soon after these two actions were instituted the executor of Long, the executrix of Gripp, and the children and heirs of Gripp, who were all adults at the time, entered into a settlement and compromise of all matters between them. By this compromise Dennis Long's executor accepted and received in satisfaction of all claims due the estate of his testator the pieces of real estate involved in this action and one other small piece, and the executrix of Gripp, as such and in her individual capacity, together with all the children and their wives and husbands, joined and executed a deed of conveyance to Dennis Long's executor for the recited consideration of \$50,000 and more. It appears from this record that Long's executor accepted, in satisfaction of the claims due his testator's estate, property not worth exceeding one-fourth the amount of the claim. Upon the execution of this conveyance Long's executor dismissed each of his actions, settled in full. It is not intimated in this record that the claims of Dennis Long's estate were other than bona fide and just claims, and it appears that, if his suit had progressed to final judgment and a forced sale of the property of Gripp, it would have taken all of the estate of Gripp and more, and nothing would have been saved to the Gripp estate. In the year 1900 Long's executor sold a piece of this property, situated on Main street in Louisville, Ky., for something more than \$10,000, to Charles B. Nau, Fred E. Zeigler, and John Bender. The purchasers having failed to pay, the executor, on the 12th of June, 1902, instituted this action to enforce his lien for the unpaid price, to wit, \$10,000, with its interest. The court adjudged that Long had a lien for that sum, and directed a sale of the property. At a sale under this judgment the appellant R. C. Kerr bought one-half of the lot, and appellant Debrovy bought the other half; each paying in cash \$25. They failed and refused to execute bond to the commissioner for the balance of the purchase price. The facts

were reported by the commissioner to the court, and it issued a rule against the appellants to show cause why they had failed to execute such bond or pay the purchase price. The effect of their response was that Henrietta Gripp had no power, under her husband's will or otherwise, to convey this land for the purpose of paying debts, and therefore the deed of herself and her children did not pass any interest in this property, except her individual interest in the trust estate.

The testator, Erasmus Gripp, did not intend, and, if so, he did not have the power, to dispose of his property by will so as to prevent the collection of his just debts out of his estate. The will authorized Henrietta Gripp to sell and convey in fee simple this property as fully as the testator could have done, if living. In compliance with this power, and for the purpose of saving to herself and children a remnant of this estate, she, together with her children, all adults, executed the conveyance. We are of the opinion that this deed passed a good title to Dennis Long's executor.

The court did not err in adjudging the response of appellants insufficient. Wherefore the judgment is affirmed.

BRITE et al. v. GUY.

(Court of Appeals of Kentucky. Sept. 27, 1905.)

1. PARTNERSHIP—BORROWING MONEY FOR FIRM PURPOSES—LIABILITY.

Money was borrowed by a firm for its use and within the scope of the partnership authority. The transaction was made by one partner, with the knowledge and acquiescence of a co-partner. *Held*, that the copartner was liable on the note given for the loan.

2. FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE—EVIDENCE—SUFFICIENCY.

Evidence in a suit to set aside a conveyance as fraudulent towards creditors examined, and *held* to charge the grantee with notice of the grantor's fraudulent purpose to defeat his creditors.

Appeal from Circuit Court, Allen County.
"Not to be officially reported."

Action by C. J. Guy against Walter Brite and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Wm. Cromwell, Jno. M. Wilkins, and Oliver & Gilliam, for appellants. W. C. Goad, for appellee.

HOBSON, C. J. Appellant Walter Brite was a member of the firm of Ham & Co. The firm executed a note for \$500 to appellee, C. J. Guy, for money borrowed of him. The firm failed, and this action was brought by Guy against Brite to recover on the note. An attachment was taken out and levied on two tracts of land as the property of Brite. Afterwards an amended petition was filed, in which it was charged that just before the suit was brought Brite had conveyed to his brother-in-law, Lovell Morehead, one of the tracts of land for the pretended considera-

tion of \$2,000, and had mortgaged the other tract to his attorneys to secure a fee of \$1,000; that the deed to Morehead had been lodged for record since the suit was filed; and that it was fraudulent and made for the purpose of defeating the claims of his creditors. The circuit court on final hearing set aside the deed, gave judgment on the note, and ordered a sale of the land to satisfy the debt. From this judgment Brite and Morehead appeal.

Brite contested his liability on the note, but the proof shows that the money was borrowed by the firm for the use of the firm, and that the borrowing of the money was within the scope of the partnership authority. The loan was made by Ham, but the proof strongly tends to show that Brite knew of it and acquiesced in the borrowing of the money. As to the deed, both Brite and Morehead testify that it was made in good faith, and that Morehead in fact paid \$2,000 for the land. It is evident from the record that Brite made the deed to Morehead after the firm of Ham & Co. had failed, and after the creditors of the firm were asserting their claims against him, and that he made the deed for the purpose of defeating his creditors. It is insisted for Morehead that he is a purchaser in good faith, and that he had no notice of the fraudulent purpose of his vendor. We cannot concur in this view. They were brothers-in-law. Brite spent much of his time at Morehead's house. After the deed was made he made his home there. Up to the time the deed was made he lived on the land. Morehead knew of Brite's financial situation, and he knew that his creditors were pressing him. Brite says that he now has in his possession the \$2,000 paid to him by Morehead, and that he has not deposited it in bank or invested it in anything; and Morehead says that he paid the \$2,000 to Brite without drawing any of it out of bank, and paid it in cash. His statements as to where he got the money are vague, and neither he nor Brite explains satisfactorily why the money was paid in specie, or satisfactorily explains why Morehead had kept this amount of money in his house. Under all the evidence we cannot disturb the chancellor's finding, as the conduct of both the parties indicates that, if Morehead paid Brite the \$2,000, he paid it distinctly understanding why Brite wanted the \$2,000 paid to him in specie.

Judgment affirmed.

FRENCH v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 27, 1905.)

1. HOMICIDE—EVIDENCE—INSTRUCTIONS.

Where, on a trial for voluntary manslaughter, defendant testified that, when assaulted by decedent, he had his knife open, about to cut a string around a bundle he held, and that when decedent struck at him he threw up his arm to ward off the blow, thereby accidentally in-

flicting the fatal wound, it was reversible error to fail to instruct that, if the jury believed his statement, they should acquit him, though the court correctly charged on self-defense.

2. CRIMINAL LAW—TRIAL—DUTY TO INSTRUCT. It is reversible error for the court, on a trial for crime, to fail to instruct, though not requested, on the whole law governing the case.

Appeal from Circuit Court, Jefferson County, Criminal Branch.

"Not to be officially reported."

Charles French was convicted of voluntary manslaughter, and he appeals. Reversed.

James W. Garrison, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

BARKER, J. The appellant, Charles French, was indicted by the grand jury of Jefferson county, charged with the offense of voluntary manslaughter, committed by killing Edward Lloyd in sudden heat and passion or in sudden affray. A trial resulted in his conviction as charged in the indictment, and his punishment, fixed by confinement in the penitentiary for 10 years, of which he is now complaining. It is not necessary to enter into a detailed statement of the facts. French and Lloyd met by chance on the sidewalk on Green street, between First and Second, in Louisville, Ky., and engaged in what appeared to be a fist fight over some trivial matter. After the combatants were separated, it was found that Lloyd was cut; the carotid artery being severed. From this wound he died. We think there was sufficient evidence to justify the submission of the case to the jury, and that the court properly overruled the motion of appellant for a peremptory instruction to the jury to find him not guilty.

There is substantially but one question in the record which merits our attention. The court gave instructions on voluntary and involuntary manslaughter, self-defense, presumption of innocence, and reasonable doubt. The appellant, on his own behalf, testified that, when assaulted by Lloyd, he had his knife open in his hand, about to cut the string around a bundle which he held; that when Lloyd struck at him he threw up his arm to ward off the blow; that in some way, not fully explained, Lloyd's own blow drove the knife into his own neck, thereby inflicting the wound of which he died. The appellant was most positive in his declaration that he had no intention of cutting Lloyd, and did not do so, except in the accidental way thus explained. The court gave no instruction to the jury that, if they believed this statement to be true, they should find the defendant not guilty. Appellant was entitled to this instruction. The instruction as to self-defense does not cover the accidental killing. Blackstone, in his Commentaries, vol. 4, p. 182, divides excusable homicide into two classes, either per infortunium, being misadventure, or se defendendo, upon a principle of self-preservation. And he defines homicide by

misadventure as "where a man, doing a lawful act, without any intention of hurt, unfortunately kills another." In Clark's Criminal Law, § 67, the rule is thus stated: "So, also, if a person accidentally kills another in mutual combat, where he is voluntarily fighting, he is guilty of manslaughter, as the fighting is an unlawful act; but if he does not wish to fight, and is merely defending himself, as the law permits him to do, he is excused on the ground of accident." In Kentucky Criminal Law and Procedure, vol. 1, § 16, Roberson says: "Where any accidental mischief results from the proper performance of a lawful act, the party doing the act is excused from all guilt. The ground of this exemption is the absence of a criminal intent. If the accident happen in the doing of an unlawful act which is morally wrong, *malum in se*, then there is no exemption. Thus, if two men are engaged in a mutual fight and one accidentally kills the other, the one doing the killing is guilty of manslaughter, if he was voluntarily fighting, because the fighting is an unlawful act; but if he did not desire to fight, and was merely defending himself, then he is excused on the ground of accident." In the case of Howard v. Commonwealth, 81 S. W. 689, 26 Ky. Law Rep. 465, this court, speaking through Judge Nunn, said: "Appellant's defense was that the discharge of the gun which wounded his uncle was not intended by him, but was accidental, and two witnesses stated facts which tended to show the truth of appellant's contention. This court is of the opinion that appellant was entitled to an instruction directing the jury to acquit him, if they believed from the evidence the shooting and wounding was accidental and unintentional." To the same effect is Reg. v. Knock, 14 Cox, Cr. Cas. 1. It is true the court's attention was not called to this question by the appellant or his counsel; but we have so often announced the rule that it is the duty of the trial court in a criminal case to give the whole law, and that a failure to do so, even when unasked, is reversible error, that it is unnecessary to here cite the cases. If the death of Edward Lloyd was the result of an accident, as stated by the appellant, the latter was not guilty of any crime, and it was the duty of the court to so instruct the jury.

The appellant was entitled to an instruction upon the only defense he claimed to have. Wherefore the judgment is reversed for proceedings consistent herewith.

LEE v. TRUSTEES OF SHEPHERDSVILLE GRADED COMMON SCHOOL DIST. NO. 4.

(Court of Appeals of Kentucky. Sept. 27, 1905.)

SCHOOL DISTRICTS—ELECTION OF TRUSTEES—VALIDITY.

Ky. St. 1903, § 4471, provides that the trustees of graded common school districts shall

be divided into three classes, to hold office for one, two, and three years, respectively, "or until their successors are elected and qualified," and on the first Saturday in May following the first election, and each year thereafter, two trustees shall be elected to succeed two trustees retiring from office. At the election in 1905 all the trustees were elected, as there had been no election since the election of 1902, so that the term of all the trustees had expired. *Held*, that the trustees were properly elected, and authorized to submit to a vote of the electors of the district the question of the issuance of bonds in the manner provided by section 4481.

Appeal from Circuit Court, Bullitt County.
"Not to be officially reported."

Action between W. T. Lee and the trustees of the Shepherdsville graded common school district No. 4. From a judgment for the latter, the former appeals. Affirmed.

J. R. Zimmerman, for appellant. Chas. Carroll, for appellee.

BARKER, J. The question submitted on this appeal is the validity of \$4,000 of bonds issued by the appellees for the purpose of purchasing a lot and erecting a school building thereon in their school district. The circuit court rendered a judgment in favor of the validity of the bonds, from which appellant has appealed.

The bonds in question were issued in pursuance of an election held for the purpose of submitting to the voters of the district the question as to whether or not they should assume the indebtedness, with the result that a lawful majority authorized the trustees to issue the bonds. The evidence is all contained in an agreed statement of facts, which shows conclusively that all of the requirements of section 4481 of the Kentucky Statutes of 1903, which regulates the matter, were scrupulously complied with, and it is therefore not necessary to recite the provisions of the statute or of the agreed facts. So far as we are able to understand, the only real question made by appellant is whether or not the trustees were lawfully elected.

Section 4471 of the Kentucky Statutes of 1903, provides that the trustees of graded common school districts shall be divided by lot into three classes, to hold their offices for one, two, and three years, respectively, or until their successors are elected and qualified; "the two trustees selected for the shortest term to retire from office on the second Saturday in May following their election, and the two selected for the second shortest term, and the two selected for the longest term, shall serve one year and two years, respectively, after the second Saturday in May following their election. On the first Saturday in May following the first election of trustees under this act, and the first Saturday in May of each year thereafter, there shall be elected as trustees of common schools are elected two trustees of the said graded common school district, who shall qualify on the second Saturday of the month of their

election, to succeed the two trustees retiring from office, and to serve three years, and until their successors are elected and qualified. If, at any time, there should be a vacancy in said board, the same shall be filled by election by the remaining members, and the person elected to fill such vacancy shall hold his office until the next regular election, when his successor shall be elected to fill out the unexpired term." By the agreed statement of facts it appears that "on the 6th day of May, 1905, an election for trustees of said graded common school district was held at the school house of said graded school district in Shepherdsville, Ky.; said election continuing from 1 o'clock p. m. to 4 o'clock p. m. on said day. At said election the following persons were voted for and elected trustees of said graded school district, namely: S. B. Simmons, O. A. Lutes, W. N. Griffin, C. F. Troutman, and C. L. Crom—which election was properly certified by the officers thereof, and the election sheet so certified was returned to the chairman of said board of trustees on May 6, 1905. There had been no previous election of trustees since the ——— day of May, 1902, and at time of election in May, 1905, the term of all trustees had expired."

It is now said that the election of the trustees who ordered the submission of the question of the issuance of the bonds was illegal, because they were all elected at once, instead of by classes annually, as regularly they should have been. This position is unsound. The terms of all of the old officers had expired, and they were holding over until the election of their successors. In the very nature of things, in order to meet the condition with which the district was confronted, all of the trustees must be elected at once, unless a part should be allowed to hold over still further for the want of an election. This very ques-

tion arose in the case of Louisville Industrial School of Reform v. City of Louisville, 12 S. W. 710, 11 Ky. Law Rep. 567. Under the charter of the Industrial School of Reform the board of managers, consisting of nine, were required to divide themselves into three classes of three each, "the term of one class to expire in one year, the second in two years, and the third class in three years, and in each year thereafter three managers should be elected. This mode of election continued until May, 1885, and from that time until these last managers were elected, on the 2d of May, 1889, no election was held. The general council failed to elect for the years 1886, 1887, and 1888, and when the present appellees were elected the term of office of all the old managers had expired, and all were holding over. So at the election held on the 2d of May, 1889, the general council had to determine whether an election of all nine managers should be had, or an election of only three, following with an election of three members each year." It was held that it was the duty of the city to elect the whole board. There is less question as to the regularity of the election of the trustees in the case at bar than of the managers in the case cited. In that there were two sets of managers, each claiming to be the lawful board. In the case at bar only the appellees claim to be the lawful incumbents of the offices in question. Elections to fill such vacancies as occur in the board were regularly held in pursuance of the provision of section 4471 of the Kentucky Statutes of 1903.

A careful examination of the record convinces us that the requirements of the law in reference to the issuance of the bonds involved were faithfully carried out, and there is no substantial question as to their validity. Wherefore the judgment is affirmed.

FITZPATRICK v. VINCENT.

(Court of Appeals of Kentucky. Oct. 6, 1905.)

1. VENDOR AND PURCHASER—ACTION FOR PURCHASE MONEY—PLEADING—CONSTRUCTION OF ANSWER—LIMITED DENIAL.

In an action on a note given for the price of land, in which the petition alleged that plaintiff had made and the defendant accepted a deed with general warranty, an answer denying that plaintiff had made defendant a good title, or that the defendant had ever accepted such deed or title, amounted merely to a denial that plaintiff had made defendant a good title, and not to a denial that he had accepted a warranty deed.

2. APPEAL—PRESUMPTIONS—PLEADING—FAILURE TO REPLY.

Where, in an action on a note given for the price of land, there was no reply to an answer alleging that the sale was champertous, but both parties took proof on that issue and the case was submitted on the merits, it should be presumed on appeal that the answer was taken as controverted, and a judgment for plaintiff should not be reversed.

Appeal from Circuit Court, Rowan County.

"Not to be officially reported."

Action by L. S. Vincent against W. W. Fitzpatrick. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. E. Clark, for appellant. Jno. W. Ray, for appellee.

HOBSON, C. J. L. S. Vincent sold to W. W. Fitzpatrick a tract of land. For part of the purchase money he took a note for \$150. The note contained these words: "This note is for the fifteen acres in dispute and is not to be paid until the said dispute is settled." The note was dated November 21, 1891. On November 23, 1892, Fitzpatrick paid \$100 on the note, and, having failed to pay the remainder, Vincent filed this suit against him on February 7, 1894, to enforce the lien retained in the deed. The plaintiff alleged in his petition that the dispute named in the writing had been fully settled, and that he had made the defendant a deed for the land with general warranty, including the 15 acres, and that the defendant had accepted the deed. The defendant filed an answer in which he denied that the dispute as to the 15 acres of land had been settled. The answer then contains these words: "He denies that the plaintiff has made him a good title to said 15 acres of land, or that he has ever accepted such deed or title."

A pleading must be taken most strongly against the pleader. The words "such deed or title" must refer to the good title mentioned in the preceding clause. There is no denial of the allegation of the petition that the plaintiff made the defendant a warranty deed for the land, and, construing the answer against the pleader, it simply amounts to a denial that the plaintiff made the defendant a good title to the land. The defendant in an amended answer pleaded that the

land at the time he bought it was in the adverse possession of one Jeff Withrow, and Withrow was made a defendant to the suit. Withrow also alleged that he was in the actual possession of the land at the time the plaintiff sold it to the defendant. During the progress of the case, however, it appeared that the defendant had bought a tract of land from Withrow, and that Withrow had made him a deed for a boundary of land which included the 15 acres, so that he undoubtedly, at the trial, had title to the land, either by the deed that Withrow had made him or by the deed from the plaintiff.

The proof failed to show that there was any such actual possession of the land by Withrow at the time of the defendant's purchase from the plaintiff as to bring that sale within the champerty statute. It is insisted, however, for the defendant, that there was no reply to his answer pleading that the sale was champertous. This is true; but both parties took proof on the issue without objection, and appear to have submitted the case on the merits. There was no objection that no reply had been filed, and no motion for a judgment on the pleadings. After judgment on the merits, where the parties treated the issues as made up, it must be presumed that the amended answer was taken as controverted of record, and that the order by some oversight was not entered. At any rate, the judgment will not be reversed for a defect of the pleadings, where the objection was not raised in the circuit court. The defendant did not show what he was out for the 15 acres. The dispute as to the 15 acres was undoubtedly settled, and on all the evidence we see no reason for disturbing the finding of the chancellor on the facts.

Judgment affirmed.

COMMONWEALTH v. REDMAN.

(Court of Appeals of Kentucky. Oct. 6, 1905.)

1. INTOXICATING LIQUORS—LICENSES—NOTICE OF APPLICATION.

Ky. St. 1903, § 4203, providing that the county court shall not grant a license to sell liquors until 10 days' notice shall be given, by posting a notice at the door of the courthouse and at least at four public places in the neighborhood where the liquor is to be sold, authorizes the county court to grant licenses only if the proper notice has been given; and a license may be revoked where such notice was not given.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 65.]

2. SAME—POSTING OF NOTICES OF APPLICATION—SUFFICIENCY.

On the issue of the giving of the notice required by Ky. St. 1903, § 4203, of an application for a license to sell liquors by posting a notice at the courthouse door and at four public places in the neighborhood where the liquor is to be sold, citizens of the neighborhood testified

that they saw no notice, though they were looking out for one. The applicant testified that he posted four notices, 10 days before the application, by hanging one on a tack on the front of his house, and one on a tree on the opposite side of the road, and two on telegraph poles about 300 yards away. No one saw the notice hung on the front of the house or the one put up on the tree. It was shown that the applicant went out after dark and put up the notices. *Held*, that the notices were not posted in compliance with the statute, and the court was authorized to revoke the license.

Appeal from Circuit Court, Jefferson County, Criminal Branch.

"To be officially reported."

Proceedings by the commonwealth against Lemon Redman for the revocation of a liquor license. From a judgment of the circuit court, reversing a judgment of the county court revoking the license, the commonwealth appeals. Reversed.

Ohandler & Norman, R. W. Bingham, and J. M. Huffaker, for the Commonwealth. Forcht & Field, for appellee.

HOBSON, C. J. Appellee, Redman, on March 31, 1905, was granted a license by the Jefferson county court to keep a tavern at Taylor Boulevard and New Pleasure Ridge Roads, in Jefferson county, with the privilege of selling spirituous, vinous, and malt liquors. On April 25th the county attorney served notice on Redman that at the next term of the court, commencing not less than five days after the service of the notice, he would move the court to revoke the license, on the ground that Redman was not properly equipped to keep a tavern as required by law and that he had illegally obtained the license. The motion was entered, the parties appeared, and considerable testimony was heard on both sides. The county court upon the evidence revoked the license, and the defendant appealed to the circuit court. In that court the judgment of the county court was reversed, and the commonwealth has appealed to this court.

The proceedings were under the following provisions of the statutes:

"All licenses mentioned in this article except licenses to sell by retail spirituous, vinous or malt liquors, shall be granted by the county clerk; and license to sell by retail spirituous, vinous or malt liquors shall be granted by the county court; but the county court shall not grant a license to sell spirituous, vinous or malt liquors until ten days' notice shall be given by posting a written or printed notice at the door of the courthouse, and at least at four public places in the neighborhood where the liquor is to be sold; and if the majority of the legal voters in the neighborhood shall protest against the application it shall be refused. The county court in each instance shall determine what constitutes the neighborhood. Nor shall

such license be granted to any person of bad character, or who does not keep an orderly, law-abiding house." Ky. St. 1903, § 4203.

"License to keep a tavern outside of an incorporated city or town shall be granted only to persons who are prepared with houses, bedding, stabling and provender sufficient to accommodate the public, and shall not be granted to any one unless the keeping of a tavern at the place proposed is necessary for the accommodation of the public, nor until the applicant shall take an oath, in open court, that he in faith intends to keep tavern for the accommodation of the public." Ky. St. 1903, § 4206.

"Any tavern-keeper who shall violate the provisions of his bond, or any tavern-keeper, merchant, distiller or druggist who shall violate any provision of this article, shall forfeit his license; and when the county attorney shall have reasonable grounds to believe either upon his own knowledge or from the oath of two credible witnesses of such violation, he shall notify the alleged offender to appear before the next term of the county court, commencing not later than five days after the service of the notice to show cause why his license should not be cancelled. On the trial of the case, the court shall enter an order cancelling the license or acquit the defendant, as the proof may authorize." Ky. St. 1903, § 4208.

We deem it necessary to consider only one of the questions discussed by counsel, and that is the question of notice. It will be observed that the statute requires that license shall not be granted until 10 days' notice shall be given by posting a written or printed notice at the door of the courthouse and at least four public places in the neighborhood where the liquor is to be sold, and if the majority of the legal voters in the neighborhood shall protest against the application it shall be refused. The purpose of the statutory provision is that the license shall not be granted in any neighborhood contrary to the wishes of the majority of the legal voters, and to give them an opportunity to protest against the granting of the license the 10 days' notice is required to be given. The notice lies at the base of the proceeding. If the notice was not given, the county court was without authority to grant the license, and, if it did grant the license, it had authority to revoke it when it was shown that the proper notice had not been given. Otherwise the applicant could defeat the purpose of the statute, and, when he had once gotten the license without notice, could continue to sell contrary to the wishes of the majority of the legal voters of the neighborhood, although by failing to give the proper notice he had prevented them from protesting.

On the question of notice, the proof for the commonwealth by a number of citizens of the neighborhood was that they were op-

posed to the granting of a license to sell liquor at that point, and had defeated other applications; that they had understood that Redman was going to apply for license, and were looking out for the notices that they might oppose the application, but saw none, and had no notice of the application until the license was granted. On the other hand, Redman testified that he posted four notices 10 days before the application at public places in the neighborhood. He said that he hung one on a tack on the front of his house, and also put up one with one tack on a tree on the opposite side of the road; that he put up two others about 300 or 400 yards away on telegraph poles, one north and the other south of the house. These last two notices seem to have been put up in the same way, and they were shown to have remained up for some time; but no witness in the case ever saw afterwards the notice that was hung on a tack on the front of the house, or the notice which was put up with one tack on the tree on the side of the road. The proof by Redman also shows that he went out after dark and put up the notices. His conduct shows that he understood that his application would be resisted, and that he was trying to put up notices that would not give notice. In order to comply with the statute the notice must be substantially posted; that is, it must be posted as other notices of like character are usually posted. It must be tacked up securely. It must be posted in good faith, and at four public places in the neighborhood. In the case at bar the posting of the notices was a sham, intended to defeat the purposes of the statute, and the county court properly revoked the license.

Judgment reversed, and cause remanded for a judgment as herein indicated.

MOODY v. CITY OF WILLIAMSBURG.

et al.

(Court of Appeals of Kentucky. Sept. 27, 1905.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—AUTHORITY TO ENACT—STATUTORY PROVISIONS.

Ky. St. 1903, c. 47, prescribing a schedule of fees and costs in judicial proceedings; section 3637, subsec. 5, conferring on councils the right to impose fines for violation of ordinances; and section 3623, providing that the city attorney shall receive a compensation to be fixed by ordinance by the council—do not authorize a municipality to adopt an ordinance providing that, when a judgment for a fine is less than \$10, a fee of \$2.50 for the city attorney shall be taxed as costs.

2. SAME—INVALIDITY IN PART—EFFECT ON VALID PART.

The provision in a municipal ordinance that, when a judgment for a fine shall be less than \$10, a fee of \$2.50 for the city attorney shall be taxed as costs, is severable from the provisions that he shall receive a percentage

on judgments for fines rendered for the benefit of the commonwealth, and the invalidity of the former provision does not affect the validity of the latter.

Nunn and Paynter, JJ., dissenting.

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Prohibition by William Moody against the city of Williamsburg and another to test the validity of a municipal ordinance. From a judgment for defendants, plaintiff appeals. Reversed.

C. W. Lester, for appellant. Sharp & Siler, for appellees.

BARKER, J. Williamsburg, Ky., is a city of the fifth class. Among the ordinances ordained by its board of council is No. 56, fixing and regulating the compensation of the city attorney, prescribing that he shall receive 50 per cent. of all judgments for fines and forfeitures rendered in the police court, either for the benefit of the commonwealth or the city, "except that, when a judgment is for less than \$10, a fee of \$2.50 shall be taxed as costs, and belong to him."

The appellant, William Moody, was tried in the police court of Williamsburg for the offense of drunkenness, and adjudged to pay a fine of \$1 and the cost of the prosecution; the whole amounting to the sum of \$6.35, which included the sum of \$2.50 city attorney's fee as provided in the ordinance. This judgment he replevied, and was released from custody. The replevin bond being about to fall due, he instituted this action to test the validity of the ordinance in question, in so far as it authorized the imposition of the sum of \$2.50 for the benefit of the city attorney. This proceeding seems to be authorized by section 3639, Ky. St. 1903, which provides that "the validity or constitutionality of any city ordinance, by-law or rules of the fifth-class cities, shall be tried by a writ of prohibition from the judge of the circuit court in which said city is located, with right of appeal by either party to the court of appeals." With out setting forth in detail the allegations of the petition, it is sufficient to say that the pleading states a cause of action, if the question of law sought to be maintained by appellant is sound.

Police courts of cities of the fifth class are established by section 3651, which confers jurisdiction upon them concurrent with justices' courts for all actions and proceedings, civil and criminal, except that in criminal cases the jurisdiction is confined to cases occurring within the city; and they are given exclusive jurisdiction of all actions for the recovery of fines, penalties, or forfeitures prescribed for breach of the city ordinances. "The rules of practice and mode of proceedings in such police court shall be same as are or may be prescribed by law for justices' courts, and appeals may be taken from all

judgments of said police courts in the time and manner, and where the amount in controversy authorizes appeals from justices' courts." Section 3652 confers upon the judges of the police court the right to charge and receive the same fees as are or may be allowed to county judges for services rendered in the quarterly court. Section 3623 provides that "the clerk, treasurer, assessor, marshal and city attorney shall severally receive at stated times a compensation, to be fixed by ordinance by the city council, which compensation shall not be changed after their appointment or during their several terms of office." Subsection 5 of section 3637 confers upon the general council the right to impose fines, penalties, and forfeitures "for any and all violations of ordinances, and for any breach or violation of any ordinance; to fix the penalty by fine or imprisonment, or both; but no such penalty or fine shall exceed one hundred dollars nor the terms of imprisonment exceed fifty days."

It will be observed that there is no express authority for the imposition of an attorney's fee in favor of the city attorney, to be charged as a part of the costs. The city council have the right and power to pass general ordinances imposing fines for the violation of city ordinances, and they undoubtedly have the right, when these fines and forfeitures are covered into the treasury, to pay the city officers from the fund so created, as seems to have been done in the main by the ordinance under consideration; but there is certainly no express warrant of law for the attorney's fee. Chapter 47 of the Kentucky Statutes contains a general law and schedule of the fees and costs authorized in judicial proceedings, criminal and civil, in this state, but nowhere is such a fee authorized as that under consideration. In the case of *Broadbush v. Broadbush*, 10 Bush, 299, it is said: "The General Statutes must be regarded as containing a complete system of laws, and, in so far as they treat of any general law, whether under the title of 'Wills,' 'Executors and Administrators,' 'Husband and Wife,' 'Guardian and Ward,' etc., it must be considered and treated as all the statute law on the subject indicated by the title; and, if the system is defective in any of its parts, the remedy is to be found in legislative amendments." Tested by this rule, chapter 47, entitled "Fees," contains all the law on that subject, except wherein it has been expressly changed by subsequent amendment; and this seems not to have been done as to the matter in hand. It is certainly within the general spirit, both of the Constitution and the statutes enacted in pursuance thereof, that there should exist a uniform system of judicial procedure throughout the state, in so far as that is practicable, and we deem it the duty of the courts to carry into effect this general spirit, wherever it can be done without violence to the letter of the law.

We therefore conclude that so much of the ordinance as prescribes the imposition of a docket fee of \$2.50 in favor of the city attorney, where the fine imposed is less than \$10, is invalid. But, as this provision is contained in an exception readily severable from the body of the ordinance, this conclusion leaves all but the exception intact. For the foregoing reasons, the judgment must be reversed, and the case remanded, with directions to overrule the demurrer to the petition, and for further proceedings consistent herewith.

NUNN and PAYNTER, JJ., dissent.

BALDRIDGE v. COMMONWEALTH.
(Court of Appeals of Kentucky. Sept. 22, 1905.)

1. CRIMINAL LAW—CONTINUANCE—TIME TO PREPARE DEFENSE.

Where defendant forfeited his bail bond, it was error to force him to trial on the second day after he was arrested on a bench warrant, and to refuse a continuance of one day to enable him to procure counsel and witnesses and prepare his defense.

2. SAME—APPEAL—QUESTIONS REVIEWABLE.

An objection to the sufficiency of the indictment cannot be raised for the first time on appeal.

Appeal from Circuit Court, Rowan County.
"Not to be officially reported."

Sherman Baldridge was convicted of crime, and appeals. Reversed.

John E. Cooper, for appellant. N. B. Hays, C. H. Morris, and Alex. Connor, for the Commonwealth.

SETTLE, J. The appellant was indicted, tried, and convicted in the Rowan circuit court for the crime of unlawfully detaining a woman, one Mary Alice Hicks, against her will, with the intent to have carnal knowledge of her; his punishment being fixed at two years' confinement in the penitentiary. He has appealed, and urges a reversal of the judgment of conviction upon several grounds.

The facts established by the evidence of the commonwealth were: That on the night the crime is charged to have been committed Mary Alice Hicks, a girl 14 years of age, was staying at the house of Green Baldridge, a brother of appellant, and sleeping with her younger sister in the second story of the house. That during the night appellant, a married man of middle age, and uncle by marriage of the prosecutrix, entered the room in which she was sleeping through the window and approached her bed. That she, hearing him, got up from the bed, when he seized the garment she was wearing, tore the skirt of it off, and said to her, "Hold on!" About this time the noise made by her and appellant aroused the wife of Green Baldridge.

sleeping in the room below, who went to the room above and with several blows with a broomstick, inflicted upon the person of appellant, drove him from the house. Thereupon Mrs. Baldridge took the girl to her room, where she remained through the night. Appellant testified in his own behalf that he entered the room of the prosecutrix pursuant to an agreement previously made with her, and for the purpose of having carnal knowledge of her, and that he had theretofore repeatedly had sexual intercourse with her. He also proved by other witnesses that the reputation of the prosecutrix for virtue was bad.

It is insisted for appellant that he was forced into trial on the second day after his arrest and without an opportunity to procure the attendance of certain witnesses, whose testimony he claims would have shown his innocence of the crime charged. It appears that he was indicted at the October term, 1902, of the court; that upon his motion and affidavit the case was then continued, following which he furnished bail for his appearance to answer the indictment at the succeeding term, but failed to do so, which caused a forfeiture of his bond and the issuance of a bench warrant for his arrest, which was not executed until the first day of the court and two days before his trial, which occurred at the June term, 1905. Upon the calling of the case for trial, through Attorney W. A. Young, whom he endeavored to employ as his counsel, appellant asked the court that the case be passed until the next day to enable him to procure the attendance of his witnesses. The court refused his request, but did consent to lay the case over until 1 o'clock p. m. of the same day. Thereupon Young informed the court that he would not represent appellant in the trial, and declined to accept employment at his hands unless the court would pass the case until next day. The appellant then in person asked the court to lay the case over one day to enable him to employ an attorney and get his witnesses. The request was again refused by the court, with the statement, however, that he would appoint counsel to defend appellant, and did then appoint two lawyers to conduct his defense. The trial by order of the court was then proceeded with.

As well said by this court in *Helton v. Commonwealth*, 87 S. W. 1073, 27 Ky. Law Rep. 1163: "While promptness in the apprehension and trial of persons accused of crime is commendable, the interests of the commonwealth are primarily in having the accused tried under circumstances where the verdict will be just, and will represent the deliberate and calm judgment of a properly selected and instructed jury in a court having jurisdiction of the offense. Innocence is as much to be protected, to say the least of it, as it is due to crime to be punished, and, whether one or the other,

courts will not be hurried by popular clamor, or delayed by technical quibble, to the detriment of the orderly administration of justice." While the patience of the trial judge had doubtless been tried by the failure of appellant to comply with the undertaking of his bail bond, whereby an earlier trial of his case was prevented, still he was entitled to reasonable time and opportunity to employ counsel for his defense of his own choosing, also to consult with such counsel and place in his possession the facts of his case, names of his witnesses, etc., that he might make the preparation needful to procure, if possible, the attendance of the witnesses and take such further steps as would secure to appellant a fair and impartial trial. But appellant was not allowed time to employ counsel, secure his fee, or lay before him the nature of his defense. The attorney he attempted to employ would not consent to undertake his defense without preparation or go into trial upon such short notice. Appellant was not even given time to prepare an affidavit by which he might have presented with particularity the grounds for his motion to lay the trial of his case over one day. It was certainly not unreasonable for him, under the circumstances, to ask to be allowed one day to get his witnesses. Doubtless the attendance of some of them could have been procured in that time. Counsel of the court's appointment were compelled to go into the trial of appellant without preparation. We do not question their capacity or skill, but are well aware that lawyers of the greatest skill and experience need to be informed in advance of a trial of the law and facts of the case they are expected to conduct to a successful issue. We conclude, therefore, that appellant was not allowed reasonable opportunity to prepare for trial, and that the court erred in refusing to postpone the trial as requested by him.

It is contended that the indictment under which appellant was convicted is fatally defective, in that it charges him with having unlawfully and feloniously detained Mary A. Hicks, a female, for the purpose of having carnal sexual intercourse with her against her will, instead of charging, as in the language of the statute, that he unlawfully "detained her against her will" for such purpose. We find that no objection was made to the indictment in the lower court, either by demurrer or motion in arrest of judgment. Consequently the question of its sufficiency cannot be considered by us, because raised for the first time in this court. However, as the commonwealth's attorney, after the filing of the mandate in the lower court and the entering therein of the order granting appellant a new trial, may, if the indictment be deemed defective, elect to dismiss it and remand the case to the grand jury

for another, we think it not improper to say that in the case of *Wildner v. Commonwealth*, 81 Ky. 591, it was held by this court that an indictment similar to the one in the case at bar was fatally defective.

We find no error in the instructions given by the trial court. They follow the statute, and not the indictment, in defining the offense with which appellant is charged. The instructions are only two in number, and we commend them for their brevity and accuracy.

For the reasons herein given, the judgment is reversed, and cause remanded for a new trial and further necessary proceedings.

CONTINENTAL CASUALTY CO. v. JASPER.
(Court of Appeals of Kentucky. Sept. 26, 1905.)

1. EVIDENCE — PAROL — INSURANCE POLICY — CONSIDERATION.

Ky. St. 1903, § 470, declaring that the consideration of a written contract need not be expressed, but may be proved by parol; section 472, providing that the consideration of any writing may be impeached; section 656, providing that no insurance company shall make any terms as to premiums not expressed in the policy; and section 679, providing that policies referring to the application as forming a part of the policy shall have attached a copy of the application when read together, render parol evidence showing the consideration of a policy admissible, but require that the statement of the consideration in the application shall be set forth in the policy or a copy thereof attached thereto.

2. INSURANCE — WAIVER OF FORFEITURE — AUTHORITY TO RECEIVE PREMIUM.

Industrial insurance policies provided that the premiums should be paid out of the wages of the insured. Orders were given the insurer by the insured on the employer's paymaster, who did not retain the premiums out of his wages, and insured was notified that the policy had lapsed. Before any further payment became due, the insured died. Subsequently the beneficiary paid the premium to the paymaster and received a receipt, which had been sent to him by the insurer. *Held*, that the paymaster was without authority to receive the payment; he being the agent of the insured to pay from the wages the premium as it fell due, and the agent of the insurer only in remitting the same to it, and the policy, stipulating that the payment of the premium was a condition to a recovery thereon, was forfeited.

Appeal from Circuit Court, Greenup County.
"To be officially reported."

Action by Cynthia Jasper against the Continental Casualty Company. From a judgment for plaintiff, defendant appeals. Reversed.

Allen D. Cole and W. T. Cole, for appellant. Worthington & Paynter, for appellee.

O'REAR, J. This was an action upon a policy of accident insurance. The policy provided that, if the premium or any installment was not paid when due, the policy was to lapse. It was a form of industrial insurance used among patrons of the insurer,

who were railroad employes. The policy contains these clauses relative to the premiums: "The consideration for this policy is the warranties contained in the application therefor (which is made part hereof) and the payment of the premium therefor when due, payment of which when due is a condition precedent to a recovery hereunder. * * * This company shall not be liable for any loss occurring hereunder while the insured shall be in default in the payment of any premium." What the sum was to be that should constitute the premium is not stated in the policy. It is stated in the application, and the notes given therefor are shown in the record. But it is argued that under sections 656, 679, Ky. St. 1903, as applied and construed in *Provident Saving Life Assurance Society of New York v. Beyer*, 67 S. W. 827, 23 Ky. Law Rep. 2460, and other cases, the application and notes cannot be treated as part of the contract; nor can their statement be considered, unless they are attached to, or copies thereof are attached to, the policy. No case adjudicated so far has held that the consideration for an insurance policy may not be proved or disproved, however it may be stated in the policy. Under section 470, Ky. St. 1903, the consideration of a written contract need not be expressed in the writing. "It may be proved when necessary, or disproved by parol or other evidence." If a policy of insurance in writing fail to state the consideration therefor, the contract would not be deemed nudum pactum on that account. The law of this state presumes there is a consideration for all written engagements to pay money. And by section 472, Ky. St. 1903, it is provided: "The consideration of any writing, with or without seal, may be impeached or denied by pleading verified by oath." Sections 470, 472, 656, 679, Ky. St. 1903, all being in force, must be read together in construing written contracts of insurance. Evidence is therefore receivable to show what the true consideration of a policy of insurance was, and likewise to show that it was not paid. Where, however, any part of the consideration is a statement of the insured made in a written application, under the statute (section 656) it must be stated in the policy, or a copy thereof endorsed on the policy. To this extent, section 656, Ky. St. 1903, imposes an additional condition to the validity of such contracts, under consideration of a public policy to guard against deception and overreaching of insurers.

In the case at bar, the money consideration for the policy of insurance sued on was an annual premium of \$10, to be paid in four equal installments, the first of \$2.50, to be paid out of the insured's January wages to become due from the railroad company for which he was working, and like sums to be paid out of the January, March, and April wages of the same year. Orders were

given appellant by the insured upon the paymaster of the railroad company accordingly. Owing to the fact that insured gave his name to appellant as Benjamin F. Jasper, and was known on the payrolls of the railroad company as Frank Jasper, the installment due out of the January wages was not retained by the paymaster for remittance to appellant. It was all paid to the insured instead, who was notified promptly that his policy had lapsed in consequence. Before any further payment became due, insured was accidentally killed by a railroad train. A few days afterward his widow, appellee, who was the beneficiary named in the policy, paid to the paymaster of the railroad company for transmission to the appellant, the \$2.50 due in January past, and was delivered by the paymaster a receipt therefor, which had been issued and sent to him before the January installment became due, so that it could be delivered to insured when that amount was deducted from his wages. The paymaster was without authority to receive this payment on behalf of appellant, after the death of the insured; nor was he the agent of appellant in that transaction. On the contrary, in the absence of such an agreement, he was the agent of both parties in such matter. He was the agent of the insured to pay over from his wages the agreed amount as it became due on his premium. He was the agent of the insurer in remitting it to the home office of appellant. It was clearly shown that insured paid nothing whatever for his contract. It was lapsed by its express terms when the accident occurred. A peremptory instruction should have been given to the jury upon this showing.

Judgment reversed, and cause remanded, for proceedings not inconsistent herewith.

BONTA v. HARVEY.

(Court of Appeals of Kentucky. Sept. 28, 1905.)

INDEMNITY — CONTRACT — CONSTRUCTION — RIGHT TO SUE THEREON — PROOF OF LOSS — SUFFICIENCY.

An indemnitor stipulated to indemnify one from loss in purchasing shares in a corporation. The corporation executed two mortgages on its property to secure creditors. The property was sold to the trustees in the mortgages for the beneficiaries named in them. The conveyance was absolute, and there was no understanding that any of the property purchased was for the benefit of the corporation. Subsequently the mortgage liens were released of record. The corporation was indebted to the amount of \$8,000 to \$10,000, and it had about \$9,000 of unsecured judgments and claims, which were practically worthless and from which nothing could be derived for the benefit of the stockholders. *Held*, that an action was maintainable on the indemnity, subject to the right of the indemnitor to a credit, if anything was left after payment of the corporate debts, to the extent of his pro rata part.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by A. B. Bonta against W. P. Harvey and another. From a directed judgment for defendant Harvey, plaintiff appeals. Reversed.

Bradley & Batson, for appellant. Carroll & Carroll and W. H. Holt, for appellee.

NUNN, J. The appellant instituted this action on the following writing: "Louisville, Ky., May 7, 1889. We, the undersigned, hereby guaranty Messrs. H. C. Williams and A. B. Bonta that in the purchase of interests in the Ozone Park Land Company of New York they shall suffer no loss, and that we will indemnify them for any loss, should any such occur. In other words, they, having subscribed each for a share of \$5,000 in the above-styled company, we hereby agree that to the extent of \$2,500 paid by each of them, and 8 per cent. additional, that we will make good any loss or damage to them arising out of this transaction. This guaranty is only to the extent of our respective interests in the said Ozone Park Land Company paid up, amounting to \$5,000 each, or a total of \$15,000. John S. Cain. H. Allen Tupper, Jr. W. P. Harvey." The appellant alleged that John S. Cain had died, leaving no estate; that H. Allen Tupper, Jr., had become a nonresident of this state; and that the interest of H. C. Williams in the contract had been transferred to John O. Rogers. The action was brought against appellee, W. P. Harvey, and Rogers was made a defendant because he declined to join as a plaintiff. The plaintiff alleged, in substance, that he was induced by appellee, Cain, and Tupper to take and pay for the stock in the Ozone Park Land Company by reason of their executing and delivering the writing copied above; that this land company has been insolvent from its organization; that it never undertook to perform any act in its corporate capacity, except to purchase and dispose of the land mentioned, and that this was completed in July, 1901; and that since that time it has not owned any property or anything of value, and it had abandoned the purpose for which it was organized; and, in everything save the formality of surrendering its charter, that it has ceased to exist. The petition continued as follows: "Plaintiff finally avers that he has never received one cent from his investment of \$2,500 in the stock of the said corporation, in dividends, or distribution of its property among stockholders, because there has been none, nor otherwise, and that the said amount, together with interest thereon at the rate aforesaid from the date of his subscription to the capital stock of said corporation, to wit, May 7, 1889, has been and is now a total loss to him. He alleges that

neither under the contract of indemnity set out in the petition, nor otherwise, have the guarantors, whose signatures appear thereto, or any of them, ever paid him his loss aforesaid, or any part thereof." The answer of appellee made an issue. The proof was heard, and at its conclusion the court gave a peremptory instruction to the jury to find for the appellee. We copy a portion of the reasons given by the court which induced it to give the instruction: "The Ozone Park Land Company was the owner of very considerable property in New York, about which you have heard very considerable in the testimony. A great part of that property has been sold; in fact, it seems from the evidence that all of it has been sold. I take it for granted that the plaintiff will ultimately suffer a loss, and that there may then be a liability upon this writing upon which he sues; but the Ozone Park Land Company owns an equity in a considerable part of this land, which was formerly owned by this company, subject to certain claims that have priority upon a part of the land, and after those claims have been satisfied, if there is any surplus, it belongs to the stockholders of the company. So that it is impossible for you or any one else to say at the present juncture whether or not the plaintiff has sustained a loss; and it is especially impossible for you to say what that loss is, because that cannot be ascertained until the affairs of the company are wound up, and this equity that I have spoken of is developed, or at least until their property has been sold, and it is ascertained whether or not it amounts to more than the claims which are fixed charges upon it. So that the verdict is rendered, not upon the ground that the defendant is not liable upon the writing, but simply upon the ground that the case is prematurely brought."

After a careful reading of the record, we are unable to agree with the conclusion of the lower court. From the evidence it appears that the corporation was hard pressed for money with which to conduct its business from its organization; that it was advanced money for such purposes by loans from some of the stockholders, and by persons who did not own stock; that on the 18th of August, 1899, it had received such loans to the amount of \$9,350, and on that day the corporation executed a mortgage to W. P. Harvey for that sum on a portion of its lots. Harvey was made the trustee for those who had furnished the money to the company; he agreeing that when the money was collected he would prorate it, and pay it to those who had furnished it. This debt remained unpaid until April 18, 1901, when the persons to whom it was due became afraid that the security was insufficient, and demanded that a new mortgage be executed, including additional property. The mortgage was executed under the same conditions as the first. In addition to

the amount named in the Harvey mortgage, the company had become indebted on account of loans from its stockholders and others in the sum of \$15,421.92, and on the 18th of April, 1901, executed a mortgage to A. J. Carroll to secure this sum. This mortgage covered many lots belonging to the company. These mortgage debts became due about the 1st of July following. It also appears that some of its creditors with liens on its property had recovered judgment in large sums in the state of New York, and the corporation, ascertaining that it could not raise the means to meet these judgment debts and the mortgages, determined that it would make a sale of all of its lots and use the proceeds to pay all of its liabilities in so far as it would. In furtherance of this the directors of the company passed a resolution authorizing and permitting the officers, directors, and stockholders of the corporation to attend such sales, and purchase the property of the company as individuals, and in any such purchase they were not to be regarded as having purchased for the company or as holding it in trust for the corporation. The sales of all the lots were made about the last days of June and the first days of July, 1901, and were public sales to the highest bidder, except what were known as the "office lots." The lots purchased by those interested in the Harvey mortgage, and the office lots which were sold by the corporation to the same persons at the agreed price of \$2,500, were all conveyed to W. P. Harvey, and the other lots purchased by those interested in the Carroll mortgage were conveyed to Carroll. In these conveyances, Harvey and Carroll took the title, and held the same for the benefit of themselves and the other beneficiaries named in the respective mortgages. These conveyances were absolute, with out any reservation of interest of any character in behalf of the corporation. The proof shows without contradiction that there was no understanding or agreement of any kind, either verbal or written, that any of these purchases of lots included in the Harvey and Carroll deeds were for the benefit of the corporation, or that under any circumstances the corporation had or could have any future interest therein. On the 5th of July the mortgage liens of Harvey and Carroll were released of record. This being true, it left the corporation without any property whatever, and with an indebtedness of \$8,000 or \$10,000. The proof shows that the corporation has about \$9,000 of unsecured judgments and claims which are worthless. One or two of appellee's witnesses stated that there might be something derived from these claims in the future, but it is evident that there cannot be enough collected to pay the ordinary liabilities of the company, and there can be nothing derived therefrom for the benefit of the stockholders. If, however, on the return of the case, the appellee desires any credit by reason of these claims, the

question as to their value may be submitted to the jury. Then, after the ordinary debts of the company are paid, if anything is left, he may be credited with his pro rata part.

For these reasons the judgment of the lower court is reversed, and the cause remanded, for further proceedings consistent herewith.

NICOLA BROS. CO. v. HURST et al.

(Court of Appeals of Kentucky. Sept. 28, 1905.)

1. SALES — ACTION FOR BREACH — MEASURE OF DAMAGES.

Where plaintiff contracted to purchase lumber from defendants, and to make advances on the price to pay defendants' hands for sawing the lumber, the measure of damages in a cross-action by defendants for breach of this agreement was the difference between the contract price and the cost of sawing, hauling, and loading the lumber, plus a payment already made.

2. EVIDENCE—CONVERSATIONS OF AGENTS—ADMISSIONS OF PLEADING.

Where plaintiff's pleadings admitted that a certain person was its agent, it was not error to admit in evidence the conversation of such agent, although there was no evidence of the agency.

3. CONTRACTS—CONSTRUCTION.

Where defendants contracted to saw and deliver lumber to plaintiff at a certain price, and plaintiff agreed to pay defendants' pay roll on the 15th and 30th of each month until certain timber should be sawed, the pay roll not to exceed \$4 per 1,000 feet, the contract did not mean that each \$4 should be paid as each 1,000 feet was cut, but merely that all the payments on the pay roll should not exceed \$4 per 1,000 feet on all the lumber sawed.

4. TRIAL—FAILURE TO INSTRUCT.

In an action for damages for breach of contract, the request of an incorrect instruction on the measure of damages was sufficient to require the court to give a proper instruction on that point.

Appeal from Circuit Court, Bell county.

"Not to be officially reported."

Action by the Nicola Bros. Company against Calvin Hurst and others, in which defendants filed a counterclaim. From a judgment for defendants on the counterclaim, plaintiff appeals. Reversed.

Logan & Jeffries and C. W. Metcalf, for appellant. Wm. Low and N. J. Weiler, for appellees.

NUNN, J. The appellant instituted this action in August, 1900, claiming a lien upon a lot of lumber and saw logs, and alleged that Hurst and others violated a contract with reference thereto, and obtained an order of court placing the property in the hands of a receiver, and directed a sale thereof. Hurst and others appealed from that order, and this court reversed the same, the opinion being in 65 S. W. 364, 23 Ky. Law Rep. 1406. While that appeal was pending the receiver, under the order of court, sold the lumber and logs. On the return of the case to the lower court, Hurst and others filed an amended answer and counterclaim by which they

sought to recover of the appellant \$2,400 in damages sustained by reason of the appellant failing to comply with its part of the contract in failing to furnish them money with which to pay their hands for sawing the logs into lumber and delivering same at the place stipulated in the contract. The appellant filed a reply making an issue; the question of damages was submitted to a jury, and it returned a verdict in behalf of appellees for the sum of \$1,500. The court rendered a judgment thereon, from which the appellant has appealed. We refer to the former opinion for a synopsis of the original and supplemental contracts between the parties.

The appellant assigns four reasons for the reversal of the judgment: First, because the court refused to render a judgment in its favor notwithstanding the verdict; second, because the court permitted witnesses to relate conversations between the appellees and one E. W. Hampton upon the idea that Hampton was the agent of appellant when there was no proof of that fact; third, because the court misconstrued the supplemental contract between the parties in reference to the responsibility of appellant to meet or pay the pay rolls of the appellees twice a month when they were sawing and delivering the lumber; fourth, in refusing to give the jury the instructions offered by the appellant and in giving an erroneous instruction on its own motion.

With reference to the first ground, we will state the facts in the record applicable to it. Under the contract between the parties the appellant was to pay appellees \$5.50 per 1,000 on the contract price when the logs were delivered at the mill, the place where they were to be sawed into lumber, and an additional amount when they were sawed into lumber, and the balance of the contract price when the lumber was delivered on board the cars. The appellees were to receive \$35 for the best class of quarter-sawed oak and \$19 for the best class of poplar, and other prices for other classes named in the contract. It was agreed in the pleadings that the appellant had paid the appellees the \$5.50 per 1,000 on the timber in the log, amounting to something over \$2,500, with its interest, and that appellant had also paid something to one Partin for the sawing of something near 100,000 feet of the timber; and the appellant claims that, the jury having only found in behalf of the appellees \$1,500, it was evident that appellant was entitled to a judgment for the difference, less the amount which the lumber and logs brought at the receiver's sale, to wit, \$1,458. In other words, that appellant was entitled to a judgment against appellees for some \$100 or \$200. The appellant is in error in this contention. It appears from the pleadings and proof that the appellees sought to recover of the appellant in damages the difference between the contract price and the cost of sawing, hauling, and placing on board cars the lumber, plus the

\$5.50 per 1,000 already advanced. If the appellees were entitled to anything, this is the proper criterion of recovery.

The court did not err on the second proposition, for the reason that appellant admitted in the pleadings that E. W. Hampton was its agent.

As to the third reason assigned, we are of the opinion that the court did not err in its construction of the supplemental contract. It is clear that the \$4 per 1,000 feet, as used in the contract, did not mean that each \$4 would be paid as each 1,000 feet was cut, but it meant that all the payments on pay rolls should not exceed \$4 per 1,000 on all the lumber sawed. It is certain that the parties understood at the time that the appellant was to meet and pay the pay rolls of the appellees on the 15th and 30th of each month, until all the logs were sawed, and that they knew that the first one or two pay rolls would be greater than at the rate of \$4 per 1,000. This was so by reason of their having the mills to set and prepare for sawing.

With reference to the fourth and last reason assigned for error, we are of the opinion that the court erred to the prejudice of the appellant in failing to define any measure or criterion of recovery. The court should have given a separate instruction, or have added to the one given a criterion such as is given in our discussion of the first proposition for reversal, *supra*. The appellant offered one upon this question, but it was coupled with other matters not proper and material to the issue, and it was properly refused. But, appellant having offered an instruction upon this point, even though not in proper form, it was the duty of the court to give a proper instruction on that point. In the case of *L. & N. R. R. Co. v. Harrod*, 75 S. W. 233, 25 Ky. Law. Rep. 250, the court said: "The rule upon this question now is that, where a party in a civil case fails to offer an instruction upon a point of law involved in the case, it is not error in the court to fail to instruct on that point; but if a party offers an instruction upon some point of law involved, which is refused by the court because of defects in form or substance, then it is the duty of the court to prepare, or have prepared, and give, a proper instruction on that point."

For the reason given, the judgment is reversed on the original appeal, and affirmed on the cross-appeal, and the cause remanded for further proceedings consistent herewith.

WIGGINGTON et ux. v. MINTER.

(Court of Appeals of Kentucky. Sept. 28, 1905.)

1. FRAUDULENT CONVEYANCES—PROOF.

While fraud must be proven before a conveyance will be set aside at the instance of a creditor, the proof need not establish fraud beyond all doubt.

2. SAME — CIRCUMSTANTIAL EVIDENCE.

While, in an action to set aside a conveyance as fraudulent, fraud will not be presumed, yet

it may be proved by circumstantial evidence.

3. SAME—CONVEYANCE TO WIFE—BURDEN OF PROOF.

A conveyance by a husband in failing circumstances to his wife places upon the grantee the burden of proving the good faith of the transaction, including proof that the consideration was adequate.

4. SAME—FRAUDULENT INTENT—KNOWLEDGE OF GRANTEE.

Where the grantee has knowledge that the grantor intends by conveyance to defraud his creditor, the question whether consideration was paid is not material.

5. SAME—EVIDENCE—SUFFICIENCY.

In a suit to set aside a fraudulent conveyance, evidence held to support findings that the grantor intended to defraud his creditors, that the grantee had knowledge of the fraudulent intent of the grantor, and that no consideration was paid.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Suit by Sarah E. Minter against J. H. Wiggington and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Sam'l Avritt, for appellants. L. A. Hickman, Reasor & Crume, and Hickman & Watkins, for appellee.

O'REAR, J. This suit was brought by appellee, a creditor of J. H. Wiggington, against appellants, J. H. Wiggington and Lena Wiggington, husband and wife, to set aside as fraudulent a conveyance of his land, made by J. H. Wiggington to his wife, which was without valuable consideration, and which was for the purpose of defrauding and delaying J. H. Wiggington's creditors. The circuit court granted the relief, set aside the conveyance, and subjected the land to appellee's debt.

J. H. Wiggington had been dealing extensively in real estate for a number of years, was heavily involved, and was, in fact, insolvent. He had been getting advances. It is claimed, from his son, N. B. Wiggington, through a number of years, and was largely indebted to N. B. Wiggington, according to the latter's claim, extending in amount from \$10,000 to \$15,000, on account of such advancements. It is claimed that J. H. Wiggington bought the tract of land in contest, but was unable to pay for it, and that his son, N. B. Wiggington, agreed to pay the consideration, provided that J. H. Wiggington would convey the land to his wife, appellant Lena Wiggington, who was the step-mother of N. B. Wiggington. The proof shows that N. B. Wiggington did, in fact, pay the greater part of the consideration; but it also shows that J. H. Wiggington and N. B. Wiggington, to settle and secure all advancements made by the latter to the former, had had numerous real estate transactions, including a conveyance by J. H. Wiggington to N. B. Wiggington of two tracts of land in Jefferson County, Ky., for a nominal consideration, the actual value of which is not clearly shown, but was admitted by N. B. Wiggington.

ton to be \$3,000, while it is otherwise proven to have been as much as \$6,000. In addition J. H. Wiggington conveyed to N. B. Wiggington all of the former's property by way of mortgage to secure a balance of \$9,500, the balance then thought to be due from J. H. Wiggington to N. B. Wiggington on account of the advancements named above. This mortgage included the land in controversy. Subsequent to this, and after appellee had obtained her personal judgment against J. H. Wiggington, the latter conveyed the land in controversy to his wife.

While it is true that fraud must be alleged and proven before a conveyance will be set aside at the instance of a creditor, it does not follow that the proof must establish the fact of fraud beyond all doubt. And it is also the law that fraud will never be presumed in the absence of evidence. Yet circumstances may prove fraud in law as clearly as if the fact were testified to by the mouths of witnesses. It is uniformly held that a conveyance by the husband to his wife, or a father to his son, the grantor being in failing circumstances, places the burden upon such grantee to prove the bona fides of the transaction, including proof that the consideration that passed between them was adequate. Under all of the facts shown in this case the court is unwilling to disturb the finding of the chancellor that this transaction was a fraud upon appellee, and was so intended by appellant J. H. Wiggington, and that it was such a transaction that any sensible person, who was as well acquainted with the situation as N. B. Wiggington and Lena Wiggington were, would have been bound to know of J. H. Wiggington's purposes in the matter. In that case it is not material whether the consideration claimed by N. B. Wiggington to have been paid by him was paid or not. Beside all that, the record satisfactorily shows that the parties, either at the time of the payment or subsequently, agreed that N. B. Wiggington was to be otherwise secured therefor, and that the conveyance by J. H. Wiggington to his wife was an afterthought, and prompted by his desire to save his property from being subjected to appellee's debt and to the debts of his other creditors.

Perceiving no error in the record, the judgment is affirmed.

LEVI v. FIDELITY TRUST & SAFETY VAULT CO.

(Court of Appeals of Kentucky. Sept. 26, 1905.)

WILLS—POWER OF APPOINTMENT.

Under a will giving all testator's property to his wife, and providing, "Previous to her death she may will or distribute to her relations and to my relations any property as she may choose or desire them to have," she, in distributing the property, is not limited to next of kin of herself and testator as beneficiaries.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by Lillie E. Levi against the Fidelity Trust & Safety Vault Company. Judgment for defendant. Plaintiff appeals. Affirmed.

E. L. McDonald, for appellant. Thos. W. Bullitt, for appellee.

SETTLE, J. B. C. Levi died in the city of Louisville, leaving a considerable estate, real and personal. He left no children, but was survived by his wife, Mary E. Levi. His last will, which was duly probated in the Jefferson county court, contained these provisions: "(1) I desire that all my debts of every kind shall be paid in full. (2) After my debts shall have been paid, I will and bequeath to my wife, Mary Ellen Levi, all of my personal, real and mixed estate of every kind and description, to have and enjoy all the days of her life. (3) Previous to her death she may will or distribute to her relations and to my relations any property, real or personal, as she may choose or desire them to have. I am satisfied that she will act justly in this matter, but under no circumstances shall she be prevented or hindered in the enjoyment of any property or personalty that I may have at my death. (4) I desire that my friend, Captain Gilmore, shall act as trustee for my wife without bond or security."

Mary E. Levi did not, previous to her death, distribute to the relations of herself or husband any of the estate he devised her; but in December, 1893, she died, leaving a last will and testament, which was shortly thereafter probated. The will provides for the payment of several small pecuniary legacies which were satisfied out of her own personal estate; but the only part of it that concerns us is found in clause No. 3, which is as follows: "All the residue of my property, real, personal and mixed, and the property of my late husband of every kind except a cottage and lot in the Kavanaugh Camp Grounds, I devise to the said Fidelity Trust & Safety Vault Company, in trust, however, to take and sell the same with all convenient speed and proper and sufficient deeds to be given therefor and to distribute the proceeds to the following persons, to-wit: * * * The persons to whom the will of Mrs. Levi gave the property devised her by the will of her deceased husband, as well as the estate she otherwise owned, were all blood relations of herself and husband, though many of them were not next of kin.

It appears that Mrs. Levi left personal estate, in addition to what she received under the will of her husband, amounting to \$4,800. There were four parcels of real estate, which had formerly been the property of the husband. It was all sold by appellee, the Fidelity Trust & Safety Vault Company, in pursuance of the power conferred upon it by

Mary E. Levi's will, with the approval of the chancellor of the Jefferson circuit court; and the proceeds, aggregating \$12,818.34, together with what was left of her personal estate after satisfying the small specific legacies, were by it distributed to the persons named in her will. Among the parcels of realty thus disposed of was a tract of land of 76 acres lying in Jefferson county, which was purchased by the appellant, Lillie E. Levi. A deed of conveyance was made heretofore by the Fidelity Trust & Safety Vault Company as "trustee under the will of Mary E. Levi". Upon the payment by her of the purchase price she was given immediate possession of the land, and has ever since continuously remained in the undisturbed possession thereof. It appears, however, that in attempting to consummate a sale of the land, recently made to another, appellant was met by the purchaser with the objection that the will of Mrs. Levi did not pass to the Fidelity Trust & Safety Vault Company a good and sufficient title to the land, and that in consequence the deed from it as trustee to appellant did not convey to her a good and valid title, and because of these supposed defects in her title the purchaser declined to accept the deed tendered or to take the property. Thereupon appellant instituted this action to cancel the deed made her by the Fidelity Trust & Safety Vault Company, rescind the contract of sale, and recover of it the purchase price paid by her therefor. The chancellor adjudged that appellant received through the deed from appellee, Fidelity Trust & Safety Vault Company, trustee under the will of Mary E. Levi, a good and valid title to the land in controversy. Consequently the action was dismissed. Not dissatisfied with, but questioning, the correctness of the chancellor's conclusions, and especially his construction of the will of B. C. Levi, appellant asks of us a consideration and review of the question of title involved.

The objection to the title of appellant is bottomed upon the theory that Mrs. Levi, in distributing to his and her relations the property devised her by the will of her husband, was limited to their next of kin, equally; whereas, the disposition made of it by her will, while equal (that is, giving one half to his and the other half to her relations) was not to the next of kin, but in the main to those related to them in a remoter degree. Although at the death of Mrs. Levi her deceased husband had six brothers living, also several nieces and nephews, children of a deceased brother, her will gave portions of the estate to but two of the brothers, one of the children of the deceased brother, and two of the nieces of her husband. Her will also gave a portion to the children of Mrs. Rebecca Robinson, and another portion to the children of Mary Clifton Duncan, though Rebecca Robinson and Mary Clifton Duncan were living and were of the next of kin of Mary E.

Levi. We are of opinion that the language of B. C. Levi's will admits of no other construction than that placed upon it by the chancellor. The language: "Previous to her death she [Mary E. Levi] may will or distribute to her relations and to my relations any property, real or personal, as she may choose or desire them to have. I am satisfied that she will act justly in this matter" — conferred upon her the power to distribute the estate of B. C. Levi, according to her discretion, to such of her relations and his relations as she might select. If she had the right to distribute any part of the estate during her life, or by will, to such of her relations and those of her deceased husband as she might "choose or desire" to have it, it follows that her selection of the objects of her bounty from among her own and her husband's relations cannot be questioned or interfered with. If this construction of the will is correct, it must be taken for granted that by the use of the word "relations" B. C. Levi did not intend to confine the distribution of the estate devised his wife to those who were directly of kin. It was manifestly used as meaning blood kin of any degree. So, if Mrs. Levi chose to give to the children of her sister, instead of the sister, or to the nieces or nephews of her husband, instead of his brothers, the estate left by him, she clearly had the right to do so, as she did not thereby violate the intention of the testator as expressed in his will.

We think, if Mrs. Levi had died without exercising the power to distribute the estate conferred by the will of her husband, and a court of equity were called on to do so, it doubtless would hold that, as the right to select the relations to whom it should go was by the terms of the will personal to the widow, and she had failed to exercise it, the word "relations" should be construed as meaning the next of kin; and, the court not having the right to exercise the power of selection given the widow, the estate would be distributed to the next of kin as provided by statute. Our conclusion, therefore, is that the power conferred upon Mrs. Levi by the will of her husband is not coupled with an enforceable trust, because it imposed no obligation upon Mary E. Levi to will or distribute to the relations of herself and husband, or any of them, any portion of her deceased husband's estate. That instrument merely provides that "previous to her death she may will or distribute any of the property." She was not authorized to go outside of the class designated as "my relations" and "her relations," and give or will the property to a mere stranger, or one not related to her or her husband, but might at any time before her death, by a gift or successive gifts, have disposed of any part of the property to any person or persons related by blood to herself or husband; and the title of the donee would have

become valid and perfect, without regard to any subsequent disposition of the remainder of the property. Therefore the power conferred upon Mary E. Levi by the will of her husband was a mere naked power, to be exercised at the discretion of the donee. *Perry on Trusts*, § 253. *Pomeroy's Equity Jurisprudence*, § 835.

Our attention has been called by counsel to the use by the testator of the word "to," instead of the word "among," in that clause of the will defining the power which may be exercised by his wife in the matter of disposing of the estate devised, and it is argued that, while possessed of the power to give "to" any person answering the description of "relations," she was not required to make such gift "among all" of the relations. But, without relying upon such refinements of distinction, our examination of the authorities bearing upon the question under consideration has brought us to the conclusion that no better statement of the law controlling this case can be found than is given in *Perry on Trusts*, § 256: "If the donee of the power, or trustee, is to select from the donor's relations those to whom he is to give the property in the execution of the power, he may select from the whole circle of relations, whether near or distant." *Sugden on Powers*, p. 242. In *Huling v. Fenner*, 9 R. I. 410, the testator devised his property to his wife for life, "with full power to devise and bequeath the same, or any part thereof, to such of my relations of the Huling family as she shall in her discretion select." The donee of the power gave the whole property to one person, who was a "relation" of the husband, but not his next of kin. It was insisted that the power of selection given the wife was limited to the relation who might be the next of kin at the testator's death. In discussing this point in its opinion the court said: "This claim is supposed to be countenanced and supported by those cases where the power of appointment has not been executed, and in which the courts hold that the devise of the power creates a trust for the class among which the selection is to be made. In these cases, where the power is to devise to relations, and the power has not been exercised, it has been held that this trust shall not be extended to all kindred, however remote, because a range so illimitable would render the trust uncertain and difficult, if not impossible, of execution, but should be limited to those who are next of kin according to the statute of distribution. If the power be executed, then the object is made certain and definite, and the objection of uncertainty ceases. If the power be not exercised, then the trust must be held void for uncertainty, or as a devise direct to relations it must be thus limited; and the courts have taken the alternative to limit the trust, rather than to hold it void. They distinguish between the trust and the ap-

pointment. None of these cases hold that the appointment is thus limited. The principle is thus stated in *Grant v. Lyman*, 4 Russ. 292: 'Where the author of a power uses the term "relations," and the donee does not exercise the power, ordinarily the court will adopt the statute of distributions as a convenient rule of construction and will give the property to the next of kin; but the donee of the power has the right of selection among the relations of the donor, although not within the degree of next of kin. It was said, also, the same rule has been applied to the personal estate, where the word "family" has been used in the place of "relations."' * * * It is not necessary, therefore, to the validity of the gift and the power that the devise should be to the next of kin to the donor, nor that he should bear the family name."

It will be found that the English and American authorities on this question, with here and there an exception, sustain the doctrine announced in the case *supra*, and no Kentucky case has been cited that conflicts with it. Indeed, the only Kentucky cases that bear on the subject are all cases of powers coupled with a trust to be exercised for the benefit of "children," where the power was either not exercised at all, or not exercised as required by the donor of the power, and the court, having regard to the trust created, enforced it in a manner consonant with the principles of equity. In the case at bar the power conferred upon Mrs. Levi by the will of her husband was completely exercised while she was living by the terms of her will. The confidence reposed in her by the husband was not misplaced, for she not only provided for the distribution of the estate left by him as allowed by his will, but in addition included in the distribution a considerable estate of her own.

In our opinion the appellant, under the wills of B. C. and Mary E. Levi and by the deed from the Fidelity & Safety Vault Company, received a good and perfect title to the land purchased by her. Wherefore the judgment is affirmed.

COMMONWEALTH v. MOORE et al.
(Court of Appeals of Kentucky. Sept. 27, 1905.)

HOMICIDE—ROBBERY—ACCIDENTAL KILLING OF THIRD PERSON.

Persons who assault one for the purpose of robbing him are not guilty of homicide, where he, shooting at them in self-defense, kills a third person.

Appeal from Circuit Court, Knott County.
"To be officially reported."

John Moore and another were indicted for murder. The indictment was dismissed, and the commonwealth appeals. Affirmed.

N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

BARKER, J. The appellees, John Moore and John Kelly, were indicted by the grand jury of Knott county, charged with the offense of willful murder. As the question of law arising upon the face of the indictment has never been adjudicated in Kentucky, we give the indictment in its entirety: "The grand jury of Knott county, in the name and by the authority of the commonwealth of Kentucky accuse John Moore and John Kelly of the crime of willful murder committed as follows: The said defendants on the 20th day of March 1905, in the county and circuit aforesaid, did unlawfully, willfully, maliciously, feloniously, and of their malices aforethought kill, slay and murder Anderson Young by causing said Young to be shot with a rifle gun loaded with powder and leaden ball or other hard and explosive substances. The said gun was at the time in the hands of John Young, who at the time assaulted by the defendant John Moore with the felonious intent to rob and kill the said John Young who shot or discharged the said gun at said Moore in his necessary self-defense and in the defense of his house and killed the said Anderson Young. The said defendants unlawfully, willfully, feloniously did conspire, band and confederate themselves together for the purpose of committing robbery upon the person of John Young and in pursuance of said conspiracy and confederacy and while the same was existing the said defendant John Moore willfully, maliciously and feloniously went to the house of said John Young and assaulted and robbed the said Young and the said Young, in order to defend himself and his house from the unlawful acts of said Moore he shot and killed the said Anderson Young as aforesaid; that the said defendant John Kelly did willfully, feloniously and of his malice aforethought counseled, advised and encouraged the said defendant Moore to commit said robbery against the peace and dignity of the commonwealth of Kentucky." A general demurrer to the indictment was interposed by the defendants and sustained by the court, and the indictment dismissed, from which judgment the commonwealth appeals.

It is unquestionably true that, where two or more persons conspire or confederate together to commit a felony, each is criminally responsible for every crime committed by his co-conspirators done in pursuance of the original conspiracy, and which naturally or reasonably might be anticipated to result from it. Therefore, if either of the defendants, in attempting to commit the robbery for which they conspired, had shot and killed John Young, or had shot at John Young and, missing him, had killed a bystander, both would have been guilty of murder. In 1 Hale, Pleas of the Crown, 441, the rule is thus stated: "If divers persons come in one company to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in do-

ing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting him and consenting to the act or ready to aid him, although they did but look on." And in 1 East, Pleas of the Crown, 257, it is said: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays, as by committing a violent dissension with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must at their peril abide the event of their actions."

But this is not the case we have at bar. Here the homicide was not committed by the conspirators, either in the pursuance of the conspiracy or at all; but it was the result of action on the part of John Young, the proprietor of the house, in opposition to the conspiracy, and entirely contrary to the wishes and hopes of the conspirators. In order that one may be guilty of homicide, the act must be done by him actually or constructively, and that cannot be, unless the crime be committed by his own hand, or by the hands of some one acting in concert with him, or in furtherance of a common object or purpose. The defendants can in no sense be said to have aided or abetted John Young, for he was firing at them; and to hold them responsible criminally for the accidental death of a bystander, growing out of his bad aim, would be carrying the rule of criminal responsibility for the acts of others beyond all reason. Suppose, instead of killing an innocent bystander, Young had killed Moore, one of the robbers; would the survivor have been guilty of murder? And yet, if the principle sought to be maintained by the commonwealth be sound, the survivor would necessarily be guilty of murder, because the owner of the house to be robbed had killed his companion; for he could just as truly be said to have aided and abetted the owner of the house in that case as in this. Indeed, the matter could be carried still further. The dead robber would also be guilty of murder, because his part in the causation of the homicide of which he was the victim would have been precisely the same as that which resulted in the death of Anderson Young. In other words, the acts of the defendants provoked and justified the shooting on the part of John Young, and if they are criminally responsible for the accidental death of a bystander shot by Young, they would also be guilty of murder if he had killed one of themselves. The illustration carried to this extreme exposes the unsoundness of the position of the commonwealth in the matter in hand.

While, as we have heretofore said, this is a question of first impression in Kentucky, we are not without high authority in support of the position we seek to maintain in this opinion. In the case of *Commonwealth v.*

Campbell, 7 Allen, 541, 88 Am. Dec. 705, it appears that the defendants had conspired to create a tumult or riot, and in quelling it the officers by accident killed an innocent bystander. In a learned opinion the Supreme Court of Massachusetts held that the conspirators were not guilty of murder, and in the argument the identical case we have here is supposed and used to illustrate the unsoundness of the position of the commonwealth of Massachusetts in regard to the guilt of the parties. Said the court: "Suppose, for example, a burglar attempts to break into a dwelling house, and the owner or occupant, while striving to resist and prevent the unlawful entrance, by misadventure kills his own servant; can the burglar in such case be deemed guilty of criminal homicide? Certainly not. The act was not done by him, or with his knowledge or consent; nor was it a necessary or natural consequence of the commission of the offense in which he was engaged. He could not, therefore, have contemplated or intended it." In the case of *Butler v. People* (Ill.) 18 N. E. 338, 1 L. R. A. 211, 8 Am. St. Rep. 423, several had banded themselves together to create a riot at a circus in Prairie City. The four defendants attacked the city marshal, and made it necessary for him in self-defense to fire at his assailants, and in so doing he missed them and killed an innocent bystander. The Supreme Court of Illinois reversed a judgment of conviction against the conspirators had under these facts, holding that the death of the bystander was not within the scope of the original conspiracy, but in opposition to it, and therefore the defendants were not guilty. In *Bishop's New Criminal Law*, vol. 1, § 637, it is said: "If those suppressing a riot accidentally kill an innocent third person, the rioters are not guilty of the homicide; for in no way did they concur in or encourage the act which caused death."

No authority is cited in support of the opposing principle, and we therefore deem, both in reason and authority, the judgment of the circuit court dismissing the indictment must be affirmed, and it is so ordered.

LOUISVILLE RY. CO. v. HOSKINS' ADM'R.

(Court of Appeals of Kentucky. Oct. 5, 1905.)

1. STREET RAILROADS—COLLISIONS WITH CARS—INJURIES TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

Where there was contributory negligence on the part of a traveler injured in a collision with a street car, there can be no recovery unless his peril was, or could by ordinary care have been, discovered by the servants in charge of the car, and the injury avoided by the exercise of ordinary care.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 219.]

2. SAME—INSTRUCTIONS.

An instruction, in an action against a street railroad company for injuries to a trav-

eler by collision with a street car, that if the injury, though occasioned by contributory negligence, could have been avoided by the motorman by the exercise of ordinary care, plaintiff is entitled to recover, is erroneous, because it eliminates the question whether the motorman knew, or might by exercise of ordinary care have known, of the traveler's peril.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 261.]

3. TRIAL—DEATH BY WRONGFUL ACT—INSTRUCTIONS.

An instruction, in an action for death by wrongful act, that in considering the damages the jury might consider the amount that decedent was earning prior to his death and all circumstances touching his capacity to earn, was erroneous, as giving prominence to certain evidence in the case.

4. STREET RAILROADS—INJURY TO TRAVELER—EVIDENCE—INSTRUCTIONS.

Where, in an action against a street railway company for the death of a traveler by collision with a street car, defendant's evidence showed that the car was close to the wagon in which decedent was riding while it was on the side of the car track, that the driver turned on the track, and that it was impossible for the motorman to prevent the collision, the refusal to charge that the motorman was under no obligation to stop his car as long as the wagon was in a place of safety, and that he had a right to presume that the wagon would remain in a place of safety until some indication was given that it would get into a place of danger, and that if the motorman used ordinary care to prevent the collision as soon as he discovered, or could have discovered by ordinary care, that plaintiff was in peril, plaintiff could not recover, was erroneous.

5. EVIDENCE—EXPERIMENTS.

In an action against a street railway company for the death of a traveler in a collision with a car, evidence of experiments made with another horse than that driven at the time of the accident, for the purpose of determining the time it took to turn and cross the tracks, was inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 439.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by John Hoskins' administrator against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Fairleigh, Straus & Fairleigh, Kohn, Baird & Spindle, and R. L. Greene, for appellant. Augustus E. Wilson and John R. Watts, for appellee.

HOBSON, C. J. John Hoskins was a contracting painter in Louisville. On October 23, 1901, he was in an express wagon, which was hired by him and driven by a man named Veith. They went out Fourth street to a house near Breckinridge, and there delivered some paints. The horse was headed south when they got in the wagon. Veith then asked Hoskins where he wanted to go next. Hoskins said to Eleventh and Maple streets, and Veith replied then that they would turn around and go down Broadway. At this point they looked back to see if a street car was coming, and saw a car at the York street crossing, or about there. Veith, thinking that he had time enough to turn around and

keep out of the way of the car, which was coming south toward them, turned his horse around; but just as the hind wheel of the wagon was leaving the street car track it was struck by the car. The wagon was knocked over, the horse took fright and ran off, and Hoskins fell out and was killed. This is about the sum of the evidence for the plaintiff, except that it also tends to show that no signal was given of the approach of the car and that the irons of the wagon were so bent as to show that the car was running with great force. On the other hand, the testimony on behalf of the street car company, including some of the passengers on the car, is to the effect that the car was quite close to the wagon, which was on the side of the street car track, before Veith made any effort to turn his horse around, and that when he turned around upon the track it was impossible to prevent the collision, although the motorman sounded his gong, applied his brakes, and put on sand immediately. It is evident from the proof that both Veith and Hoskins were aware of the approach of the car, and that the motorman had no reason to apprehend any danger to the wagon until Veith turned his horse with the view of going back to Broadway. On the first trial of the case the jury failed to agree. On the second trial they found a verdict for the plaintiff in the sum of \$5,000, and the railway company appeals.

The court instructed the jury as follows:

"(1) It is the duty of the defendant's motorman, when running the defendant's cars through the streets of the city of Louisville, to keep a lookout ahead, to keep the cars under reasonable control, and to exercise ordinary care to prevent injury to other people who may be using the street, and, if there is a person or vehicle likely to be imperiled from the car, to give timely notice of the approach of the car by the usual and ordinary signal; and if you shall believe from the evidence that at the time mentioned in the petition the motorman, in charge of the car which collided with the wagon on which Mr. Hoskins was, failed to exercise any of those duties, and by reason of such failure the car collided with the wagon, and Mr. Hoskins was thrown from it, and his death resulted therefrom, then the law is for the plaintiff, and you should so find, unless you shall believe from the evidence that Mr. Hoskins or the driver in charge of the wagon was negligent, and thereby helped to cause or bring about the collision and consequent injury, and but for which negligence upon the part of Mr. Hoskins or the driver in charge of the wagon, if any there was, the injury would not have occurred.

"(2) But if you shall believe from the evidence that the motorman in charge of the car observed those duties of which I have spoken to you, then the law is for the defendant, and you should so find, notwithstanding the injury which occurred to Mr. Hoskins;

or if you shall believe from the evidence that the driver of the wagon or Mr. Hoskins was negligent, and thereby helped to cause or bring about the injury which resulted to Mr. Hoskins, and that he would not have been injured but for such contributory negligence, if any there was, then the law is for the defendant, and you should so find, unless you shall believe from the evidence that, when the wagon became imperiled from the car, the motorman could by the exercise of ordinary care have stopped the car, if necessary, and have prevented the collision. If such was the fact, the law is for the plaintiff.

"(3) It was the duty of Mr. Hoskins and the driver of the wagon, when he turned to cross the street, to exercise ordinary care for the protection of themselves, and if either of them failed to exercise that degree of care, and thereby helped to cause or bring about the injury complained of in this action to Mr. Hoskins, and the injury would not have occurred but for the failure to exercise ordinary care, either by Mr. Hoskins or by the driver, then the law is for the defendant, and you should so find, unless you shall believe from the evidence that, when the wagon became imperiled from the car, the motorman could by the exercise of ordinary care have stopped the car, if necessary, and have prevented the collision, as mentioned in instruction No. 2.

"(4) If you find for the plaintiff, you should find in such sum as will reasonably and fairly compensate the estate of Mr. Hoskins for the destruction of his power to earn money, not exceeding the sum of \$50,000, the amount claimed in the petition; and in that connection you may consider the amount that Mr. Hoskins was earning, if any, as shown by the evidence, immediately prior to his death, and all the other circumstances shown by the evidence touching his capacity to earn money. If you find for the defendant, you will simply say so, and no more."

The defendant asked the court to give the jury the following instruction, which was refused:

"(5a) The defendant's motorman was under no obligation to stop his car or to check its speed, if it was not going at an unreasonable speed, as long as the wagon in which the plaintiff's decedent was riding was in a place of safety from the approaching car, and the said motorman had the right to presume that the said wagon would remain in a place of safety until by its movement some indication was given that it would leave its place of safety and get into a place of danger from the approaching car. And if the jury believe from the evidence that the said car was not going at an unreasonable rate of speed at the said time and place, and that the defendant's motorman used ordinary care to

check the car and prevent the collision as soon as he discovered, or could by the exercise of ordinary care have discovered that the said wagon was in danger from the approaching car, then the law is for the defendant, and the jury should so find."

The rule is in cases of this sort that if there is contributory negligence on the part of the plaintiff then there can be no recovery, unless his peril was discovered, or could by ordinary care have been discovered, and after this the injury to him might have been avoided by the exercise of ordinary care. The second and third instructions do not properly conform to the rule, as they eliminate from the consideration of the jury the question whether the motorman knew of the peril of the wagon, or might by the exercise of ordinary care have known it. The latter part of the fourth instruction, following the words "amount claimed in the petition," should have been omitted, as these only served to give prominence to certain evidence in the case. Instruction 5a, asked by the defendant, presented its side of the case, which was not aptly presented by either of the instructions given by the court. This instruction should have been given. The uncontradicted proof for the defendant showed that the car stopped within 10 feet after it struck the wagon, that its regular stopping place was only 15 feet further south, and that the signal for it to stop at this point had been given when the car left York street. We think it evident from all the proof that the car was slowing down to stop when it struck the wagon.

The plaintiff proved by Veith and two other witnesses that they took a different horse to the spot with a similar wagon not long before the trial, and that, driving at the same rate, it took only 9 seconds to make the turn and clear the street car tracks. They also proved that it took the street car 14 seconds to run from York street to that point. The evidence as to how long it took the street car to run from York street to that point was properly admitted; but the experiments which they made with another horse on the same ground should not have been admitted, for horses differ very much in speed. The horse driven when the accident occurred was 12 years old. The plaintiff may be allowed to show at what gait Veith was driving at the time of the accident, how far he had to go in making the turn and clearing the street car tracks, and how long it will take a similar wagon at this gait to go this distance; but experiments made on the same ground with a different horse should not be admitted, for it is very evident that, if Veith had had a quarter of a second more, he would have cleared the street car track, and this difference would be made by a quick horse when he was not perceptibly traveling faster than the other horse.

Judgment reversed, and cause remanded for a new trial.

NEWMAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1905.)

1. HOMICIDE—EVIDENCE—SUFFICIENCY.

In a prosecution for murder, evidence held sufficient to support a conviction.

2. SUFFICIENCY—INDICTMENT.

An indictment for murder charging that defendant and other persons, whose names were unknown, shot and killed deceased, and that the shot was fired either by defendant or by "one of the above-mentioned persons, whose name is unknown," while the other was present, aiding and assisting, and that who had actually fired the shot was unknown by the grand jury, while inaccurate, because of the use of the word "mentioned" before the word "persons," when no one had been mentioned but defendant, was nevertheless sufficient.

3. CRIMINAL LAW—EVIDENCE—STATEMENTS MADE TO ACCUSED.

In a prosecution for murder, a statement made by a witness to defendant, to which the latter made no answer, was not admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 898, 899, 968, 970.]

4. WITNESSES—CROSS-EXAMINATION OF DEFENDANT.

In a prosecution for murder, cross-examination of defendant tending to inculpate that he was testifying untruthfully was improper.

5. SAME.

In a prosecution for murder, it was improper for the prosecuting attorney, on cross-examination of defendant, to ask him if it was not a fact that people generally talked about his being jealous of deceased.

6. CRIMINAL LAW—FAILURE OF DEFENDANT TO TESTIFY ON APPLICATION FOR BAIL.

Under the statute providing that the failure of defendant in a criminal prosecution to testify in his own behalf shall not be commented upon, the prosecuting attorney has no right to refer to defendant's failure to testify as a witness upon an application for bail.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1672.]

7. WITNESSES—IMPEACHING—CROSS-EXAMINATION.

In a criminal prosecution, in which defendant called a witness to impeach one of the state's witnesses, it was improper to ask defendant's witness as to which had the worst reputation, he or the witness he was called to impeach.

8. CRIMINAL LAW—CHARACTER OF DEFENDANT FOR PEACE AND QUIET.

Where a defendant, in a prosecution for murder, does not place his general character for peace and quiet in issue, the state has no right to attack his character in that respect.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 889.]

9. WITNESSES—CHARACTER FOR TRUTH—IMPEACHMENT.

Where a defendant, in a criminal prosecution, testifies as a witness, the state has a right to attack his character for truthfulness; but the court should instruct that the evidence is only to be considered for purposes of impeachment.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1118, 1129-1132.]

10. HOMICIDE—EVIDENCE—REPUTATION FOR CARRYING PISTOL.

In a prosecution for murder by shooting with a pistol, it was improper to ask a witness whether defendant was in the habit of carrying a pistol, or had that reputation.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 810.]

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

George Newman was convicted of murder, and appeals. Reversed.

James Sparks, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

HOBSON, C. J. In May, 1904, a street fair was in progress in the town of Corbin, which is situated in Whitley county, near the Laurel line. Lynn Camp creek is the dividing line between the two counties. There is a railroad bridge across the creek; and near the Laurel county end of this bridge on Saturday evening, May 27th, at about 9 o'clock, the body of Paschal Bryant was found lying between the rails of the railroad track, with his head near one rail, his hat on his breast, and a large bullet hole entering his head behind the lower part of his left ear and making its exit at the right eye. The body was warm when found, but life was extinct. The corpse was found by a man who lived not far off and was walking along the railroad on his way to Corbin. This man heard the shot some time before he left home. While he was standing near the body, which was about a quarter of a mile from the station at Corbin, there came through the wire fence a man and a woman, from the east side of the railroad track, who came up on the railroad and looked at the corpse. The woman broke down and cried a little, and said she could not stand to look at him. Then they passed on. The man's name was Henry Carr. The woman's name was Laura Newcomb. They have since been married. That night they and the defendant, George Newman, were arrested charged with the murder of Bryant. Carr and the woman were discharged subsequently, but Newman was held over, and, having been indicted, was convicted, and his punishment fixed at confinement in the penitentiary for life.

On the trial Carr and wife were introduced as witnesses for the commonwealth, and it was insisted for Newman that Carr had killed Bryant and had married the woman to keep her from being a witness against him. There was a merry-go-round at the fair, and there was a considerable crowd in town, especially about the merry-go-round. George Newman was 22 years old, and about two months before had married Maria Hood. They lived six or seven miles from Corbin. On the preceding Tuesday, while he was out at work, she had left home, and when he came home in the evening she was not there, and he could not learn where she was. The next morning, Wednesday, he borrowed a Winchester rifle and, as he says, went turkey hunting with it, but finally, conceiving that his wife might be at Corbin, went on with the rifle to Corbin, arriving there about dark. He left the rifle with a friend, and, finding his wife on the merry-go-round, took her home. There seems to have been no trouble

between them then. She claimed that she had simply wanted to go to the fair, and, fearing that her husband would not be willing for her to go, had left home without letting him know that she was going. On Thursday evening the defendant was seen in earnest conversation with Paschal Bryant, who lived about a mile from him. The whole conversation was not heard by any of the witnesses, but the defendant was heard to ask Bryant, "Before God and Heaven did you take Maria off?" Bryant said, "No." The defendant then asked him, "Where were you when it rained Tuesday evening?" Bryant answered, "At the Laurel River bridge." This bridge was between their homes and Corbin. The defendant then said, with an oath, "That is where she said she was." The rest of the conversation was not overheard. On Saturday morning Newman and his wife went to Corbin. He took with him a large .44-caliber Colt pistol, and when they got there they went to the house of a friend, and he hung the pistol up over the washstand. They then went on to the fair. That afternoon Paschal Bryant and the defendant were seen drinking together at a saloon. The defendant was a small man, and wore a white hat. Late in the afternoon, and about dusk, Paschal Bryant went to an eating stand between the merry-go-round and the railroad bridge, and there bought some apples. He came there in company with two other men, who waited for him on the street. Neither of these men were recognized there, but one was a small man with a white hat, and the other was a larger man. The three then left and went on down toward the railroad. Between the railroad depot and the creek there is a cut. Before they had passed through this cut they were seen by two men, with their wives, who were passing along in the opposite direction, and after they passed through the cut they passed a woman named Belle Polly, who came along with two men going up toward the station. She testifies to recognizing Paschal Bryant, and also George Newman, the small man with the white hat; and one of the other witnesses, who did not know Newman, but saw him the next morning, said that from his hat, size, and face he thought he was the same man. The witness Polly had only gone a short distance, when she heard the report of a large gun down about the railroad bridge, in the direction which the three men had gone. This report was also heard by the other witnesses who passed them. The railroad maintains a pumping station at the bridge. The man who runs the pump was at the pumping house, and testifies to seeing the three men come over the bridge, the smaller man with the white hat being behind, and when they got to the far end of the bridge they got in a bunch and the pistol went off. He saw the flash of the pistol, but saw no more of any of the parties, and did not know that

any one was killed until afterwards. Two witnesses testify to seeing tracks of two men leading down from the railroad embankment towards the creek. There was a dam just below on which they could have crossed and gone back to Corbin. The defendant, when arrested soon afterwards, had no weapons upon him; but the lady at whose house he had left the pistol, when she returned home, found the pistol gone. He says that he did not return to the house, and does not know how the pistol got away. It was a private house, and only some ladies seem to have known that the pistol had been left there by him. The pistol has not been seen since, and the theory of the commonwealth is that it was thrown into the creek after the shooting.

The proof leaves no doubt that Bryant was killed by a shot from a weapon carrying a ball similar to the defendant's pistol, and that he was killed by one of the two men who were seen walking out the railroad with him and across the bridge just before the shooting took place. The proof is entirely lacking as to who the third man of this party was. There was no proof of intimacy between Bryant and Mrs. Newman. It was shown where she staid while away from home. There was no proof of any attentions by Bryant to Laura Newcomb, and the proof was that she and Carr had gone down there into the woods before dark with three pints of whisky, and after the shooting they came up out of the woods together. Carr was evidently quite drunk, and there is no evidence that he had any weapon, or that he left the woman after he went down there with her. While he is about the size of the defendant, it is not shown that he wore a white hat, nor is he in any way identified as one of the three men going down the railroad. The woman Belle Polly and the woman Laura Newcomb were both of loose morals. While the defendant's evidence is in many respects impressive, it is unsatisfactory as to the interview between him and Paschal Bryant, in which he was asking Bryant about his wife. He claims to have been with his wife at the merry-go-round the whole evening, but the other witnesses do not substantiate this statement. There was a large crowd there. One or two witnesses speak of seeing him there, but there was no proof showing that he was missed from there, or that he was there continuously.

It is insisted for the commonwealth that he was jealous of his wife, and that his jealousy was pointed at Paschal Bryant. The only real issue in the case was whether the defendant was the small man wearing the white hat, who was seen by the witnesses going down the railroad with Paschal Bryant in company with a third man just before he was shot. There is some uncertainty about the case, and it is possible that the witnesses are mistaken who identify the defendant

with the small man wearing the white hat. It was usual for persons to shoot over there beyond the bridge. At least it was not uncommon, and it is possible that Paschal Bryant and two others were going home, and he was shot by one of them in firing off a pistol at the far end of the bridge. He was found with his hands in his pockets, and when he was shot was evidently not anticipating trouble. The shot was fired from behind him. The small man was behind him when they passed the witnesses. The lady at whose house the defendant hung up his pistol locked up the house, and the house was found locked when the family returned. The defendant took supper there, and it does not appear from the evidence that any other man was there, at supper or after supper. There is testimony tending to show that the defendant was not jealous of Paschal Bryant, but of a man named Smith, and that he regarded Paschal Bryant as his friend. All these matters were for the consideration of the jury, and, while the evidence is not conclusive, we cannot say that there was no evidence warranting the verdict of the jury.

It is insisted for the defendant that the indictment against him is insufficient. The indictment charges that the defendant and other persons whose names are unknown to the grand jury, then and there acting with him, shot and killed Bryant, and that either the shot was fired by Newman or "one of the above-mentioned persons whose name is unknown to the grand jury, while the other was present aiding and assisting, but which so actually fired the shot is to the grand jury unknown." The indictment is sufficient. The word "mentioned" should have been omitted from the indictment in the expression "one of the above-mentioned persons," as no other person but Newman is mentioned in the indictment. While this is so, the sense is perfectly clear that the indictment charges that either Newman or one of the unknown persons fired the shot; the other being present and acting with him.

The court allowed J. C. Floyd to say that he made the following statement to the defendant: "The next morning after his wife went to Corbin on Tuesday evening I saw Mr. Newman at Keavy, and he seemed to be busted up some way, and was inquiring about his wife. He said she had gone. I saw from his looks he was a little out of shape, and I said to him, 'George, don't hurt—' (Defendant's objection overruled. Defendant excepts.) I said: 'George, don't hurt anybody over this woman, because you are not an innocent purchaser in this woman. You know she run off with a married man before you married her.' He didn't say anything at all." The latter part of this testimony should not have been admitted, as it was simply a statement of the witness to which the defendant made no response.

When the defendant was on the stand as

a witness, the commonwealth attorney, on cross-examination, questioned him as follows: "Q. You didn't go up through that cut at the time Mr. Ellison speaks of seeing you? A. No, sir. Q. If you had been over there and killed a fellow, you would not admit it, would you? A. Yes, sir. Q. You would not hesitate to do it? A. No, sir. Q. If you had gone over there with somebody and shot him in the head and run off, would you tell it? A. Yes, sir. Q. If you had gone over there and shot a fellow, and you and some other fellow had run off down the bank and down by the milldam and crossed over, would you tell it? A. Yes, sir. Q. And if you had shot him in the back of the head, when he had his hands in his pockets, you would not care to tell it? A. No, sir. Q. You would do that, especially because you and him were good friends, wouldn't you? A. Yes, sir; me and him was the best of friends. Q. If you had never had any suspicion of any intimate relations existing between him and your wife, do you know why the people were talking about you being jealous of him? (Defendant's objection sustained. Plaintiff excepts.) Q. Don't you know it to be a fact that the people generally talked about you being jealous of Mr. Bryant? A. No; I never heard of it. Q. Didn't you go over there on that bridge and shoot that fellow in the head and throw that pistol in that pond? A. No, sir. Q. If you did, you would tell it, I reckon? A. Yes, sir. Q. If you had gone over there and shot a fellow in the back of the head, and him with his hands in his pockets, and you had run down there on that dam and throwed your pistol in that pond, you would tell the jury about it? A. If I had been there and shot him, I would tell the jury about it. Q. And if you had thrown your pistol in the pond, you would have told about that? A. Yes, sir. Q. At the May term of this court, 1904, you made application for bail, did you not? A. Yes, sir. Q. Did you not testify as a witness upon that application? A. No, sir. Q. Why didn't you testify, if you had nothing to do with the killing of that man? (Defendant's objection sustained. Plaintiff excepts.)" The defendant introduced Wesley Wells to impeach the witness Belle Polly, and on cross-examination the commonwealth attorney asked him: "Q. Do you know which has the worst reputation, you or she? A. I don't know, hardly." The defendant did not put his character in issue. The commonwealth attorney asked one of his witnesses, introduced to impeach Belle Polly, what the defendant's general moral character was. The witness said he was a pretty reckless character. The defendant then introduced a witness to sustain his character, and the commonwealth attorney cross-examined him as follows: "Q. Did you hear about his breaking up a church in Virginia? A. No, sir. Q. Did you know that he carried a pistol regular? A. No, sir; I have saw him with a pistol in Virginia, but

every man did. It was nothing unusual. Q. Is it a penitentiary offense in Virginia to carry a pistol? A. No, sir; I don't think so." He also asked another character witness as follows: "Q. How long had this fellow been married until Paschal Bryant was killed? A. About two months, maybe. Q. Before that time what was his general moral character, good or bad? A. Not very good. He went with wild boys; sorter reckless. Q. Did you know that he carried a 45 pistol most all the time? A. Never saw it. Q. What was his reputation about it? A. The reputation was that he carried it. Q. His reputation was that of a fellow that drank a right smart, wasn't it? A. He was of a class of boys that was not good."

While there were no exceptions taken to the questions above indicated, except as quoted, it was misconduct on the part of the commonwealth attorney to ask them. When the defendant is sworn in his own behalf, in a criminal case, he is to be treated on cross-examination as any other witness, and it is very improper for the commonwealth attorney to insinuate in cross-examining him that he is swearing an untruth or would swear an untruth. The mode of cross-examination followed by the commonwealth attorney was calculated simply to discredit the witness before the jury. It was improper for the attorney to indicate what the people generally thought or said about the defendant's being jealous of Bryant. The defendant is entitled to a fair trial on the evidence heard before the court, without any reference to the sentiment of the community. It was improper for the attorney to refer to the fact that the defendant did not testify as a witness upon the application for bail. The statute which allows the defendant to testify in his own behalf in a criminal case expressly provides that his failure to testify shall not be adverted to, and this clause of the statute applies no less to previous trials than to the one in progress. It was improper for the commonwealth attorney to discredit Wesley Wells by a question implying that his character was bad. The mode of discrediting a witness is pointed out in the statute, and insulting questions should never be asked a witness. The defendant did not put his general character for peace and quiet in issue, and, he not having done that, it was improper for the commonwealth attorney to attack his general character for peace and quietness. The commonwealth might have attacked his character for truthfulness, or his general moral character, for the purpose of impeaching his testimony as a witness; but, when this is done, the court should always admonish the jury that the evidence is only to be considered by them for the purpose of impeaching his testimony as a witness. It was improper for the commonwealth attorney in any view of the case to ask whether he was in the habit of carrying

a pistol, or to go into particulars as to what he had done in his past life. The examination should have been confined to the witness' character for truthfulness or his general moral character.

By the incompetent evidence above referred to the impression, no doubt, was left upon the minds of the jury that there was an apprehension among his neighbors that appellant would hurt somebody about his wife, and this impression was fortified by the improper examination to which we have referred. When this impression was fastened upon the minds of the jurors, a foundation was laid for them to conclude that it was probable that he had killed Bryant because he was jealous of him. While we would not reverse the judgment for the conduct of the commonwealth attorney, which was not objected to, and might not reverse for the admission of the evidence which was objected to, if the proof was clear as to the defendant's guilt and the trial was otherwise fair, still the evidence was prejudicial, and being given undue weight by the matters indicated, may have had great effect upon the jury. In view of the inconclusiveness of the evidence against the defendant, and in view of the conduct of the commonwealth attorney in asking the questions above referred to, we cannot say that the defendant has had a fair trial, or that upon the whole case there was no substantial error to his prejudice.

Judgment reversed, and cause remanded with directions to grant appellant a new trial.

CHEATHAM et al. v. HICKS et al.

(Court of Appeals of Kentucky. Sept. 28, 1905.)

1. FRAUDS, STATUTE OF—BOUNDARIES—AGREEMENT AS TO LINE—VALIDITY—EFFECT.

Where adjoining landowners orally agree upon a boundary line and occupy according to the agreement, it is not within the statute of frauds, but is enforceable in equity as against subsequent owners.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 112.]

2. TRESPASS—CUTTING TIMBER—EVIDENCE.

In trespass for cutting and removing timber from plaintiff's land, evidence held not to show plaintiff to be the owner of the land on which the alleged trespass was committed.

Appeal from Circuit Court, McLean County.

"Not to be officially reported."

Action by Alice Cheatham and others against Byrd C. Hicks and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

R. H. Cunningham, for appellants. W. W. Ireland, W. B. Noe, Geo. D. Hellman, and Andrew J. Clark, for appellees.

SETTLE, J. The appellants, Alice Cheatham, R. H. Robards, and F. H. Kennedy,

sued appellees, Hicks, McFarland, and McCarty, in the circuit court for trespass, alleged in the petition to have been committed by cutting and removing timber from land in McLean county of which Alice Cheatham claims to be the owner and Robards and Kennedy in possession as her tenants. Upon the ground of the alleged insolvency of the appellees, an injunction was obtained by appellants to prevent the further cutting of timber from the land by them. The appellee Hicks answered, denying appellant's ownership of the land from which the timber was cut and removed, averring that it is owned by and in the possession of one Charles Hofferberth, setting forth the boundary of the entire tract claimed by Hofferberth, of which that in controversy is alleged to be a part, and justifying his cutting of the timber upon the ground that it was authorized by Hofferberth, the alleged owner. By an amended petition, in the nature of a bill quia timet, filed by the appellant Cheatham, appellee Hofferberth was then made a party to the action, following which he also answered, denying appellant Cheatham's title or possession of the land described in the petition, setting up title in himself to the land in question, and averring that it was a part of a large tract owned by him, the boundary of which was given in the answer by metes and bounds and courses and distances. His answer also contained the averments: That he and those under whom he claims the land in controversy had, at the time of the institution of the action, been in the actual adverse possession of it and claiming to a well-defined and marked boundary for more than 15 years continuously, and, further, that during the lifetime of George W. Scantland, father of appellant Alice Cheatham, from whom the land descended to her, he (Scantland) claimed the land now in controversy, which was also then, as now, claimed by appellee Hofferberth; and to settle the dispute between them as to the line dividing their lands and prevent litigation they agreed that the true line between their lands was as follows: "Beginning at three maples on the bank of Green river, running thence to a stake, with a burr oak pointer, near a pin oak stump." And the line was thus established. That this agreement was made more than 25 years before the action was brought, and the line of division thus agreed upon and designated was thereafter always recognized by appellee and Scantland as the true line between their lands, and was so recognized by appellant until about the time of the institution of her action. That the line thus established left to appellee on his side of the line, and as part of the entire tract claimed by him, the land in controversy. The agreement as to the dividing line, and the marking and fixing of same in pursuance thereof, was relied on by appellee in his answer as a bar to appellant's action. Replies were filed by appellants, traversing

the affirmative allegations of appellees' answers. After thus completing the issues, proof was taken by the parties in the form of depositions, and the case tried by the court without the intervention of a jury; the trial resulting in a judgment dismissing the action, of which appellants complain.

The tract of land claimed by appellant Alice Cheatham embraces 282½ acres, including the parcel in controversy, and 149½ acres without it. Adjoining this is the land of appellee Hofferberth, consisting of several tracts and the entire boundary containing about 1,500 acres, including that in controversy. The part in controversy contains 133 acres and is about 53½ poles in width. Both parties derived title from one Myers, a remote vendor, and each seems to concede that the east line of what is known as the "Henderson grant" from the state of Virginia is the true line dividing their lands; appellants claiming that this line runs from a small hickory snag on Green river to a pin oak and sweet gum, and appellees that it runs from three maples on Green river (53½ poles north of the corner as claimed by appellants) to a stake with a burr oak pointer near a pin oak stump. One or the other of these lines is the true one. The appellant Alice Cheatham introduced in evidence divers deeds showing her title from Myers, the common vendor. Appellee Hofferberth did not offer in evidence any deeds exhibiting title to the land claimed by him, but it seems to be conceded in the record that his holdings, whatever they are, were acquired by purchase as much as 30 years ago. The land of appellant Cheatham was conveyed her by deed from her brother in making partition of the lands of their deceased father, George W. Scantland; they being the only heirs at law. This deed does not give the boundary of the land conveyed, and the other deeds relied on as showing her title do not give clear descriptions of the lands thereby conveyed or make easy the identification of the boundary she now claims. She has not shown by the evidence that she or her vendors ever had actual possession of any part of the land claimed by her until about the time of the institution of this action, at which time the appellants Robards and Kennedy were by lease put into possession of parts thereof, including some of the land in controversy. Previously her possession and that of her father had been only constructive. Upon the other hand, while it is true, according to the evidence, that appellee, by one or more tenants, had actual possession of a part of the land in controversy at the time of and before the institution of the action, and likewise had at different times during the previous 25 years agents or tenants upon and in actual possession of parts thereof, and other parts of the entire boundary claimed by him, and that they from time to time sold timber from different parts of same, his possession, though adverse to appellants and all

others, was not connected or continuous for as much as 15 years, the statutory period. The case therefore cannot be decided in favor of either party upon the statutes of limitation.

We are of opinion that the appellant Cheatham has not satisfactorily shown by the evidence that she is entitled to recover, and that the weight of the evidence is to the effect that the true line of division between the lands of appellant Cheatham and appellee Hofferberth is as claimed by the latter; that is, that it begins at the three maples on the bank of Green river marked as a corner, and standing 53½ poles from and northeast of the small hickory, erroneously claimed by appellants as the corner, running thence S. 32° W. 387½ poles to a stake with a burr oak pointer, near a pin oak stump and the remains of a sweet gum. Not only is the line as claimed by appellees established as the true line by the testimony of a majority of the witnesses, but is also shown by ancient marks along the line, and by all but one of the several surveys made of the lands of the parties.

The chancellor in his written opinion gives especial weight to the survey by Col. Ben Johnson, then county surveyor, made 25 years before the institution of this suit, to ascertain and fix the true line between the lands of appellant Cheatham and appellee Hofferberth; the land of the former being then owned by her father, G. W. Scantland. Col. Johnson, as stated by the chancellor and conceded by all the parties, was distinguished for his high character as a man, his skill as a surveyor, and his familiarity with the lands and titles of McLean county. Apparently without difficulty he located and established the line of division as now claimed by appellees. It also appears that he was selected to ascertain and locate the line by G. W. Scantland and Theodore Grim, the then agent of appellee Hofferberth in charge of the land. At the time this was done Grim and Scantland were in a controversy as to the location of the line, growing out of the cutting by a tenant of Scantland's of a board tree on appellee Hofferberth's side of the line. We agree with the chancellor that the work of Surveyor Johnson and his fixing of the line in dispute is entitled to great weight.

It further appears from the evidence that appellant Cheatham's father was satisfied with and then acquiesced in the line as ascertained and established by Johnson, in token of which he surrendered to Grim, Hofferberth's agent, the boards that his tenant had made on the latter's land, and it does not satisfactorily appear from the evidence that Scantland was thereafter ever heard to deny or repudiate the line as established by Johnson, or reassert claim to any part of the land thereby left in the boundary of Hofferberth. Furthermore, it is, we think, abundantly shown by the evidence, not only

that Scantland acquiesced in the line as established by Johnson, but that he admitted he had been mistaken in claiming the line to be elsewhere, and agreed that the line established by Johnson was the true line. This admission and agreement were made to and in the presence of Grim, appellee Hofferberth's agent, who seems to have had authority from his principal to have the true line established and to act upon the agreement of Scantland that it had been correctly and satisfactorily done. If the line as thus established by Johnson and agreed to by the parties continued to be treated and recognized by Scantland, as well as by appellee Hofferberth, during the remainder of the life of the former, it would be inequitable to allow his daughter, the subsequent owner of the land affected by the agreement as to the dividing line, to abandon that agreement after his death or repudiate the line as established. An oral agreement fixing a dividing line between adjoining lands is not within the statute of frauds, and may be enforced in a court of equity. *Jamison v. Petit*, 6 Bush, 670; *Grigsby v. Combs*, 21 S. W. 37, 14 Ky. Law Rep. 652; *Campbell v. Campbell*, 64 S. W. 458, 23 Ky. Law Rep. 870; *Frazier v. Mineral Development Co.*, 86 S. W. 983, 27 Ky. Law Rep. 815.

We fully concur in the conclusions, expressed in the opinion of the learned chancellor, that appellants are not entitled to recover, because the line as claimed by appellee Hofferberth is, as shown by the weight of the evidence, the true line dividing the land claimed by him from that of the appellant Cheatham, and, if this were not so, it was, by agreement between her father, the former owner of her land, and appellee Hofferberth, made the dividing line between them. Consequently the land upon which the alleged acts of trespass were committed does not belong to the appellant Cheatham.

Wherefore the judgment is affirmed.

CABELL v. CITY OF HENDERSON.

(Court of Appeals of Kentucky. Sept. 29, 1905.)

1. MUNICIPAL CORPORATIONS—ENFORCEMENT OF LIEN FOR IMPROVEMENTS—PETITION.

Ky. St. 1903, § 3279, governing cities of the third class, provides that no ordinance shall take effect until the same shall have been twice publicly read and passed at two sessions held on different days, and that all ordinances requiring the improvement of streets shall on each passage receive a vote of two-thirds of all the councilmen. *Held*, that a petition to enforce a lien for street improvement, averring that the ordinance was read and passed by the council on a certain day, is sufficient, without an averment that it was twice publicly read and passed at two sessions held on different days.

2. SAME.

Ky. St. 1903, § 8453, relating to liens for improvements in cities, provides that such liens "may be enforced by filing a petition in equity," and that "it shall only be necessary for plain-

tiff to file a copy of the ordinance requiring the work to be done, a copy of the contract, a copy of the engineer's report, * * * a copy of the order or each resolution of the common council receiving the work as done according to the contract, which shall be, together with the corresponding allegations in the petition, prima facie evidence of plaintiff's right to recovery." *Held*, that the failure of plaintiff to file a copy of the resolution accepting the work, it being alleged that such copy was filed as an exhibit, did not defeat its right to recover; the allegation relating thereto not being put in issue by the answer.

3. APPEAL—HARMLESS ERROR.

Under Civ. Code, Prac. § 134, providing that no judgment shall be reversed by reason of any error or defect which does not affect the substantial rights of the adverse party, failure to file an exhibit showing that the council received the work done in improving the street, it being alleged that such exhibit was filed, constitutes no ground for reversal of a judgment enforcing the lien, in the absence of a showing that defendant was injured.

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Action by the city of Henderson, as assignee of J. E. Manion, against Laura B. Cabell to enforce a lien for street improvements. From a judgment for plaintiff, defendant appeals. Affirmed.

R. D. Vance, for appellant. Dorsey & Stanley, for appellee.

HOBSON, C. J. The common council of the city of Henderson on September 1, 1903, passed an ordinance for the improvement of Jefferson street between Main and Elm streets. The contract was let to J. E. Manion, who did the work, and, the cost of the improvement having been apportioned to the different property holders, the city of Henderson, as the assignee of Manion, filed this suit against appellee to enforce the lien on her property for \$355.96, the amount apportioned to her. The defendant filed a demurrer to the petition, and, that being overruled, filed an answer which was in effect a traverse of certain allegations of the petition. No proof was taken on either side, and, the case being submitted, the court gave judgment in favor of the city, and she appeals.

It is insisted for her that the petition is defective, for the reason that it is simply averred in the petition that the ordinance was "read and passed on the 1st day of September, 1903, by the common council of the city of Henderson, Kentucky." The petition also contains this averment: "Said ordinance was passed by a two-thirds vote of said council; the yeas and nays being called and entered upon the journal of their proceedings." Section 3279, Ky. St. 1903, governing cities of the third class, to which Henderson belongs, is as follows: "No ordinance shall take effect and be binding until the same shall have been twice publicly read and passed by the common council at two sessions, held on different days, a

majority of those present voting for same on both passages, the yeas and nays being called and entered upon the journal: Provided, however, that all ordinances requiring the improvement of streets and alleys, or the construction of sewers, or fixing salaries, or prescribing penalties, or fixing the rate of taxation, or amount of licenses, or appropriating money, where the amount appropriated is in excess of one hundred dollars, shall, on each passage, receive the votes of two-thirds of all the councilmen then elected, the yeas and nays being called and entered on the journal."

It is insisted that the petition is insufficient, because it is averred in it that the ordinance was read and passed by the council on September 1, 1908, and it is not shown that it was twice publicly read and passed by the common council at two sessions held on different days; a majority of those present voting for it on both passages. The rule is that a general allegation that the council passed the ordinance is sufficient; it being presumed that the council did its duty. It is to be presumed that the pleader refers to the final passage of the ordinance, when he says that it was read and passed on September 1st. In *Preston v. Roberts*, 76 Ky. 579, the court said: "The allegation that an ordinance was passed was not the mere pleading of a conclusion, but of a fact, just as an allegation that a party executed a deed, a note, or other writing, or is the holder and owner of a bill of exchange, or the like, without alleging the facts which show that he did execute the writing or which make him the owner and holder of the bill." See *Lexington v. Woolfolk*, 78 S. W. 910, 25 Ky. Law Rep. 1817. If the defendant wishes to take issue as to the passage of the ordinance, he can do so by his answer, by traversing the allegations of the petition, and then, as the certified ordinance which is filed with the petition makes out a prima facie case for the plaintiff, the burden is on him to show that the council did not do its duty or conform in its proceedings to the statute.

It is averred in the petition that the work was accepted by the common council. It is stated in the petition that a copy of the resolution of the common council receiving the work as done according to the contract is filed therewith as part thereof, marked "E." The answer of the defendant does not traverse the allegations of the petition on this subject, and, when the case was submitted and was on trial, during the argument of the plaintiff's attorney, it appearing that exhibit E was not in the papers, the court allowed the city to file a copy of the exhibit. The paper so filed is not a copy of the resolution of the council receiving the work. Perhaps a mistake was made in getting the right paper; but, however this

may be, the defendant not having traversed the allegation of the petition that the work was accepted by the council, there was no issue between the parties on this subject, and it was admitted of record that the work had been accepted by the council. Section 3453, Ky. St. 1908, among other things, provides: "The liens given for the purposes named in the last four sections may be enforced by filing a petition in equity in favor of the contractor, or his assignee, against any or all the persons liable for the cost of said work, and it shall only be necessary for the plaintiff in the action to file a copy of the ordinance of the common council requiring the work to be done, a copy of the contract for doing the same, a copy of the engineer's report showing the respective liability of each person sued, a copy of the order or each resolution of the common council receiving the work as done according to the contract, which shall be, together with the corresponding allegations in the petition, prima facie evidence of the plaintiff's right of recovery, and in such cases the defendant shall not be allowed to make the defense that the work was not done according to contract, as against said plaintiff in the action."

It is insisted for appellant that, as a copy of the resolution accepting the work was not filed with the petition, the plaintiff failed to make out a prima facie case. Waiving the question whether it should be presumed under the pleadings that the exhibit was in fact filed with the petition and had simply been lost from the record, we think that where no issue is made as to a fact alleged in the pleading, and the fact is thus conceded of record, the failure to file an exhibit showing the fact is immaterial; and, the other papers required by the statute to make out a prima facie case being filed, there was a substantial compliance with the statute. Under section 134 of the Civil Code of Practice a judgment shall not be reversed for an error not affecting the substantial rights of the adverse party.

There is nothing in the record to raise the question of spoliation, or to show that anything more was assessed against the defendant's property than should have been assessed against it.

Judgment affirmed.

BARRET et al. v. GWYN et al.

(Court of Appeals of Kentucky. Oct. 4, 1905.)

1. WILLS—CONSTRUCTION.

Where a will provided for the division of testator's residuary estate into equal shares, to be held in trust for testator's brothers and sisters, and at their death paid to their children, an only child of one of the sisters, who after his mother's death was paid a part of her share of the estate, took such share absolutely, so that when he died, his property passed under the law of descent and not under the will.

2. EXECUTORS AND ADMINISTRATORS—INSOLVENCY—LOSS OF ASSETS OF ESTATE—BY WHOM BORNE.

A will directed testator's residuary estate to be divided into equal portions and held in trust for testator's brothers and sisters; the share of each to be paid after the death of such brother or sister to his or her children. After a portion of their shares had been paid to the descendants of four of the legatees, the executor became insolvent, and part of the estate was thereby lost. *Held*, that the loss was to be borne by the whole estate, and not wholly by the shares which had not been paid, and hence, in making further payments from assets in process of collection, no payments should be made to those beneficiaries who had received partial payments until the payments to those who had received none of the principal should equal the amounts which had been paid to those who had received partial payments.

3. PLEADING—ANSWER—REPLY.

Where the answer of certain defendants is not made a cross-petition against their co-defendants, the latter are not required to reply.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by Henry W. Barret and others against Hugh G. Gwyn and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Alex G. Barrett and R. H. Blain, for appellants. Nathan J. Kahn, Chas. F. Taylor, and Guy H. Herdman, for appellees.

HOBSON, C. J. James Garvin died, a resident of Louisville, about the year 1859, the owner of a considerable estate. He had no children, and left a will by which he devised his entire estate to his executors, in trust for his two brothers, Samuel and William Garvin, five sisters, and the children of a deceased sister, to each one-eighth. William Garvin's share was left to him absolutely, but the shares of the other brother and the sisters were to be held by the executors during their lives, the income to be paid to them, and at their death the principal to be paid to their children, or, if any of them died without children or descendants, to the remaining brothers and sisters or their issue. The will also directed that the executors, as soon as in their judgment it was practicable to make a proper and judicious division of the residue of the estate, should divide it into eight shares, and upon making the division they should pay the income of each part to the person entitled to receive it, and upon the death of the brother or sisters to pay over to the lawful issue of the decedent forthwith the portion set apart for the parent. He also directed that, as soon as the division was made, the portion assigned to the children of the dead sister should be paid to them. He appointed his friends, John Bell and Samuel Gwyn, executors of the will. Gwyn only qualified, and on April 30, 1861, filed his petition in the Louisville chancery court, asking a construction of the will and the direction of the court in the execution of his trust. Settlements were made by him from time to time with the commissioner. Finally, in

March, 1865, it appeared that the executor had in his hands the sum of about \$61,000, and thereupon the court entered a judgment construing the will, and directing the executor to pay over to William Garvin one-eighth of the sum in his hands, \$7,625.19, and that he should pay the same amount to the children of the sister who was dead at the death of the testator, and also to the children of another sister who had since died. The order concludes with these words: "The other five-eighths of said residuary estate the executor will still hold in trust in accordance with the provisions of the testator's will."

Later it was made to appear to the court that M. J. Brown, another sister, had died, and the executor paid to her children another one-eighth of the fund, leaving in his hands something over \$30,500. He had continued to collect the assets of the estate, and it appeared that he had in his hands the sum of \$7,240.80 since the division was made in 1865; and he was ordered to hold this general fund. He reported to the court, before he paid Mrs. Brown's share, that \$38,125.89 was invested in a house and lot in Brooklyn, certain bank stock, and some notes of the heirs which he had taken. After this the executor became insolvent, and R. H. Blain was appointed, in the year 1875, as administrator with the will annexed. Blain found the house and lot in Brooklyn incumbered by tax liens, the bank stock pledged for the personal debts of Gwyn, and the general fund of \$7,240.80, which remained in the hands of the executor undivided, had disappeared. Blain finally sold the house in Brooklyn for \$8,000 or \$7,000. He succeeded in getting \$3,000 or \$4,000 from the bank stock, and \$3,000 or \$4,000 from the heirs to whom money had been loaned, making the total of the estate in his hands about \$16,000. The testator owned 33 surveys of land in Texas, of 320 acres each, on which there were also unpaid taxes, and perhaps some of the land had been sold for taxes. Blain paid off the taxes in Texas, and, as directed by the court, paid out the income on the estate in his hands, until he finally resigned and settled his accounts in the year 1880. D. M. Rodman was thereupon appointed as trustee in his stead, and received the estate which Blain had in his hands. Rodman remained trustee until about the year 1888, paying out the income to the heirs, and in 1888 he failed, and the Louisville Trust Company was then appointed trustee.

The chief thing that the trust company got from the estate in Rodman's hands was a piece of Louisville property which belonged to Thomas Kennedy, his surety, and is yet in the hands of the trust company. What this property is worth does not clearly appear from the record. During the administration of Blain some of the Texas lands were sold and some were also sold during the administration of Rodman. Quite a number of sales have been made by the trust

company, so that now more than one-half of the land has been sold. One of the three sisters whose part of the estate was left in the executor's hands, Mrs. Kerr, died, a resident of Memphis, Tenn., about the year 1875, leaving an only son, John L. Kerr, who died shortly after his mother, intestate. At Mrs. Kerr's death, Blain, as trustee, held a note secured by a mortgage on property in Memphis amounting to \$4,080. Under the order of the court Blain released the mortgage, and took Kerr's receipt for the amount of the debt as so much distributed to him from the estate. Nothing since has been paid to this interest. About the year 1890 (the exact date is not shown) Samuel Garvin died without issue. At his death Mrs. Barret and Mrs. Hunter were the only two sisters living, and the trustee seems to have paid them the entire income on the estate from that time forward. They are now dead, and, all of the brothers and sisters of the testator being dead, the circuit court was called upon to adjust the rights of the parties in the estate in the hands of the trust company. At the time of the judgment there was only a balance of \$5,092.36 in the trustee's hands, and it is not shown what will probably be realized from the remaining assets of the estate. The case presents several questions, by no means easy of solution, on which we will give our conclusions, without elaborating our reasons for them, as this would unduly lengthen this opinion.

1. The testator's will indicates a manifest purpose to equalize his brothers and sisters. He goes to great length to show that he intends to place them on an absolute equality. The spirit of the will forbids that any of them should be given an advantage over the others. When Samuel Garvin died without issue, his share did not descend to the surviving sisters, but to them and the descendants of those who were dead; that is, the descendants of those who were dead took their parents' shares, just as the parents would have taken them if living. When Mrs. Kerr died her son took her share absolutely, and when he died his property passed, not under the will, but under the law of descent.

2. In so far as the special fund of \$30,569, which was left in the hands of the executor after paying off four of the heirs, has been lost by the insolvency of Gwyn or the insolvency of Rodman, the loss must fall upon the estate, and not upon the four shares alone that received nothing in the distribution. To hold otherwise would be to defeat that equality which the testator aimed to maintain. The order of the court simply directed the executor to hold the fund as directed by the will, and when it was lost in the executor's hands the case should be treated simply as one where some of the devisees have received money from the executor, who became insolvent before he distributed to the other devisees. Before anything more is paid

upon the four shares, who received each \$7,625.19, Kerr, who only received \$4,080, must be made equal with them, and Samuel Garvin's heirs, who have received nothing must receive \$7,625.19. Mrs. Barret and Mrs. Hunter must also be made equal with the first four heirs before they receive anything further.

It is insisted for appellees that the case should now be settled by an application of the maxim that "in equity that will be treated as done which ought to have been done." But, if that had been done which ought to have been done, there would have been no case to settle. In that event the \$30,569 would have been kept intact, and the yearly income paid to those entitled to it. When Mrs. Kerr died, her fourth would have been paid to her son, and not \$4,080 merely. When Samuel Garvin died, his fourth would have been paid to his heirs, and the income on the remainder of the fund would have been divided between Mrs. Barret and Mrs. Hunter. If that had been done which ought to have been done, the general fund of \$7,247.80 left in the executor's hands would have been kept intact. The taxes would have been paid out of it, and this fund would have been swelled with the proceeds of the sales of the Texas lands. The surplus income from this fund, thus augmented, after paying taxes, should have been distributed to all eight of the devisees or their representatives. The trouble in the case is, where so much was left undone that should have been done, how shall the rights of the parties be adjusted to work out justice between them as near as it can be now done?

Rodman sold Texas land to the amount of \$2,587, and paid taxes on it to the amount of \$1,328. So, considering what Blain paid out on this account and interest, we have not a large balance either way. Rodman paid as income to Mrs. Hunter \$2,543.44, and to Mrs. Barret the same amount. As nothing had been paid to Samuel Garvin's heirs on account of principal, and as practically one-fourth of the fund in the hands of the trustee had been paid John S. Kerr's heirs, this income should have been divided between the remaining three, and one-third of it should have been paid to Samuel Garvin's heirs. Since the trust company took charge it has paid to Mrs. Hunter and her heirs \$3,536.77, to Mrs. Barret and her heirs \$8,560.10, and nothing to any of the other devisees. Of the amount paid Mrs. Hunter's heirs \$2,000 was paid on account of principal, and of the amount paid Mrs. Barret's heirs \$2,312.52 was paid on account of principal; so that the amount paid Mrs. Hunter and her heirs on account of income was \$6,536.77, and the amount paid Mrs. Barret and her heirs on account of income was \$6,247.78. Samuel Garvin was paid his share of income by Blain; but it must be presumed nothing has paid thereon since his death from the facts shown in the record. The trust

company received some money from Rodman and Kennedy, his surety. It sold Texas lands for \$19,449, and out of this paid on the Louisville land obtained from Kennedy, in taxes, costs, apportionment warrants, etc., \$8,318.63. The income which it received was derived mainly from the proceeds of the Texas lands which it sold. The income which the trust company received should have been divided equally between Mrs. Hunter, Mrs. Barret, and Samuel Garvin's heirs, as they had received no part of the principal of the estate, and the losses of the special fund must in equity be borne by the estate and not by them alone.

The total amount of income paid to Mrs. Hunter, Mrs. Barret, and their heirs by Rodman and the trust company, as we figure it, is \$17,871.43, and the third of this sum going to Samuel Garvin's heirs is \$5,957.14, which should be paid back to them by Mrs. Hunter's and Mrs. Barret's heirs, without interest, out of any funds hereafter falling to them, before anything more is in fact paid to Mrs. Hunter's or Mrs. Barret's heirs. Out of the \$5,092.36 now on hand for distribution, the chancellor will distribute \$3,000 to Samuel Garvin's heirs, \$1,000 Mrs. Hunter's heirs, and \$687.68 to Mrs. Barret's heirs, to bring them up to \$3,000. But the amount above adjudged to Mrs. Hunter's or Mrs. Barret's heirs, or that may be coming to them from the estate of Samuel Garvin, will not be paid to them, but will be applied to pay what they owe to that estate on account of income received by them; and as they own one-third interest in Samuel Garvin's estate, they should be required to pay out of their own funds only two-thirds of the amount they owe to the estate, and the two-thirds so paid by them should be divided between the other four heirs of Samuel Garvin's estate. In future distributions Samuel Garvin, Mrs. Hunter, and Mrs. Barret will be made up to Kerr's estate, \$4,080, and after that the surplus will be divided among the four, until they are made equal to the other four (\$7,625.19), and after that there will be an equal division in eight parts of the surplus. But Mrs. Hunter's and Mrs. Barret's heirs must in fact be paid nothing until their debt to Samuel Garvin's estate is settled, and, as Mrs. Hunter received more of the income than Mrs. Barret, the chancellor, after the debt to Samuel Garvin's estate is paid, will, if necessary, require Mrs. Hunter's heirs to pay Mrs. Barret's heirs a sum sufficient to equalize them.

3. The note against William Garvin will be charged to Mrs. Weston, without interest after his death; no demand having been made for its payment, properly verified, in one year from that time. It will be deducted from the first money coming to her.

4. The questions raised on the appeal are not concluded by any of the judgment entered in the case. Appellants are not con-

cluded by failing to reply to appellee's answer; for it was not made a cross-petition against them, and they were not required to reply to the answer of their codefendants.

The judgment is reversed on the original and cross-appeal, and cause remanded for further proceedings consistent herewith. Each party will pay his own costs in this court. The transcript fee will be paid by the trustee out of the trust estate.

CRAFT v. BARRON.

(Court of Appeals of Kentucky. Oct. 4, 1905.)

1. PLEADING—ALLEGATIONS OF FRAUD—SUFFICIENCY—MOTION TO MAKE SPECIFIC.

A general plea of fraud in an answer is good, without specifying the facts constituting the fraud, though it is better pleading to set out the facts, and on a motion to make more specific this should be required, when necessary to enable the plaintiff to prepare his case.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 37; vol. 39, Cent. Dig. Pleading, § 28½.]

2. APPEAL—HARMLESS ERROR.

Where an answer pleaded fraud generally, but a former answer, which had been required to be reformed, had set out the specific facts, and both plaintiff and defendant had taken the depositions of plaintiff's agent, who, it was alleged, had made the fraudulent statements, the overruling of a motion to make the complaint more specific was not reversible error, under the Code provision that a judgment shall not be reversed for an error not affecting the substantial rights of the party complaining.

3. CONTINUANCE—SURPRISE.

Shortly before trial, defendant took the depositions of witness attacking the character of one of plaintiff's witnesses for truth and veracity. After a ruling that the plaintiff would not be compelled to go to trial without time to take proof to meet these depositions, the defendant agreed to withdraw the depositions and the trial proceeded. While it was in progress, plaintiff saw the deponents in the courtroom and moved for a continuance, but filed no affidavit of surprise, and did not show that, if given time, he could sustain the character of his witness, and did not ask a continuance at his cost. *Held*, that the court properly refused to continue the case.

4. WITNESSES—IMPEACHMENT—REPUTATION.

Evidence that the reputation of a witness for truth and veracity was bad at places where he had resided some time before trial is admissible, in connection with similar testimony as to his reputation at a place where he resided at the time of trial, but for only a short time before.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1124.]

5. TRIAL—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.

In an action on a contract which defendant claimed he was induced to enter into through fraudulent misrepresentations of plaintiff's agent, instructions that, if the representations were substantially untrue, and by reason of them the defendant was induced to make the contract, relying on the statements and believing them to be true, the jury should find for defendant, while, if the agent only made the statements as matters of opinion, they should find for plaintiff, were not objectionable, on the ground that they took from the jury the power to judge of the materiality of the misrepresentations.

Appeal from Circuit Court, Fayette County.
"To be officially reported."

Action by J. A. Craft against W. E. Barron.
From a judgment for defendant, plaintiff appeals. Affirmed.

Morton, Webb & Wilson, for appellant.
Allen & Duncan, for appellee.

HOBSON, C. J. Appellant, Craft, was a contractor with the United States government on a number of star routes for the carrying of mail in the year 1898, and he sublet to the appellee, Barron, the contract on the route from Brownsville to Alice, Tex., for a term of four years. The contract with Barron was made on behalf of Craft by P. H. Idol, his agent. When the contract was signed by Barron, he had not been over the route, and did not know anything about it personally. After he signed the contract he went to Texas and found the route different from what he had understood, and at once gave notice to Craft that he would have to make some other arrangement, as he had been deceived in the contract. Idol received the letter, and wrote Barron that he would have to stand to the contract. Barron had contracted to take the route for \$4,500 a year. Craft finally made a contract with another person to take it for \$7,900 a year, and sued Barron to recover the damages which he had sustained, amounting to \$3,400 a year for the four years. Barron pleaded that the contract had been obtained from him by fraud. The case was heard by a jury, who returned a verdict in favor of Barron, and Craft appeals.

Barron pleaded simply that he was induced to make the alleged contract by the fraud, misrepresentation, and covin of the plaintiff, without setting up in what the fraud consisted. The plaintiff demurred to the plea, and also entered a motion that the defendant be required to make his plea more specific. The court overruled the demurrer and the motion, and of this the plaintiff complains. The rule that a general plea of fraud in an answer is good, without specifying the facts constituting the fraud, was announced by this court in *Sharp v. White*, 1 J. J. Marsh. 106, and in *Ross v. Braydon*, 2 Dana, 161, 26 Am. Dec. 445. These cases were approved in *Whitehead v. Root*, 2 Metc. 584; *Evans v. Stone*, 80 Ky. 78; and *Dowing v. Carr*, 38 S. W. 1044, 18 Ky. Law Rep. 979. The circuit court properly followed these cases, which cannot now be departed from, though, as was said in the first case, it is better pleading to set out the facts constituting the fraud, and, on a motion to make the pleading more specific, this should always be required, where it appears to be necessary to enable the plaintiff to prepare his case. But in the case before us this was not shown. The defendant had pleaded the facts specially in his original answer, which the court had required to be reformed. The plaintiff, some months before the trial, had taken the deposition of his agent, Idol, with whom the transaction was

had; both sides interrogating him as to the misrepresentations relied on. The Code provides that a judgment shall not be reversed for an error not affecting the substantial rights of the party complaining. If the answer had been made specific, it would not have enlightened the plaintiff one whit as to the case he was to meet, and no substantial right of his was affected by the ruling of the court.

On the Saturday before the trial took place the defendant had taken the depositions, at Danville, Ky., of White and Chrisman, by whom he proved that Idol's character for truthfulness was bad. When the case was called for trial, the plaintiff announced that he was not ready on account of these two depositions, which had been taken on the preceding Saturday. The court ruled that he would not compel the plaintiff to try, but would give him time to take proof to meet the evidence of White and Chrisman. The defendant thereupon withdrew the depositions of White and Chrisman, agreeing not to read them on the trial. The parties then announced ready, and the trial was begun. On the next day, while the trial was in progress, the plaintiff saw White and Chrisman in the courtroom, and thereupon moved the court to set aside the swearing of the jury and continue the case. The court overruled the motion, and of this he complains. If the defendant had not taken the depositions of White and Chrisman, but had brought the witnesses into the courtroom, as he did on the second day of the trial, the plaintiff would have been in no better shape than he was when the depositions were taken and withdrawn. If he had filed his affidavit that he was taken by surprise, and that, if given time, he could get proof sustaining the character of Idol, it would have been proper for the court to set aside the swearing of the jury and continue the action. But this he did not do. He did not make any showing that, if given time, he could get any evidence he did not have then. He simply stood upon his right to object to White and Chrisman testifying. He did not ask at any time during the trial a continuance at his cost, nor did he make any showing that he was surprised by the attack on Idol's character, and under the circumstances the court properly refused to set aside the swearing of the jury and continue the case.

It is also insisted for the plaintiff that the proof assailing the character of Idol should not have been admitted. While the evidence does not fix dates very accurately, it shows that for a number of years Idol lived at Danville, Ky., and that he left Danville and moved to Lexington about the year 1896. He was living in Lexington in the year 1898, when the contract was made which was involved in the action. Some time after that he left Lexington and went to Indiana, staying there a short time, and then went to California, and had lived in California three

years at the time of the trial. White testified that his character for truthfulness was bad at Danville up to the time that he left there, and that it was bad in California, where he lived at the time of the trial. Other testimony was introduced showing that his character was bad at Lexington and at Danville. When a witness' character is attacked, the evidence is admitted for the purpose of discrediting the witness. His character at the time he testified is the material inquiry; but his character at a previous time not too remote is relevant, as tending to confirm the evidence as to his present character. The law does not presume that a character once formed in a mature man will suddenly change. The trial court has some discretion in determining whether the evidence is too remote or not. No definite rule can be laid down for all cases. The best evidence which is reasonably practical must be adduced. If a witness has moved from the state, and especially if he has not remained very long at one place since leaving the state, but has been a transient person, resort may be had to his reputation at his former residence, and at a time more remote from the trial than would be otherwise allowed. In the case at hand the witness' character was shown to be bad, both at Danville and at Lexington, where he had lived in this state, and in California, where he lived at the time of the trial. Evidence that a witness has a bad character at the place where he lives at the time of the trial, when he has been there only a short time, is materially strengthened by proof showing that his reputation where he last lived before going there was equally bad.

The evidence for the defendant was sufficient to go to the jury, under the rule which obtains in this state that, where there is any evidence, it must be left to the jury. Nor can we say on the whole case that the verdict is against the evidence. If the defendant's statements were true, he was grossly deceived by Idol, and was induced to sign the contract before he went to Texas and examined the route by Idol's false statement to him that the contract had to be closed within three days or he could not get it. The instructions of the court set out the representations which the defendant testified Idol had made to him in regard to the route, and instructed the jury that if these representations were substantially untrue, and by reason of them the defendant was induced to make the contract when he would not have made it if he had not been deceived, and that he made the contract relying on the statements and believing them to be true, they should find for the defendant. The court also instructed the jury that, if Idol only made the statements or representations as matters of opinion, and not as a matter of fact, they should find for the plaintiff. These instructions correctly informed the jury as to the law of the case. They did not take from the jury

the power to judge of the materiality of the representations, for the jury were expressly told that they could not find for the defendant, unless he relied upon the statements and, believing them to be true, was thus induced to enter into the contract, when but for his belief in the truth of the statements he would not have entered into the contract. There are cases holding that these instructions are more favorable than they should have been for the plaintiff; but we think there is no authority for the position that the court should not in his instructions inform the jury that certain misrepresentations, if made by the plaintiff and relied on by the defendant, were substantially untrue, and the defendant was induced by the falsehood to make the contract, when he otherwise would not have done so, they should find for the defendant. The materiality of the misrepresentation is submitted to the jury, within the meaning of the authorities, when the jury are left to determine whether it was substantial and induced the making of the contract. The instructions of the court fairly submitted to the jury the real issues in the case. Their finding for the defendant under the instructions was a finding on the merits of the controversy.

Judgment affirmed.

GOODIN v. HAYS.

(Court of Appeals of Kentucky. Oct. 5, 1905.)

1. ATTORNEY AND CLIENT—COMPENSATION—DISCHARGE.

Where an attorney under contract of employment is discharged without cause, he is entitled to recover for the services rendered the contract price, abated by such sum as reasonably represents the unperformed part of the services; and where he is discharged for cause he can only recover a reasonable compensation for his services, without regard to the contract price.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 302.]

2. SAME—RIGHT TO DISCHARGE ATTORNEY.

Where an attorney under contract to render services for his client fails to pay over on demand the amount due the client under the contract, the client may discharge him.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 122, 800.]

3. SAME—CLAIM FOR COMPENSATION—SET-OFF.

Where a client discharged his attorney under contract to render services, and sued him for the money collected by him under the contract, the attorney could set off his claim for services against the amount in his hands.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 276.]

4. SAME—INTEREST.

Where a client, after discharging his attorney under contract to render services, sued him for money collected under the contract and recovered judgment, interest should be allowed from the time the attorney collected the money, while, if the attorney recover judgment, interest should be allowed on the balance due from the time of his discharge.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 283.]

"Not to be officially reported."

. Appeal from Circuit Court, Garrard County.

Action by Mary Jane Goodin against John T. Hays. From a judgment for defendant, plaintiff appeals. Reversed.

S. B. Dishman and Herndon & Swinebroad, for appellant. J. Smith Hays and Lewis Walker, for appellee.

HOBSON, C. J. In the year 1889 Mary Jane Goodin held two notes, one for \$885 and one for \$115, against solvent persons. Her husband was indebted to William Locke and J. H. Tinsley, who brought suit against him and attached the notes held by his wife. In that action a consent judgment was rendered subjecting the notes of Mrs. Goodin to the debt. She thereupon employed appellee, John T. Hays, and he filed a petition for her to set aside the judgment. The circuit court sustained a demurrer to the petition, and he took an appeal to the superior court. On the appeal the petition was held good. No further contest was made in that action, and on the return of the case to the circuit court the consent judgment was set aside and the original action was then tried. The circuit court held that \$724 of the notes belonged to Mrs. Goodin, and adjudged this much of the fund to her, but subjected the remainder of the fund to her husband's debt. She then appealed to this court, and it was held on the appeal that she was entitled to the whole fund. The controversy up to this time had simply been between her and her husband's creditors. She then filed suit against the makers of the notes. The sureties, who were the solvent parties, pleaded that they had been released by novation. A trial was had on this issue, resulting in a judgment in her favor. The sureties appealed the case to this court, and it was here affirmed, with 10 per cent. damages; they having superseded the judgment. Appellee, John T. Hays, was her attorney in all this litigation. He collected from one of the sureties on August 9, 1899, about 10 years after he was first employed, \$793, which was half of the larger note, with interest. It would seem that he could have collected the entire debt from this surety, but undertook to collect the other half of the debt from the other surety, and in doing this got into litigation with him in which the surety was successful. Out of the \$793 which he collected, he paid Mrs. Goodin \$100. He paid to the clerk of this court \$24.63, and to Mr. Smith Hays, who had been employed to assist him in one of the trials, \$43.74, leaving a balance in his hands of \$624.63. He refused to pay any of this money to her, and she thereupon discharged him as her attorney, and brought suit against him to recover the money. She testifies that the contract between them was that he was to charge her \$100, and that, when the second appeal was taken to this court, he said that he was having more trouble than he thought with the case, and that she ought to pay him \$40,

\$50, or \$60 more, and she said, "Let it be \$50," and that this was all she had ever agreed to pay him, and that he had agreed at one time to pay her \$340 out of the funds in his hands. He denied all this, and said that she agreed to pay him \$100 to get the consent judgment set aside, and that she agreed to pay him additional sums for taking the several appeals, and finally it was agreed between them that he was to have \$150 and a sum equal to the interest on the notes accrued or to accrue in full of all his services in the matter. This she denied. It appears in the proof that she also paid Judge Pryor a fee of \$50 for arguing one of the appeals in this court, and that she paid appellee from time to time different sums to cover his expenses in coming here to attend to the appeals, amounting to perhaps as much as \$50. She has also paid costs, except so far as she has recovered them. The jury found for the defendant, and she appeals.

In *Henry v. Vance*, 111 Ky. 72, 63 S. W. 273, this court said: "The relationship of attorney and client is so peculiarly one of confidence and reliance that it would not do to require a party to continue in his service one whom he distrusts, or whose capacity he no longer believes in, nor to permit the attorney, under such circumstances, to continue the relationship, where the lack of confidence would seriously impair his efficiency and interfere with his full opportunity to serve the party and the court as his office requires. That the client has the right to discharge his attorney at any time, with or without cause, even in a case where a contingent fee has been agreed upon, cannot be well doubted. *Mechem*, Ag. 856. If the discharge is for cause, the question of fee may become eliminated, or give to the client even a right to an action over. If the discharge is without cause, and after the attorney entered upon and performed part of the services, he will undoubtedly be entitled to recover at least to the extent of the value of the services rendered. But generally the attorney should be relegated to an action to recover on quantum meruit, where he has been prevented by the client, or other fact not his fault, from fully discharging the services contemplated by his contract. *Moore v. Robinson*, 92 Ill. 491; *Duke v. Harper*, 8 Mo. App. 296; *Quint v. Mining Co.*, 4 Nev. 304; *Scobey v. Ross*, 5 Ind. 445; *Telegraph Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Wilson v. Barnes*, 13 B. Mon. 330; and *Bank v. Barclay*, 60 S. W. 553, 22 Ky. Law Rep. 1555. In the case at bar, if the question of fraud in the procuring of the contract were eliminated, the question should be submitted to the jury as to what, under the circumstances, would be a reasonable compensation to appellees for the services actually rendered before notice of their discharge. And in estimating such value the jury should consider the extent of services rendered, and those to be rendered, allowing the contract price, abated by such

sum as is reasonably represented by the unperformed part of the labor." The instructions which the court gave did not follow the rule laid down in that case. Under the evidence the court should have told the jury that they should determine from all the evidence what the contract between the plaintiff and the defendant was, and that they should allow the defendant a reasonable compensation for the services actually rendered before he was discharged by her, and in estimating such value the jury should consider the extent of the services rendered and those to be rendered under the contract, allowing the contract price, abated by such sum as reasonably represents the unperformed part of the labor, if the defendant was discharged by the plaintiff without cause, but that, if he was discharged for cause, then they should only allow him a reasonable compensation for his services, without regard to the contract under which the services were rendered, and that if he had collected money for her, and failed to pay over to her on demand money that was due her under the contract, then she had a right to discharge him. The jury should also be told to offset whatever they allowed the defendant on account of his services against the amount in his hands, and to find a verdict for the party entitled thereto according as the balance may fall. If they find for the plaintiff, they should allow interest from the time the defendant collected the money, and, if they find for the defendant, they should allow interest on the balance due him from the time he was discharged.

Judgment reversed, and cause remanded for a new trial.

ALEXANDER, Revenue Agent, v. AUD et al.
(Court of Appeals of Kentucky. Sept. 28, 1905.)

1. TAXATION—REGULARITY OF PROCEEDINGS—PLEADING—PRESUMPTIONS.

Under Ky. St. 1903, §§ 3760, 4030, providing that no fact officially stated by an officer shall be called in question, except in a direct proceeding, and that a tax deed shall be prima facie evidence of the regularity of the proceedings, an allegation in a pleading that the tax collector has certified certain facts gives rise to the presumption that the acts certified to have been performed, as well as all other acts required to be done to support them; and hence a pleading attacking the validity of such acts is bad, unless it shows affirmatively that the acts were not done or that some essential was omitted.

2. SAME—SUIT TO ENJOIN COLLECTION—PETITION—SUFFICIENCY.

In a suit to enjoin the sale of lands which had been bid in by the state for taxes, a petition alleging that at the time the sale to the state was made the taxpayer had enough personal property to pay the taxes, but not stating the character and value of the property, was fatally defective.

3. SAME—SALE OF LAND—FAILURE TO LEVY ON PERSONALTY.

Under Const. § 171, and Ky. St. 1903, § 4019, making all property not specifically exempt liable to taxation, section 4021, creating a

lien for taxes, and section 4143, declaring that if the tax is not paid by a certain time the sheriff shall distrain the property of the taxpayer, and from its sale pay the taxes to the state etc., the failure of the sheriff to levy upon a landowner's personalty to collect taxes assessed against the land does not render a sale of land for taxes invalid.

4. SAME—SUIT TO ENJOIN SALE—NECESSITY OF TENDER.

Under Ky. St. 1903, § 4036, declaring that if any person shall purchase property sold for delinquent taxes, and the sale shall be set aside for irregularity, the purchaser shall have a lien on the property for the amount of taxes and costs paid by him etc., plaintiffs, in a suit to enjoin the sale of land which had been bid in by the state for delinquent taxes, must tender the unpaid taxes.

5. SAME—PARTIES.

Under Civ. Code, Prac. § 25, all the taxpayers of a county cannot join in a suit to enjoin the sale of lands bid in by the state for delinquent taxes on the various grounds, not common to all, that the personalty of the taxpayers should have been distrained before resorting to the real estate, that the description in the levy made by the sheriff or in the lists of sale returned by him was insufficient, that taxes for which the sales were made were barred by limitation, etc.

Appeal from Circuit Court, Daviess County.
"To be officially reported."

Suit by J. B. Aud and others against George H. Alexander, as revenue agent. From a judgment for plaintiffs, defendant appeals. Reversed.

M. J. Holt, for appellant.

O'REAR, J. From time to time the sheriffs of Daviess county have reported sales of certain parcels of real estate in that county to the state for taxes assessed against the owners. The Auditor directed appellant, as revenue agent for the state, to sell these lands and to cover into the treasury the proceeds of sales. This suit was brought by 19 plaintiffs, each of whom owned separate tracts, listed separately for some of the years in question, suing on their own behalf and on behalf of some 1,170 other plaintiffs similarly situated, who were not named in the caption, but whose interest, it is alleged, is identical with that of the other plaintiffs. An injunction was sought against appellant and the Auditor of Public Accounts, restraining them from selling the lands, or any of them, on the alleged grounds that the sheriff's reports of sales were insufficient in their descriptions to identify the parcels sold by him, and on the further ground that some of the taxes had in fact been paid, and that others were barred by limitation. But the main ground advanced is that, at the time the sheriff sold the land for taxes, each one of the owners then had personal estate in that county enough to have satisfied the distraint. It is asserted by plaintiffs that in consequence the sheriff's sales were void.

By the Constitution (section 171) and statutes of this state (section 4019, Ky. St. 1903), all property in this state not specifically exempt is liable to a uniform tax for purposes

of state government. A lien is created by the statute (section 4021, Ky. St. 1903) to the state, as well as to the county and municipality where located, for the tax. This lien continues for five years. Section 4021, Ky. St. 1903. Real property is assessed for state taxes, called the "revenue tax," by the county assessor of the county where the land is located. Section 4049, Ky. St. 1903. The sheriff by virtue of his office is tax collector (section 4129, Ky. St. 1903), and it is his duty to collect the tax at the time it is due, and to promptly pay it into the state treasury (section 4143, Ky. St. 1903). If the tax is not paid by the 1st of July of the year for which it is due, it is the duty of the sheriff to distrain the property of the taxpayer, and from its sale to collect and pay the taxes to the state. Section 4149, Ky. St. 1903. If there is no other bidder at the sheriff's sale, he is authorized and directed by the statute to buy in the property so sold for the state at the amount of the accumulated tax and costs. Section 4152, Ky. St. 1903. The taxpayer is then given two years within which to redeem the land from this sale by the payment of the delinquent tax, interest, and certain penalties and costs. Section 4152, Ky. St. 1903. A failure to so redeem vests the purchaser, whether the state or another, with the fee-simple title to the land. Section 4154, Ky. St. 1903. Then it is that the Auditor of Public Accounts is authorized to direct the sale of the lands so bought in for the state, or enough thereof to pay to the state the tax, interest, penalties, and costs of the proceeding. Section 4154, Ky. St. 1903. It was under these several statutes that appellant was proceeding when arrested by the restraining order, and finally by the judgment in this case.

To clearly present the case, it is necessary to state what is admitted, either expressly or tacitly, by the petition. It is stated that all the plaintiffs, as well as those for whom they sue, are citizens of Daviess county, Ky.; that the lands mentioned in the suit, and named in appellant's advertisement of sale, are all situated in that county; that the lands had been assessed for taxes in recent years, amounts of which were stated, against the then owners of the lands, and that the taxes had not been paid; that the sheriffs then in office had advertised the lands for sale within the time prescribed by the statute, because the taxpayers had not paid their current taxes, and had offered them for sale at public outcry as advertised, and that, no one else offering to bid the amount of the tax due on each tract named, it was stricken off to the state, and so reported by the sheriff in the list he was required to return and did return to the county court clerk's office of his county (section 4152, Ky. St. 1903); that more than two years had elapsed since such sales and report, and that the lands had not been redeemed from such sales; that appellant was the duly appointed and acting

revenue agent for the state of Kentucky, and as such had advertised these lands for public sale at the direction of the Auditor of Public Accounts, and was proposing to sell enough of each lot or tract to reimburse the state its delinquent taxes assessed against each lot or tract, including penalties and costs of sales. All the foregoing, while not specifically admitted in detail, is so far admitted by express statement, or by a failure to negative the fact, that it is to be deemed as admitted by the petition.

Public officers, who are required to discharge an official duty and to make a certificate or return thereof, are presumed to have truly done all that is certified and all that they were required to do to make the certificate true. Sections 3760, 4030, Ky. St. 1903; *Smith v. Ryan*, 88 Ky. 636, 11 S. W. 647; *Graves v. Hayden*, 2 Litt. 65; *Hickman v. Skinner*, 3 T. B. Mon. 211; *Terry v. Bleight*, 3 T. B. Mon. 272, 16 Am. Dec. 101; *Blight v. Banks*, 6 T. B. Mon. 207, 17 Am. Dec. 136; *Currie v. Fowler*, 5 J. J. Marsh. 152; *Oldhams v. Jones*, 5 B. Mon. 458; *Bodley v. Hord*, 2 A. K. Marsh. 244; *Board of Councilmen v. Mason & Foard*, 100 Ky. 48, 87 S. W. 290. This is as true of tax collectors as it is of other officers. When it is stated, therefore, that the tax collector has certified to certain facts, they are deemed to have been done, as well as all other acts necessarily required to have been done to support them, till the contrary is shown. A pleading which attacks the validity of an official act is bad, unless it shows affirmatively that the act was not done, or that some essential was omitted which goes to the vitality of the act. *Belknap v. Clark*, 10 Ky. Law Rep. 872.

This brings us to consider the allegations of the petition which attack the verity of the sheriff's return, and which undo, as it is claimed, his action. It is charged in the language of the petition that: "In each attempted sale as set out in said bill [sale bill] said sheriff's act was void; that every step taken by him therein was void; that the owner of each of said tracts of land at the time of said attempted sale, and during all the time for six months before, had in Daviess county, Ky., tangible personal property more than ample out of which said sheriff could have made the state's and county's claim for taxes and costs of collection due to them from said delinquents, and all of which was known to the sheriff at the time he took each step in making said sale; and for these reasons each step he took in selling each tract of said lands was absolutely void, and the state of Kentucky acquired no title by said attempted sales, nor by any of them." Stripped of its conclusions of law, which are to be treated as so much surplusage (section 119, Civ. Code, Prac.); this averment amounts to this: That at the time the sheriff sold the land of the delinquent taxpayer the latter had, in the opinion of the pleader, enough tangible

personal property in that county, which fact was known to the sheriff, to pay the taxes due. Good pleading required that the character and value of the personal property be stated, if it was to be considered at all.

But, waiving this defect, fatal though it is, the court is of opinion that the fact, though true, would not vitiate the sale of the land; and particularly is it true that the fact, if a fact, would not affect at all the state's liens for taxes duly assessed against the property. The tax was assessed against the taxpayer and his property. It was a lien upon all of his property of whatever description. The lien was to be enforced by summary sale, if not sooner discharged. While the statute contemplates a sale first of the personality, it does not release, nor was it intended to release, the realty from lien. The lien is to the state, not to the sheriff. The object of the statutes is to raise promptly a sufficient revenue to maintain the state government. It is a duty imposed upon the owner of the property legally assessed to pay it. All the machinery provided by the law for raising the necessary revenue to defray the expenses of our common government looks to a just ascertainment of an equal rate of assessment and to its speedy collection. If there is a slight misstep on the part of some collecting or assessing officer, an inadvertence, or intentional fault, shall the whole people, who are represented by the state government, suffer by it? Or shall the taxpayer be made to pay what he justly and actually owes, notwithstanding, the recalcitrant official being punished appropriately for his misdoing? Nothing is more essential than that the revenue to defray expenses of government be promptly collected. All should pay alike, or inequality, which is itself injustice, would result. What merit is there in allowing the taxpayer to escape from his just share of the public burdens, because the collecting officer sold one piece of property that was liable to the tax before he sold another piece belonging to the same taxpayer that was also liable? It is as much the legal and moral duty of the taxpayer to pay his taxes as it is that of the collector to collect them. Then, if the taxpayer will not pay, does it lie in his mouth to say, "I will never pay, and the lien created by statute upon my land in favor of the state is released, because the sheriff in ignorance, or mistakenly from other cause, has not first distrained my personal estate, which is left to me"? Even if it were a matter wholly between the sheriff and the taxpayer, there would be but slight ground for listening to such an argument. But the sheriff is the people's representative; and it is familiar law that the people are not estopped from collecting state revenues by an act of a public officer. *County of Henderson v. Henderson Bridge Co.*, 116 Ky. 164, 75 S. W. 239; *Bank Tax Cases*, 102 Ky. 174, 39 S. W. 1030.

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It must be admitted that the authorities are not harmonious on the subject whether a distraint of realty before the personality is exhausted is void. Those cases which hold that it is not are *Smith v. Mitchell*, 9 Ky. Law Rep. 813, and *Husbands v. Paducah*, 5 Ky. Law Rep. 193. Those in which the contrary view has been expressed are *Wheeler v. Brammel*, 8 S. W. 199, 10 Ky. Law Rep. 302; *Julian v. Stephens*, 11 S. W. 6, 10 Ky. Law Rep. 862; *Turner v. Pewee Valley*, 100 Ky. 288, 38 S. W. 143; and *Allen v. Perrine*, 103 Ky. 516, 45 S. W. 500. In *Turner v. Pewee Valley*, the town marshal was about to sell the taxpayer's realty. The latter enjoined, on the ground, among others, that he then owned personality located in the town of greater value than the tax. Obviously the court did not hesitate to compel the tax collector to follow the statute, where both ways were still open to him. In *Allen v. Perrine*, supra, the sheriff had himself become the owner of the tax by having paid it off to the state. The suit was a contest of equities between the sheriff and an innocent purchaser of the taxpayer's land; the former having knowingly suffered the personality to be removed from the state to accommodate the taxpayer, it was suggested. The court held that the sheriff would suffer from his own neglect, or generosity, whichever it was, and not visit the consequence upon another who was innocent and helpless. The wisdom of the law in these matters is happily shown in the quotation from *Cooley on Taxation*, cited approvingly in *Botto v. Louisville*, 79 S. W. 241, 25 Ky. Law Rep. 1918, which is as follows: "All legislation must be supposed to take into account the possible, if not probable, mistakes and irregularities of officers in executing the provisions of the law, and it is hardly reasonable to infer an intent on the part of a legislative body that a failure of administrative officers to comply with any provision made for the benefit of the state exclusively, or merely as a guide in orderly proceedings, should deprive the state of all benefit to be derived from a compliance with other provisions that embody the main purpose and object of the law." Besides, the Legislature seems to have had the same idea about it; for other redress is given the taxpayer, where the tax collector does not literally follow the statute, and damage results to the taxpayer therefrom. By section 4149, Ky. St. 1903, it is provided: "If the sheriff shall distraint before demand, he shall pay double the amount of the tax," etc. And by section 4150, Ky. St. 1903, "If the sheriff make illegal or unreasonable seizure and levy for taxes he shall be liable in damages to the party aggrieved," which seems to us to be the sense of the matter.

So far we have discussed this feature of the case as if it stood alone. Nowhere do the plaintiffs offer to pay the taxes actually due. There is no tender. In *Wheeler v. Brammel*, 8 S. W. 199, 10 Ky. Law

Rep. 301, where a sale was set aside because the sheriff had sold realty before distraining the taxpayer's personalty, the court held that the purchaser acquired a lien on the lot for the amount of the taxes actually due and which he had paid to the state. In *Louisville Water Co. v. Clark*, 15 Ky. Law Rep. 94, it was held that, before a taxpayer would be granted an injunction to restrain an illegal sale of its property for taxes due upon it, it must in equity first do equity and tender the taxes due. In *Thompson v. City of Lexington*, 104 Ky. 165, 46 S. W. 481, it was held that a sale under a tax lien partly valid and partly invalid would not be enjoined, unless plaintiff tendered to pay the part that was good. To the same effect are *Louisville v. Board of Trade*, 90 Ky. 418, 14 S. W. 408, 9 L. R. A. 629, and *Cooley on Taxation*, p. 1424. The statute law of this state is (section 4036, Ky. St. 1903): "Whenever any person shall purchase property sold for delinquent taxes, and the sale shall be set aside because of any irregularity, the purchaser shall have a lien on the property for the amount of taxes and costs paid by him, and for which the property is liable with legal interest from the time of such payment, which may be recovered from the owner of the property or the person owning the same." The failure of the plaintiffs to tender and of the court to require the payment of the taxes actually due in any event was fatal error.

There is another objection to the petition as grave as any that has been discussed. The suit attempts to litigate in this action for all the taxpayers of Daviess county questions which might arise in all the suits, but which of necessity affected only each individual suitor. Whether the sheriff had or had not advertised A's property for the requisite time, or had failed to distrain his personalty first, or failed to return a proper report or list to the county court clerk, were essentially independent matters, in no wise connected with other transactions of a similar or even of precisely the same nature regarding B's, C's, or D's properties. The cause of action was not common to all the plaintiffs. They were not entitled to be joined under section 25 of the Civil Code of Practice. The proposition is widely different from suit by one of a number of taxpayers to test the validity of a tax, its constitutionality, and the like, where the matter to be litigated is common to all.

There are other objections of a general nature, but which plead conclusions of law, not presenting any question for review here, and which, though specifically and well pleaded, would be governed by the same rules as those discussed above. We are of opinion that the petition failed to state a cause of action in behalf of any of the plaintiffs against appellant or the Auditor. It may be, as is suggested, that the tax sales were irregular in some particulars. The de-

scription in the levy made by the sheriff, or in the lists of sales returned by him, may have been insufficient in some instances, or the tax may have been paid or may have been barred by limitation before the sheriff attempted to enforce the state's lien. But each of these matters will have to come up in its individual case. Enough has been suggested, it is believed, to enable the parties and the court to adjust the cases as they may arise.

The judgment is reversed, and cause remanded, with directions to sustain both the special and general demurrers to the petition, and for proceedings not inconsistent herewith.

BOWRON v. CURD et al.

(Court of Appeals of Kentucky. Sept. 27, 1905.)

1. HUSBAND AND WIFE—WIFE'S LIABILITY AS SURETY.

Under the statute prescribing the method by which a married woman may charge her estate as surety, a wife who merely signs notes of her husband as his surety does not charge her separate estate.

2. DEEDS — CANCELLATION — CONVEYANCE BY WIFE—MISTAKE OF LAW.

Where a married woman conveyed land belonging to her separate estate in satisfaction of a liability, which she mistakenly supposed she had incurred as surety for her husband, she was entitled to have the deed set aside.

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Action by Florence C. Bowron against Josephine Curd and others. From a judgment for defendants, plaintiff appeals. Reversed.

Tye & Denham, for appellant. R. S. Crawford, for appellees. Curd heirs. Sharp & Siler, for appellee Kuton.

HOBSON, C. J. Appellant, Florence C. Bowron, alleged in her petition that in the year 1895 she owned certain real estate in Whitley County, which she had inherited from her father; that prior to that time her husband, G. T. Bowron, borrowed large sums of money from the Bank of Williamsburg and W. R. Denham; that she and her brother, L. P. Curd, signed the notes of her husband as his surety; that the money was borrowed by her husband and used by him; that to secure Curd they delivered to him certain stocks, then of the value of \$3,000; but that the company failed; that her husband could not pay the debts, and that her brother L. P. Curd, paid the money; that he represented to her that the amount was \$3,200, and also represented to her that she was liable for it; that she believed and relied upon the statement of her brother to the effect that she was legally responsible for the indebtedness, and, so believing and for this consideration alone, she and her husband on September 11, 1895, united in a deed whereby they conveyed to him the land above referred to, reciting in the

deed that it was made in consideration of \$1,200, cash in hand paid; that the deed was made by a mutual mistake; that her brother had been her adviser in regard to her estate, and she had always confided and trusted in him; that in fact she was not legally responsible for the indebtedness of her husband; and that the deed was executed without any other consideration than the mistake as to her legal rights upon the representations made to her by her brother. She prayed that the deed be set aside. The court sustained a general demurrer to her petition, and she appeals.

It is insisted for the appellee that, when a married woman signs a note, she must be presumed to have intended to charge her estate. This may be conceded, but the statute expressly provides how she may charge her estate as the surety of another, and unless the statutory method is followed she is not bound. Under the allegations of the petition Mrs. Bowron was in no way liable on the notes which she had signed as surety of her husband, and her brother, upon paying the notes, had no cause of action against her thereon. It is true that she and her husband could convey her land, and they could convey it to pay his debts. Such a conveyance would be binding, if voluntarily made and fairly understood; but, if they conveyed her land to pay his debt and for no other consideration, upon the understanding that she was legally liable for the debt, then the deed made by reason of this mistake may be relieved against, as any other deed made by mistake. While it is presumed that all persons know the law, it often happens in fact that a person does not understand some rule of law, and that in this way people make mistakes as to their legal rights, and by reason of a mistake as to their legal rights pay money or make conveyances or do things they would not otherwise have done. The settled rule in Kentucky is that a mistake of law may be relieved against, no less than a mistake of fact. In *Blakemore v. Blakemore*, 44 S. W. 96, 19 Ky. Law Rep. 1620, a married woman had a mortgage upon her property upon the belief and assurance of the mortgagee that the property was already in lien for the payment of the debt. As a matter of law there was no lien on the property, and the mortgage was in fact executed under a mistake of law. The court held that, as both parties acted under a mistaken view of their legal rights equity would grant relief. The same principle must be applied here. To the same effect see *Fitzgerald v. Peck*, 14 Ky. 125; *Ray v. Bank of Kentucky* 42 Ky. 510; 39 Am. Dec. 479; *Bruner v. Town of Stanton*, 102 Ky. 459, 43 S. W. 411; *Lyon v. Mason & Ford Co.*, 102 Ky. 594, 44 S. W. 135; *Board of Trustees of Public Library of City of Covington v. Board of Education of City of Covington*, 75 S. W. 225, 25 Ky. Law Rep. 341.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

KEHOE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 26, 1905.)

1. CRIMINAL LAW—CONTINUANCE.

Where the affidavit for a continuance of a criminal case disclosed the absence of witnesses, the materiality of their testimony, which could not otherwise be supplied, and facts disclosing reasonable diligence in procuring the attendance of the witnesses, it was error to refuse a continuance, or to permit the affidavit to be read as the depositions of the absent witnesses.

2. SAME—EVIDENCE SHOWING SEVERAL OFFENSES—ADMISSIBILITY—ELECTION.

On a prosecution for the illegal sale of liquor, evidence of two distinct offenses committed on the same day is admissible, though the indictment charges but one offense; but the prosecution, before the defense opens its case, should elect on which of the transactions it will ask for a conviction, and the jury should be admonished accordingly.

Appeal from Circuit Court, Fleming County.

"Not to be officially reported."

H. C. Kehoe was convicted of crime, and appeals. Reversed.

J. D. Pumphrey, O. R. Bright, and W. G. Dearing, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

O'REAR, J. This appeal is from a judgment convicting appellant of an infraction of the local liquor law in Fleming county.

Appellant's affidavit for a continuance disclosed the absence of certain witnesses and the materiality of their testimony, together with the facts indicating what, under the circumstances, appears to the court to have been reasonable diligence in procuring their attendance. The testimony of the absent witnesses was material, and could not otherwise be supplied. It was error, therefore, in the trial court to refuse a continuance, under the circumstances shown, or at least to let the affidavit be read as the depositions of the absent witnesses.

Prosecution was allowed to prove two distinct offenses committed on the same day, whereas the indictment charges but one. The evidence of the prosecuting witness was to the effect that about noon of the 25th day of April, 1904, he applied to a young man in appellant's drug store in Flemingsburg to sell him a half pint of brandy; that this young man was behind the counter, and appeared to be in charge, and the clerk; that the person applied to asked the witness his name, wrote something on a scrap of paper which he placed on a file hook, handed to the witness a half pint bottle of brandy, and took the pay therefor. Later in the day the prosecuting witness again went to appellant's drug store, where he found one of appellant's clerks, whom he knew and identified, and who appellant says in his affidavit for a continuance was his clerk at that time, and bought of him a half pint of

brandy and paid therefor. Appellant objected to the evidence last named upon the ground that the commonwealth had elected to stand upon the offense first attempted to be proved. Under our Criminal Code of Practice the date of the offense is not essential, other than it be within 12 months before the finding of the indictment. But as the indictment really charges but one offense, and as under it the defendant could be convicted of one offense only, it is not proper to allow the prosecution, in aggravation of that offense, to submit evidence of and have conviction for other distinct offenses for which it might also have maintained prosecutions. Still, until the prosecution elects which of the transactions it will ask a conviction upon, it was not improper to allow the evidence. The true rule is that in prosecutions of this kind the commonwealth ought to be permitted to show, if it can, any breach of the statute within the period covered by the indictment. But before the defense is compelled to open its case the prosecution ought to be required to elect which of the transactions detailed it will ask a conviction under, and the jury should be admonished accordingly. In a case very similar to this it was held that, where a defendant's conviction was sought for illegal sales of liquor made by his agents in his presence, it was permissible, to illustrate the character of the sale in a particular case and to show that it was made by defendant's authority, to allow evidence of other sales on the same day. *Hensly v. State*, 52 Ala. 10. The evidence admitted was therefore relevant. But it should have been regulated in its effect by the practice above directed.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

UNITED STATES HEALTH & ACCIDENT INS. CO. v. WEBB'S ADM'R.

(Court of Appeals of Kentucky. Sept. 28, 1905.)

APPEAL — DECISIONS REVIEWABLE — AMOUNT IN CONTROVERSY.

The Court of Appeals has no jurisdiction of an appeal from a judgment for \$200, the amount sued for, where defendant admits a liability for \$40.

Appeal from Circuit Court, Nelson County.
"Not to be officially reported."

Action by Roy E. Webb's administrator against the United States Health & Accident Insurance Company. From a judgment for plaintiff, defendant appeals. Dismissed.

E. E. McKay, for appellant. G. S. & J. A. Fulton, for appellee.

HOBSON, C. J. Appellee sued appellant to recover \$200. Appellant answered, admitting a liability for \$40 and denying any fur-

ther liability. It thereupon filed a written offer to confess judgment for \$40. The plaintiff declined the offer, and on final hearing recovered judgment for the full amount of his claim, \$200. The defendant has prosecuted an appeal, and the plaintiff has entered a motion to dismiss the appeal on the ground that the court is without jurisdiction. In *I. C. R. Co. v. Landrum*, 112 Ky. 687, 66 S. W. 599, a judgment had been rendered for \$200, where the defendant by its answer admitted a liability of \$1.40. It was held that the amount in controversy on the appeal was only \$198.60, as the \$1.40 was not in controversy. Upon the principles laid down in that case, the court is without jurisdiction in this case.

Appeal dismissed.

COMMONWEALTH v. AKERS.

(Court of Appeals of Kentucky. Sept. 28, 1905.)

SEDUCTION—OFFER TO MARRY PROSECUTRIX—RIGHT OF ACCUSED TO DISCHARGE.

The statute declaring that a prosecution for seduction shall be discontinued, if the accused marry the prosecutrix before final judgment, authorizes the court to discharge one accused of seduction on his offering in good faith, after a verdict of conviction, to marry the prosecutrix, though she refuses to do so.

Appeal from Circuit Court, Pike County.
"Not to be officially reported."

Moses Akers, on trial for seduction, was released, after verdict of conviction, on his offer to marry the prosecutrix, and the commonwealth appeals. Affirmed.

N. B. Hays, C. H. Morris, and J. F. Butler, for the Commonwealth.

NUNN, J. This appeal involves the correctness of a judgment dismissing and releasing the appellee after a verdict of conviction of the crime of seduction under section 1214 of the Kentucky Statutes of 1903. The record shows that after the verdict of the jury appellee offered to marry the prosecutrix, and she refused the offer. Thereupon the court discharged him from custody, over the objection of the commonwealth. We understand that the court released the accused upon the ground that no final judgment had been entered by the court, and it was therefore incumbent upon it to discharge the accused; the prosecutrix having refused to marry him.

In the section of the statute referred to, this language occurs: "Any prosecution instituted shall be discontinued, if the party accused marry the girl seduced before final judgment." This court has, in the cases of *Com. v. Wright*, 27 S. W. 815, 16 Ky. Law Rep. 251, *Com. v. Hodgkins*, 64 S. W. 414, 23 Ky. Law Rep. 829, and *Ingram v. Com.*, 71 S. W. 908, 24 Ky. Law Rep. 1531, decided that in such cases if the defendant in good faith

offers to marry the prosecutrix, and she refuses, that he has done all that he can do to repair the wrong, and it was the duty of the court to discontinue the prosecution. The statute says that if he marry the girl before final judgment the prosecution shall be discontinued, but this court has construed it to mean in addition, that if he in good faith offer to marry her, and she refuses before final judgment, the prosecution shall likewise be discontinued. This construction is a doubtful one, but to decide otherwise would have the effect of overruling previous decisions referred to.

For these reasons the judgment of the lower court is affirmed.

SLUSHER et al. v. HOWARD et al.

(Court of Appeals of Kentucky. Oct. 6, 1905.)

ADVERSE POSSESSION—TITLE ACQUIRED.

Where bona fide purchasers of land for a valuable consideration and their vendors have been in actual possession of the land for more than 30 years, their title is perfect as against the holders of an alleged title bond which has been lost.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 148-206, 218.]

Appeal from Circuit Court, Harlan County.
"Not to be officially reported."

Action by Phillip Slusher, Sr., and others against James T. Howard and others for the recovery of real estate. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

G. A. Eversole, for appellants. N. B. Hays, for appellees.

NUNN, J. Prior to 1853 there was granted to Olive Spurlock a patent for 800 acres of land lying in Harlan county, Ky. In 1853 she conveyed the whole of it to one William Miracle. Appellants allege that in 1854 Miracle sold it to their father, Jacob Slusher, and gave him a bond for title for it, which was lost; that their father died in 1854 or 1855, and that this land descended to them; and they asked to be put in possession thereof. Appellees controverted the allegations of the petition, and allege that they are the owners

of it by purchase and deeds of conveyance, and that they and their vendors have been in the actual, peaceable, and adverse possession of it for more than 30 years. They also allege that, even if the bond for title, as alleged in the petition, was executed by Miracle to Slusher, they had no information or notice of it when they purchased it, and that they were innocent purchasers of it for a valuable consideration.

The appellants introduced three or four witnesses, all but one being the sons or sons-in-law of Jacob Slusher, who testified that they had heard both Slusher and Miracle say that such a bond had been executed and delivered to Slusher. One or two of these witnesses stated that they had seen the bond, but were unable to give its date, or any portion of the contents of it. These witnesses proved that Jacob Slusher died in the year 1854 or 1855, and that his widow and children left the place about the year 1856, leaving two of his sons-in-law, Wilder and Bull, upon the land. It appears from the record that, while Bull was in the possession of the western part of this land, William Miracle, in consideration of \$100, conveyed to Bull that part of the survey. This conveyance was made in 1858. Bull conveyed it to David Fee in 1872, and Fee conveyed it to appellee Hall in 1895. It also appears that Miracle conveyed to Wilder the other portion of the land in 1859 for the consideration of \$150, while he (Wilder) was in possession of that part. Wilder conveyed a portion of it to one Harris in 1860, and the other portion to one Brittain in 1863; and by other conveyances the Wilder portion came into the ownership and possession of appellees. It also appears from the proof that Wilder and Bull, their vendees, and subsequent vendees, on down to the institution of this action, were in the actual, peaceable, and adverse possession of this land a period of more than 30 years. It also appears that, when the appellees purchased this land, they had no notice of the alleged title bond, and that they were bona fide purchasers for a valuable consideration.

We are of the opinion, under the facts as proven in this case, that the appellees' title to this land is perfect. Wherefore the judgment is affirmed.

GULF, C. & S. F. RY. CO. et al. v. HOUSE & WATKINS.

(Court of Civil Appeals of Texas. June 14, 1905.)

1. NEW TRIAL—VERDICT—SUFFICIENCY OF EVIDENCE.

Where, in an action against a carrier for injuries to a shipment of cattle, there was no allegation of injuries to the cattle from bad handling, it was not error to refuse a new trial, on the ground that the verdict was against the evidence, because there was no evidence of bad handling.

2. SAME.

Where, in an action against a carrier for injuries to a shipment of cattle, there was direct evidence of the shrinkage of the cattle, occasioned by the delay in transporting them, and testimony of experts based on hypothetical questions embracing the facts proven, a verdict for the shipper was not against the evidence, as failing to show that the cattle were injured by the carrier's negligence.

3. CONTRACTS—BREACH OF ORAL CONTRACT—LIABILITY—SUBSEQUENT WRITTEN CONTRACT—EFFECT.

Where an oral contract binding a carrier to furnish cars for a shipment of cattle at a specified time was breached before a written contract was signed, the carrier's liability for the breach of the oral contract could not be avoided by the written contract, unless there was a consideration inuring to the shipper as compensation for the damages resulting from the breach when the contract was signed.

4. APPEAL—HARMLESS ERROR.

The error in permitting a witness to testify to a fact is harmless, where the same witness and others testified thereto without objection.

5. CARRIERS—INJURY TO LIVE STOCK—EVIDENCE—ADMISSIBILITY.

Where, in an action against a carrier for delay in a shipment of cattle, it was shown that cattle would shrink from 50 to 60 pounds every 24 hours during transportation, it was not error to permit an expert to testify as to the difference in the value of cattle on account of such shrinkage.

6. SAME.

Where, in an action against a carrier for delay in transporting cattle, it was shown that the cattle arrived at a city on a Sunday, where they remained 24 hours, it was not error to permit plaintiff to ask a witness whether any stock trains passed through the city, going in the direction of the destination of the cattle, during that time, as against the objection that there was no evidence that the carrier could have carried the cattle on such trains, or as to the destinations of such trains, as the question might have been asked for the purpose of showing the condition of the carrier's road, or that trains were operated.

7. SAME—FAILURE TO FURNISH CARS.

In an action against a carrier for failure to furnish cars for the transportation of cattle, evidence that cars were ordered at a station from the agent there, who stated that cars could be had through the agent at another place, was admissible, as showing that the carrier had contracted to furnish cars.

8. SAME—FAILURE TO FEED AND WATER CATTLE.

Where a shipper placed his cattle in pens for shipment, when he knew there were no cars there in which to ship them, and permitted them to remain in the pens and await the arrival of the cars without feeding and watering them, because relying on the carrier's representations that cars would soon be there, the carrier was liable for the injury resulting from such failure.

Appeal from Cooke County Court; J. M. Wright, Judge.

Action by House & Watkins against the Gulf, Colorado & Santa Fé Railway Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Rehearing denied October 4, 1905.

J. W. Terry and A. H. Culwell, for appellants. Potter & Potter, for appellees.

NEILL, J. Appellees, House & Watkins, sued appellants, the Gulf, Colorado & Santa Fé and the Atchison, Topeka & Santa Fé Railway Companies, in the county court, for \$350 damages to a shipment of two car loads of cattle, shipped by plaintiffs over defendants' lines of railway from Valley View, Tex. to Kansas City, Mo., in August, 1902. Plaintiffs charged in their petition that they made a contract with defendants' agent at Gainesville, by the terms of which defendants agreed to have two cars placed at Valley View on the 16th day of August, 1902, for the shipment of 56 head of cattle to Kansas City, Mo.; that the cars failed to arrive at the appointed time, and that the cattle, on account of plaintiffs being induced to believe by the representations of defendants' agent that the cars were expected to arrive immediately, remained in the pens at Valley View for about 16 hours without food or water; that after they were loaded on the cars they were unreasonably and negligently delayed in transit, so that they were greatly reduced in flesh and in market value on their arrival at destination; that had defendants promptly received and transported the cattle with reasonable dispatch, they would have arrived in Kansas City in time to have been sold on the market of August 18th, the day they were intended for sale; but that they did not, by reason of defendants' negligence, reach there until August 20th, and that the market price of the class of cattle such as plaintiffs' had depreciated 15 cents per hundred pounds, which was lost to plaintiffs, etc. The defendants answered by general and special exceptions, a general denial, and pleaded specially that the cattle were shipped under a written contract signed by the respective agents of plaintiffs and defendants at Valley View; that by the terms of such contract it was stipulated that the cattle should not be transported within any specified time, nor delivered at any particular hour, nor for any particular market, and that all prior understandings and agreements concerning the transportation of the cattle were to be considered as merged in said written contract; that, if the cattle suffered in the pens at Valley View, it was caused by the negligence of plaintiffs in not properly feeding, watering, and caring for them, and that defendants were not responsible for anything that happened to the cattle prior to the time of the execution of the written contract; that, if

the cattle were injured en route, it was caused by plaintiffs improperly loading them, etc. The case was tried before a jury, and resulted in a verdict and judgment in favor of plaintiffs for the sum of \$125.

Conclusions of Fact.

The evidence is reasonably sufficient to prove the negligence averred by plaintiffs and that in consequence of it they were damaged in the amount found by the jury.

Conclusions of Law.

1. There was no allegation of injuries to the cattle from bad handling by defendants while in transit, to Kansas City. Therefore there was no such issue in the case, and it could not have been error in the court to refuse a new trial upon the ground that the verdict was contrary to the law and against the evidence, because there was no evidence of bad handling of the cattle while in transit.

2. The plaintiffs did not base their cause of action on the failure of defendants to water and feed the cattle while at Valley View, after being requested to do so by plaintiffs, but partly upon the failure of the cattle to get food and water while there, by reason of defendants' agent continually representing to plaintiffs that the train would arrive and take the cattle off in a very short time, thereby inducing plaintiffs to believe all along that the cattle would be shipped before they would need food or water, or before plaintiffs would have time to water them. Therefore we overrule the second assignment of error.

3. The appellants' assignment of error that the verdict is contrary to the law and against the manifest weight of the evidence, in that it fails to show plaintiffs' cattle were injured by the negligence of defendants, the whole case being decided on the admission of hypothetical evidence of shrinkage of cattle cannot be sustained. There was direct evidence of the shrinkage of the cattle occasioned by the long delay in transporting them to their destination, besides the testimony of experts based upon hypothetical questions, which embraced facts proven in this particular case.

4. The oral contract of appellants to furnish the cars at Valley View at a specified time was breached and the damages ensued by reason thereof before the written contract was signed. Therefore appellants' liability for the breach of such contract could not be avoided by the written contract of shipment afterwards made, unless there was a consideration inuring to plaintiffs, as compensation for such damages, when such contract was signed. And the evidence entirely negatives the idea that any such consideration was contemplated by appellants, or induced plaintiffs to execute the written contract. On the contrary, it shows that plaintiffs were compelled to sign the contract for the purpose of getting their cattle shipped.

5. The same facts which the witness Tamlyn testified to in his answer to the eighteenth direct interrogatory, the admission of which in evidence was objected to by appellant, was testified to by the same witness and others without objection. If, therefore, it should be conceded that the court erred in allowing the answer to be read in evidence over the objections, such error was harmless.

6. The sixth assignment of error is analogous to the one just disposed of, the same proposition being advanced under it. It having been shown by the testimony of the witness Raisor that cattle such as plaintiffs' would shrink from 50 to 60 pounds per head every 24 hours during the time they were handled in transportation by rail, the witness could, as an expert, testify as to what the difference in value per hundred weight of the cattle would be on that account. To illustrate, suppose two steers of the same kind, shipped from the same place over the same road, one 24 hours before the other, arrive at the same place of market at the same time and are then of the same weight. The one shipped first, though he may have been properly handled, has suffered 24 hours longer than the other, besides the loss in weight from shrinkage during that time, he is drawn and gaunt and, in consequence, is classed on the market, though he weighs as much, lower than the other, which has been transported without delay and has arrived at market in good condition. Can it not be shown by an expert that there is a difference in their value, what the difference is, and the cause of it? If there is a difference in value, and it is caused by the negligent delay of the carrier, and if the shipper is not allowed to prove it, then he has, by the negligence of the carrier, lost this difference, and has no redress for the wrong done him. The trial court simply held that he could make such proof, and admitted the testimony complained of in this assignment for that purpose.

7. The evidence shows that the cattle arrived at Arkansas City at 4 o'clock p. m. on Sunday, were unloaded and fed, and remained there until about that time next day. In connection with these facts, the witness J. S. Froak was asked by plaintiffs' counsel this question: "Do you know whether or not any trains passed through Arkansas City, going north—freight trains, or stock trains—during that time?" To which defendants' counsel objected on the ground that there was no evidence that defendants could have carried plaintiffs' cattle on such trains, or where the destination of said trains was. The objection was overruled by the court, and the witness was permitted to answer before the jury as follows: "I don't know how many trains there were. I think there were probably two trains. I saw two freight trains." To the ruling of the court allow-

ing the question asked, the appellants excepted, and upon the bill of exceptions the seventh assignment of error is predicated. It will be noted that the objection only went to the question, and not to the relevancy of the testimony elicited by it. It seems to us that, if appellants deemed the testimony prejudicial, they should have also requested the court to exclude it from the consideration of the jury. We are not informed of the purpose of the testimony. It may have been for the purpose of showing that the condition of appellants' road was such that trains could be operated over it towards Kansas City, Mo., or it may have been for the purpose of showing that trains were operated over appellants' road on Sunday. If either of these were the purpose, it seems to us that the question and answer to it were proper, as tending to show that appellants could not excuse themselves for the delay in holding appellants' cattle so long at Arkansas City upon either of the grounds which such testimony tends to show did not exist. If the question was asked for the purpose of showing that trains passed going north to Kansas City to which the cars in which plaintiffs' cattle were loaded could have been attached and carried there, it would also be legitimate; for the desired answer would tend to show that there was no reason for appellants' delaying the cattle so long at Arkansas City. The answer, however, does not of itself show such fact as may have been intended by plaintiffs to be elicited by the question. It may be, though, that the two freight trains the witness saw pass, going north, were destined for Kansas City, and were such as to which the cars containing plaintiffs' cattle could have been attached and carried to their destination. As to whether they could was a matter peculiarly within the knowledge of appellants, and upon cross-examination they could have shown, if it was a fact, that the cars could not have been coupled onto either of the trains and carried to Kansas City more expeditiously than they were. We think what we have said demonstrates that the objection to the question may have been properly overruled by the court; and we must indulge the presumption that the ruling of the court upon it was correct.

8. What we have said in disposing of other assignments of error also disposes of the eighth adversely to appellants.

9. The testimony of the witness Mount Dillon, the admission of which over appellants' objections is made the subject of this assignment of error, was, in view of the fact that he testified that he first ordered cars at Valley View from the agent there for the shipment of the cattle, and that the agent then informed him he could get the cars through the agent, Mr. Gates, at Gainesville, admissible as evidence against appellants to show that they had contracted with appellee through their proper agent to furnish him the cars for the shipment at the time and place agreed upon.

10. The court did not err in those paragraphs of its charge pointed out by the tenth and twelfth assignments of error. *Easton v. Dudley*, 78 Tex. 238, 14 S. W. 583; *McCarthy v. G., C. & S. F. Railway Co.*, 79 Tex. 35, 15 S. W. 164.

11. The paragraph of the charge complained of in the eleventh and thirteenth assignments of error, by which the jury were charged substantially that if the appellees had placed their cattle in the pens for shipment, and if at a time they knew there were no cars there in which to ship them, and they permitted their cattle to remain in the pens and await the arrival of the cars without taking them to feed and water, on account of the reliance upon the defendants' representations, through its agent at Valley View, that the cars would be there soon, and if on that account the cattle suffered injury, defendants would be liable, is not subject to the objection urged to it. It simply submitted to the finding of the jury certain matters which, if established by the evidence, would render appellants liable. *Easton v. Dudley*, 78 Tex. 238, 14 S. W. 583.

12. The fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth assignments of error are directed against the charge of the court. In considering them we have concluded that none is well taken, and that the charge of the court fully and fairly presents the law upon the issues involved in the case. We also overrule the remaining assignments of error, which complain of the court's refusal to give certain special charges requested by appellants.

There is no error assigned which requires a reversal of the judgment, and it is therefore affirmed.

DOUGHERTY et al. v. HOLSCHEIDER et al.

(Court of Civil Appeals of Texas. June 7, 1905.)

1. WILLS—HOLOGRAPHIC WILLS—EXECUTION—SUFFICIENCY.

Sayles' Ann. Civ. St. 1897, art. 5335, provides that a will, except where otherwise provided, shall be in writing and signed by the testator, and shall, if not written by himself, be attested by witnesses. Article 5338 provides that, where the will is wholly written by the testator, the attestation of the subscribing witnesses may be dispensed with. A. wrote a letter addressed to another, stating that he was going to a certain place to have an operation performed, and that possibly he might not live, and that he would write full particulars as to the disposition of his property. Subsequently he wrote a letter, addressed to the same person, in which he directed the manner of the disposition of his property "in case anything happened to him." *Held*, that the letters constituted a will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 336-345.]

2. SAME—CONTINGENT WILL.

A will, to become effective only on the happening of a contingency, is a contingent will; and in case the contingency does not arise it is revoked.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 200.]

3. SAME—WHAT CONSTITUTES.

Where the happening of an event is merely referred to as giving the reason for the making of a will, the will is unconditional, while, if the testator intended to dispose of his property in case of the happening of the event named, the will is conditional, and, on the failure of the event to happen, there is no will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 200.]

4. SAME.

A. wrote a letter, addressed to another, as follows: "I am going * * * to have a surgical operation performed, * * * and possibly I may never get back alive. I will write you full particulars as to what to do with my property." Subsequently he wrote: "I wrote you * * * and told you I intended undergoing an operation, and before doing so that I would write you and tell you what to do with my stuff, if anything happened to me." After expressing his desires as to the disposition of his property, he said that, "while I don't anticipate any danger, as the doctor has assured me that there is no danger, yet there might be, and I think this will * * * explain to you my wishes." *Held*, that the will was contingent, and it was not operative on his surviving the operation.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 200.]

5. SAME—REVOCATION—SUBSEQUENT CONDITIONAL WILL—REPUBLICATION.

Under Sayles' Ann. Civ. St. 1897, art. 5337, declaring that no will shall be revoked, except by a subsequent will, or declaration in writing executed in conformity with the statutes relating to the execution of wills, a will is revoked by a subsequent inconsistent conditional holographic will, though it fails because of the failure of the happening of the event named in the will, and must be republished in order to be a valid will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 456-460.]

Appeal from District Court, Duval County; Stanley Welch, Judge.

Consolidated proceedings by Lillie Holscheider and others and by J. R. Dougherty and another for the probate of the will of Raf Welder, deceased. From a judgment admitting to probate the will offered by Lillie Holscheider and others, J. R. Dougherty and another appeal. Reversed.

Rehearing denied October 4, 1905.

Dougherty & Dougherty, J. O. Luby, and J. C. Scott, for appellants. D. McNeill Turner, for appellees.

FLY, J. On July 20, 1904, Lillie Holscheider applied to the county court of Duval county for the probate of a will executed by Raf Welder, on February 21, 1900, in which he bequeathed to his two children, Mary and Duncan, the sum of \$10 each, to his sister, Mary O'Connor, his entire interest in his father's estate, and to Lillie Holscheider, then Lillie Ramey, all the balance of his property, consisting of over 20,000 acres of land and personal property. Lon C. Hill and B. W. Klipstein were the independent executors named in the will. On July 21, 1904, Mrs. Mary O'Connor and James R. Dougherty applied for the probate of a will alleged to have been executed by Raf Welder, who died on February 7, 1904, and of which James R. Dougherty had been appointed executor. That will consisted of two letters, written by Raf Welder to Dougherty, which are as follows:

"Hebronville, 4-12, 1902.

"Mr. J. R. Dougherty, Beeville—Dear Sir & Friend: Yours of yesterday to hand, and in reply will say that I have instructed Mr. John Corrigan to pay you over the money in case you made a settlement. He left here Thursday last for home, and I presume will see you. If he does not show up there, you either send for him or draw a check on him through the bank, or you can drop him a note through the post office. I will write him myself.

"Friend Jim, I am going to start to Monterey to-morrow to have a surgical operation performed on me, and possibly I may never get back alive. I will write you full particulars as to what to do with my stuff when I get there. The doctors have said that it would not be dangerous; but, in case anything should happen, I want you to see to what I have left. As I said to you before, I am not satisfied with the way things are going. Will also instruct him pay you balance of your fee. He has just sent me \$400.00. This, with what he pays over to you, is all I have received from him. He has never paid any interest on the note whatever. So, thanking you for your kindness in this matter and hoping to see you again some of those bright days, I will say good bye.

"Your friend,

Raf Welder."

"Monterey, Mexico, 5-6, 1902.

"Mr. James R. Dougherty, Beeville, Texas—Friend Jim: I wrote you some weeks ago, and told you that I intended undergoing an operation, and that before doing so that I would write you and tell you what to do with my stuff, in case anything happened to me. I expect to be operated on tomorrow. 1st. I owe the First Nat'l Bank of Beeville \$154.80, due in July, that I want paid. 2nd. John Corrigan in July will owe me two years' interest on that note, less \$822.00. He also is to pay me interest on the amount that was due last July. I want you to attend to it all for me, as though it was your own. 3rd. I want you to finish educating those two girls of Mrs. Ramey's that I have raised, Nellie and Susie, and, after they have been given a thorough education, the remainder I want it to go to my sister, Mrs. Mary O'Connor. At the same time I want you to compensate yourself for your trouble. You will have to be careful with Mr. Corrigan as he is liable to become involved. He owes a great deal of money, while he has enough property to pay out of any ordinary trouble; but you will have to hold the reins over him. Now, Jim, possibly this is asking too much of you; but, as I have known you from boyhood up and your father before you, I have all confidence in your carrying out my wishes. While I don't anticipate any danger, as the Dr. has assured me that there is no danger, yet there might be, and I think this will fully explain to you my wishes. You can write me here, on receipt of this. I will close, hoping to hear from you soon, and with best wishes to all inquiring friends, I remain as ever.

"Your friend, Raf Welder.

"P. S. You can address your letters to 66 San Francisco street, Monterey, N. L., Mexico. Also tell Brother Klipstein that I have instructed you to settle that little matter at the bank and not to be uneasy. Raf."

On August 17, 1904, Mrs. O'Connor filed a contest to the application of Mrs. Holscheider to probate the first will of Welder, and by an order of the county court the applications for probate of the two wills were consolidated. The contest of the will was made on the ground of undue influence on the part of Mrs. Holscheider, and on the ground that it had been revoked by the transfer of the lands by Welder after the will was executed and by the execution of a holographic will entirely inconsistent with the terms of the first will. Duncan Welder and Mary Welder, minor children of Raf Welder, through their mother, Mrs. Julia D. Welder, filed a protest against the probate of both wills—against the first on the ground of undue influence, and against the second on the ground that it was dependent on a contingency which did not arise. They stated, however, that, if the first will

was held not to have been the product of undue influence, they withdrew all objections to the probate of the second will. The second will was admitted to probate by the county court, and an appeal was taken to the district court, where the first will was probated.

It was proved that the letters, hereinbefore copied, were in the handwriting of Raf Welder, and were signed by him, and were duly received by James R. Dougherty, who had them in his custody from the time of their reception until they were filed in the county court. Raf Welder lived about two years after he wrote the letters. The requisites of a written will, prescribed by Article 5335, Sayles' Ann. Civ. St. 1897, are that it must be signed by the testator, or some other person by his direction, and, if not wholly written by himself, must be attested by two or more credible witnesses above the age of 14 years, subscribing their names thereto in the presence of the testator. Where the will is wholly written by the testator, the attestation of the subscribing witnesses may be dispensed with. Article 5336. The letters written by Raf Welder to J. R. Dougherty have the essentials necessary to constitute a will under the statute, and, unless the will was to take effect only upon the fatal termination of the operation referred to therein, it should have been probated by the district court.

A will which is to become effective only upon the happening of a contingency is a contingent will, and in case the contingency does not arise is by the failure of the happening of the event annulled and revoked. There are numerous cases, English and American, involving the construction of wills in which contingencies were expressed, for it seems to be very common for those unlearned in the law, who write their own wills, to do so under the influence of the fear or expectation of imminent peril and consequent death; but an infallible guide for their construction is difficult to be evolved therefrom. The current of modern authority, however, seems to be that, if the happening of the event is merely referred to as giving the reason or inducement for the making of the will, it be held unconditional; but, if it appears that the testator intended to dispose of his property in case of the happening of the named event, then it will be held to be conditional. The rule is thus stated in the case of *French v. French*, 14 W. Va. 459: "It seems that it is now an established principle that, while a person may make a conditional will, his intention to do so must appear clearly. The question is whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative." In that case the words used by the testator were: "Let

all men know hereby that if I get drowned this morning, March 7, 1872, I bequeath all my property, personal and real, to my beloved wife, Florence." He was about to go on a journey, and had to cross a swollen stream. He was not drowned, but lived for three years thereafter. The court held that the will was not conditional. In the case of *Eaton v. Brown*, decided by the Court of Appeals of the District of Columbia, and reported in 56 Cent. Law J. No. 9, the testatrix used the following words: "I am going on a journey and may not ever return; and, if I do not, this is my last request." It was held that the will was a conditional one, and, as the maker of it did return, it was not effective. The following cases are cited as sustaining the decision: *Parsons v. Lanoe*, 1 Ves. Sr. 190; *Sinclair v. Hone*, 6 Ves. Jr. 607; *In re Winn*, 2 Perry & Davison, 47; *Roberts v. Roberts*, 8 Jur. (N. S.) 220; *In re John Porter*, L. R. 2 Perry & Davison, 22; *In re Robinson*, L. R. 2 Perry & Davison, 171; *Lindsay v. Lindsay*, L. R. 2 Perry & Davison, 449; *In re Ward*, 4 Haggard, 176; *In re Todd*, 2 Watts & S. (Pa.) 145; *Morrow's Appeal*, 116 Pa. 440, 9 Atl. 660, 2 Am. St. Rep. 616; *Wagner v. McDonald*, 2 Har. & J. 345; *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101; *Dougherty v. Dougherty*, 4 Metc. (Ky.) 25; *Robnett v. Ashlock*, 49 Mo. 171; *Magee v. McNeill*, 41 Miss. 17, 90 Am. Dec. 354.

In most of the cases holding wills dependent on the happening of the condition named, the words "if I never get back," referring to a certain journey, or "should anything happen to me," referring to a particular time or event, were used. In this case the words were: "Friend Jim, I am going to start to Monterey to-morrow, to have a surgical operation performed on me, and possibly I may never get back alive. I will write you full particulars as to what to do with my stuff when I get there. The doctors have said that it would not be dangerous; but, in case anything should happen, I want you to see to what I have left." That was the language of the first letter; and in the second, in which disposition is made of his property, he said: "I wrote you some weeks ago, and told you that I intended undergoing an operation, and that before doing so that I would write you and tell you what to do with my stuff, in case anything happened to me. I expect to be operated on to-morrow." After expressing his desires as to the disposition of his property he again said: "While I don't anticipate any danger, as the Dr. has assured me that there is no danger, yet there might be, and I think this will fully explain to you my wishes." We think the words of the letter indicate clearly that it was written merely as an expedient in case of death resulting from the operation. In both letters he desires certain things done

"in case anything happened," evidently in connection with the operation. The words bring it clearly within the purview of cases holding that the wills were contingent on the happening of certain events. *Morrow's Appeal* (Pa.) 9 Atl. 660, 2 Am. St. Rep. 616, in which the authorities are cited.

Although the second will, as evidenced by the letters, afterwards became of no effect, because of the failure of the happening of the contingency on which it was based, it was a valid will, which was utterly inconsistent, in the disposition it made of the property, with the disposition of the property made in the first will. It evidenced in no uncertain way that it was the desire of the testator to revoke the former will; and, if it was a compliance with the terms of the statute in regard to the revocation of wills, it destroyed the first will the moment it was published, regardless of its being afterwards annulled. No matter what may have been the intention of the testator as to his will being contingent on the result of the surgical operation, the desire to revoke his former will was evident, and that desire could not have been dependent on the result of the operation. He may have concluded that, if he recovered from the operation, he could carry into execution the disposition of his property in the way he indicated in his letters; but he had annulled his former will, and nothing but a republication of it could give it validity again. It is true that in common-law courts of England the earliest will, which had been revoked, but never actually destroyed, was presumed to have been revived by the destruction or revocation of the revoking will, even though it had never been republished; and a distinction has been made in some cases between the revival of a will revoked by the inconsistent disposition of the property, contained in a subsequently executed will, and a will revoked by an express revocation clause in a subsequent will. *Colvin v. Warford*, 20 Md. 357; *Cheever v. North* (Mich.) 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 409. Other cases, however, deny the existence of any distinction between wills which do and those which do not contain express clauses of revocation, so far as the revival of undestroyed prior wills is concerned. *Reese v. Portsmouth Probate Court*, 9 R. I. 434; *Boudinot v. Bradford*, 2 Dall. 268, 1 L. Ed. 375; 1 Jarman, 336; *Lones v. Lones* (Cal.) 41 Pac. 771; *Ennis v. Smith*, 55 U. S. 400, 14 L. Ed. 472; *Barker v. Bell*, 46 Ala. 216; *Brown v. Crossley*, 69 Ind. 203; *Smith v. McChesney*, 15 N. J. Eq. 359; *Tournoir v. Tournoir*, 12 La. 19; *Ludlum v. Otis*, 15 Hun, 410; *Clarke v. Ransom*, 50 Cal. 595; *Newcomb v. Webster*, 113 N. Y. 191, 21 N. E. 77. This question has never been directly passed upon in Texas, although it has been held that the destruction of a second will containing an express

revocation of all former wills will not have the effect of reviving the first will. *Hawes v. Nichols*, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863. That decision goes further, and holds that a written declaration, properly executed, as effectually revokes a will from the date of its execution as does its destruction.

There was a conflict of opinion in England as to whether the destruction of a will, which had revoked a former will, either expressly or by implication, would revive the former will; the old common-law courts holding that in either case the first will would be revived, and the ecclesiastical courts, which had jurisdiction of wills disposing of personalty, held that in either case the intention of the testator should control. The doctrine of the latter is thus stated: "The legal presumption is neither adverse to nor in favor of the revival of a former uncanceled, upon the cancellation of a later revocatory, will. Having furnished this principle, the law withdraws altogether, and leaves the question as one of intention purely, and open to a decision either way, solely according to facts and circumstances." *Usticke v. Bowden*, 2 Addams (Eng. Eccle.) 116. With the exception of New Jersey and Connecticut, it is the American rule that the destruction of a later will, containing an express revocation of a former one, will not revive the older will. But, as hereinbefore indicated, there is a conflict of opinion as to whether the destruction or cancellation of a later will which has no express revocation clause in it, but merely revokes by implication, will revive the revoked will. In those cases making a distinction between an express revocation and one by implication, it is argued that the express revocation takes place at once, is immediate and absolute, but that in the other, the revocation being only implied, if it is destroyed by its author it never takes effect. *Scott v. Fink* (Mich.) 7 N. W. 799; *Cheever v. North* (Mich.) 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499. We do not see the force in that distinction. The only reason why the express revocation takes effect at once is because it shows beyond doubt that such was the desire and intention of the testator; but does express, positive language make it any plainer that a revocation is desired than a disposition of the whole property in a way utterly inconsistent with that in the former will would do? The testator in this case bequeathed his property to one who had no claims upon his bounty. He made another will, giving his entire property to other and different persons, the bulk of it to a beloved sister. The revocation would be as forcible, clear, and explicit as though he had reiterated in language his desire to revoke the former will. If the revocation expressed in words should take place at once, why should not

the one based on acts too clear to be misunderstood take effect at once? *Raf Welder*, nearly a month before he wrote to Dougherty as to the disposition he desired to be made of his property, had in mind a change in the will made in 1900, for he says: "I may never get back alive, I will write you full particulars as to what to do with my stuff." If he had not contemplated a change in his will, there could have been no necessity for so writing. In the last letter he wrote he spoke of his former letter in regard to the disposition of his property, and then proceeded to dispose of it in a manner utterly inconsistent with a large portion of the former will. Nothing was left to Mrs. Holscheider in the last will, while in the first the bulk of the property was bequeathed to her. He could not, had he said so in the most forcible language, have shown a stronger desire of depriving Mrs. Holscheider of any interest in the property that she could get from the former will. The moment that he sent it to James R. Dougherty he had published it, and it was a live, active will. It is true that it depended for its future vitality upon the happening of a certain contingency; but, if it had contained an express revocation of the former will, the weight of authority is to the effect that the former will would be revoked, whether the contingency happened or not, and we can see no reason why a revocation by inconsistent disposition of property would not have the same effect.

In the case of *Williams v. Miles*, 94 N. W. 705, 62 L. R. A. 383, the subject under investigation was considered by the Supreme Court of Nebraska, and the following conclusion reached: "But the strong tendency in the United States is to follow the rule of the English ecclesiastical courts, and hold that if the testator destroys a subsequent will, revoking a former one either expressly or by implication, such act of itself will not revive the former will. In *re Gould's Will*, 72 Vt. 316, 47 Atl. 1082; *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44; *Harwell v. Lively*, 30 Ga. 315, 76 Am. Dec. 649; *Bonanon v. Walcott*, 1 How. 336, 29 Am. Dec. 631; 1 *Woerner, Probate and Administration*, § 51. Following the English act of 1837, the statutes, wherever this subject has been dealt with by legislation, are all against the doctrine of constructive revival of the prior will. Hence we may well regard Lord Mansfield's rule as disapproved, and the doctrine of the ecclesiastical courts as vindicated. Preferring the latter, we think the rule should be to look to the intention of the testator in every case. Whether the former will is revived depends upon his intention, which is to be deduced from all the circumstances." These views are fully sustained by *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322, and *Williams v. Williams* (Mass.) 8 N. E. 424. In the case of *Gould's Will* (Vt.) 47 Atl.

1082, it was said: "The most reasonable rule that can be formulated makes the question of revival depend upon the intention of the testator at the time of the destruction of the revoking will. A presumption does not arise from that act alone that it was the intention to reinstate the former will. The fact that he once superseded that will by another, on account of changed conditions of his estate, or changed circumstances of persons who were dependent upon him, tends to repel such a presumption." In this case Raf Welder wrote a holographic will which, by a disposition so repugnant to that disposition made of the property in the will executed in 1900, was to all intents and purposes a full revocation of it. He sent that will to his trusted attorney and friend, and he must have known that it was in his custody, and yet he made no effort to destroy it. It may be said in this connection that he made no effort to destroy the first will either; but it was shown that it was not in his possession, but in that of Mrs. Holscheider, who kept it securely in the safety vault of a bank. If it was his deliberate intent, as evidenced by the making and publishing of the holographic will, to revoke the first will, that intention, if not shown to have afterwards been changed, should be carried into execution, even though it carried with it the presumption that he wished to die intestate. It would not have been unnatural if he had deliberately made up his mind to die intestate and permit his estate to descend as the law directs that a father's estate shall descend in case of intestacy.

It has been held that, where wills were denied probate on account of having been obtained through undue influence and because not executed as provided by statute, they could not be used to show revocation because void in toto, and this would vitiate the revocation as well as other parts of the will. But the holographic will in this case

is not a void instrument, but one that has lost its disposing power because based on a contingency which did not happen. It is at least a "declaration in writing," executed with the formalities required of holographic wills, and the intention is plain to divert the property from Mrs. Holscheider, and as evincing such intention is legitimate evidence to go before a jury. *Dudley v. Gates*, (Mich.) 83 N. W. 97, *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322. As said in the last-named case: "Since the enactment of the English statute of wills [St. 7 Wm. IV & 1 Vict. c. 26, § 22], the decisions in all courts have been uniform that, after the execution of a subsequent will which contained an express revocation, or which by reason of inconsistent provisions amounted to an implied revocation, of a former will, such former will would not be revived by the cancellation or destruction of the later one." In article 5337, *Sayles' Civ. Ann. St. 1897*, it is provided that "no will in writing, made in conformity with the preceding articles, nor any clause thereof or devise therein shall be revoked except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by the testator destroying, canceling, or obliterating the same, or causing it to be done in his presence." The execution, therefore, of a subsequent will, a codicil, or declaration in writing, has the effect to annul and revoke a former will, and that revocation would take place upon the publication of the paper, regardless of what might afterwards become of it, and a republication of the former will would be necessary to give it vitality, no matter whether the later will was destroyed or became inoperative. This doctrine is sustained by the weight of English and American authority.

Because the court erred in not permitting the letters of Raf Welder to be used as evidence, the judgment is reversed, and the cause remanded.

HOLLINGSWORTH v. NATIONAL BISCUIT CO.

(Kansas City Court of Appeals. Missouri.
June 28, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE.

A servant was injured by the explosion of a copper kettle while used by him in manufacturing candy. He had 15 years' experience in the work, and was in charge of the kettle, determining for himself the manner of making the candy, the heat, and the time necessary to make it. The kettle had been relined three years before the accident, and linings were supposed to last ten years. He knew of a defect in the lining without reporting the same to the master. There was no negligence in the original purchase, nor in the purchase of the new lining, which the master had put in. Held insufficient as a matter of law to show actionable negligence on the master's part.

2. SAME—INSPECTION.

An experienced servant, who knows of the methods employed by the master in inspecting the appliances used, cannot recover for an injury received by reason of a defect in the appliance, though a different manner of conducting the business would have been less dangerous.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 593.]

Appeal from Circuit Court, Jackson County; S. C. Douglass, Judge.

Action by Benjamin F. Hollingsworth against the National Biscuit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied October 2, 1905.

Harkless, Crysler & Histed, for appellant.
Bird & Pope, for respondent.

ELLISON, J. The plaintiff was engaged in making candy for the defendant by boiling the ingredients in a copper vessel with steam heat. The vessel exploded and threw the hot candy over plaintiff, whereby he was severely injured. He brought this action, charging that the vessel was old, worn, and defective, and was therefore unsafe. He recovered judgment in the trial court.

The vessel, called a "kettle," was about 32 inches across the top and about 20 inches deep, and it assumed an oval shape at the bottom. It was composed of two sheets of copper, one outside and the other inside, called the "lining." These were a short space apart, and in the space thus left between the two steam was passed around and under the ingredients out of which the candy was made. The steam was admitted through a pipe and valve on one side of the vessel, and was let out at an exhaust valve on the other side. Thus the candy was boiled by steam. It was usual to heat the candy in boiling to about 265 degrees. At the time in question plaintiff had boiled the candy about 20 minutes, when it was ready to be taken out and put into what was called the "beater." He found that the beater could not be used at that moment, so he shut off both the admitting and exhaust valves. These re-

mained shut off for about five minutes, which caused the candy to cool down several degrees. Wishing to bring it up to the point it had reached when he shut off the valves, he partly opened the exhaust valve, giving it two or three turns, ten or twelve being necessary to a full opening, and opened the admitting valve by giving it three turns. When he did this the explosion took place which injured him. Plaintiff was a man of 15 years' experience in the work, and had had charge of the kettle for more than a year, determining for himself the manner of making the candy, and the heat and time necessary to make it ready for the beater. He had an assistant or helper under him. The kettle had been used for some years, but had been relined about 3 years previous to the accident. Linings were supposed to last 10 or 12 years. There was testimony tending to show that at one or two points where the kettle was riveted bubbles appeared in the candy when it got up to that height in the kettle. Plaintiff had noticed these, but never examined for the cause, and paid no attention to it. He did not complain of it, nor ask that it be repaired. He generally cooked in a day from 10 to 12 "batches," of about 85 pounds each, and it was his duty to clean the kettle. He testified that he did not know of defendant ever having the kettle inspected. So far as he knew, the defendant did not inspect the kettle, except what might be made by looking at it.

It is apparent that plaintiff is without any legal standing, and should not have had judgment in the trial court. He was practically his own master in managing the kettle. He himself made out in testimony that he was in sole charge thereof. He was as completely in control of the kettle as the ordinary domestic is of a cooking stove upon which daily meals are prepared. He testified, and, indeed, that seems to be one cause of his complaint, that defendant had no one to come and inspect the kettle or to look after it during the whole time that he used it. As already stated, he had been engaged in such work for 15 years, and must have known that he was expected to have sole charge of it. The part which was affected by the explosion had not been in use a great length of time, certainly not long enough to show negligence from mere continued use. He testified that there was a defect which had begun to make its appearance by causing bubbles in the candy at certain times, but, as before stated, admits that he did not report it nor ask that it be repaired, though he casually spoke of it to a steam fitter in the building.

The only charge of negligence left to the plaintiff after the court's instructions were given, and which is now relied upon, is that the kettle was "old, worn, and thin," and that it was known to the defendant, or, if not known, it could have been, had ordinary care in observing, inspecting, and repairing

the kettle been observed. There is no charge nor pretense of negligence in the original purchase, nor in the new lining which defendant had put in. Evidence in plaintiff's behalf showed that a lining would be expected to last 10 or 15 years, when this had only been in use 2 or 3 years. But it is insisted that there was no proper inspection system adopted by defendant. The mode of inspection was not by any specific test of the strength of the kettle, but was merely that made by observation by defendant's foreman as he passed around the apartment. All this was known to the plaintiff, for he explicitly states that there was no other inspection made within his knowledge at any time during his employment. It is a familiar law that a "master may conduct his business in his own way, and the servant, knowing the hazards of his employment as the business is conducted, impliedly waives the right to compensation for injuries resulting from causes incident thereto, though a different method of conducting the business would have been less dangerous." *Bradley v. Ry. Co.*, 138 Mo. 302, 39 S. W. 763; *Howard v. Ry. Co.*, 173 Mo. 524, 73 S. W. 467; *Glasscock v. Swofford*, 106 Mo. App. 657, 80 S. W. 364; *Harrington v. Ry. Co.*, 104 Mo. App. 663, 78 S. W. 662. A perusal of the evidence fails to disclose any showing of negligence as regards a complainant such as plaintiff has shown himself to be. Nothing was concealed from him. No assurances were given to him, and no complaints made by him. His long experience and extended knowledge in the use and operation of kettles of this character leave him without any just ground of complaint.

The judgment will be reversed. All concur.

NELSON v. METROPOLITAN ST. RY. CO.
(Kansas City Court of Appeals. Missouri.
June 26, 1905.)

1. APPEAL—HARMLESS ERROR—VARIANCE.

Where, in an action against a street railroad company for injuries to a passenger, plaintiff alleged that while she was dismounting, and before she had sufficient time to do so safely, the car was negligently started with a sudden jerk and at a rapid rate of speed. *Held*, that the allegations as to the manner of starting the car were not essential to the cause of action, so that failure to prove them was not cause for reversal, under Rev. St. 1899, §§ 655, 798, providing that no variance shall be deemed material, unless it has actually misled the adverse party, and that, where the cause of action is unproved in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof.

2. CARRIERS—MEASURE OF CARRIER'S DUTY.

Street railways are common carriers, and must employ the highest degree of care to avoid injury to their passengers.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1087, 1089-1091.]

3. SAME—CONTINUANCE OF RELATION.

The relation of carrier and passenger continues until the time the latter leaves the train, so that it is the duty of the carrier, not only to safely carry the passenger, but, when his destination is reached, to keep the train stationary while he is alighting.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1223, 1223½.]

4. SAME—ALIGHTING FROM STREET CAR—DUTY OF CONDUCTOR.

A street car conductor is required, in the exercise of due care, to look to see if passengers are in the act of alighting before he starts his car, though the car has been stationary for a reasonable length of time to permit passengers to alight.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1223, 1223½.]

5. SAME—INSTRUCTIONS.

In an action against a street railway company for injuries alleged to have been caused by the sudden starting of the car as plaintiff was dismounting therefrom, an instruction predicated plaintiff's right to recover upon proof that, while the car was standing, plaintiff took a position upon the back platform for the purpose of stepping off, and that, while in that position and before she had sufficient time to get off, the defendant's servants suddenly caused the car to be started, did not, when considered with another instruction forbidding a recovery if plaintiff stepped from the car after it started, authorize a finding for plaintiff, notwithstanding the jury might believe that she did not attempt to step from the car until after it had started.

6. DAMAGES—PERSONAL INJURIES—FUTURE SUFFERING.

In an action for personal injuries, plaintiff may recover damages for pain which will be suffered in the future as a result of the injury.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 236.]

Appeal from Circuit Court, Jackson County; J. McD. Trimble, Special Judge.

Action by Clare Nelson against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied October 2, 1905.

John H. Lucas, for appellant. Meservey, Pierce & German, for respondent.

JOHNSON, J. Plaintiff was a passenger upon one of defendant's cable trains operated upon the Ninth Street line of its street railway system in Kansas City. She was injured while alighting from the car, and sues to recover damages therefor, alleging that the negligence of defendant was the direct cause of her injury. The answer pleads a general denial and contributory negligence. Plaintiff recovered judgment in the sum of \$1,000, and the case is here upon the defendant's appeal. The errors assigned all relate to the action of the trial court in refusing to sustain a demurrer to the evidence and in the giving of instructions.

First, it is said plaintiff failed to sustain by proof the cause of action pleaded in her petition. The petition charges that: "On the 21st day of March, 1903, plaintiff enter-

ed one of the cars of defendant company at or near the corner of Grand avenue and Ninth street, in said Kansas City, Mo., for the purpose of taking a trip west as a passenger on one of defendant's cars; that plaintiff's destination was the corner of Ninth and Penn streets, and that, upon the arrival of said car at the corner of Ninth and Penn streets aforesaid, the agents, servants, and employes of defendant in charge of said car stopped the same for the purpose of permitting passengers to alight from said car, and this plaintiff immediately undertook to pass out of said car to the street below; that while plaintiff was in the act of stepping from the platform of said car, and before she had sufficient time to get safely off from the same, the agents, servants, and employes of defendant, managing its said railway and in charge of said car, negligently and carelessly started said car forward with a sudden jerk and at a rapid rate of speed, causing said plaintiff to be thrown with great force and violence off of said car and upon the street below; * * * that said injuries were directly caused by the carelessness and negligence of the agents, servants, and employes of said car in starting it forward with a sudden jerk while plaintiff was in the act of alighting therefrom; that at the time when said plaintiff started out of said car other passengers were preceding her, and by the exercise of ordinary care the agents, servants, and employes of defendant might have known that plaintiff was in a place of danger at the time when said car was started; and plaintiff charges that said defendant actually knew that plaintiff was in a dangerous position at the time when said car was started."

Under the facts disclosed by the evidence it appears that plaintiff boarded a west-bound train at Grand avenue; her destination being Penn street. The train consisted of a grip car and coach. Plaintiff seated herself in the coach, near the middle thereof, and paid her fare to the conductor. Before reaching Penn street an additional grip car was attached to the front end of the train to assist it uphill and down a steep incline on the other side thereof to the Union Station, the terminus of the line. Penn street was on the summit of the hill, and all west-bound trains were required to stop there for the purpose of receiving and discharging passengers, and to exchange signals with a station at the foot of the incline before proceeding. A telephone line was the medium of communication, and the instrument at the east end thereof was located on the northwest corner of the intersection of the streets, near the curb line of the sidewalk. It was the duty of the gripman to stop the train at this place, and not to proceed until signaled by the conductor, whose duty it was to go to the box, ring up the other end of the line, and

wait until he obtained the proper signal. On arriving at Penn street the train upon which plaintiff was a passenger came to a full stop at its customary place, and plaintiff proceeded to alight from the rear end thereof, the proper place. She was preceded by two other passengers. To this point the facts are undisputed. Plaintiff and her witnesses say that she arose from her seat as the car was slowing, remained standing until it came to a full stop, and then walked behind the other two disembarking passengers to the rear platform, and from there was in the act of putting her foot upon the first step, when the train suddenly started without warning and threw her violently to the street; that her progress from the time the car stopped was continuous and as expeditious as possible. She was carrying some bundles, which prevented her from using the railings and other holds provided. Further, her witnesses say the conductor jumped from the train as it was stopping, went to the signal box, received his signal to go ahead, and, without looking to the rear end of the train, raised his hand, called "All right," and ran to and boarded the train, which started immediately, without warning, when he gave the signal.

The facts alleged, which it is claimed by defendant are unsustained by any evidence, are that the conductor had actual knowledge of plaintiff's position when he signaled the gripman to start, and negligence in the manner in which the train was set in motion by the gripman. There is substantial evidence in the record that the train started with an extraordinary jerk; and, while it must be conceded that plaintiff's witnesses all say that the conductor did not look in the direction of plaintiff, and consequently had no knowledge of her situation, the conductor himself said: "After getting the signal from the depot I went toward the car, boarded the front platform of the coach, looked to see if everything was clear, then gave the gripman two bells to go ahead. As the train started off, and had gone perhaps six or eight feet, a woman stepped off the rear platform and fell." From this statement it appears the conductor must have seen plaintiff; but, as the instructions given on her behalf are criticised for failing to require the jury to find these facts we will consider the questions of law arising from defendant's hypothesis that neither of them is supported by proof.

A plaintiff will not be permitted to declare upon one cause of action and recover upon another. When acts of negligence, fundamental to the right asserted, are specifically alleged, they must be proven as alleged. *Waldhier v. Railroad*, 71 Mo. 514; *Ely v. Railroad*, 77 Mo. 34; *McManamee v. Ry. Co.*, 135 Mo. 440, 37 S. W. 119. But this well-settled rule is in its application restricted by statute to predicative facts, without proof

of which the cause of action pleaded cannot be established in its full scope and meaning, and not to facts that, particularizing only, may be eliminated without changing the cause of action. *Rev. St. 1899, §§ 655, 798; Waldhler v. Ry. Co., supra; Leslie v. Ry. Co., 88 Mo. 50; Ridenhour v. Ry. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.* Whether or not the facts under consideration are substantive is therefore the question for determination. A fair and reasonable construction of the petition leads to the conclusion that the act of negligence charged was the starting of the train with sufficient force to destroy plaintiff's equilibrium while she, exercising due care, was in the act of leaving the car. The negligence of the gripman, if any, in the manner of moving the train, was immaterial. It was negligent for defendant to make any kind of a start while passengers were leaving the train at a place provided for their discharge. The manner of starting the car, its rate of speed, and jerking motion are but nonessential particulars.

Defendant says that, even under the evidence of plaintiff, she was given ample time to leave the car; that defendant is required to stop for the discharge of passengers a reasonable time, after the lapse of which the conductor is not bound to look to the places of exit for departing passengers, but may assume that they have safely alighted. Street railways are common carriers, and as such must employ the highest degree of care to avoid injury to their passengers. *Hite v. Railway Co., 130 Mo. 132, 81 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555; Jackson v. Railway Co., 118 Mo. 199, 24 S. W. 192; Barth v. Railway Co., 142 Mo. 535, 44 S. W. 778; Fillingham v. Transit Co., 102 Mo. App. 573, 77 S. W. 314.* The relation of carrier and passenger continues to the time the latter alights from the train. It was not only the duty of defendant to safely carry plaintiff, but, when her destination was reached and the car stopped, to hold it stationary while she was alighting. *Leslie v. Railway Co., supra; Grace v. Railway Co., 156 Mo. 295, 56 S. W. 1121; Dougherty v. Railroad, 81 Mo. 330, 51 Am. Rep. 239; Weber v. Railway Co., 100 Mo. 194, 12 S. W. 804, 18 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541; Becker v. Building Co., 174 Mo. 246, 73 S. W. 581; Cullar v. Railway Co., 84 Mo. App. 340.* The characterization of the acts of carriers in the handling of their traffic often depends upon the circumstances and conditions under which an act in question is done. It has been held that the conductor of a train upon a steam railroad running across the country may, in the exercise of proper care, signal the engineer to start the train after it has stopped at a station a reasonable time for passengers to leave, without looking at all of the places of exit to see if any one is in the act of alighting. *Straus v. Railroad Co., 75 Mo. 185.* But the authorities agree that simi-

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lar conduct on the part of the conductor of a street car is negligence. The conductors in both instances are required to use the highest degree of care, but the street car conductor has no means of knowing how many passengers intend to alight at a given place, and therefore cannot judge in advance of the length of stop required. Regard, also, must be had for the habits of people patronizing such urban vehicles, who frequently make impulsive exits therefrom for divers reasons. However long a stop may be, due care requires the conductor to look to his car before giving the signal to start. *Railway Co. v. Smith, 90 Ala. 60, 8 South. 86, 24 Am. St. Rep. 761; Anderson v. Ry. Co., 12 Ind. App. 194, 38 N. E. 1109; Patterson v. Railway Co., 90 Iowa, 247, 57 N. W. 880; Nellis, Street Railroad Accident Law, § 2; Booth on Street Railways, § 349.* As before stated, the gravamen of the charge is the starting of the car with plaintiff in the situation described. Actual knowledge on the part of the conductor of her position is beside the real issue. His act in starting the train was tortious, either with or without such knowledge, if it, without fault of hers contributing, produced her fall. *Ridenhour v. Railway Co., supra; Duffy v. Transit Co., 104 Mo. App. 235, 78 S. W. 581.* Under these conclusions it follows that a failure of proof with respect to either of these facts, and the omission to refer to them in the instructions as essential to a recovery, do not constitute substantial error.

Plaintiff's first instruction was in part as follows: " * * * And that said train upon which plaintiff was a passenger stopped on or near the crossing on Penn and said Ninth streets for the purpose of permitting passengers to alight therefrom, and that while said train was standing on or near said crossing plaintiff took a position upon the back platform of the rear car of said train for the purpose of stepping off said car, and that while plaintiff was in that position, and before she had sufficient time to get safely off said car, the agents, servants, and employes in charge of said train suddenly caused the said car to be started forward," etc. A fair interpretation of this language does not admit of the conclusion that the jury was authorized to find for plaintiff, notwithstanding they might have believed that plaintiff stood upon the platform and did not attempt to step therefrom until after the car had started. If such construction is not admissible, there is no substantial difference between the cause of action pleaded and proven and that submitted. No claim is made by any witness that plaintiff stopped upon the platform. Plaintiff's witnesses said that the car started when she was in the act of stepping therefrom, and those for defendant testified that she attempted to step off after the car started. There is no controversy over the fact that when the car started she was in the act of leaving it. The instruction under consideration required the

jury to believe, in order to find for plaintiff, that "at the time she attempted to alight from said car she was exercising ordinary care for her own safety in doing so under the circumstances shown in evidence." And defendant's fourth instruction told the jury that, "although you may find and believe from the evidence that defendant's agents and servants were negligent in starting the car before plaintiff had safely alighted from said car, yet if you further find and believe from the evidence that plaintiff voluntarily stepped off of said car after it had started, and by reason thereof fell and was injured, your verdict will be for the defendant." Thus it appears that the only act of negligence asserted against plaintiff was that of attempting to alight after the car started. Of course, if plaintiff was not overthrown by the unexpected starting of the car, but endeavored thereafter to step from the platform while the train was in motion, and sustained the fall in consequence thereof, such negligent conduct would preclude her recovery. But there is no room for the contention that the instruction under consideration permitted a verdict for plaintiff, even in the face of such contributory negligence. The issue was fairly presented in the instructions of both parties, and the jury was unequivocally directed to find for defendant, if they believed that plaintiff was negligent in the manner claimed.

Plaintiff's second instruction directed the jury to include within the recoverable damages "fair compensation to her for any pain of body or mind which you may find and believe from the evidence she has suffered and will suffer by reason of the injury," etc. These words are essentially different in meaning from those used in the instruction condemned in the case of *Ballard v. Kansas City* (Mo. App.) 88 S. W. 479, cited by defendant. There compensation was to be awarded "for any pain of body and mental anguish that plaintiff may suffer in the future." The use of the words "may find and believe," followed by the restrictive words "will suffer," plainly confined the inquiry to such pain as the jury believed was reasonably certain to result from the injury, and did not permit indulgence in conjecture or speculation relative to possible or contingent future happenings.

No substantial error appearing in the record, the judgment is affirmed. All concur.

CITY OF ST. JOSEPH ex rel. FORSEE v. BAKER et al.

(Kansas City Court of Appeals. Missouri. May 22, 1905.)

1. APPEAL AND ERROR—REVIEW ON SUBSEQUENT APPEAL.

Where no reason appears for reexamination of questions decided on a former appeal, the court will confine its consideration to

points raised for the first time on the second appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4353-4368.]

2. EVIDENCE—PAROL—CONTRADICTING DEED.

A witness to a deed of a certain date, to whom a deed of a subsequent date is shown, may testify that the latter deed was the same instrument witnessed by her, with the exception that the date has been changed, the consideration raised to a larger amount, and that additional property has been inserted.

3. DEEDS—REDELIVERY TO GRANTOR.

Where the grantee of land is in possession under an unrecorded deed, and delivers the deed to the grantor that he may insert additional property, redate, and redeliver it, which the grantor does, such acts constitute a destruction of the original deed by consent of the parties, and the substitution of another in place thereof, without an intention to revest the title to the property originally included, which continues in the grantee from the date of the delivery of the original deed.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by the city of St. Joseph, on the relation of Zelida Forsee, against John W. Baker and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Rehearing denied October 2, 1905.

James F. Pitt, for appellant. Chas. F. Strop and Samuel S. Shull, for respondents.

JOHNSON, J. Action founded upon a special tax bill issued against certain real estate in St. Joseph for the construction of a sewer. This is the second appeal taken by plaintiff. On the former occasion we reversed and remanded the cause for error in the admission of evidence. 88 Mo. App. 310. In view of the probability of a retrial, we announced the law controlling the case. No reason appears for reexamination of the questions then decided, and our consideration now will be confined to points raised for the first time upon the present appeal. *Leicher v. Keeney* (Mo. App.) 85 S. W. 920.

The action originally was brought against defendant Baker alone. After the expiration of the limitation period of two years for bringing actions on such bills, plaintiff filed an amended petition making other parties defendants, among whom were Ivanora Baker Shull and her husband, Samuel S. Shull. The points in contention evolve from the claim of title made by Mrs. Shull to the property against which the bill was issued. It is asserted by her, and denied by plaintiff, that on December 17, 1890, about two years before the tax bill was issued, defendant Baker and his wife—her parents—executed and delivered to her their deed conveying the property here involved, and that this deed, unacknowledged, was not recorded, but held by her until December, 1895, when it was returned to her father, not for the purpose of revesting title, but for the insertion therein of other property he desired to convey to her. The date and consideration of the deed

were then changed, and the description of the property enlarged, to meet the wishes of the parties, after which the deed was acknowledged, delivered, and filed for record. Further, it is claimed that Mrs. Shull entered into possession of the premises immediately after the delivery of the 1890 deed, remained therein continuously thereafter, and that the facts of her ownership and possession were known to the holder of the tax bill at and before the bringing of this suit. As the action was not brought against the real owner of the property within the time fixed by law, the plea of limitation is the defense interposed by Mrs. Shull. We held that, if the suit should have been brought against her, it will not avail plaintiff that it was brought against Baker within the period of limitation, and Mrs. Shull brought in by amendment after that period had expired; following *Smith v. Barrett*, 41 Mo. App. 460, and *Jaicks v. Sullivan*, 128 Mo. 187, 30 S. W. 890.

A witness to the deed of 1890, to whom the deed executed in 1895 was shown, testified that the latter deed was the same instrument witnessed by her, with the exception that the date had been changed from 1890 to 1895, the consideration raised from \$1,000 to \$6,000, and that additional property had been inserted. Witness saw the signing of the deed by Baker and his wife, and attached her own signature thereto as a witness. Plaintiff vigorously presses the objection made to the admission of this evidence upon the ground that it is a parol contradiction of the contents of the deed, and for that reason incompetent. Following our former expression of opinion on this subject, we entertain the view that the act of Mrs. Shull in delivering the original deed to the grantor, that he might insert additional property, redate, and redeliver it, together with the acts of the grantor in the furtherance of that purpose, constituted a destruction of the original deed by consent of parties and the substitution of another in place thereof, without an intention to revest the title, from which it follows that from the date of the delivery of the original deed the title to the property involved has remained without break in Mrs. Shull. The testimony was admissible, not to contradict the deed of 1895,

but to establish the fact of the execution of the prior deed, the identity of which as a written instrument had been destroyed.

We are urged, however, to reconsider the conclusion that the title was not revested in the grantor upon an hypothesis at variance with facts in proof. It is asserted that in the deed of 1895 an addition to the habendum clause was inserted, depriving the husband of Mrs. Shull of his curtesy. The only evidence in the record touching this point is found in the testimony of the witness referred to in the following portion of her examination: "Q. In 1890, when you signed said deed, can you state what description of property was in said deed at that time? A. Lot 6, block 48, in the St. Joseph Extension addition, an addition to the city of St. Joseph, in said Buchanan county, state of Missouri." Q. Has any additional property been described in writing in said deed since it was delivered as aforesaid? A. All the written description in said deed which is not included in my last answer has been inserted since that deed was delivered to Ivanora Baker Shull. Q. If any other changes have been made in said deed after it was signed and delivered, will you please point them out? A. In the second line of said deed, after the word 'ninety' the word 'five' has been inserted; and the original consideration written in said deed was 'one thousand dollars,' and the word 'one' has been erased and the word 'six' inserted, so that the consideration now reads 'six thousand dollars.' In all other respects the deed is as it was at the time it was delivered to Ivanora Baker Shull." None of the changes referred to affected the right of curtesy. The provision relating thereto appears to have been incorporated in the original deed. The principle invoked is unsupported by any fact in evidence.

There is evidence tending to show open and notorious possession and claim of title by Mrs. Shull from the time of delivery of the first deed, and knowledge on the part of the holder of the tax bill of these facts received before the suit was brought.

The issues were fairly submitted in the instructions given. No error appearing, the judgment is affirmed. All concur.

RIDGELEY NAT. BANK, OF SPRINGFIELD, ILL., v. BARSE LIVE STOCK COMMISSION CO.

(Kansas City Court of Appeals. Missouri. June 5, 1905.)

PRINCIPAL AND AGENT—SCOPE OF AUTHORITY.

A bank authorized a live stock commission company to receive shipment of cattle mortgaged to secure notes held by the bank, sell the cattle, and receive the proceeds. The commission company took a substituted mortgage and note, and sold the same to a third party, but failed to turn over the proceeds of the same to the first mortgagee. *Held*, that their authority was limited by the instruction given, and the execution of the second mortgage did not discharge the lien of the first mortgage, and, on the sale by the commission company of the cattle under the second mortgage and payment of the proceeds to the first mortgagee, the latter was not liable for the amount thereof to the second mortgagee.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 283-289.]

Appeal from Circuit Court, Jackson County; William B. Teasdale, Judge.

Action by the Ridgeley National Bank, of Springfield, Ill., against the Barse Live Stock Commission Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Rehearing denied October 2, 1905.

Milton Moore and Stewart Taylor, for appellant. Haff & Michaels and L. W. McCandless, for respondent.

BROADDUS, P. J. This is a suit for the alleged conversion of 120 head of cattle. The following facts are admitted: On October 30, 1900, one Benjamin Funk, a resident of the state of Kansas, executed a note payable to the Siegel-Sanders Live Stock Commission Company, of Kansas City, Mo., for the sum of \$4,106.85, due February 4, 1901, and executed a mortgage on 120 head of cattle then on what was known as the "Funk Farm," situated in McLean county, Ill. On January 10, 1901, he also executed a second mortgage on said cattle to secure a note payable to said commission company for the sum of \$4,285.14, due August 10, 1901. The form of the two mortgages is the same, both notes are payable at Kansas City, Mo., and both mortgages contain a provision that the cattle shall be shipped to the said commission company at Kansas City, Mo., to be sold on the market. The plaintiff claims under the second mortgage. The said commission company procured said Funk, the owner of the cattle, to execute the second mortgage as a renewal of the first. The note secured by the latter belonged to the National Bank of Carthage, Mo. The note secured by the second mortgage was sold and assigned by said commission company to one Ridgeley, who sold and trans-

ferred it to the plaintiff, an Illinois banking corporation; but the said commission company failed to apply the proceeds on the first indebtedness due the Carthage Bank. On the 4th of February, 1901, the cattle were shipped to East St. Louis, consigned to said commission company, who directed the defendant to receive and sell them. This the latter did, and, after deducting expenses, sent to the said company by the hands of Funk a check for \$4,200.75, the net proceeds of the sale, and which were paid by it to the National Bank of Commerce, who held the note secured by the first mortgage for collection, and which paid it to the Carthage Bank.

Many questions are raised by the respective parties in the briefs. The first in importance is that of authority in said commission company to extinguish the lien on the cattle of the National Bank of Carthage, by taking in renewal thereof the second note and mortgage under which plaintiff claims to maintain this suit. The evidence shows that the Bank of Carthage had bought many notes, other than that mentioned, of said commission company, and that said bank authorized the latter, where no extension of the time of payment of any of its said notes had been granted, to have the cattle mentioned in the mortgages shipped to said company at Kansas City, for it to sell them on the market and receive the proceeds thereof as agent of said bank. There was no positive evidence that said commission company had any authority to extend the time of payment of any of these notes or to renew them. Much of the correspondence between the said bank and the commission company, relating to the other notes transferred by the latter to the former, was in evidence. But we have found nothing in this correspondence, nor in any other evidence, that shows any authority in said commission company from said bank than, as stated, to take control of the mortgaged cattle, sell them on the market, and hold the proceeds to be applied on the bank's notes.

Plaintiff contends, however, that the "Siegel-Sanders Company did not take the new note and mortgage for the purpose of selling it to the Carthage Bank, but for the purpose of selling it on the market and receiving the proceeds as payment of the Carthage Bank's note, the same as if they had sold the cattle; and it is but splitting hairs that there is a difference between selling the cattle on the market and selling new paper on these cattle on the market, so far as the question of agency is concerned. In neither case would the Carthage Bank be bound until the proceeds 'or avails' came into the hands of Siegel-Sanders. In either case the Carthage Bank would be bound when its agent received the money." In a short manner of stating the proposition, it was a collection. The plain-

tiff's reasoning leaves out of consideration that the act of the commission company in taking a renewal note and mortgage was in fact substituting one security for another. The authority to sell the mortgaged cattle and receive the proceeds of the sale did not authorize said company to interfere with the bank's security to the extent of taking a new note and mortgage. The authority conferred was in reference to the mortgaged property, and not to the securities. We have been unable to find any particular evidence in the record that conferred such authority, and plaintiff's counsel have been unable to indicate such; and their insistence is that it may be inferred from the general course of dealing. But the scope of the commission company's authority, as stated, did not go beyond protecting the bank's interest in the property itself, and selling the same and collecting the proceeds.

Plaintiff admits the full force of the rule, as it must, that "an agent, authorized merely to collect a demand or to receive payment of a debt, cannot bind his principal by any arrangement short of an actual collection and receipt of the money, and he cannot, therefore, take in payment the note of the debtor, either to himself or to his principal." Yet it insists that, "on the other hand, when the agent is authorized to transact all the principal's business of a certain kind, the very breadth of the employment and variety of the duties to be performed necessarily involve more or less of discretion and choice of methods, and render impracticable, if not impossible, much of particularity or precision, either as to the exact means and method to be employed, or as to the scope or extent of the authority itself. When so little is expressed, more may well be implied. The fact of such an authority of itself presup-

poses a general confidence is bestowed upon the agent, and a general committal to his discretion and judgment of all beyond the essential objects to be attained and the outlines of the course to be pursued. It may not unreasonably be presumed, where nothing is indicated to the contrary, that such an agent possesses those powers which are commensurate with his undertaking, and which are usually and properly exercised by other similar agents under like circumstances"—citing *Mechem on Agency*, p. 188, § 285. The meaning of the foregoing is that, where an agent is authorized to transact all of the principal's business, discretion is vested in the agent to use such means and methods as may be necessary to accomplish the object of his agency. That is a correct proposition of law that we do not deny as applied to a general agency. But the rule has no application to this case. The Siegel-Sanders Commission Company had no authority to transact all the business relating to the Carthage Bank's loans as aforesaid; but, on the contrary, its powers were limited, as stated, to the selling of the mortgaged cattle, collecting the proceeds of sale, and holding them for the bank to be applied on its notes. The agent had all the necessary powers for that purpose, and no more. The method by which the bank's interest was to be protected was prescribed. In such circumstances the agent is bound to pursue the prescribed method. *Reinhardt on Agency*, § 286; *Mechem on Agency*, § 409.

Our holding on this question precludes the necessity of passing on other questions raised by appellant. It follows, therefore, that as plaintiff had no lien on the cattle, and therefore cannot maintain this suit, the rule of caveat emptor applies.

Affirmed. All concur.

WOODS v. THOMPSON.

(Kansas City Court of Appeals. Missouri.
June 28, 1905.)

1. SALES—RESCISSION—REASONABLE TIME.

Where defendant purchased a quantity of brooms of plaintiff on certain representations as to their quality, and with opportunity for only a slight examination, an offer to rescind, because of defects, made three days after the brooms were received, was within a reasonable time.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 313, 314.]

2. SAME—TENDER—NECESSITY.

Where a buyer of personalty offers to rescind the sale, and it appears that a tender of the property back would be refused, it is unnecessary.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 303, 308.]

3. SAME—WARRANTIES—QUESTION FOR JURY.

In an action for the price of goods which the buyer had refused to receive because of alleged defects, evidence held to justify submission to the jury of the question whether the buyer relied on the representations of plaintiff's agent as to the quality of the goods or upon his own inspection.

4. SAME—EVIDENCE—RELIANCE ON REPRESENTATIONS.

In an action for the price of goods, it is competent for the buyer to prove that the seller's agent warranted the goods, and that he relied upon such warranty, although he inspected the goods.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 738.]

5. SAME—QUESTION FOR COURT.

Whether or not the buyer of personalty offered to rescind within a reasonable time is a question of law for the court, where the testimony is undisputed.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 317.]

6. SAME—ISSUE OF FACT.

In an action to recover the price of goods, the question whether there was a warranty or representation relied on by the purchaser is one of fact for the jury.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1304.]

Appeal from Circuit Court, Jackson County; A. F. Evans, Judge.

Action by F. W. Woods against Hugh E. Thompson. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied October 2, 1905.

Warner, Dean, McLeod & Holden, for appellant. J. Allen Prewitt and D. C. Herrington, for respondent.

BROADDUS, P. J. The plaintiff was a broom manufacturer at Blue Springs, Mo., and defendant was a broom manufacturer at Kansas City. On and prior to the 7th day of April, 1903, the plaintiff had on hand 228 dozen brooms and some broom corn that he desired to sell. A few days prior to said date he requested one D. L. Cobb to sell the same for him, and the said Cobb saw defendant at his place of business in reference to the matter, and the latter soon thereafter went to Blue Springs and inspected the

brooms, but did not buy at that time. He was at the latter place only a short time; and, as the brooms were stored in a loft over plaintiff's shop, he claims that he did not have the opportunity to make a complete inspection of them for want of time. The plaintiff was not in the factory when defendant inspected the brooms, but he saw him before he left Blue Springs. He testified that defendant said to him: "I have been at the factory and seen your brooms, and have come out to see about buying you out. I have 15 minutes to do it in. We can trade in 15 minutes, I guess, or we can't in an hour." He also testified that he priced the brooms at \$1.65, and defendant said, "No, sir; I will give you straight \$1.50 for your brooms put on the cars;" that after that plaintiff instructed Cobb to sell them to defendant at \$1.50, if he could not get any more. Defendant testified that, when he inspected the brooms, Cobb was present, and that he represented that the brooms would probably average in weight 23 pounds; that they were uniform, and that some of them that could not be seen were better than those in view; and that he guaranteed that the handles were all tight. He also testified that among broom men the question of weight was one of the material elements in arriving at the value of a broom, and that it would have taken a day's time to have weighed all the brooms. On April 1st Cobb wrote to defendant that he had bought the property from Woods, the plaintiff, and asking what was the best offer he would make for the brooms. To this defendant replied, asking Cobb to name his lowest price, and the latter wrote offering to take \$1.60 a dozen. To this defendant replied, declining the offer. On April 7th Cobb called up Thompson over the telephone and the trade was agreed on at \$1.50 per dozen. The brooms were immediately shipped to defendant, and arrived at Kansas City April 10th and were unloaded. Soon thereafter defendant inspected them, and found, as he stated, that they were light in weight and loose in the handles; that he put 15 or 20 dozen of them on the scales; that most of them weighed only a little over 20 pounds, and that they were of an inferior grade. He then had them removed to his warehouse and had each dozen weighed, which showed that they were inferior in quality and not according to the guaranty made by Cobb. On April 13th defendant wrote to Cobb the following letter: "Dear Sir: I have received the 228 dozen brooms shipped me, and hold them subject to your order, because they are not as represented to me. I have paid the freight on same, amounting to \$6.24, as I told Mr. Woods this morning. I think it best for you to come here right away, so that you can personally go over the lot of brooms and decide what you wish to do with them." On April 15th Cobb wrote defendant in effect

that he had inspected the brooms himself; that he sent him the brooms he saw, and none others; and that all he asked of him was to pay for them as he had agreed. On the same day defendant wrote Cobb as follows: "In reply to your favor of the 15th, I beg to say that I must absolutely refuse to receive these brooms, because a great many of them are loose on the handles, which you absolutely guaranteed me they would not be, and they are short in weight, as there are a few dozen, if any, that will run 24 pounds to the dozen.

* * * I do not want any advantage over you at all, and am simply waiting your order to know what to do with them, and, if you wish me to, I will ship them all back to you, and will keep out five dozen to pay the freight, amounting to \$8.24, and my trouble in hauling them from the depot and back.

* * * I hold them subject to your order and subject to your risk of fire," etc. To this letter Cobb replied that defendant could do as he pleased, as he had no interest in the brooms. On April 23d defendant wrote to Cobb as follows: "I write you once more, asking you to give me prompt disposition on these brooms, as they are in our road, and unless you give this prompt attention I shall be obliged to store them in some public store-room." Mr. Herrington, plaintiff's attorney, then wrote defendant, threatening to bring suit unless the brooms were paid for. Whereupon defendant wrote as follows: "I am willing to load these brooms on the car and ship back to Mr. Cobb and charge nothing for my expense of hauling both ways." Mr. Herrington wrote defendant, declining this offer. Defendant then wrote: "I will deliver these brooms to Mr. Cobb or his order, or I will haul them to the depot and reship them to him or his order to any point he may order them shipped to, and will lose the amount of freight I paid on them and the expense I have been to in handling them; but this is all I will do." It was developed that Cobb was at no time the owner of the property, but that he was acting as plaintiff's agent. The court, sitting as a jury, at the close of all the evidence gave a peremptory instruction in favor of plaintiff, and gave judgment accordingly. Defendant appealed.

The defendant in his answer, after admitting the contract of purchase, set up the following as a defense: "That as a part of said contract of purchase, and of the consideration therefor, said Cobb represented and warranted that at least two-thirds of said brooms would weigh at least 24 pounds to the dozen, and that all of said brooms would weigh an average of at least 23 pounds to the dozen, and that none of said brooms were or would be loose upon the handles, * * * and that said representations and warranties were untrue," etc. It is assumed by defendant that, as there was evidence of said representations and warranties, and that the brooms were not such as repre-

sented and warranted, the court predicated its said instruction on the ground that defendant had not offered to rescind the contract within a reasonable time. On the other hand, plaintiff contends that the action of the court was proper, as all the evidence shows that defendant purchased upon his own inspection, and not upon warranty. There was some dispute as to the facts relative to defendant's purchase, but none as to his offer to rescind. This case in principle is much like the one in *Enterprise Soap Works v. Sayers*, 55 Mo. App. 15. The plaintiff in that case bought of defendant 150 barrels of tallow, which was received by it on November 26th. In four days thereafter it notified defendant that the tallow was impure, and not according to sample, but did not offer to rescind. Several letters passed between the parties in an effort to adjust the matter, but without effect. This correspondence continued until December 30th, when plaintiff, through its attorney, still expressed a desire to adjust the dispute between the parties, proposing two means for doing so which would be acceptable to plaintiff, and, further, if the terms proposed were not accepted, plaintiff would proceed to sue, and have the tallow sold and the proceeds applied on its demand, and hold defendant for the balance. The defendant declined to accede to plaintiff's terms, and it brought suit. The holding was that "the case is lacking all elements which would enable the court to declare as a matter of law that the ultimate refusal of the vendee to accept the goods, and the institution of the suit for a recovery of the purchase money, did not occur within a reasonable time." The defendant, Thompson, as soon as he examined the brooms, and within the three days after he had unloaded them, notified plaintiff that he would not accept them; and in all his subsequent letters he insisted upon a rescission of the contract, and that he was holding the brooms subject to plaintiff's order. It seems to us that the offer to rescind was made within a reasonable time. See, also, *Steam Heating Co. v. Gas Fixture Co.* 60 Mo. App. 148.

But plaintiff contends that the offer to rescind was not accompanied with a tender of the goods at Blue Springs, where they were delivered to defendant. But all the evidence shows that, if a tender had been made, it would not have been accepted. Under such circumstances a tender need not be proven. *Enterprise Soap Works v. Sayers*, supra.

The plaintiff claims that defendant did not purchase the brooms upon representation or warranty of the quality, but upon his own inspection. It is true that defendant inspected the brooms, but it appears that, owing to the manner in which they were stored, his inspection was not satisfactory, and he required some assurance from Cobb,

the agent, as to the quality, which was given. It was at least a question for the jury to say whether defendant relied on such representations or upon his own knowledge derived from inspection. It was competent for defendant, notwithstanding he had inspected the brooms, to show that plaintiff's agent had warranted their quality and that he relied upon such warranty.

We think upon the undisputed testimony it was a question of law for the court to say whether the defendant had exercised the necessary diligence in rescinding the contract, and we are constrained to hold that he did exercise such diligence. Whether there was a warranty or representation, which was relied on by defendant when he made the purchase, was a question of fact for the jury.

Reversed and remanded. All concur.

HOGAN v. KAISER et al.

(Kansas City Court of Appeals. Missouri. May 28, 1905.)

1. LOST INSTRUMENTS—ACTION ON—AFFIDAVIT OF LOSS.

Under Rev. St. 1899, § 3854, providing that in an action on a lost instrument plaintiff must make affidavit that the instrument is not accessible, an affidavit wherein plaintiff states that the note sued on has become lost or destroyed and that plaintiff does not know whether it is the one or the other, but believes it to be one or the other, is sufficient.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lost Instruments, § 38.]

2. SAME—DESCRIPTION OF INSTRUMENT.

The note being sufficiently described in the statement to which the affidavit was appended, the reference in the affidavit was a sufficient description of the note.

3. BILLS AND NOTES—PAYMENT—WORTHLESS CHECK.

Where a note is surrendered to the maker in exchange for a worthless check, this does not constitute payment.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1257.]

4. PRINCIPAL AND SURETY—SURRENDER OF NOTE—DISCHARGE OF SURETY.

Where a note was surrendered to the maker in exchange for a worthless check, this did not release the surety, in the absence of any evidence that during the interval between the time the surety was notified that the note had been paid and the time he was notified that the check had been dishonored he could and would have protected himself.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, § 232.]

5. LOST INSTRUMENTS—INDEMNIFYING BOND—NECESSITY.

Under Rev. St. 1899, § 745, requiring an indemnifying bond in actions on lost instruments, the filing of the bond is not jurisdictional, but is merely a condition precedent to recovery, which must be performed before judgment is entered.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lost Instruments, § 43.]

6. SAME—ACTION BEFORE JUSTICE.

Under Rev. St. 1899, § 745, requiring the giving of indemnifying bonds in actions on

lost instruments, and sections 3854, 3855, relative to procedure on such instruments before justices of the peace, and not requiring a bond in such case, plaintiff, in an action on a lost instrument commenced before a justice of the peace and appealed to the circuit court, cannot have judgment without giving an indemnifying bond.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lost Instruments, § 43.]

7. SAME—TIME FOR FILING BOND.

Under Rev. St. 1899, § 745, requiring the giving of an indemnifying bond in actions on lost instruments, the bond is given in time if it is filed and approved before the ruling of the trial court upon the motion for a new trial.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lost Instruments, § 42.]

Appeal from Circuit Court, Jackson County; J. McD. Trimble, Special Judge.

Action by W. C. Hogan against Frank Kaiser and another. From a judgment for plaintiff, defendant Kaiser appeals. Reversed, with directions.

Rehearing denied October 2, 1905.

Meservey, Pierce & German, for appellant. Geo. A. Neal, for respondent.

JOHNSON, J. Suit upon a promissory note, begun before a justice of the peace, against W. C. Bishop and appellant. The judgment in the circuit court was for plaintiff against both defendants, but Kaiser alone appealed. Both Bishop and Kaiser signed the note as makers, but the latter was in fact a surety. Some time after maturity Bishop gave plaintiff his check upon a bank for the full amount due, and plaintiff, believing the check to be good, thereupon delivered the note to Bishop, who retained possession thereof. The check was dishonored by the bank for lack of funds to the credit of the drawer.

In the statement filed plaintiff alleged that the note had been lost or destroyed, and supported the allegation with the following affidavit: "This affiant, the plaintiff in the foregoing cause, being duly sworn, on his oath says that said note sued on has become lost or destroyed, and plaintiff does not know whether it is one or the other, but believes it to be one or the other." We do not entertain the view advanced by defendant that this verification fails to meet the requirements of section 3854, Rev. St. 1899. The words employed contain a positive and unqualified affirmation of the essential fact, plaintiff's inability to produce the primary evidence of his unsatisfied demand, resulting from its loss or destruction, the counter term to which would be his dispossession thereof by voluntary surrender upon payment or other satisfaction. The fact that the owner of a note is unable to state whether it has been misplaced or destroyed does not prevent his right to recover under the statute. His statement under oath that one or the other of said causes has deprived him of possession is sufficient.

Nor does the affidavit here fail to describe the note. The substance thereof appears in the statement filed to which the affidavit is appended. Reference to this description is made therein, disclosing the purpose to include it within the verification. *Warder v. Libby*, 104 Mo. App. 140, 78 S. W. 338. The surrender of the note by plaintiff to Bishop, obtained by the artifice of the latter, did not constitute payment. *Johnson v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; 2 *Parsons on Contracts*, 624.

But it is insisted that, through the act of plaintiff in accepting a worthless check and delivering the note to Bishop as paid, defendant was misled to his detriment and prevented from availing himself of means at hand for his protection. Plaintiff testified: "After the check was found to be no good, I informed Mr. Kaiser that the check was no good, and that I couldn't get any money on it. He laughed at me, and he says: 'You go to Mr. Bishop. He is the man to look to for the money.' He says: 'You haven't any action against me. Bishop came up here and told me the note was destroyed. If you want any sympathy I can give you that, but I won't give you any money.'" Defendant, though called to the stand, failed to deny this conversation, and it is a fair inference from his own testimony to say that his failure to attempt coercion upon Bishop resulted from his mistaken notion that the delivery of the note by plaintiff to Bishop under the belief that the check was good released defendant from liability as surety. There is no pretense that defendant was kept in ignorance of any facts known to plaintiff affecting his liability as surety, and we therefore are asked to declare that the single act of plaintiff in returning the note to the principal released the surety; in other words, to hold that Bishop's fraud was effective. In the absence of evidence tending to show that during the interval between the reception by defendant of information that the note had been paid and canceled and his notification by plaintiff of the dishonoring of the check defendant could and would have protected himself, we fail to perceive wherein he has been injured by the conduct of plaintiff. The contention cannot be sustained under the evidence. *Bank v. Lillard*, 55 Mo. App. 675; *Bank v. Danckmeyer*, 70 Mo. App. 168.

Finally, we are asked to reverse the case because of the failure of plaintiff to give an indemnifying bond, as required by section 745, Rev. St. 1899. Plaintiff answers to this that such bonds are not required in suits begun before a justice of the peace. Rev. St. 1899, §§ 3854, 3855. In actions upon lost instruments, the filing and approval of an indemnifying bond to the defendant is not

jurisdictional to the institution and maintenance of the suit, but is a condition precedent to recovery, which must be performed before judgment is entered. *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981; *Eans v. Bank*, 79 Mo. 182; *Barrows v. Million*, 43 Mo. App. 79. In actions originating before a justice of the peace the circuit court upon appeal derives the jurisdiction vested in the inferior court over subject-matter and parties, and proceeds with the cause anew, following the rules of practice and procedure which govern causes begun in the circuit court. Evidently, it was the legislative purpose, as expressed in section 745, to apply to all cases falling under the jurisdiction of the circuit court, without regard to the origin of the case, the rule followed by courts of equity of requiring a plaintiff to furnish indemnity as a condition to the granting of relief in suits upon lost instruments. There is always a possibility that an instrument alleged to have been lost may appear in possession of another, coupled with a claim of ownership and the right to enforce collection, in which event the defendant might be compelled to pay the same debt twice, in addition to being put to expense in defending against such claim. As between the plaintiff, who lost possession of the instrument, and the defendant maker, it is but fair that the former should bear the burden of possible future demands predicated by others upon such instrument. With this principle as the motive for the enactment of the provisions contained in section 745, supra, it is inconceivable that it was within the legislative intent to exclude defendants in actions originating before a justice of the peace from the protection afforded thereby. It is more consonant with reason to infer that the Legislature, treating the subject as one relating to procedure, and in no sense jurisdictional, assumed that the enactment would apply alike to all such cases in the circuit court. Under the views expressed, it was error to enter judgment without the giving of the statutory bond; but, as the bond would have been in time, had it been filed and approved before the ruling of the trial court upon the motion for new trial (*Aylor v. McMunigal*, 66 Mo. App. 657), and the error is without effect upon the issues involved, no reason appears for a retrial of the case.

The judgment is reversed, and the cause remanded, with directions to the trial court to enter judgment for plaintiff, under the verdict, upon the filing and approval of a bond, as required by section 745, Rev. St. 1899; and, should plaintiff fail to give the bond in a time to be fixed by the court, the action shall be dismissed. All concur.

STAFFORD v. ADAMS.

(Kansas City Court of Appeals. Missouri.
June 28, 1905.)

1. MASTER AND SERVANT—LIABILITY FOR INJURIES TO SERVANT.

It is negligence per se for the owner of a mill to fail to guard pulleys and belts, as required by Rev. St. 1899, § 6433.

2. APPEAL AND ERROR—REVIEW—WEIGHT OF EVIDENCE.

When the testimony of witnesses can reasonably be reconciled to the physical facts, the appellate court will not reject it, nor weigh it, notwithstanding the weight of the physical evidence seems to oppose that given by witnesses.

3. MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE.

In an action for injuries to plaintiff while employed in defendant's mill, evidence tending to show that the injury was caused by the unguarded condition of the machinery considered, and held sufficiently reconcilable to the physical facts to prevent its rejection by the court.

4. SAME—ASSUMED RISKS.

When the master has failed to exercise ordinary care, or has ignored the requirements of the statute, the fact that the dangers resulting from his dereliction are obvious will not excuse him from liability on the ground of assumed risk.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 663.]

5. SAME—QUESTIONS FOR JURY.

In an action by a servant for injuries, it appeared that plaintiff, while working in defendant's mill and in performance of his duties, was standing near a wheel which had been left unguarded, in violation of statute. He saw a stick on the point of falling into the wheel, and attempted to seize it for the purpose of throwing it out of the way, and while in this act the stick moved into the wheel, violently struck his hand, and forced it into contact with the teeth of the saw. Held, that the court cannot say that plaintiff was guilty of contributory negligence in working with the machine in its unsafe condition, and that the issue was properly left to the jury.

6. DAMAGES—ACTIONS—INSTRUCTIONS.

Where the petition contained no averment of loss of earnings from the date of the injury to the time of bringing suit, it was error to make such damages an element in the instructions given.

7. APPEAL AND ERROR—DISPOSITION OF CAUSE.

Where the petition contained no averment of loss of earnings from the date of the injury to the time of bringing suit, and such loss was made an element of damage in the instructions, and plaintiff's testimony that he had lost all of his time from the date of injury and that the value thereof was a certain sum per week was uncontradicted, the court may assume that the jury estimated his lost earnings at that rate and order a remittitur; there being no other error.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Robert B. Stafford against Charles E. Adams. From a judgment in favor of plaintiff, defendant appeals. Remittitur ordered.

Rehearing denied October 2, 1905.

Boyle & Guthrie, for appellant. L. A. Laughlin and O. Y. O. Pugh, for respondent.

JOHNSON, J. Plaintiff, injured while in the service of defendant, charged that the negligence of the latter was the direct cause of his injury. In addition to a general denial, defendant in his answer pleaded assumption of risk and contributory negligence. At the conclusion of the evidence defendant unsuccessfully requested the court to direct a verdict for him. Plaintiff recovered judgment in the sum of \$1,074. Defendant assigns as error the refusal of the court to sustain his demurrer to the evidence.

One of the claims advanced is that plaintiff failed to show that the negligent act complained of caused the injury. No evidence was offered by defendant, and the relevant facts disclosed in that introduced by plaintiff are these: Defendant at the time of the occurrence in question, October 23, 1903, owned and operated a factory in Kansas City for the manufacture of certain articles of furniture. Installed therein, and in use, was a certain sawing machine, called a "ripsaw," operated by steam power. The component parts of the machine were mounted upon a metal table 3 feet high, in the top of which a circular saw 16 inches in diameter was vertically set to freely permit its revolution. The table top, horizontal in position, was 3 feet long, 2 wide, and about 1 inch thick, and projected in all directions over its supporting die, which extended upward from one end of the base. The other end of the base carried a revolving shaft, upon which was set three wheels, two of which were used to communicate the power to the saw shaft, and the other to carry the belt coming from the engine room when it was desired to have the machine at rest. The latter wheel was called the "loose wheel," because it turned upon the center shaft and did not transmit power thereto. This function was performed by one of its companions, called the "fixed wheel." The third wheel, also, was fixed to the center shaft and carried a belt running to the saw shaft, causing it and the attached saw to revolve. The saw was set on one side of the die, and about 6 inches thereof extended above and 10 inches below the plane of the table top. The machine could not have been operated, had the part of the saw above the table been inclosed; for it was there the sawing was done. The saw below the table platform could have been inclosed without affecting its usefulness, but defendant says this was unnecessary, because of its isolation by the projection of the sides and ends of the platform. The wheels and belts described could have been guarded as required by the statute (section 6433, Rev. St. 1899), but were not; and the right to recover is founded upon the negligence involved in defendant's omission to perform his duty in this respect. Plaintiff was injured late in the afternoon. During the day he assisted in the work of sawing certain boards to a required

dimension. Another workman did the feeding, and plaintiff the off bearing; that is, he received the boards from the saw and piled them nearby. The waste strips of wood were permitted to fall from the end of the table to the floor in close proximity to the wheels. It was plaintiff's duty to clear away the debris, but it was the rule of the shop to do this cleaning at the close of the day's work. While the work was in progress, plaintiff's time was fully occupied in his other duties, and the only attention he could give to the pile of waste formed was to throw aside sticks that threatened to fall therefrom into the revolving wheels. Plaintiff, standing near this pile of waste, heard the noise of a stick being broken in one of the wheels. Looking, he saw what he took to be a part of the same stick on the point of falling into a wheel, and attempted to seize it for the purpose of throwing it out of the way. While he was in this act, the stick moved into the wheel, violently struck his extended hand, and forced it under the table top into contact with the teeth of the saw. All the fingers were severed, and the thumb wounded.

If any credit is to be given the testimony, defendant's negligence must be conceded in the consideration of the ruling upon the peremptory instruction. It was negligence per se for defendant to fail to guard the pulleys and belts. *Rev. St. 1899, § 6433; Colliott v. Mfg. Co., 71 Mo. App. 163; Lore v. Amer. Mfg. Co., 160 Mo. 608, 61 S. W. 678; Bair v. Heibel, 103 Mo. App. 621, 77 S. W. 1017.* The stock could not have fallen into the wheel had this duty been performed, from which it follows that the unguarded condition of the machine was the immediate cause of the injury. But defendant says that plaintiff's account of the manner of his injury is at variance with the physical conditions disclosed. While appellate courts uniformly refuse to weigh evidence, they do not renounce the right to reject entirely the testimony of witnesses found to be repugnant to physical law and facts. Testimony, to be entitled to any weight, must be within the bounds of reason. Failing in this, it cannot be denominated evidence, and should be cast out as devoid of probative force. But, when the testimony of witnesses can reasonably be reconciled to the physical facts, we will not reject it, nor weigh it, notwithstanding we may believe the weight of the physical evidence opposes that given by witnesses. It is the duty of courts to determine what constitutes substantial evidence, and the business of the triors of fact to settle conflicts therein.

Turning to the facts of this case, we see no reason for declaring the occurrence as detailed by plaintiff an impossibility. Considering that plaintiff was standing on the side of the table which carried the exposed

saw, and on a line with the wheels and the pile of waste, and that the stick declined from this pile towards the wheels, which were rapidly revolving, their rotary motion being towards the saw, it is not hard to believe the plaintiff's assertion that the stick moved into the wheel, caught its motion, and struck his extended arm. It may be conceded, as suggested by defendant, that a stick long enough to have reached from the wheel to the saw would have been arrested by the table end, and one short enough to clear the table could not reach the saw; but his conclusion that plaintiff's hand could not have been forced into the saw by the blow does not follow inevitably. Approximately, the bottom of the saw was $2\frac{1}{2}$ feet from the nearest wheel; the end of the table $1\frac{1}{2}$ feet therefrom. Omitting from consideration any involuntary movement of plaintiff's body towards the saw as a result of the sharp blow received a very likely occurrence—in the position he occupied his hand was required to move a distance of but a foot, or, at most, 18 inches, to reach the saw. No law of physics need be disregarded in accepting plaintiff's testimony.

Further, defendant argues that plaintiff's account of the injury fails to coincide with specific facts alleged in the petition. Plaintiff was the only witness to the injury, and, owing to the rapidity of the occurrence, his opportunity was too restricted to permit of accurate observation. Consequently his statement of the details of the situation existing when he reached for the stick is admittedly somewhat vague; but the salient facts appear and are consistent with those alleged. As to facts not elemental to the cause of action, a variance between allegation and proof is immaterial. As stated in the case of *Waldhier v. Railroad, 71 Mo. 518*, "there is a wide margin of difference between a case where there exists a lack of correspondence between the allegation of the cause of action and the proof in some particular or particulars only, and one where the allegation is unproved in its entire scope and meaning. In the former case the failure of the party complaining of any discrepancy between allegation and proof to file his statutory affidavit is fatal to his case, so far as concerns any such discrepancy. In the latter case the failure to file such an affidavit can have no such effect, for the simple reason that no such affidavit is required by the statute when there is an entire failure of proof." The substantive facts pleaded and those proven are the same, and it does not appear, nor is it claimed, that defendant was or could have been misled. The error, if any, was harmless.

Also, it is urged that as the unguarded condition of the machine and the likelihood that waste material from the sawing would fall into its unprotected gearing and belts

and be converted into missiles or instruments of danger were obvious and known to plaintiff, he impliedly assumed the risk of injury therefrom. Plaintiff had been working at this machine for some time, and admitted that sticks frequently caught in the wheels. He must have known that danger confronted him, when his position placed him within their range of action. His admitted knowledge of the dangers incident to his master's negligence in failing to guard the machine presents the question of assumption of risk as one of law to be determined by the court. In the case of *Shore v. American Bridge Co.* (Mo. App.) 86 S. W. 905, after reviewing pertinent cases in this state, we said that: " * * * In the recent decisions noted prevailing opinion inclines to the view that the existence of the master's negligence excludes the implication of an assumption of risk on the part of the servant. The scope of the rule which affords immunity to the master while conducting his business in his own way is confined within the limits of reasonable care." This principle has been so plainly stated in so many recent decisions of the Supreme Court that it must be considered as firmly settled in this state, whatever may be the views entertained in other jurisdictions. *Huhn v. Railway*, 92 Mo. 440, 4 S. W. 987; *Soeder v. Railway*, 100 Mo. 678, 18 S. W. 774, 18 Am. Rep. 724; *O'Mellia v. Railway*, 115 Mo. 221, 21 S. W. 503; *Francis v. Railway*, 127 Mo. 669, 28 S. W. 842, 30 S. W. 129; *Bradley v. Railway*, 138 Mo. 302, 39 S. W. 763; *Doyle v. Trust Co.*, 140 Mo. 1, 41 S. W. 255; *Hamman v. Coal Co.*, 156 Mo. 232, 53 S. W. 1091; *Pauck v. Beef Co.*, 159 Mo. 467, 61 S. W. 806; *Grattis v. Railway*, 153 Mo. 380, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721; *Connolly v. Printing Co.*, 166 Mo. 463, 66 S. W. 268; *Minnier v. Railway*, 167 Mo. 112, 66 S. W. 1072; *Holmes v. Brandenbaugh*, 172 Mo. 66, 72 S. W. 550; *Haviland v. Railway*, 172 Mo. 112, 72 S. W. 515; *Curtis v. McNair*, 173 Mo. 279, 73 S. W. 167; *Parks v. Railway*, 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425.

We do not understand that in the recent case of *Mathias v. Kansas City Stockyards Co.*, reported in 84 S. W. 66, the Supreme Court intended to depart from the rule followed in the long line of cases above cited. An analysis of that case is convincing that the conclusion reached was based upon the hypothesis that the appliance furnished by the master which was the subject of complaint, though not the best for the purpose of its use, was reasonably safe. In other words, the master was held blameless, and the risk, treated as one incidental to operations conducted by the master in a proper manner, being obvious to the servant, was for that reason held to have been assumed by him as a part of the contract of employment. The court, in defining the duty of the master to provide the servant suitable

tools and appliances with which to work, said: "In cases like the present it seems that, the risk of injury being but small, the use of very primitive and inefficient implements is allowable, and such use will fill the measure of ordinary care. The master is not the warrantor of the tools furnished his servants. Having exercised ordinary care in the selection of the implements, his liability, so far as mere selection is concerned, ceases." But when the master has failed to exercise ordinary care with respect to tools and machinery provided for the servant's use—when, as in this case, he has ignored the requirements of the statute—the fact that the dangers resulting from his dereliction are obvious will not excuse him from liability on the ground of assumed risk. The salutary purpose which prompted the legislative enactment for the protection of people working with and around dangerous machinery should not be defeated by the agreement of the servant, express or implied, to waive the compliance by the master with its requirements.

With the defendant's negligence found, the only defense available was that of contributory negligence. That issue was submitted to the jury and decided in favor of plaintiff, but we are asked to hold that the negligence of plaintiff in working with the machine in its unsafe condition was of a degree to make it a question of law for the court. The issue of contributory negligence is one of fact, to be decided by the jury, except when it appears that the danger of injury is so apparent and certain that no person of ordinary prudence would encounter it. We are unable to say that plaintiff was not justified in believing that he could by the exercise of care avoid danger by keeping the sticks from moving into the wheels. Evidently defendant thought so. Plaintiff had worked there without injury for a number of days. He was in the performance of duties assigned him by defendant when injured, and which were made necessary by defendant's negligence. Under such facts his conduct in continuing the work should not be characterized by us as essentially negligent. The issue was one for the jury to pass upon. The request for a peremptory instruction was properly refused.

Plaintiff's second instruction, criticised by defendant, is identical with one approved by the Supreme Court in the case of *Lore v. American Mfg. Co.* 160 Mo. 616, 61 S. W. 678, and for that reason will not be discussed.

An examination of the record discloses that the case was fairly tried and submitted, except in one particular. Loss of earnings from the date of injury to the time of bringing suit was made an element of damage in the instructions given. It is the rule that such damages must be specially pleaded

and proven. *Wilbur v. Railway Co.* (Mo. App.) 85 S. W. 671; *Mellor v. Railway Co.*, 105 Mo. 462, 16 S. W. 849, 10 L. R. A. 36; *Slaughter v. Railway Co.*, 116 Mo. 274, 23 S. W. 760; *Britton v. St. Louis*, 120 Mo. 437, 25 S. W. 366; *Gurley v. Railway Co.*, 122 Mo. 151, 26 S. W. 953. The petition contains no averment of loss of earnings during the period mentioned, and recovery for them should not have been permitted. Plaintiff testified that he had lost all of his time from the date of injury and that the value thereof was \$10 per week. As his evidence is uncontradicted, it is to be presumed that the jury estimated his lost earnings at that rate. The injury occurred on the 23d day of October, 1903, and the petition was filed November 20, 1903, just four weeks thereafter. It thus being possible to ascertain the maximum allowance, the jury could have made under the evidence for these damages, a new trial of the cause will not be ordered, if a remittitur is entered.

Upon condition that within 10 days from the filing of this opinion plaintiff remits \$40, the judgment is affirmed; otherwise, it is reversed, and the cause remanded. All concur.

ST. LOUIS, I. M. & S. RY. CO. v. GRANT.
(Supreme Court of Arkansas. Sept. 30, 1905.)

Dissenting opinion. For majority opinion, see 88 S. W. 580.

Dodge & Johnson, for appellant. Cantrell & Loughborough, for appellee.

BATTLE, J. On the 25th day of November, 1902, C. Harold Grant stood upon a sidewalk in the city of Little Rock. C. W. Burke, at that time and place, without a word of warning, struck, beat, and bruised him unmercifully. The provoking cause was, Grant had before that time taken, for another railroad company, a memorandum of the numbers of the cars of the St. Louis, Iron Mountain & Southern Railway Company.

Was Burke acting at the time of this assault and battery, in pursuance of his real or apparent agency, in the apparent course of his employment? A. R. Bragg, S. C. Bossinger, William Ballard, and Daniel Webster are mentioned in connection with Burke as to the assault and battery.

An effort was made by appellee, it seems, to show that Burke was employed, authorized, or directed by one or more of them to maltreat Grant. Were they agents or employes of the St. Louis, Iron Mountain & Southern Ry. Company (which for convenience I will call "Iron Mountain Company"), and, if so, were they or either of them authorized by their principal to employ or direct Burke to assault and beat

Grant, or was such employment or direction in pursuance of their real or apparent agency or scope of employment, and did they or either of them so employ or direct him?

In November, 1902, Bragg was division freight agent of the Iron Mountain Company. He had charge of the freight agents in the traffic department, and had authority to solicit freight and sign bills of lading.

In the same month (November) Bossinger was local freight agent of the Iron Mountain Company at Little Rock. His duties were to deliver and forward freight in Little Rock, and to keep a record of the numbers of cars on switches in that city.

At the same time (November, 1902) Daniel Webster was in the employment of Bossinger, and his duties were to take car numbers and do messenger and office work.

After reading the record carefully I fail to observe any evidence tending to prove that Bragg, Bossinger, or Webster had control or direction of Burke, or that the employment or direction of him to assault and beat Grant or any one else came within the real or apparent scope of his or their employment, or was apparently in pursuance of a single act of his or their agency.

In November, 1902, William Ballard was chief of special agents for the Iron Mountain Company. At that time Burke was a special agent under his control. He did not authorize Burke to assault Grant. He testified that Burke's duties on the river front, where the assault on Grant was made, "were in connection with and reference to cars being broken open; that in those instances he would have authority to look after those things without any special directions; that his instructions given his men, where cars were broken open, were to investigate at once, and this was with reference to robbery of cars and other depredations." He further testified that he knew nothing about Burke "going to the river front for the purpose of finding anybody who was taking the number of cars," and Burke had no authority from him to do such work. Here is Burke's authority as stated by his superintendent. In the apparent scope of what part of this authority does the assault and battery of Grant come? I am unable to discover. He was not in the performance of a single act he was authorized to do. His cruel and malicious treatment of Grant stands solitary and alone, unaccompanied by a single act he was really or apparently authorized to do. Such being the case it was wholly outside of his authority, and beyond the apparent scope of his employment; and appellant was not responsible for the consequences.

There are, also, errors in the admission of testimony for which I think the case should be reversed; but I do not discuss them, for the reason that I base my dissent on the broader ground that all the testimony

introduced fails to establish any liability on the part of appellant for the injury.

The judgment in favor of appellee against appellant, I think, should be reversed, and the cause remanded for a new trial.

MCCULLOCH, J., concurs herein.

MEMORANDUM DECISIONS.

STATE ex Inf. ATTY. GEN. v. BEACH. (Supreme Court of Missouri. June 23, 1905.) Quo warranto by the state, on the information of the Attorney General, against Frank W. Beach. A demurrer to the return sustained, and judgment of ouster ordered. The Attorney General for informant. Vinton Pike and C. F. Strop, for respondent.

PER CURIAM. The demurrer to the return herein is sustained, on the authority of *State ex Inf. v. Lund*, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572, and judgment of ouster is ordered.

WOOLSEY-STAHN HAY CO. v. MISSOURI PAC. RY. CO. (Kansas City Court of Appeals. Missouri. June 28, 1905.) Appeal from Circuit Court, Jackson County; Shannon C. Douglass, Judge. Action by the Woolsey-Stahn Hay Company against the Missouri Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed. Elijah Robinson, for appellant. L. C. True, for respondent.

ELLISON, J. This is an action of damages for the loss of a car load of hay. The plaintiff recovered judgment in the trial court. The hay had been shipped over defendant's road to Kansas City, Mo., and reached its yard on May 25, 1903, and was placed on a track to be unloaded. On the next day plaintiff requested defendant to place it on a different track for the purpose of unloading. There was delay in doing this until the 30th, when the hay was destroyed by the great flood of 1903. Defendant attempts to explain the delay, but we will assume, with the plaintiff, that it was a negligent delay. Assuming there was negligence, the defendant contends that it was not the proximate cause of the injury; that the proximate cause was the act of God, with which defendant's negligence had no legal connection. The point has been decided in defendant's favor in the case of *Moffatt Commission Company v. Railway Co.* (decided this term) 88 S. W. 117. We refer to that case, and the opinion of Judge Goode in *Grier v. Ry. Co.*, 108 Mo. App. 565, 84 S. W. 158, for a discussion of the reasons governing the disposition of this. The judgment will be reversed. All concur.

DALHOFF CONST. CO. v. ADAMS. (Supreme Court of Arkansas. June 17, 1905.) Appeal from Circuit Court, Hot Spring County; Alexander M. Duffie, Judge. Action by E. Adams against W. T. Gibbs and others, in which the Dalhoff Construction Company was summoned as garnishee. From a judgment for plaintiff against the garnishee, it appeals. Re-

versed. H. F. Auten, for appellant. E. H. Vance, Jr., and Andrew I. Roland, for appellee.

WOOD, J. The undisputed testimony shows that Gibbs was a subcontractor under Ford, and that the Dalhoff Construction Company had no contract with him. The uncontroverted proof also shows that the Dalhoff Construction Company had no money in its hands belonging to Gibbs at the time the writ of garnishment was served on it. True, appellee's witnesses testify that they heard Dalhoff say "that Gibbs got scared and run off before he was hurt; that there was \$550 coming to him." But Dalhoff did not say that his company was owing Gibbs any money, or that any money was coming to Gibbs from his company. Nor does the language warrant such an inference in view of the positive proof, undisputed, that whatever was due from the Dalhoff Construction Company under its contract was due to Ford, and not to Gibbs; that Gibbs left some claims of laborers unpaid, which were liens upon the work, and which Ford had to pay off; and that it not only consumed all the money going to Gibbs on the contract, but that the Dalhoff Construction Company was compelled to advance Ford more money than was due him on the contract to pay the balance of these liens, and is still owing part of this balance. In view of this proof, we are of the opinion that the court erred in not giving instruction No. 1 under the proof as developed at the trial. The majority of the judges are also of the opinion that there was no evidence to justify the court in submitting to the jury the question as to whether or not Ford was the agent of the Dalhoff Construction Company, and that the court erred in doing so. Upon the case as developed at the trial, the court should have given appellants prayer No. 1. For the error indicated the judgment is reversed, and the cause is remanded for new trial.

HENSLEE v. BREWSTER et al. (Supreme Court of Arkansas. July 29, 1905.) Appeal from Circuit Court, Boone County; Elbridge G. Mitchell, Judge. Suit by Clara B. Henslee against Edgar Brewster, the St. Louis & North Arkansas Railway Company, and others. From so much of the decree as dismissed the bill, on sustaining a demurrer interposed by defendant St. Louis & North Arkansas Railway Company, plaintiff appeals. Affirmed. J. W. Story and B. B. Hudgins, for appellant. J. V. Walker, for appellee railway company.

WOOD, J. This case is ruled by *St. Louis, Iron Mountain & Southern Ry. Co. v. Love*, 74 Ark. —, 86 S. W. 395, where it is held that one who furnishes teams to a subcontractor, which are used by him in constructing the road of a railroad, has no lien on the railroad for the hire of such teams, under Acts 1899, p. 145, No. 88, § 1 (Kirby's Dig. § 6681). Affirm.

LOVEJOY et al. v. ROTAN GROCERY CO.* (Court of Civil Appeals of Texas. June 12, 1905.) Appeal from District Court, McLennan County; Marshall Surratt, Judge. Action between S. O. Lovejoy and others and the Rotan Grocery Company. From the judgment Lovejoy and others appealed, and the judgment was affirmed May 10, 1905, on certificate, for failure to file transcript in time; no written opinion having been filed. On motion for rehearing. Motion overruled. A. C. Prendergast, for the motion. McGown & Wade and H. N. Atkinson, opposed.

FISHER, C. J. In the original consideration of the motion to affirm on certificate, we considered the case of *Gulf, Colorado & Santa Fe Ry. Co. v. Hall*, 76 S. W. 590, 8 Tex. Ct. Rep. 334, and reached the conclusion that that

*Writ of error denied by Supreme Court.

case was distinguishable from that presented in this motion to affirm on certificate. We are still of that opinion. Therefore the motion for rehearing is overruled. Motion overruled.

MISSOURI, K. & T. RY. CO. OF TEXAS v. BRYSON et al.* (Court of Civil Appeals of Texas. May 24, 1905.) Appeal from District Court, Harrison County; Richard B. Levy, Judge. Action between J. M. Bryson and others and the Missouri, Kansas & Texas Railway Company of Texas. From the judgment the latter appeals. Affirmed. Rehearing denied June 28, 1905. Figures & Pruitt, for appellant. T. P. Young and P. M. Young, for appellees.

FISHER, C. J. No error was committed by the trial court in the judgment rendered in this case. The facts in the record are sufficient to show that the appellant had not used proper diligence in presenting its answers in the justice's court and there defending against the claim of appellees. We find no error in the record, and the judgment is affirmed.

S. W. SLAYDEN & CO. v. PALMO. (Court of Civil Appeals of Texas. June 28, 1905.) Appeal from District Court, McLennan Coun-

*Writ of error denied by Supreme Court.

ty; Marshall Surratt, Judge. Action between S. W. Slayden & Co. and M. Palmo. From the judgment S. W. Slayden & Co. appeal. On motion of appellees to strike out transcript. Motion overruled. Richard I. Munroe and J. R. Downs, for the motion. Eugene Williams and Clark & Bolinger, opposed.

FISHER, C. J. On the authority of *Henry v. Boulter* (Tex. Civ. App.) 63 S. W. 1056, *Bassett v. Mills*, 89 Tex. 162, 34 S. W. 93, and *United States v. Gomez*, 1 Wall. 690, 17 L. Ed. 677, the motion of appellees to strike out the transcript is overruled. Motion overruled.

EWELL & SMITH v. JACKSON'S ADM'R. (Court of Appeals of Kentucky. Nov. 3, 1905.) Response to petition for rehearing and modification. For majority opinion, see 88 S. W. 1047.

NUNN, J. The court considered the questions involved in this case, presented in the petition for a rehearing, prior to writing the opinion, and we do not find any reason to change our conclusion. If the court erred in naming the survey of 687 acres, charged by the lower court to appellants, "as the Helton survey," this cannot be material. It is clear that the 350 acres alleged to have been sold by Jackson to Ewell are to be deducted from the 687-acre survey charged by the lower court to appellants, and it matters not if it be called "Helton" or by some other name. Petition overruled.

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*Under Kirby's Dig. § 5061, invalidity of a tax title does not affect the title acquired by adverse possession thereunder.—*Carpenter v. Smith* (Ark.) 976.

Act March 18, 1899 (Acts 1899, p. 177, No. 66), in relation to the payment of taxes under color of title on unimproved land, held to constitute such payment possession for each successive year in which payment is made, provided it be continued for at least seven years in succession, and not less than three after the passage of the statute.—*Price v. Greer* (Ark.) 985.

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* Point annotated. See syllabus.

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Appellate jurisdiction of particular courts, see "Courts," § 4.

Costs, see "Costs," § 2.

Effect of disqualification of judge on affidavit in proceeding to take appeal, see "Judges," § 1.

Harmless error in admission of evidence in action against carrier, see "Carriers," § 2.

Review in particular civil actions.

See "Reformation of Instruments," § 2.

Review in special proceedings.

See "Contempt," § 1; "Habeas Corpus," § 1; "Quo Warranto," § 1.

To open street, see "Municipal Corporations," § 7.

Review of criminal prosecutions.

See "Criminal Law," §§ 21-27; "Homicide," § 11.

Review of proceedings of justices of the peace.

See "Justices of the Peace," § 2.

§ 1. Decisions reviewable.

The Court of Appeals has no jurisdiction of an appeal from a judgment for \$200, sued for, where defendant admits a liability for \$40.—United States Health & Accident Ins. Co. v. Webb's Adm'r (Ky.) 1108.

Where a motion was pending to reinstate plaintiff's dismissal as to one defendant, an appeal from a judgment on demurrer of the other defendants *held* premature.—Baker v. City of St. Louis (Mo. Sup.) 74.

§ 2. Presentation and reservation in lower court of grounds of review.

An objection that an attachment sale was void because the plaintiff in attachment was dead at the time of the sale cannot be urged for the first time on appeal.—Williams v. Bennett (Ark.) 600.

A question as to rendering a personal judgment against a defendant, which was not made a ground for a new trial, cannot be considered first on appeal.—Hot Springs Ry. Co. v. McMillan (Ark.) 846.

*Complaint cannot be made of a failure to give instructions on the burden of proof and credibility of witnesses, when no request was made therefor.—Carpenter v. Jones (Ark.) 871.

Where an objection to two instructions was made in gross, and objection to one was omitted from motion for new trial, the court on appeal cannot consider the other.—Dowell v. Schieler (Ark.) 966.

Defendant in a suit to foreclose a vendor's lien *held* not entitled to raise on the appeal for the first time the question of the vendor's failure to tender a deed.—Tillar v. Clayton (Ark.) 972.

A general objection to an instruction submitting a question as to which issue was not raised by the pleadings, *held* insufficient, in view of introduction of evidence without objection.—McElvaney v. Smith (Ark.) 981.

Where defendant's title to the office of school director was contested in quo warranto proceedings on the ground that he had not paid taxes as required by Rev. St. 1899, §§ 9759,

9760, a judgment in favor of defendant will not be reversed for failure of the bill of exceptions to show that defendant proved he was a citizen of the United States.—State ex inf. Sutton v. Fasse (Mo. Sup.) 1.

Where a defendant failed to take any exception to the transfer of the cause to the equity docket, but acquiesced therein, and tried the cause as if one in equity, he could not complain of the transfer on appeal.—Kessner v. Phillips (Mo. Sup.) 66.

Where appointment of certain commissioners was made at one term of court, and no objection made, a party could not at a subsequent term have the validity of the appointment reviewed by incorporating the proceedings of the prior term in a motion for a new trial.—City of St. Louis v. Lawton (Mo. Sup.) 80.

Where a party made no exception to a judgment against him for costs during the term, it will not be reviewed on appeal.—Keene v. Sappington (Mo. App.) 144.

Instructions not assigned as grounds for new trial in the motion therefor are not reviewable on appeal.—Llewellyn v. Spangler (Mo. App.) 1021.

A motion for a new trial, made and overruled, *held* necessary to a review of errors occurring in the trial of the case, which a bill of exceptions is required to bring into the record.—Memphis St. Ry. Co. v. Johnson (Tenn.) 169.

Evidence admitted without objection must be considered, although hearsay or otherwise incompetent.—Ehrlich v. Weber (Tenn.) 188.

Assignments of error attacking the findings of fact on the ground of omissions therefrom *held* without merit.—Logan v. Lennix (Tex. Civ. App.) 364.

An objection to evidence on the ground that it constituted the witness' opinion *held* insufficient to sustain a contention that the evidence was incompetent because defendant was not responsible for depreciation in the cattle resulting from their being transported.—Missouri, K. & T. Ry. Co. of Texas v. Russell (Tex. Civ. App.) 379.

An assignment of error *held* unavailing on appeal where no objection to the ruling of the court was made at the time.—Red River, T. & S. Ry. Co. v. Eastin & Knox (Tex. Civ. App.) 530.

§ 3. Requisites and proceedings for transfer of cause.

*Under the statute limiting the time for taking an appeal to one year after judgment, the death of the defeated party during the year *held* not to extend the time.—Evans v. St. Louis, I. M. & S. Ry. Co. (Ark.) 994.

§ 4. Effect of transfer of cause or proceedings therefor.

The authority to award an injunction restraining a city from interfering with the tracks constructed by a street railway company under a franchise *held* to be in the court in which the company institutes proceedings to test its rights under a municipal ordinance.—Little Rock Ry. & Electric Co. v. City of North Little Rock (Ark.) 1026.

§ 5. Record and proceedings not in record—Matters to be shown by record.

A statement contained in a bill of exceptions, that it was filed in due time, *held* insufficient to prove the fact.—School District No. 1, Tp. 24, R. 4, v. Boyle (Mo. App.) 136.

Where neither the briefs nor bill of exceptions taken at the time of excluding evidence discloses

* Point annotated. See syllabus.

what the objection was which the trial court sustained to the evidence offered, the ruling is not reviewable on appeal.—*Jones v. Humphreys* (Tex. Civ. App.) 408. .

§ 6. — Scope and contents of record.

*A bill of exceptions, not filed within the time allowed by the trial court, will not be noticed on appeal.—*Henry v. Beal & Doyle Dry Goods Co.* (Ark.) 987.

A bill of exceptions, not filed within the time granted by the court for that purpose, will not be noticed on appeal.—*School District No. 1, Tp. 24, R. 4, v. Boyle* (Mo. App.) 136.

Allegations in a motion *held* not to dispense with the necessity of a showing in the record that the court acted on the matter complained of.—*M. L. Chambers & Co. v. Herring* (Tex. Civ. App.) 371.

§ 7. — Necessity of bill of exceptions, case, or statement of facts.

Alleged erroneous argument of counsel cannot be reviewed on appeal, unless timely objections and exceptions are made, and the same appear with the matter complained of in the bill of exceptions.—*Champagne v. Hamey* (Mo. Sup.) 92.

In the absence of the facts the court on appeal cannot review the requested charges and bills of exceptions.—*Patterson v. State* (Tex. Cr. App.) 226.

Statement in connection with assignment of error *held* insufficient under rule 31 for the Courts of Civil Appeals (67 S. W. xvi).—*Logan v. Lennix* (Tex. Civ. App.) 364.

Under Rules for the District Court 41 (67 S. W. xxiii) defendant's bill of exceptions on appeal *held* to properly present questions raised by objection to improper language in argument to jury.—*St. Louis Southwestern Ry. Co. of Texas v. Boyd* (Tex. Civ. App.) 509.

§ 8. — Abstracts of record.

An abstract of the transcript on appeal *held* not to sufficiently present the testimony to the Supreme Court.—*Shorter University v. Franklin Bros. Co.* (Ark.) 587; *Same v. Franklin Bros., Id.* 974.

Supreme Court rule 9 does not contemplate that each party abstract his own testimony, but requires appellant to abstract all necessary matters.—*Beavers v. Security Mut. Ins. Co.* (Ark.) 848.

Appellant's record, styled "Abstract of Record, Statement, and Brief," *held* not a compliance with Supreme Court Rules 12, 13 (73 S. W. vi), necessitating the dismissal of the appeal.—*Vandeventer v. Goss* (Mo. Sup.) 610.

§ 9. — Transmission, filing, printing, and service of copies.

Statement of facts filed after the adjournment of the term without an order allowing the filing cannot be considered on appeal.—*Patterson v. State* (Tex. Cr. App.) 226.

§ 10. — Defects, objections, amendment, and correction.

Under Rev. St. 1895, art. 1239, the court *held* not without jurisdiction to proceed with the trial, and hence certiorari to perfect the record, which would not change the result, if allowed, must be denied.—*Brewster v. State* (Tex. Civ. App.) 858.

§ 11. — Conclusiveness and effect, impeaching and contradicting.

A recital in the record on appeal *held* contradicted by the affidavit of appeal.—*State ex rel. Orr v. Gates* (Mo. App.) 640.

§ 12. — Questions presented for review.

In order to test the propriety of instructions otherwise than as abstract propositions of law, the substance of the evidence must be incorporated in appellant's abstract.—*Beavers v. Security Mut. Ins. Co.* (Ark.) 848.

Refusal to allow a deposition to go to the jury *held* not to be reviewed; the bill of exceptions not containing it, or showing the exceptions filed to it were passed on.—*Flint v. Illinois Cent. R. Co.* (Ky.) 1055.

A judgment on the report of a referee affirmed on appeal for failure of the transcript and abstract of the record to contain all the evidence.—*Vandeventer v. Goss* (Mo. Sup.) 610.

A ruling on demurrer to the evidence will not be reviewed, unless all the evidence is before the court.—*Harrison v. Pounds* (Mo. Sup.) 713.

The rule that an assignment of error on the court's refusal to allow a witness to answer cannot be considered where it does not appear what the witness would have stated does not apply where the trial court rules out an entire line of competent evidence, or where he holds that a witness is incompetent and refused to hear him at all.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

Assignments of error on the court's refusal to allow witnesses to answer cannot be considered where it does not appear what the witness would have stated.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

§ 13. — Matters not apparent of record.

Where the instructions were neither copied nor called for in the bill of exceptions, an assignment that the court erred in modifying a certain instruction could not be reviewed.—*Hartin Commission Co. v. Pelt* (Ark.) 929.

The question whether appellant furnished proof of his inability to pay costs, as required by Rev. St. 1895, art. 1401, *held* properly raised in the appellate court by affidavits showing the facts.—*Kalklosh v. Bunting* (Tex. Civ. App.) 389.

§ 14. Assignment of errors.

Assignment of error in gross to several instructions will not be considered if any of the instructions are good.—*Wells v. Parker* (Ark.) 602.

On appeal in condemnation proceedings, an assignment that the court erred in permitting a lease to one of the defendants to be used as an absolute criterion for value is too general.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

Certain propositions *held* not germane to the assignments of error under which they were placed.—*Garrett v. Spradling* (Tex. Civ. App.) 293.

An assignment of error without a proposition *held* not open to consideration.—*Gulf, C. & S. F. Ry. Co. v. St. John* (Tex. Civ. App.) 297.

Assignments of error that the court erred in refusing to allow plaintiff to take a nonsuit, and that the court erred in giving plaintiff a nonsuit and then entering judgment against plaintiff, are too general to be considered.—*Logan v. Lennix* (Tex. Civ. App.) 364.

Reference to evidence warranting a requested instruction *held* insufficient to require the court to review the same.—*Gulf, C. & S. F. Ry. Co. v. Beattie* (Tex. Civ. App.) 367.

A proposition under an assignment of error which is not germane to the assignment will not be considered on appeal.—*Sweet v. Lyon* (Tex. Civ. App.) 384.

* Point annotated. See syllabus.

An assignment of error will not be considered where it is not supported by any statement as required by the rules.—*Parlin & Orendorff Co. v. Vawter* (Tex. Civ. App.) 407.

Where an instruction authorizes a finding for plaintiff on an issue not made by the pleading, the error, though not assigned, is so fundamental as to require the court to act on it.—*San Antonio Traction Co. v. Yost* (Tex. Civ. App.) 428.

Assignments of error held not reviewable, under rule 31 for the Courts of Civil Appeals (87 S. W. xvi), requiring each proposition under an assignment to be followed by a brief statement.—*Gulf, C. & S. F. Ry. Co. v. Harbison* (Tex. Civ. App.) 452; *Same v. Wetherly* (Tex. Civ. App.) 456; *Same v. Oates* (Tex. Civ. App.) 457.

Where the statements under assignments of error relating to the admissibility of testimony do not show what objections to the testimony were urged, the assignments will not be considered.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 490.

A proposition under an assignment of error foreign to the assignment will not be considered on appeal.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 499.

A proposition under an assignment of error which is not germane to the assignment will not be considered.—*International & G. N. R. Co. v. Glover* (Tex. Civ. App.) 515.

Where neither cross-assignments of error nor a copy of appellee's brief containing them are filed in the court below, as required by District and County Court Rule 101, such cross-assignments will not be considered on appeal.—*City of Austin v. Cahill* (Tex. Civ. App.) 536.

An assignment of error that the court erred in refusing to grant defendant a new trial because the verdict was contrary to the law and the evidence held too general.—*Brewster v. State* (Tex. Civ. App.) 858.

§ 15. Briefs.

Where no briefs were filed by either party to an appeal after submission, as required by the rules, the appeal would be dismissed.—*Missouri, K. & T. Ry. Co. v. Kidd* (Ind. T.) 308.

Omission to consecutively number assignments of error discussed in appellant's brief held a mere technical violation of rule 29 for the Courts of Civil Appeals (87 S. W. xv), and insufficient to require court to refuse to consider the assignments.—*Lewis v. Houston Electric Co.* (Tex. Civ. App.) 489.

Failure of statement following assignment of error in appellant's brief to refer to page of record held a mere technical violation of rule 31 for the Courts of Civil Appeals (87 S. W. xvi), and insufficient to require the court to refuse to consider the assignments.—*Lewis v. Houston Electric Co.* (Tex. Civ. App.) 489.

§ 16. Dismissal, withdrawal, or abandonment.

Under Kirby's Dig. § 1227, held, that an appellee may plead on appeal that since the appeal was taken a judgment has settled as against the appellant the rights asserted on the appeal.—*Church v. Gallic* (Ark.) 979.

§ 17. Review—Scope and extent in general.

On appeal, on trial by the court, held, that the only question for review was the sufficiency of the evidence.—*Luster v. Robinson* (Ark.) 896.

On appeal the parties are bound by the theory they adopted at the trial.—*James v. United States Casualty Co.* (Mo. App.) 125.

Assignment of error that there is no evidence to sustain the judgment raises a question of law, viz., whether the facts legally justify the judgment.—*Wilson v. Alexander* (Tenn.) 935.

Where there is no statement of facts in the record, and no finding that property involved was a homestead, the appellate court cannot consider that issue.—*Featherstone v. Brown* (Tex. Civ. App.) 470.

§ 18. — Parties entitled to allege error.

*An attachment plaintiff cannot contend on appeal that the court erred in rendering judgment for costs against his surety on the attachment bond.—*Thompson v. Baxter* (Ark.) 985.

A party cannot predicate error on the giving of an erroneous instruction, which was given at his request.—*Haxton v. Kansas City* (Mo. Sup.) 714.

Rulings in favor of appellant cannot be reviewed, where respondents do not appeal.—*Darnell v. Lafferty* (Mo. App.) 784.

A party cannot complain that the pleadings did not raise a certain issue as to which evidence was admitted, where he himself introduced evidence on that issue.—*Simons v. Wittmann* (Mo. App.) 791.

A party held not entitled to complain of evidence of value, though immaterial; it being in rebuttal of testimony introduced by him.—*Oneal v. Weisman* (Tex. Civ. App.) 290.

Where plaintiff's claim to a certain item of damage was conditioned on the jury finding in his favor upon another issue, and the jury found against him, he was not entitled to claim the item of damage mentioned on appeal.—*Hildebrand v. Head* (Tex. Civ. App.) 438.

§ 19. — Presumptions.

It is in the province of the circuit court to amend its record, and in the absence of evidence showing error it will be presumed correct.—*Shorter University v. Franklin Bros. Co.* (Ark.) 587; *Same v. Franklin Bros.*, Id. 974.

Where appellant's abstract of the transcript does not comply with Supreme Court Rule 9, and none of the instructions are set out, they will be assumed correct.—*Shorter University v. Franklin Bros. Co.* (Ark.) 587; *Same v. Franklin Bros.*, Id. 974.

Where appellant did not bring the evidence into his abstract, the court on appeal will presume that the trial court's finding was sustained by the evidence.—*Merritt v. Wallace* (Ark.) 876.

In an action on a note given for the price of land, held, that it should be presumed that the answer was taken as controverted.—*Fitzpatrick v. Vincent* (Ky.) 1073.

The Supreme Court in disposing of an assignment that there is no evidence to sustain the judgment must adopt the theory of the facts most favorable to the successful party.—*Wilson v. Alexander* (Tenn.) 935.

Under the statute regulating the practice when cases are submitted upon special issues, the court must be presumed to have found in favor of the prevailing party upon an issue which was not submitted to the jury, but as to which there was evidence justifying its submission.—*Horstman v. Little* (Tex. Civ. App.) 286.

In a suit for divorce and partition of community property, it must be presumed, in the absence of a statement of facts, that the court made a fair and equitable settlement, and that its adjudication was founded on evidence sustaining it.—*Longwell v. Longwell* (Tex. Civ. App.) 416.

* Point annotated. See syllabus.

In a suit for divorce and partition of community property, it must be presumed in favor of the judgment that a sum adjudged to defendant as a charge on the community was proven, as alleged, to be the amount of his separate funds invested in the community property.—*Longwell v. Longwell* (Tex. Civ. App.) 416.

A decree for divorce *held* not erroneous on the ground that the petition did not allege that plaintiff was a bona fide inhabitant of the state at the time of filing her petition.—*Longwell v. Longwell* (Tex. Civ. App.) 416.

In the absence of a statement of facts from the record, it must be presumed that all matters pleaded by the parties necessary to sustain the judgment were proven.—*Longwell v. Longwell* (Tex. Civ. App.) 416.

Under Rev. St. 1895, art. 1331, where the record contains no statement of facts, a judgment on special issues submitted to the jury, subjecting certain property to a lien, *held* conclusive on appeal.—*Featherstone v. Brown* (Tex. Civ. App.) 470.

It will be presumed that the bill of exceptions states all that occurred at the trial.—*St. Louis Southwestern Ry. Co. of Texas v. Boyd* (Tex. Civ. App.) 509.

Failure to comply with *Sayles' Ann. Civ. St. 1897*, art. 1346, in a tax suit by the state against a nonresident landowner, *held* reversible error.—*Garvey v. State* (Tex. Civ. App.) 873.

§ 20. — Discretion of lower court.

The refusal of a motion for a new trial, setting up newly discovered evidence, will not be disturbed, in the absence of abuse by the trial court of its discretion.—*Hot Springs Ry. Co. v. McMillan* (Ark.) 846.

The grant of a new trial because of an inadequate verdict in an action for damages will only be interfered with when an unwise discretion is clearly shown.—*Loevenhart v. Lindell Ry. Co.* (Mo. Sup.) 757.

An order granting a motion to set aside a default judgment will not be interfered with on appeal, in the absence of a clear showing of abuse of discretion.—*Harkness v. Jarvis* (Mo. App.) 1025.

§ 21. — Questions of fact, verdicts, and findings.

The verdict of the jury on conflicting evidence will not be disturbed on appeal.—*Remmer v. Witherington* (Ark.) 967; *Thompson v. Baxter* (Ark.) 985; *Freeman v. Slay* (Tex. Civ. App.) 404; *Morrill v. Bosley* (Tex. Civ. App.) 519.

The finding of the trial judge on conflicting evidence is conclusive on appeal.—*Harrison v. Pounds* (Mo. Sup.) 713; *Tabet v. Powell* (Tex. Civ. App.) 273.

In an action for the destruction of a building by fire, a finding on conflicting evidence that defendant's engine passed the building on the day of the fire is conclusive on appeal.—*St. Louis, I. M. & S. Ry. Co. v. Coombs* (Ark.) 595.

A finding on conflicting evidence on an issue of fraud in the execution of a release, submitted under proper instructions, will not be disturbed on appeal.—*Hot Springs Ry. Co. v. McMillan* (Ark.) 846.

*A verdict of the jury, sustained by the evidence, will not be disturbed on appeal.—*St. Louis, I. M. & S. Ry. Co. v. Shaver* (Ark.) 961.

A verdict will not be disturbed on appeal, as against the weight of evidence; it having evidence to support it.—*Flint v. Illinois Cent. R. Co.* (Ky.) 1055.

The mere fact that a verdict appears to be against the preponderance of the evidence *held* not sufficient to warrant disturbing it on appeal.—*Harrison v. Lakenan* (Mo. Sup.) 53.

A finding in favor of defendant on an issue of non est factum will not be set aside on appeal, unless it clearly appears from the record that the finding is the result of passion, prejudice, or misconduct.—*Standard Mfg. Co. v. Hudson* (Mo. App.) 187.

On appeal in an action for personal injuries, the verdict will not be disturbed unless the damages assessed are so excessive as to shock the moral sense, or it clearly appears that the jury was influenced by passion or prejudice.—*Waechter v. St. Louis & M. R. R. Co.* (Mo. App.) 147.

A finding on an issue as to a change in a contract of guaranty, on conflicting evidence, will not be disturbed, though the principal evidence was given by deposition.—*John A. Tolman Co. v. Hunter* (Mo. App.) 636.

Testimony which can be reconciled to physical facts will not be weighed.—*Stafford v. Adams* (Mo. App.) 1130.

A verdict clearly supported by the testimony of a credible witness will not be set aside because of a conflict between his testimony and that of other witnesses.—*W. Scott & Co. v. Woodard* (Tex. Civ. App.) 406.

§ 22. — Harmless error in general.

The error of the court in permitting an argument of counsel in an action against a railway company for the death of a passenger *held* prejudicial.—*Kansas City Southern Ry. Co. v. McGinty* (Ark.) 1001.

A school district, sued by holders of void bonds used in procuring certain property, *held* not prejudiced by judgment for conveyance of property purchased with bonds.—*Board of Trustees of Fordsville v. Postel* (Ky.) 1065.

Error in cross-examining defendant as to meaning of letters written to plaintiff *held* not prejudicial to defendant.—*Harrison v. Lakenan* (Mo. Sup.) 53.

Any error in action of court to which a cause was taken on change of venue in permitting change in transcript *held* not prejudicial to defendant.—*Haxton v. Kansas City* (Mo. Sup.) 714.

In an action against a street railway for injuries to passenger, an instruction as to care required of defendant *held* not reversible error.—*McHugh v. St. Louis Transit Co.* (Mo. Sup.) 853.

Remarks by the court in the jury's presence, on request for time to prepare a bill of exceptions, *held* not prejudicial to plaintiff.—*Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 463.

Under Rules for the District Courts 39 (67 S. W. xxiii), permitting plaintiff's counsel to use certain language in argument to jury *held* prejudicial error.—*St. Louis Southwestern Ry. Co. of Texas v. Boyd* (Tex. Civ. App.) 509.

§ 23. — Harmless error in rulings on pleadings.

Irregularity in pleading in action to enforce lien for street improvement *held* not to affect substantial rights, and, under Civ. Code Prac. § 134, not to be ground for reversal.—*Cabell v. City of Henderson* (Ky.) 1095.

Under the Code provision that a judgment shall not be reversed for an error not affecting the substantial rights of the complaining party, the overruling of a motion to make the answer more specific *held* not reversible error.—*Craft v. Barron* (Ky.) 1099.

* Point annotated. See syllabus.

Failure of a petition for injuries to an elevator passenger to allege that the car was "negligently" started before plaintiff's dress was released from the door in which it was caught *held* immaterial.—Hensler v. Stix (Mo. App.) 108.

In an action against a street railway company for injuries to a passenger, failure to prove certain allegations in the petition *held* not cause for reversal, under Rev. St. 1899, §§ 655, 798.—Nelson v. Metropolitan St. Ry. Co. (Mo. App.) 1119.

In an action for injuries, defendant *held* not prejudiced by the court's refusal to sustain a special exception to an allegation that plaintiff was steadily becoming more proficient in her profession, and, but for her injury, would soon have been able to earn more than her compensation prior to the injury.—Alexander v. McGaffey (Tex. Civ. App.) 462.

The court's striking out a pleading was not injurious to the person presenting it, where he was allowed to prove the matters alleged therein.—Ray v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 466.

Where the court did not submit to the jury the matter in plaintiff's petition specially excepted to by defendant, there was no error in overruling the exception.—International & G. N. R. Co. v. Glover (Tex. Civ. App.) 515.

§ 24. — Harmless error in rulings on evidence.

A chancery case *held* not to be reversed for admission of improper evidence, there being enough without it.—Waters v. Merritt Pants Co. (Ark.) 879.

As on trial de novo of a case heard before the chancellor, who is presumed to have disregarded all incompetent testimony, the case is weighed solely on the competent testimony, questions relating to alleged incompetent evidence will not be discussed on appeal.—Niagara Fire Ins. Co. v. Boon (Ark.) 915.

On an issue as to whether plaintiff had consented to an alteration in a contract between himself and defendants, error in receiving evidence without the issues *held* cured by an instruction.—Harrison v. Lakenan (Mo. Sup.) 53.

In an action for injuries received in a collision between plaintiff's vehicle and a street car, plaintiff's testimony as to the speed of the car *held* no ground for reversal.—Sluder v. St. Louis Transit Co. (Mo. Sup.) 648.

The admission of incompetent testimony to contradict other incompetent testimony is harmless.—Fields v. Missouri Pac. Ry. Co. (Mo. App.) 134.

There was no reversible error in the admission of evidence where the items of damage proven by the testimony were not submitted in the charge.—Gulf, C. & S. F. Ry. Co. v. St. John (Tex. Civ. App.) 297.

The exclusion of evidence was not prejudicial where the fact sought to be proven was testified to by the opposite party.—Gulf, C. & S. F. Ry. Co. v. St. John (Tex. Civ. App.) 297.

In an action for injuries to cattle shipped, defendant *held* not prejudiced by the admission of the statement by its conductor to plaintiff with reference to the insufficiency of the engine drawing the train.—Missouri, K. & T. Ry. Co. of Texas v. Russell (Tex. Civ. App.) 379.

In action for injury to passenger, any error in admission of city ordinance inhibiting street cars from stopping on street crossings *held* not prejudicial to plaintiff.—McCabe v. San Antonio Traction Co. (Tex. Civ. App.) 387.

In an action for breach of a carrier's contract to transport certain cattle, the admission of certain evidence as to the time required to transport the cattle from the point of shipment to destination *held* harmless.—Pecos River R. Co. v. Latham (Tex. Civ. App.) 392.

In trespass to try title, certain objectionable evidence *held* not to have affected the result.—Freeman v. Slay (Tex. Civ. App.) 404.

The admission of incompetent testimony is not reversible error in a case tried before the court, there being ample competent testimony to authorize the judgment.—Jones v. Day (Tex. Civ. App.) 424.

The admission of incompetent evidence tending to establish a fact proven by other uncontradicted and competent evidence is harmless.—Texas Cent. R. Co. v. West (Tex. Civ. App.) 426.

Error in the admission of irrelevant evidence is cured by the subsequent admission without objection of similar evidence.—McFarland v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 450.

In an action for injuries by the fall of an elevator, defendant *held* not prejudiced by the sustaining of an objection to a question as to the speed at which the elevator was set to run.—Alexander v. McGaffey (Tex. Civ. App.) 462.

The exclusion of an answer of a witness *held* not reversible error, the issue to which his testimony related being otherwise established.—Brewster v. State (Tex. Civ. App.) 858.

Where a witness was permitted to explain his reasons for desiring to see defendants get out of the suit, the exclusion of an additional explanation *held* harmless.—Brewster v. State (Tex. Civ. App.) 858.

The error in permitting a witness to testify to a fact is harmless, where the same witness and others testified thereto without objection.—Gulf, C. & S. F. Ry. Co. v. House & Watkins (Tex. Civ. App.) 1110.

§ 25. — Harmless error relating to instructions.

When the issues were properly presented to the jury, error cannot be predicated on the refusal of instructions requested.—Carpenter v. Jones (Ark.) 871.

An instruction erroneously stating plaintiff's claim *held* prejudicial.—McElvaney v. Smith (Ark.) 981.

In an action against a street railroad, where plaintiff alleged that defendant by a negligent and violent rate of speed of another car caused the collision, an instruction to find for plaintiff, if the jury found that defendant so negligently ran and operated its cars or either of them, *held* not error affecting the merits which will be regarded on appeal.—Reynolds v. St. Louis Transit Co. (Mo. Sup.) 50.

Where verdict for injury to plaintiff's wife exceeded the sum of disbursements made for medical attention, etc., error in permitting a recovery, under the pleading and proof, for unpaid liabilities, could not be deemed harmless.—Nelson v. Metropolitan St. Ry. Co. (Mo. App.) 781.

Where in a will contest the evidence of undue influence was insufficient to take that issue to the jury, error, if any, in an instruction submitting that issue, was harmless to contestants.—Franklin v. Boone (Tex. Civ. App.) 262.

Charge on damages consisting of loss of time caused by personal injuries *held* erroneous under the pleadings and evidence.—Texas & P. Ry. Co. v. Frank (Tex. Civ. App.) 383.

* Point annotated. See syllabus.

In action for injuries to passenger, error in charge as to degree of care required of defendant *held* not harmless.—*Lewis v. Houston Electric Co.* (Tex. Civ. App.) 489.

In action involving title to real estate, failure of jury to find and state amount of taxes due to city as party *held* harmless as to plaintiff.—*Morrill v. Bosley* (Tex. Civ. App.) 519.

§ 26. — Decisions of intermediate courts.

The Supreme Court may, in considering questions certified from the Court of Civil Appeals, determine every minor question upon which a correct decision of the general question certified may depend.—*City of Austin v. Cahill* (Tex. Sup.) 542.

§ 27. — Subsequent appeals.

Where, on appeal, the evidence is found to have been sufficient to support the verdict, but the cause is reversed because of erroneous instructions, the finding as to the sufficiency of the evidence is not conclusive on the next appeal, after a retrial.—*St. Louis, I. M. & S. Ry. Co. v. Cleere* (Ark.) 995.

*On a second appeal, the court will not consider the points decided in the former appeal.—*City of St. Joseph ex rel. Forsee v. Baker* (Mo. App.) 1122.

§ 28. Determination and disposition of cause.

*Where it appeared that an issue tendered by plaintiff had not been determined or abandoned judgment on reversal will not be rendered for defendant, but the cause will be remanded.—*Wagner v. Arnold* (Ark.) 852.

In an action to recover land, a holding on appeal that certain evidence of plaintiff's title was erroneously admitted *held* not to render necessary an affirmance of a judgment for defendant.—*Boynnton v. Ashabraner* (Ark.) 1011.

The fact that judgment against appellant is for too small a sum is not reversible error.—*Morrow v. Pike County* (Mo. Sup.) 99.

Where the appellate court can determine the amount that was allowed by the jury under an erroneous instruction, and no other error appears, a new trial will not be ordered, if a remittitur is entered.—*Stafford v. Adams* (Mo. App.) 1130.

Act 1903, requiring the mandate in reversed and remanded cases to be filed within 12 months, *held* to apply to a judgment rendered in 1894, on which no mandate had been filed up to 1903.—*Aspley v. Hawkins* (Tex. Civ. App.) 289.

Where a charge on the measure of damages for personal injuries erroneously permits a greater recovery than is authorized by the pleadings, and the evidence on the subject is too indefinite for the error to be cured by remittitur, a judgment for plaintiff must be reversed.—*Texas & P. Ry. Co. v. Frank* (Tex. Civ. App.) 383.

Where, after two opportunities, plaintiff fails to establish his cause, the Court of Appeals will reverse the judgment of the county court in his favor, and render judgment that he take nothing by the suit and pay all costs.—*Texas Cent. R. Co. v. Harbison* (Tex. Civ. App.) 414.

In a suit against a firm and an executrix of an alleged partner, where evidence establishing partnership was inadmissible, and the remaining evidence showed decedent not a partner, the court will not remand, but render judgment for the executrix.—*Rascoe v. Walker-Smith Co.* (Tex. Civ. App.) 439.

APPEARANCE.

By corporation, see "Corporations," § 4.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 4.

APPOINTMENT.

Of receiver, see "Receivers," § 2.

ARBITRATION AND AWARD.

Under insurance policy, see "Insurance," § 6.

§ 1. Arbitrators and proceedings.

An arbitration cannot, after it is properly submitted, be defeated by the withdrawal of one of the appraisers during the investigation.—*Niagara Fire Ins. Co. v. Boon* (Ark.) 915.

§ 2. Award.

Where there is sufficient evidence to sustain an award as to value, it is not open to attack, though the valuation be inaccurate, unless so grossly erroneous as to indicate bad faith, or other grounds to set the award aside.—*Niagara Fire Ins. Co. v. Boon* (Ark.) 915.

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 3.

In criminal prosecutions, see "Criminal Law," § 16.

ARREST.

See "Bail"; "Rescue."

Legality of, as defense to robbery by officer, see "Robbery."

ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 20.

ARSON.

Harmless error, see "Criminal Law," § 27.

Statement of venue in information, see "Indictment and Information," § 1.

An information on a prosecution for arson *held*, under Rev. St. 1899, § 1875, sufficient to charge defendant with notice of the particular church which he was charged with burning.—*State v. Hunt* (Mo. Sup.) 719.

ASSAULT AND BATTERY.

Accomplices, see "Criminal Law," § 2.

Assault with intent to kill, see "Homicide," §§ 4, 9.

Assault with intent to rape, see "Rape," § 2.

By agent, see "Principal and Agent," § 2.

Conviction of offense included in charge, see "Indictment and Information," § 4.

Credibility of witnesses, see "Witnesses," § 3.

Declarations as evidence, see "Criminal Law," § 9.

§ 1. Civil liability.

In an action for an assault and battery a verdict for \$7,000 *held* not excessive.—*St. Louis, I. M. & S. Ry. Co. v. Grant* (Ark.) 580, 1133.

§ 2. Criminal responsibility.

Evidence *held* insufficient to sustain conviction of assault as a principal.—*Clay v. State* (Ark.) 306.

* Point annotated. See syllabus.

On prosecution for aggravated assault, defendant *held* entitled to charge that he was not bound by intent of person in whose behalf he interfered in difficulty.—*Pedro v. State* (Tex. Cr. App.) 233.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 2.
Of damages, see "Damages," § 5.
Of expenses of public improvements, see "Municipal Corporations," § 5.
Of loss on insured, see "Insurance," § 8.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 14.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."
Fraud as to creditors, see "Fraudulent Conveyances."
In bankruptcy, see "Bankruptcy," § 2.
Of corporate shares, see "Corporations," § 3.
Of dramshop license, see "Intoxicating Liquors," § 2.

§ 1. Requisites and validity.

An order for the payment of money *held* an assignment of a particular account, the acceptance of which constituted an agreement to pay the amount due, less credits arising from the same or other transactions.—*Comer v. Floore* (Tex. Civ. App.) 246.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 2.

§ 1. Rights and remedies of creditors.

Holders of mortgage bonds of a corporation *held* not required to account for the profits from the property and paid to them by the assignee of the mortgagor for the benefit of creditors, in order to share with the general creditors in the proceeds of a sale of the property.—*Phoenix Brewing Co.'s Assignee v. Central Consumers' Co.* (Ky.) 1051.

ASSOCIATIONS.

See "Building and Loan Associations."
Hospital associations, see "Hospitals."
Mutual benefit insurance associations, see "Insurance," § 8.

ASSUMPSIT, ACTION OF.

Right of broker to recover for services, see "Brokers," § 3.

ASSUMPTION.

Of risk by employé, see "Master and Servant," §§ 7, 9.

ASYLUMS.

See "Hospitals."

ATTACHMENT.

See "Execution"; "Garnishment."
Conflicting jurisdiction of courts, see "Courts," § 5.

Exemptions, see "Exemptions"; "Homestead." Parties entitled to allege error, see "Appeal and Error," § 18.

Questions presented for review, see "Appeal and Error," § 2.

§ 1. Property subject to attachment.

Where a deed by a husband and wife was made in good faith, and not fraudulent, it was superior to a subsequent attachment by a creditor of the grantors, irrespective of whether the property conveyed was a homestead at the time of the conveyance.—*Parlin & Orendorff Co. v. Vawter* (Tex. Civ. App.) 407; *Same v. Leggett* (Tex. Civ. App.) 408.

§ 2. Claims by third persons.

Bad faith purchasers of property which had been transferred to their vendors by an insolvent in fraud of creditors *held* not entitled to retain the property by reason of the fact that at the time of the last sale the vendors therein had recovered the property from attaching creditors of the insolvent by giving a bond.—*Horstman v. Little* (Tex. Civ. App.) 286.

§ 3. Wrongful attachment.

Plaintiffs, who ratified the issuance and execution of a writ under which personal property of defendant was wrongfully seized, *held* liable for the conversion, though the writ was not actually signed by the justice.—*Sanger Bros. v. Brandon* (Tex. Civ. App.) 431.

ATTENDANCE.

Of juror, see "Jury," § 2.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 3.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 16.

Attorney's fees in prosecution for violation of municipal ordinances, see "Municipal Corporations," § 6.

Attorneys in fact, see "Principal and Agent." Employment of attorney by county, see "Counties," § 2.

Estoppel to deny authority of attorney, see "Estoppel," § 1.

Interest on attorney's fee, see "Interest," § 2.

Payment of attorney employed by county, see "Counties," §§ 3, 4.

Preservation in record of objections to argument for purpose of review, see "Appeal and Error," § 7.

Privileged communications, see "Witnesses," § 1.

Recovery of counsel fees in action for breach of covenant, see "Covenants," § 2.

§ 1. Retainer and authority.

A receipt given by attorneys to a debtor is not evidence against the creditor, in the absence of a showing that the attorneys were attorneys for the creditor.—*Bank of Batesville v. Maxey* (Ark.) 968.

Attorney acting for certain creditors *held*, under the circumstances, not the attorney for another creditor whose claim he collected, and payment to him did not affect the liability of sureties on such claim.—*Bank of Batesville v. Maxey* (Ark.) 968.

In order that the act of a creditor in accepting money collected by an attorney without authority may amount to a ratification of the attorney's act, such acceptance must be accompanied by full knowledge of the facts.—*Bank of Batesville v. Maxey* (Ark.) 968.

* Point annotated. See syllabus.

Act of creditor in accepting money from an attorney which the latter had collected *held*, under the circumstances, not to amount to ratification of the attorney's acts, so as to make him the creditor's agent.—*Bank of Batesville v. Maxey* (Ark.) 968.

§ 2. Duties and Liabilities of attorney to client.

*A client, recovering judgment for money collected by his attorney under contract of employment, *held* entitled to interest from the time of the collection; while the attorney, recovering for services, *held* entitled to interest from his discharge.—*Goodin v. Hays* (Ky.) 1101.

*Where a client discharged his attorney under contract to render services, and sued him for the money collected by him under the contract, the attorney might set off his claim for services against the amount in his hands.—*Goodin v. Hays* (Ky.) 1101.

§ 3. Compensation and Lien of attorney.

*Facts *held* not to warrant an implied contract to pay for services of attorneys.—*Davis v. Trimble* (Ark.) 920.

*An attorney, wrongfully discharged under his contract of employment, *held* entitled to recover the contract price for the services rendered.—*Goodin v. Hays* (Ky.) 1101.

*Where an attorney, under contract to render services for his client, fails to pay over on demand the amount due the client under the contract, the client may discharge him.—*Goodin v. Hays* (Ky.) 1101.

In an action by an attorney for services, evidence *held* to show that a fee paid plaintiff included services only in the district court, so that he was entitled to a reasonable fee for services in appellate courts.—*Morris & Crow v. Kesterson* (Tex. Civ. App.) 277.

In an action by an attorney for services, evidence *held* to show that plaintiff assisted in suit without the knowledge or consent of his client, so that he was not entitled to recover for services.—*Morris & Crow v. Kesterson* (Tex. Civ. App.) 277.

AUTHORITY.

Of agent, see "Principal and Agent," § 2.
Of attorney, see "Attorney and Client," § 1.
Of broker, see "Brokers," § 1.
Of corporate agent, see "Corporations," § 4.

AWARD.

See "Arbitration and Award," § 2.

BAIL

§ 1. In criminal prosecutions.

A recognizance on appeal *held* sufficient.—*Cassens v. State* (Tex. Cr. App.) 229.

BAILMENT.

See "Banks and Banking," § 1; "Carriers," § 1.

A repairer of machinery has a lien thereon entitling him to retain possession until the repair charges are paid or tendered.—*Pine Bluff Iron Works v. Boling & Bro.* (Ark.) 306.

BALLOTS.

See "Elections," § 2.

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

Liability of sureties for expense of filing claim in bankruptcy against principal, see "Principal and Surety," § 2.

Right of trustee to interest on judgment, see "Interest," § 1.

Sale of improvements on partition at suit of trustee, see "Partition," § 1.

Surplusage in pleading in action by trustee, see "Pleading," § 1.

Testimony as to transactions with decedent in action by trustee, see "Witnesses," § 1.

§ 1. Petition, adjudication, warrant, and custody of property.

Under Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3452], authorizing the trustee to avoid fraudulent transfers, it is immaterial whether a transfer is made four months prior to the adjudication of bankruptcy or not.—*Sharp v. Fitzhugh* (Ark.) 929.

§ 2. Assignment, administration, and distribution of bankrupt's estate.

The fact that a debt owing by an insolvent is secured does not prevent a transfer of property to pay it from being preferential as to creditors not secured.—*Horstman v. Little* (Tex. Civ. App.) 286.

A creditor of an insolvent *held* guilty of receiving a preferential transfer within Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], declaring such transfers void.—*Horstman v. Little* (Tex. Civ. App.) 286.

A surety is a creditor within the meaning of the provision of the bankruptcy act, condemning preferential transfers to creditors.—*Horstman v. Little* (Tex. Civ. App.) 286.

In action by trustee of bankrupt husband against bankrupt's wife, costs of suit *held* taxable against wife's interest in improvements erected on her separate property, both in the trial court and on appeal.—*Collins v. Bryan* (Tex. Civ. App.) 432.

Prayer of petition of trustee in bankruptcy to enforce claim against separate estate of wife of bankrupt *held* to authorize court to decree the sale of the improvements on wife's separate estate to satisfy judgment.—*Collins v. Bryan* (Tex. Civ. App.) 432.

Averments of petition of trustee in bankruptcy to enforce claim against separate property of wife of bankrupt *held* sufficient to justify finding of fact and judgment.—*Collins v. Bryan* (Tex. Civ. App.) 432.

Trustee in bankruptcy *held* entitled to recover out of the proceeds of the sale of the improvements on the separate property of the bankrupt's wife amount of community funds expended by husband in making the improvements.—*Collins v. Bryan* (Tex. Civ. App.) 432.

A trustee in bankruptcy, suing under Bankr. Act July 1, 1898, c. 541, § 70, subd. e, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], must allege the amount of the claims of creditors existing at the time of the fraudulent conveyance, and that the assets were insufficient to pay them.—*Shelley v. Nolen* (Tex. Civ. App.) 524.

Under Bankr. Act July 1, 1898, c. 541, § 70, subd. e, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], a trustee in bankruptcy *held* entitled to sue to recover property alleged to belong to the community estate, and to have been conveyed to the bankrupt's wife prior to the bankruptcy act and by her conveyed to defendants pursuant to a conspiracy to conceal the property from creditors existing to the time of the in-

* Point annotated. See syllabus.

stitution of the suit.—*Shelley v. Nolen* (Tex. Civ. App.) 524.

BANKS AND BANKING.

Verification of pleading in action against bank, see "Pleading," § 6.

§ 1. Functions and dealings.

Under Negotiable Instrument Law, § 189 (Acts 1899, p. 172, c. 94), the drawer of an ordinary check may revoke the same and forbid its payment, so that any subsequent payment is at the peril of the bank.—*Pease & Dwyer Co. v. State Nat. Bank* (Tenn.) 172.

The fact that the drawer of a check sued the payee for its proceeds *held* not to constitute a ratification of the payment of the check by the bank after its revocation.—*Pease & Dwyer Co. v. State Nat. Bank* (Tenn.) 172.

In order to place a check beyond the control of the drawer and preclude him from stopping payment thereon, it must be clearly shown that it was the intention of the parties to assign all or a part of the specific fund on deposit.—*Pease & Dwyer Co. v. State Nat. Bank* (Tenn.) 172.

*Drawee bank which passed a forged check *held* negligent.—*Farmers' & Merchants' Bank v. Bank of Rutherford* (Tenn.) 939.

Bank to which bearer check was presented for payment *held* not negligent in failing to have the holder identified.—*Farmers' & Merchants' Bank v. Bank of Rutherford* (Tenn.) 939.

§ 2. National banks.

Payment of certain notes by surety *held* not to give the principal a cause of action to recover a penalty under the federal statutes relative to exaction of usury by national bank.—*Laasater v. First Nat. Bank* (Tex. Civ. App.) 429.

BAR.

Of action by former adjudication, see "Judgment," § 8.

BASTARDS.

Civil liability for rape, see "Rape," § 3.

BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 8.

BENEFITS.

Acceptance of, as ground of estoppel, see "Estoppel," § 1.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE

In civil actions, see "Evidence," § 3.

BIAS.

Of juror, see "Jury," § 3.

Of witness, see "Witnesses," § 3.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF LADING.

See "Carriers," § 1.

BILLS AND NOTES.

See "Lost Instruments."

Bonus to railroad, see "Railroads," § 2.

Instructions in general in action on note, see "Trial," § 8.

Land purchase price notes, see "Vendor and Purchaser," § 4.

Parol or extrinsic evidence, see "Evidence," § 8.

Partnership notes, see "Partnership," § 3.

Payment by check, see "Payment," § 1.

Power of agent to take note, see "Principal and Agent," § 2.

Presumptions on appeal or writ of error in action on note, see "Appeal and Error," § 19.

Subrogation to rights of payee, see "Subrogation."

Testimony as to transactions with decedent in action involving notes, see "Witnesses," § 1.

§ 1. Requisites and validity.

*The drawee of a check by accepting the same makes himself a guarantor thereof.—*Farmers' & Merchants' Bank v. Bank of Rutherford* (Tenn.) 939.

*A payee bank which received and paid a forged check *held* estopped to deny its genuineness as against indorsers.—*Farmers' & Merchants' Bank v. Bank of Rutherford* (Tenn.) 939.

§ 2. Construction and operation.

Where a note bearing 10 per cent. interest contains no stipulation for interest after maturity, interest must be computed at 10 per cent. from date to maturity, and thereafter at 6 per cent.—*Johnson, Berger & Co. v. Downing* (Ark.) 825.

That a note bears, after the name of the payee, letters indicating his title as officer in a beneficial association, does not render the note payable to him other than as an individual.—*Luster v. Robinson* (Ark.) 896.

§ 3. Rights and liabilities on indorsement or transfer.

*An indorser of negotiable paper does not warrant to the drawee the genuineness of the maker's signature.—*Farmers' & Merchants' Bank v. Bank of Rutherford* (Tenn.) 939.

*Certain certificates of deposit, payable to C., "trustee," and to C., "trustee of B. F.," respectively, *held* to impart actual notice of the rights of the cestui que trust to an indorsee, within Negotiable Instruments Law, § 56 (Acts 1899, p. 150, c. 94).—*Ford v. H. C. Brown & Co.* (Tenn.) 1036.

§ 4. Presentment, demand, notice, and protest.

Where plaintiffs retained as collateral a note of a third person, transferred by defendant before executing his note to them, they were bound only to use reasonable diligence to collect it, and defendant cannot complain of mere delay in enforcing payment.—*Johnson, Berger & Co. v. Downing* (Ark.) 825.

Defendant *held* to have waived any liability as indorser, because of failure to make demand and give notice of nonpayment.—*Johnson, Berger & Co. v. Downing* (Ark.) 825.

§ 5. Payment and discharge.

*The surrender of a note to the maker in exchange for a worthless check is not payment.—*Hogan v. Kaiser* (Mo. App.) 1128.

* Point annotated. See syllabus.

Payment of unindorsed note to one in possession thereof *held* good.—*Higley v. Dennis* (Tex. Civ. App.) 400.

§ 6. Actions.

In an action on a note by an indorsee against the maker, a certain instruction *held* erroneous.—*N. Nigro & Co. v. Security Bank of Minnesota* (Tex. Civ. App.) 375.

In an action on a note, where the defense was payments to one other than the plaintiffs, who held the note, the burden was on defendant to show that the one to whom payments were made had authority to collect it.—*Higley v. Dennis* (Tex. Civ. App.) 400.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.
Of goods, see "Sales," § 4.

BONDS.

Following proceeds of sale of invalid bonds, see "Trusts," § 3.
Laws impairing obligation, see "Constitutional Law," § 2.
Municipal bonds, see "Municipal Corporations," § 9.
School district bonds, see "Schools and School Districts," § 1.

Bonds in legal proceedings.

See "Bail."
Appeal from justice's court, see "Justices of the Peace," § 2.
Appeal in criminal prosecution, see "Criminal Law," § 23.
On lost instrument, see "Lost Instruments."

§ 1. Actions.

Under Rev. St. 1889, c. 6, art. 1, § 473, *held* that a judgment in an action on a bond should provide that it shall stand as security for further breaches, and not that it shall be satisfied by the payment of the damages already accrued.—*Fidelity & Deposit Co. of Maryland v. Schuchman* (Mo. Sup.) 626.

BONUS.

See "Railroads," § 2.

BOOK ACCOUNT.

See "Account, Action On."

BOUNDARIES.

See "Municipal Corporations," § 1.

BOYCOTT.

Action for conspiracy to, see "Conspiracy," § 1.

BREACH.

Of contract, see "Vendor and Purchaser," § 2.
Of warranty, see "Sales," §§ 5, 7.

BREACH OF THE PEACE.

A village marshal *held* not a person whose peace could be disturbed by loud and offensive talking, within a village ordinance providing that, if any person disturbs the peace of another, etc., he shall be adjudged guilty of a misdemeanor.—*Village of Salem v. Coffey* (Mo. App.) 772.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 15.

BROKERS.

See "Principal and Agent."

§ 1. Employment and authority.

The employment of a real estate broker to procure a purchaser for a farm *held* to continue up to the time he procured a purchaser.—*Sallee v. McMurry* (Mo. App.) 157.

In determining what constitutes a reasonable time within which a real estate broker employed to procure a purchaser for a farm must procure a purchaser in order to be entitled to his commissions, the circumstances must be considered.—*Sallee v. McMurry* (Mo. App.) 157.

A broker, employed to procure a purchaser for a farm, has, in the absence of any provisions in the contract of employment, a reasonable time in which to procure a purchaser, unless his authority is in the meantime revoked.—*Sallee v. McMurry* (Mo. App.) 157.

The right of a real estate broker to procure a purchaser for a farm *held* not revoked.—*Sallee v. McMurry* (Mo. App.) 157.

§ 2. Duties and liabilities to principal.

In an action to recover from brokers a portion of the purchase price retained by them after effecting a sale of plaintiff's land, an instruction *held* not erroneous because it assumed that defendants had received money from the purchaser.—*Harrison v. Lakenan* (Mo. Sup.) 53.

In an action to recover from brokers a portion of the purchase money retained by them after effecting a sale of plaintiff's land, an instruction *held* not erroneous as covering matter without the issues.—*Harrison v. Lakenan* (Mo. Sup.) 53.

In an action against brokers to recover a portion of the purchase price of plaintiff's land retained by them, an instruction that authority to sell at a specified price did not excuse defendants from selling at the best obtainable price *held* not erroneous.—*Harrison v. Lakenan* (Mo. Sup.) 53.

In an action against brokers who had sold plaintiff's land to recover moneys received from the purchaser and retained by defendants, the petition *held* not insufficient for failing to allege that defendants were granted authority to collect the money.—*Harrison v. Lakenan* (Mo. Sup.) 53.

An owner employing a broker to sell his land *held* entitled to sue the broker for the forfeit money paid by an intending purchaser, though the time for completing the purchase has not expired.—*M. L. Chambers & Co. v. Herring* (Tex. Civ. App.) 371.

The right of an owner employing a broker to sell his land to recover the forfeit money paid by an intended purchaser *held* not affected by a custom.—*M. L. Chambers & Co. v. Herring* (Tex. Civ. App.) 371.

In an action by an owner of land to recover the forfeit money paid to his real estate broker by an intended purchaser who failed to complete the purchase, the purchaser is not a proper party.—*M. L. Chambers & Co. v. Herring* (Tex. Civ. App.) 371.

§ 3. Compensation and lien.

*A broker *held* not entitled to recover commissions for selling goods.—*Taylor v. Godbold* (Ark.) 959.

* Point annotated. See syllabus.

*Real estate agent *held* to have been the procuring cause of a sale made by the owner, and to be entitled to commission.—*Hunton v. Marshall* (Ark.) 963.

A real estate broker earns his commission on producing a buyer able, ready, and willing to buy on the terms fixed by the owner.—*Sallee v. McMurry* (Mo. App.) 157.

A real estate broker employed to sell land *held* entitled to his commissions, though the owner did not carry out his agreement to sell.—*Sallee v. McMurry* (Mo. App.) 157.

A real estate broker is entitled to his commission on a sale of land where he is the procuring cause of the negotiations resulting in a sale.—*Sallee v. McMurry* (Mo. App.) 157.

A broker employed to sell land on commission has a right to give a part of his commissions to the purchaser.—*Stephens v. Tomlinson, Henderson & Co.* (Tex. Civ. App.) 304.

A real estate agent who renders services *held* entitled to recover the reasonable value thereof.—*Stephens v. Tomlinson, Henderson & Co.* (Tex. Civ. App.) 304.

§ 4. Actions for compensation.

An instruction in an action to recover commissions earned on procuring a purchaser for a farm *held* erroneous, as suggesting a conspiracy between the broker and the purchaser.—*Sallee v. McMurry* (Mo. App.) 157.

BUILDING AND LOAN ASSOCIATIONS.

A building and loan association which furnished funds for the construction of a building *held* not liable for the negligence of the building contractor causing the collapse of an adjacent building.—*Henry v. Stuart* (Tex. Civ. App.) 248.

In an action against a building and loan association for damages caused by the negligence of a contractor in constructing a building, certain evidence *held* irrelevant.—*Henry v. Stuart* (Tex. Civ. App.) 248.

BUILDING CONTRACTS.

See "Building and Loan Associations."
Damages for breach, see "Damages."

BURDEN OF PROOF.

In criminal prosecutions, see "Criminal Law," § 6.

BURGLARY.

Arguments of counsel, see "Criminal Law," § 16.

§ 1. Prosecution and punishment.

Where an indictment for burglary charges the entry without consent of the "occupant" of the house, occupancy is equivalent to possession and embraced a chicken house on the premises of the prosecutor.—*Moore v. State* (Tex. Cr. App.) 230.

In a prosecution for burglary, an instruction *held* not erroneous as authorizing conviction regardless of whether accused had prosecutor's consent to enter the house.—*Moore v. State* (Tex. Cr. App.) 230.

In a prosecution for burglary, certain evidence *held* not a variance from the indictment.—*Johnson v. State* (Tex. Cr. App.) 813.

In a prosecution for burglary, certain testimony *held* admissible to identify defendant as the burglar, and to show the intent with which

the burglary was committed.—*Johnson v. State* (Tex. Cr. App.) 813.

CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Bar of causes of action by judgment, see "Judgment," § 8.

Deed of trust on community property, see "Husband and Wife," § 5.

Deeds, see "Deeds," § 1.

Insurance policy, see "Insurance," § 2.

Rescission of contracts, see "Sales," § 3.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

§ 1. Proceedings and relief.

In an action to cancel a deed given defendant by plaintiff in payment for defendant's supposed interest in property which the parties had agreed to purchase jointly, evidence *held* to require submission to the jury of the question whether the parties in fact purchased jointly.—*Paddock v. Bray* (Tex. Civ. App.) 419.

CANVASS OF VOTES.

See "Elections," § 2.

CARGO.

See "Shipping."

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Admissions as evidence in action for injury to cattle shipped, see "Evidence," § 4.

As employers, see "Master and Servant," §§ 1, 10.

Carriage of goods by vessels, see "Shipping," § 1.

Damages for failure to perform contract, see "Damages," § 2.

Declarations as evidence in action for death of passenger, see "Evidence," § 5.

Effect of subsequent written contract on liability for breach of oral contract, see "Contracts," § 2.

Evidence as to authority of agent, see "Corporations," § 4.

Harmless error in action for injuries to passenger, see "Appeal and Error," §§ 22, 23, 25.

Hearsay testimony as to damages from delay of live stock in transit, see "Evidence," § 6.

Instructions in general in action for death of passenger, see "Trial," § 11.

Instructions in general in action for injuries to live stock in transit, see "Trial," § 5.

Jurisdiction of particular courts of actions for injuries to animals in transit, see "Courts," § 2.

Jurisdiction of particular courts of action to enforce carrier's lien, see "Courts," § 3.

New trial in action for injuries to live stock in transit, see "New Trial," § 1.

Opinion evidence in action for injuries to live stock in transit, see "Evidence," § 9.

Opinion evidence in action for injuries to passenger, see "Evidence," § 9.

Res gestæ in action for injuries to passenger, see "Evidence," § 2.

Trespassers on trains, see "Railroads," § 5.

§ 1. Carriage of goods.

A shipper cannot recover special damages arising from a railroad company's failure to

* Point annotated. See syllabus.

furnish cars, unless the facts leading to the special damages are made known to the company.—*Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.) 870.

A shipper *held* entitled to recover the expense in keeping teams necessary in loading logs on cars while waiting for a railroad company to furnish cars.—*Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.) 870.

A complaint in an action against a railway company for failure to furnish cars *held* to show the tender of goods for shipment made to the company's agents.—*Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.) 870.

A complaint in an action against a railway company for failure to furnish cars *held* sufficiently definite as to time when cars were demanded.—*Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.) 870.

Allegation in an action against a railway company for failure to furnish cars *held* to show a demand on proper authority.—*Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.) 870.

An unsigned bill of lading delivered by the carrier's agent *held* ineffective to limit the carrier's common-law liability.—*Patrick v. Missouri, K. & T. Ry. Co.* (Ind. T.) 330.

In order to render a carrier liable for the consequence of the conjunction of its negligence with an act of God, such injury must have been a probable consequence of the negligence.—*Moffatt Commission Co. v. Union Pac. R. Co.* (Mo. App.) 117.

A carrier is not liable as for a breach of contract for the destruction by an unprecedented flood of goods which it delayed to transport.—*Moffatt Commission Co. v. Union Pac. R. Co.* (Mo. App.) 117.

Unexplained delay in transportation by a connecting carrier *held* concurring negligence, rendering such carrier liable for damages resulting therefrom.—*Butterick Pub. Co. v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 299.

Where cattle were shipped over the lines of several connecting carriers under a several contract, plaintiff *held* not entitled to sue one of them for a separate default in a county through which its railroad did not run, and in which it had no place of business.—*Atchison, T. & S. F. Ry. Co. v. Waddell Bros.* (Tex. Civ. App.) 390.

An initial carrier was not negligent in delivering freight to a connecting carrier for transportation to a station on the line of the connecting carrier which that carrier had officially stated to be open for business, but which was not so open in fact.—*Texas & N. O. Ry. Co. v. E. R. & D. C. Kolp, Jr.* (Tex. Civ. App.) 417.

In an action against a carrier for delay in the shipment of freight, an instruction relative to the estimation of reasonable time for the shipment *held* sufficiently favorable to defendant.—*Texas & N. O. Ry. Co. v. E. R. & D. C. Kolp, Jr.* (Tex. Civ. App.) 417.

In an action against carrier for damages caused by unreasonable delay in delivering freight, plaintiff *held* entitled to recover certain demurrage paid defendant as a result of the delay.—*Texas & N. O. Ry. Co. v. E. R. & D. C. Kolp, Jr.* (Tex. Civ. App.) 417.

Where freight is accepted by a carrier without notice to the shipper that its delivery will be delayed, any delay occasioned by an unusual rush of business or large accumulation of freight is no defense to an action for delaying the shipment.—*Texas & N. O. Ry. Co. v. E. R. & D. C. Kolp, Jr.* (Tex. Civ. App.) 417.

In an action against a railroad for failure to furnish cars for shipment of cattle, there can be no recovery for an item of damages which is not pleaded.—*Texas & P. Ry. Co. v. Arnett* (Tex. Civ. App.) 448.

Where a petition counted on a breach of contract to furnish cars on a specific date, the submission to the jury of negligent delay in furnishing cars was error.—*Texas & P. Ry. Co. v. Arnett* (Tex. Civ. App.) 448.

Evidence *held* insufficient to establish a contract on the part of a railroad to furnish cars on a day certain.—*Texas & P. Ry. Co. v. Arnett* (Tex. Civ. App.) 448.

§ 2. Carriage of live stock.

Written contract between shipper and carrier *held* to preclude shipper from recovering damages for breach of prior verbal contract.—*Hoover v. St. Louis & S. F. R. Co.* (Mo. App.) 769.

An instruction in an action against a carrier for delay in transportation of cattle *held* to correctly fix the measure of damages.—*Gulf, C. & S. F. Ry. Co. v. Beattie* (Tex. Civ. App.) 367.

An instruction in an action against a carrier for delay in transportation of cattle *held* correctly refused because eliminating a period the cattle were detained in considering the reasonableness of the time taken in making the trip.—*Gulf, C. & S. F. Ry. Co. v. Beattie* (Tex. Civ. App.) 367.

It is the duty of a common carrier receiving live stock for transportation to use reasonable diligence to transport the same within a reasonable time.—*Gulf, C. & S. F. Ry. Co. v. Beattie* (Tex. Civ. App.) 367.

In an action for injuries to cattle in transit, evidence *held* to support a verdict finding defendant carrier guilty of negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Russell* (Tex. Civ. App.) 379.

In an action for injuries to cattle shipped, a requested instruction *held* properly refused as misleading.—*Pecos River R. Co. v. Latham* (Tex. Civ. App.) 392.

In an action for breach of a carrier's contract to ship certain cattle, evidence *held* not to constitute a fatal variance.—*Pecos River R. Co. v. Latham* (Tex. Civ. App.) 392.

Where plaintiff's cattle were injured by the concurring negligence of defendants and certain other railroads, defendants were liable therefor.—*Pecos River R. Co. v. Latham* (Tex. Civ. App.) 392.

In an action against a carrier for damages to a shipment of cattle caused by delay, it was not necessary for the court to define negligence.—*Texas Cent. R. Co. v. West* (Tex. Civ. App.) 426.

In an action against a carrier for damages to a shipment of cattle, evidence *held* to justify submission to the jury of the question whether any of the damage occurred on defendant's line.—*Texas Cent. R. Co. v. West* (Tex. Civ. App.) 426.

A carrier, contracting to deliver a shipment of cattle at a place designated within a certain time, is liable to the shipper for damages on its own or connecting carrier's lines.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 499.

An instruction in an action against a carrier for damages to a shipment of cattle *held* correct as far as it went, and any omission must be supplied by a requested instruction.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 499.

A carrier, failing to deliver a shipment of cattle within the time agreed on, is liable to the

* Point annotated. See syllabus.

shipper for the damages sustained by reason of his failure to receive the market value of the cattle occasioned by the breach of the carrier's agreement.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 499.

In an action against an initial carrier for damages to a shipment of cattle, the receipts from the connecting carrier to the shipper's consignee, showing the freight paid, are admissible.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 499.

In an action against railroads for damages to plaintiff's cattle resulting from delay in transportation, the admission of certain testimony on the issue of damages *held* not reversible error.—*Red River, T. & S. Ry. Co. v. Eastin & Knox* (Tex. Civ. App.) 530.

In an action against railroads for damages to plaintiff's cattle resulting from delay in transportation, defendant connecting road *held* to have waived insufficiency of tender of cattle.—*Red River, T. & S. Ry. Co. v. Eastin & Knox* (Tex. Civ. App.) 530.

Under Rev. St. 1895, arts. 4535, 4496, in an action against railroads for damages to plaintiff's cattle resulting from delay in transportation, defendant connecting road *held* liable for all damages naturally and proximately resulting from its refusal to receive the cattle when tendered.—*Red River, T. & S. Ry. Co. v. Eastin & Knox* (Tex. Civ. App.) 530.

*A clause in a live stock shipment contract limiting the carrier's liability for delay *held* not to release the carrier as to delay caused by negligence.—*Texas & N. O. Ry. Co. v. Farrington* (Tex. Civ. App.) 889.

A live stock contract, exempting the carrier from liability for delay after delivery to its agent, *held* to refer to delay after delivery by the initial carrier to its connecting line.—*Texas & N. O. Ry. Co. v. Farrington* (Tex. Civ. App.) 889.

In an action against a carrier for delay and injuries to cattle shipped, refusal to require plaintiff to separately state the amount of damages claimed for the delay and for the injuries *held* error.—*Texas & N. O. Ry. Co. v. Farrington* (Tex. Civ. App.) 889.

In an action for delay in shipping cattle, plaintiff *held* entitled to testify as to the length of time it ordinarily took to make the journey in question.—*Texas & N. O. Ry. Co. v. Farrington* (Tex. Civ. App.) 889.

A carrier *held* liable for the failure to feed and water cattle.—*Gulf, C. & S. F. Ry. Co. v. House & Watkins* (Tex. Civ. App.) 1110.

In an action against a carrier for delay in transporting cattle, *held* not error to permit plaintiff to ask a witness a question with reference to trains during a period of delay at a town.—*Gulf, C. & S. F. Ry. Co. v. House & Watkins* (Tex. Civ. App.) 1110.

In an action against a carrier for delay in a shipment of cattle, evidence of value of cattle on account of shrinkage *held* admissible.—*Gulf, C. & S. F. Ry. Co. v. House & Watkins* (Tex. Civ. App.) 1110.

In an action against a carrier for failure to furnish cars for the shipment of cattle, certain evidence *held* admissible, as showing that the carrier had contracted to furnish cars.—*Gulf, C. & S. F. Ry. Co. v. House & Watkins* (Tex. Civ. App.) 1110.

§ 3. Carriage of passengers—Relation between carrier and passenger.

A railroad company is not required to accept as a passenger without an attendant one who from intoxication is incapable of taking care

of himself.—*Price v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 575.

In an action against a street railroad company *held* not error to instruct a finding for plaintiff if the jury found, among other facts, that defendant received plaintiff as a passenger to be carried for hire, though there was no evidence that plaintiff paid his fare or that fare was demanded.—*Reynolds v. St. Louis Transit Co.* (Mo. Sup.) 50.

Carrier's acceptance of a person to become a passenger *held* implied from act of motorman of street car.—*Lewis v. Houston Electric Co.* (Tex. Civ. App.) 489.

§ 4. — Fares, tickets, and special contracts.

Where a railroad ticket is over several roads, *held* that the ticket agent of one whose duty it was to stamp it for return passage was not the agent of the seller, so as to make it responsible for his erroneous statement as to time return passage should be begun.—*Boling v. St. Louis & S. F. R. Co.* (Mo. Sup.) 35.

Condition in a special rate ticket, as to return passage being commenced on day it was punched *held* valid.—*Boling v. St. Louis & S. F. R. Co.* (Mo. Sup.) 35.

A passenger *held* not relieved from a condition in a special rate ticket because of her not reading it.—*Boling v. St. Louis & S. F. R. Co.* (Mo. Sup.) 35.

§ 5. — Performance of contract of transportation.

*In an action by a passenger who was carried past his station and voluntarily walked back, an instruction allowing the recovery for humiliation *held* without foundation in the evidence.—*St. Louis Southwestern Ry. Co. v. Knight* (Ark.) 1035.

Waiver of condition in a railroad ticket by one of connecting carriers *held* not to require another to accept it.—*Boling v. St. Louis & S. F. R. Co.* (Mo. Sup.) 35.

In an action for failure to transport a passenger according to contract, the petition *held* defective for failure to state certain facts relative to a claim of special damage.—*Townsend v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 302.

§ 6. — Personal injuries.

Where a conductor accepts an unattended passenger who is so drunk as to be unable to look after himself, the railroad company is bound to exercise reasonable care to protect him.—*Price v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 575.

A conductor accepting an unattended passenger who is so drunk as to be unable to look after himself *held* acting within the scope of his authority.—*Price v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 575.

Limitations of the doctrine of *res ipsa loquitur* stated.—*Price v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 575.

In an action against a railroad company for the death of a drunken passenger, evidence *held* to justify submission to the jury of the issues of defendant's negligence.—*Price v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 575.

In an action for the death of one killed by being struck by a locomotive, an instruction on negligence in connection with defendant's duty as to guards and signals *held* not erroneous.—*St. Louis, I. M. & S. Ry. Co. v. Cleere* (Ark.) 995.

In an action against a street railway for injuries to a passenger while alighting from a car, evidence *held* to authorize submission of

* Point annotated. See syllabus.

the case to the jury.—*McHugh v. St. Louis Transit Co.* (Mo. Sup.) 853.

In an action against a street railway for injuries to a passenger, an instruction as to care required of defendant *held* not error.—*McHugh v. St. Louis Transit Co.* (Mo. Sup.) 853.

An instruction that defendants were liable for plaintiff's injury if caused by any failure on their part to exercise care and precaution *held* error.—*Hensler v. Stix* (Mo. App.) 108.

In an action for injuries to a passenger in an elevator, the court should have charged that defendants were liable for slight negligence on the part of their employé in charge of the elevator.—*Hensler v. Stix* (Mo. App.) 108.

In an action for injuries to an elevator passenger, a motion by defendants for a directed verdict, in that there was a total failure of proof of negligence alleged, *held* properly denied.—*Hensler v. Stix* (Mo. App.) 108.

In an action for injuries to an elevator passenger, whether the elevator operator was negligent after he discovered plaintiff's peril *held* for the jury.—*Hensler v. Stix* (Mo. App.) 108.

In an action for injuries to an elevator passenger, the act of the operator in suddenly moving the elevator upwards after he discovered plaintiff's peril *held* not the proximate cause of plaintiff's injury as a matter of law.—*Hensler v. Stix* (Mo. App.) 108.

Persons operating elevators in stores are common carriers of passengers and bound to exercise the highest practicable care to prevent injuries to them.—*Hensler v. Stix* (Mo. App.) 108.

In an action for injuries sustained by alighting from a street car, instructions considered, and *held* misleading because mingling causes of liability under certain states of evidence and pleading not found in case.—*Corum v. Metropolitan St. Ry. Co.* (Mo. App.) 143.

In an action against a carrier for injuries, evidence *held* insufficient to warrant the submission of the question to the jury whether plaintiff's injuries were due to the accident or to an antecedent rupture.—*Young v. Missouri Pac. Ry. Co.* (Mo. App.) 767.

Carrier *held* liable for injuries to passenger from act of its servants in suddenly moving train.—*Young v. Missouri Pac. Ry. Co.* (Mo. App.) 767.

*Street railways are common carriers, and must employ the highest degree of care to avoid injury to their passengers.—*Nelson v. Metropolitan St. Ry. Co.* (Mo. App.) 1119.

*The relation of passenger and carrier continues until the time the latter leaves the train.—*Nelson v. Metropolitan St. Ry. Co.* (Mo. App.) 1119.

*A street car conductor is required, in the exercise of due care, to look to see if passengers are in the act of alighting before he starts his car.—*Nelson v. Metropolitan St. Ry. Co.* (Mo. App.) 1119.

In an action against a street railway company for personal injuries, an instruction *held* not objectionable as authorizing a recovery, though plaintiff did not attempt to dismount until the car had started.—*Nelson v. Metropolitan St. Ry. Co.* (Mo. App.) 1119.

A carrier *held* liable for injuries to a passenger who was accidentally shot by one of several other passengers, carousing in the train.—*Nashville, C. & St. L. Ry. Co. v. Flake* (Tenn.) 326.

In an action for injuries to a passenger by fall of an elevator, allegations of petition *held* sufficient to charge a causal connection between

the acts of negligence specified and the injuries complained of.—*Alexander v. McGaffey* (Tex. Civ. App.) 462.

The derailment of a passenger train at a time when the track and train are under the control of the carrier raises a presumption of negligence on the part of the carrier.—*St. Louis Southwestern Ry. Co. of Texas v. Harkey* (Tex. Civ. App.) 506.

In action by passenger for injury in wreck by derailment of train, burden *held* to be on defendant to show that the accident could not have been avoided by exercise of utmost care and foresight reasonably compatible with the prosecution of its business.—*St. Louis Southwestern Ry. Co. of Texas v. Harkey* (Tex. Civ. App.) 506.

§ 7. — Contributory negligence of person injured.

In an action for the death of a drunken passenger, evidence *held* to justify submission to the jury of the issues of the contributory negligence of deceased.—*Price v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 575.

Where a railroad company accepts an unintended passenger who is so drunk as to be unable to take care of himself, the question of contributory negligence cannot arise when he is injured.—*Price v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 575.

*In an action for the death of one killed by being struck by a locomotive while crossing a railroad track, *held* a question for the jury whether he had exercised ordinary care and prudence under the circumstances.—*St. Louis, I. M. & S. Ry. Co. v. Cleere* (Ark.) 995.

In action for the death of one struck by a locomotive, an instruction on contributory negligence *held* not erroneous.—*St. Louis, I. M. & S. Ry. Co. v. Cleere* (Ark.) 995.

*One assisting an embarking passenger *held* to have had a right to assume that the railroad tracks at that point were clear.—*St. Louis, I. M. & S. Ry. Co. v. Cleere* (Ark.) 995.

An instruction, in an action against a railway company for the death of a passenger while in the act of boarding a train, as to the company's duty of discovering decedent's dangerous position, *held* erroneous.—*Kansas City Southern Ry. Co. v. McGinty* (Ark.) 1001.

In an action for injuries to an elevator passenger, an instruction on contributory negligence *held* erroneous as misleading, and as requiring of the elevator operator only ordinary care after discovering plaintiff's peril.—*Hensler v. Stix* (Mo. App.) 108.

In an action for injuries to an elevator passenger, an instruction *held* erroneous as eliminating defendants' liability for negligence of the operator in failing to sooner discover plaintiff's peril.—*Hensler v. Stix* (Mo. App.) 108.

Defendants *held* liable for injuries to an elevator passenger, regardless of her negligence, if the operator by the exercise of a high degree of care could have prevented the injury.—*Hensler v. Stix* (Mo. App.) 108.

In an action for injuries to a passenger, refusal of special charge on contributory negligence *held* error.—*Missouri, K. & T. Ry. Co. of Texas v. Criswell* (Tex. Civ. App.) 373.

In action for injuries to passenger, burden *held* on defendant to establish plea of contributory negligence.—*Lewis v. Houston Electric Co.* (Tex. Civ. App.) 489.

The attempt of a passenger to board a street car while it is in motion is not contributory negligence as matter of law.—*Lewis v. Houston Electric Co.* (Tex. Civ. App.) 489.

* Point annotated. See syllabus.

§ 8. — Ejection of passengers and intruders.

Certain acts *held* to constitute an ejection of a passenger.—*Boling v. St. Louis & S. F. R. Co.* (Mo. Sup.) 35.

Certain acts *held* not to constitute ejection of a passenger.—*Boling v. St. Louis & S. F. R. Co.* (Mo. Sup.) 35.

A passenger rightfully ejected *held* entitled to recover damages for insulting language of conductor.—*Boling v. St. Louis & S. F. R. Co.* (Mo. Sup.) 35.

CARS.

Liability of carrier for failure to furnish, see "Carriers," § 1.

CATTLE.

See "Animals."

CATTLE GUARDS.

Penalty against railroads for failure to construct, see "Railroads," § 8.

CAUSE OF ACTION.

See "Action"; "Malicious Prosecution," § 1.

CAVEAT EMPTOR.

See "Sales," § 1.

CERTIFICATE.

Certified copies, see "Evidence," § 7.

Of insurance, see "Insurance," § 8.

Of notice to take deposition, see "Depositions."

CERTIFICATES OF DEPOSIT.

See "Bills and Notes," § 2.

CERTIORARI.

Perfecting record on appeal or writ of error, see "Appeal and Error," § 10.

§ 1. Nature and grounds.

Certiorari will not lie to compel a county clerk to transmit to the district court a transcript of proceedings in the opening of a road.—*McKinley v. Frio County* (Tex. Civ. App.) 447.

§ 2. Proceedings and determination.

In certiorari to remove to the St. Louis Court of Appeals the record of the excise commissioner in relation to granting a dramshop license, the court, on suggestion of a diminution of the record, cannot compel the commissioner to make a record of certain alleged findings and certify them as part of the record.—*State ex rel. Sager v. Mulvihill* (Mo. App.) 773.

CHALLENGE.

To juror, see "Jury," § 3.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of civil actions, see "Venue," § 1.

Of criminal prosecutions, see "Criminal Law," § 4.

CHARACTER.

Of accused in criminal prosecutions, see "Criminal Law," § 8.

Of witness, see "Witnesses," § 3.

CHARGE.

To jury in civil actions, see "Trial," §§ 5-11.

To jury, in criminal prosecutions, see "Criminal Law," § 17.

CHARITIES.

State charitable institutions, see "States," § 1.

§ 1. Creation, existence, and validity.

A devise of a remainder *held* a valid charitable trust.—*Carson v. Carson* (Tenn.) 175.

A certain bequest *held* valid.—*Franklin v. Boone* (Tex. Civ. App.) 262.

CHARTER.

Of railroad, see "Railroads," § 1.

CHattel MORTGAGES.

As affecting rights of buyer, see "Sales," § 4.

Effect on validity of mortgage of cattle by mixing other cattle with those mortgaged, see "Confusion of Goods."

Power of agent as to, see "Principal and Agent," § 2.

§ 1. Requisites and validity.

A chattel mortgage of cattle, valid in other respects, *held* not invalidated by a misdescription as to their location.—*Tootle v. Buckingham* (Mo. Sup.) 619.

A sale of personal property with a verbal reservation of title to secure the price constitutes a valid mortgage.—*Crews v. Harlan* (Tex. Civ. App.) 411.

CHEAT.

See "False Pretenses"; "Fraud."

CHECKS.

See "Banks and Banking," § 1; "Bills and Notes."

Delivered to agent as payment to principal, see "Principal and Agent," § 2.

Necessity of verification of pleading setting up forgery of check, see "Pleading," § 6.

Of principal debtor as release of surety, see "Principal and Surety," § 3.

Payment by, see "Payment," § 1.

CHILD.

See "Adoption"; "Guardian and Ward"; "Parent and Child."

CHOSE IN ACTION.

Assignment, see "Assignments."

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

* Point annotated. See syllabus.

CITIZENS.

See "Aliens"; "Indians."

Citizenship ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

Children born of alien parents in this country are citizens.—*Ehrlich v. Weber* (Tenn.) 188.

CLAIMS.

Against estate assigned for creditors, see "Assignments for Benefit of Creditors," § 1.
To property levied on, see "Attachment," § 2.

CLERKS OF COURTS.

Certificate by clerk of notice to take depositions, see "Depositions."
Duty as to making transcript, see "Certiorari," § 1.

Under Rev. St. 1899, § 825, clerk of court held not liable for negligence of his successor in failing to transmit papers in a suit removed to another court.—*Llewellyn v. Spangler* (Mo. App.) 1021.

Rev. St. 1899, § 825, requiring the clerk to "immediately" transmit papers in a cause the venue of which has been changed, construed.—*Llewellyn v. Spangler* (Mo. App.) 1021.

Clerk of court held not liable, under Rev. St. 1899, § 825, for having failed to immediately transmit record in cause, the venue of which had been changed.—*Llewellyn v. Spangler* (Mo. App.) 1021.

CLOUD ON TITLE.

See "Quieting Title."

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 8.

COLLATERAL ATTACK.

On execution sale, see "Execution," § 4.
On judgment, see "Judgment," § 7.
On organization of school district, see "Schools and School Districts," § 1.
On sale of property belonging to decedent's estate, see "Executors and Administrators," § 3.

COLLATERAL INHERITANCE TAXES.

See "Taxation," § 3.

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1; "Guaranty."

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 1.

COLLISION.

Of trains, see "Railroads," § 5.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 1.

COMITY.

Between courts, see "Courts," § 5.

COMMERCE.

As to whether business of corporation is interstate, see "Corporations," § 6.
Carriage of goods and passengers, see "Carriers"; "Shipping."

§ 1. Power to regulate in general.

Act Feb. 27, 1885 (Acts 1885, p. 35), and Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 879, as amended by Act March 2, 1889, c. 882, 25 Stat. 855 [U. S. Comp. St. 1901, p. 8154], operating on the same subject and in conflict, the latter, being within the competency of Congress under the power to regulate commerce between the states, must control.—*Spratlin v. St. Louis Southwestern Ry. Co.* (Ark.) 836.

COMMISSIONS.

Of broker, see "Brokers," §§ 3, 4.

COMMON CARRIERS.

See "Carriers."

COMMON DRUNKARDS.

See "Drunkards."

COMMON LAW.

Liability of carrier, see "Carriers," § 1.

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMMUNITY PROPERTY.

See "Husband and Wife," § 5.

COMMUTATION.

Statute authorizing commutation of sentence as invasion of pardoning power, see "Constitutional Law," § 1.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 1.
For services, see "Master and Servant," § 2.
Of attorney, see "Attorney and Client," § 3.
Of broker, see "Brokers," §§ 3, 4.

COMPETENCY.

Of evidence in civil actions, see "Evidence," § 2.
Of experts as witnesses, see "Evidence," § 3.
Of jurors, see "Jury," § 3.
Of witnesses in general, see "Witnesses," § 1.

COMPLAINT.

In civil actions in general, see "Pleading," § 2.

* Point annotated. See syllabus.

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction"; "Payment"; "Release."

COMPUTATION.

Of interest, see "Interest," § 2.
Of period of limitation, see "Limitation of Actions," § 1.

CONCLUSION.

In pleading, see "Pleading," § 1.
Of witness, see "Evidence," § 9.

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 5.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

In tickets, see "Carriers," §§ 4, 5.
Precedent to action, see "Action," § 1.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 12.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 1.

CONFIRMATION

Of sale on execution, see "Execution," § 4.

CONFLICT OF LAWS.

See "Commerce," § 1.
Conflicting jurisdiction of courts, see "Courts," § 5.

CONFUSION OF GOODS.

A mortgagor of cattle *held* not entitled to defeat the lien of the mortgages by mixing other cattle of like description with those mortgaged.—*Tootle v. Buckingham* (Mo. Sup.) 619.

CONGRESS.

Power to regulate commerce, see "Commerce," § 1.

CONNECTING CARRIERS.

See "Carriers," §§ 1, 2, 5.

CONSENT.

As defense to charge of robbery, see "Robbery."
Capacity of female to consent to intercourse, see "Rape," § 1.

CONSIDERATION.

Of deed, see "Deeds," § 1.

CONSOLIDATION.

Of corporations, see "Corporations," §§ 1, 5.

* Point annotated. See syllabus.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.

§ 1. Civil liability.

A conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give a right of action.—*Wills v. Central Ice & Cold Storage Co.* (Tex. Civ. App.) 265.

The mere exercise of one's right to refuse to sell a certain commodity to a particular person is not actionable.—*Mills v. Central Ice & Cold Storage Co.* (Tex. Civ. App.) 265.

In an action for an alleged conspiracy to boycott plaintiff, refusal by defendants to place in evidence certain contracts *held* not to authorize a verdict for plaintiff.—*Wills v. Central Ice & Cold Storage Co.* (Tex. Civ. App.) 265.

In an action for an alleged conspiracy to boycott plaintiff, evidence *held* insufficient to authorize a recovery.—*Wills v. Central Ice & Cold Storage Co.* (Tex. Civ. App.) 265.

In an action involving the title to real estate, whether plaintiff's agent conspired with one of the owners of homestead property in making a loan of the plaintiff's money, taking the homestead as security with intent to deceive and defraud the plaintiff, *held* a question for the jury.—*Morrill v. Bosley* (Tex. Civ. App.) 619.

CONSTABLES.

See "Sheriffs and Constables."
Process directed to, see "Process," § 1.

CONSTITUTIONAL LAW.*Provisions relating to particular subjects.*

See "Death," § 1; "Judgment," § 4; "Jury," § 1; "Libel and Slander," § 3; "Mandamus," § 1; "Master and Servant," § 6; "Municipal Corporations," §§ 6, 7, 9; "Taxation," § 1.
Condemnation proceedings, see "Eminent Domain," § 2.

Enactment and validity of statutes, see "Statutes," § 1.

Indian court, see "Indians."

Road taxes, see "Highways," § 2.

Special or local laws, see "Statutes," § 2.

Subjects and titles of statutes, see "Statutes," § 3.

§ 1. Distribution of governmental powers and functions.

Under Const. art. 5, §§ 30, 31, legislative determination that certain expenses are necessary is conclusive on the courts, so long as such expenses may be necessary.—*State v. Moore* (Ark.) 881.

Granting to city of power to pass ordinances for the protection of citizens is not an infringement of the maxim that legislative power may not be delegated.—*Sluder v. St. Louis Transit Co.* (Mo. Sup.) 648.

*Statute authorizing the commutation of a penal sentence for good conduct, and specifically defining the credits to be allowed, becomes a part of the sentence, and is not an invasion of the pardoning prerogative vested in the Governor by Const. art. 3, § 6.—*Fite v. State* (Tenn.) 941.

Shannon's Code, § 7423, authorizing the board of workhouse commissioners to deduct for good conduct a portion of the time for which any person has been sentenced, *held* an unconstitutional delegation of legislative authority.—*Fite v. State* (Tenn.) 941.

§ 2. Obligation of contracts.

Legislation affecting either the validity or means of enforcement of bonds issued by a city held repugnant to Const. U. S. art. 1, § 10.—*City of Austin v. Cahill* (Tex. Sup.) 542.

CONSTRUCTIVE TRUSTS.

See "Trusts," § 1.

CONTEMPT.**§ 1. Power to punish and proceedings therefor.**

A judgment rendered on a complaint informing the court of the violation of an injunction held not appealable under Rev. St. 1899, § 2696.—*State ex rel. Chicago, B. & Q. R. Co. v. Bland* (Mo. Sup.) 28; *State ex rel. Chicago & A. Ry. Co. v. Same, Id.*

Under Rev. St. 1899, §§ 1616-1620, an order adjudging defendants in an injunction suit guilty of contempt for violation of injunction held appealable under section 806.—*State ex rel. Chicago, B. & Q. R. Co. v. Bland* (Mo. Sup.) 28; *State ex rel. Chicago & A. Ry. Co. v. Same, Id.*

CONTEST.

Of election, see "Elections," § 3.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 14.

Refusal of the court to set aside the swearing of the jury and to continue the case, because of the presence of witnesses whose depositions had been withdrawn to avoid a continuance, held not error.—*Craft v. Barron* (Ky.) 1099.

The verification to an affidavit for continuance by the attorney of the party, stating that the matters set forth are, to the best of his knowledge, information, and belief, true, is insufficient.—*St. Louis Southwestern Ry. Co. of Texas v. Harkey* (Tex. Civ. App.) 506.

In action on liquor dealer's bond an application for a continuance because of the absence of witnesses held properly overruled, the desired evidence being immaterial.—*Brewster v. State* (Tex. Civ. App.) 858.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Alteration, see "Alteration of Instruments."

Assignment, see "Assignments."

Cancellation, see "Cancellation of Instruments."

Damages for breach, see "Damages," §§ 1, 2, 3, 5.

Election of remedies on breach of contract, see "Election of Remedies."

Impairing obligation, see "Constitutional Law," § 2.

Parol or extrinsic evidence, see "Evidence," § 8.

Reformation, see "Reformation of Instruments."

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

Testimony as to transactions with decedents, see "Witnesses," § 1.

Contracts of particular classes of parties.

See "Brokers," § 1; "Building and Loan Associations"; "Carriers," §§ 1, 2, 4; "Corpo-

rations," § 4; "Counties," § 2; "Master and Servant"; "Railroads," § 1; "States," § 1.

Contracts relating to particular subjects.

See "Interest"; "Railroads," § 2.

Sale of timber, see "Logs and Logging."

Transportation of goods, see "Carriers," § 1.

Transportation of live stock, see "Carriers," § 2.

Transportation of passengers, see "Carriers," § 4.

Particular classes of express contracts.

See "Bailment"; "Bills and Notes"; "Bonds";

"Covenants"; "Deeds," § 1; "Guaranty";

"Indemnity"; "Insurance"; "Joint Ad-

ventures"; "Partnership"; "Sales."

Affreightment, see "Shipping," § 1.

Agency, see "Principal and Agent."

Bills of lading, see "Carriers," § 1.

Employment, see "Brokers," § 1; "Master and

Servant."

Leases, see "Landlord and Tenant."

Limitation of liability of carrier, see "Car-

riers," § 1, 2.

Mutual benefit insurance, see "Insurance," § 8.

Sales of realty, see "Vendor and Purchaser."

Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

Implied warranty, see "Sales," § 5.

Particular modes of discharging contracts.

See "Accord and Satisfaction"; "Payment"; "Release."

§ 1. Construction and operation.

A contract with a newspaper company held to terminate on its going out of business.—*For v. Commercial Press Co.* (Ky.) 1063.

A contract construed, and held to require a purchaser of lumber to pay the pay rolls of the seller, not to exceed a certain amount.—*Nicola Bros. Co. v. Hurst* (Ky.) 1081.

Where the terms of a contract are definitely known, and the inference to be drawn therefrom is indisputable, the interpretation of the contract is for the court.—*Young v. Van Natta* (Mo. App.) 123.

For the purpose of discovering intention of parties to a contract, the court must view the situation of the parties and their surroundings.—*Hardwick v. American Can Co.* (Tenn.) 797.

§ 2. Modification and merger.

A carrier's liability for breach of an oral contract to furnish cars held not avoided by a subsequent written contract.—*Gulf, C. & S. F. Ry. Co. v. House & Watkins* (Tex. Civ. App.) 1110.

§ 3. Actions for breach.

In action against railroad for breach of contract in failing to reconstruct fences after laying out a right of way, an instruction held erroneous, as authorizing a recovery beyond the terms of the contract.—*White River R. Co. v. Hamilton* (Ark.) 978.

An instruction held erroneous, as authorizing a recovery for a tort in tearing down fences, when a breach of contract was counted on.—*White River R. Co. v. Hamilton* (Ark.) 978.

Where defendant signed an original contract for the purchase of goods sued on, it was immaterial that a purported duplicate of the contract offered in evidence was not the same as the original.—*Standard Mfg. Co. v. Hudson* (Mo. App.) 137.

On an issue of non est factum the burden of proof is on defendant to show by a preponderance of the evidence that he did not execute the contract sued on.—*Standard Mfg. Co. v. Hudson* (Mo. App.) 137.

* Point annotated. See syllabus.

CONTRADICTION.

Of record, see "Appeal and Error," § 11.
Of witness, see "Witnesses," § 3.

CONTRIBUTION.

Between co-tenants as to purchase price of outstanding incumbrance, see "Tenancy in Common," § 2.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 3.
Of passenger, see "Carriers," § 7.
Of person injured by defect in street, see "Municipal Corporations," § 8.
Of person injured by operation of railroad, see "Railroads," §§ 5-7.
Of person injured by operation of street railroad, see "Street Railroads," § 2.
Of servant, see "Master and Servant," §§ 8, 9.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Conveyances by or to particular classes of parties.

See "Executors and Administrators," § 3;
"Husband and Wife," § 2; "Insane Persons," § 1.

Agent, see "Principal and Agent," § 2.
Sheriffs, see "Execution," § 4.

Conveyances of particular species of property.

See "Homestead," § 2; "Public Lands," § 1.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CONVICTS.

Escape of, see "Rescue."

Validity of statute relating to commutation of sentence, see "Constitutional Law," § 1.

CORPORATIONS.

Action by foreign corporation on foreign judgment, see "Judgment," § 10.

Commission company as agent, see "Principal and Agent," § 2.

Quo warranto, see "Quo Warranto."

Wrongful conversion of shares of stock, see "Trove and Conversion," § 2.

Particular classes of corporations.

See "Building and Loan Associations"; "Hospitals"; "Municipal Corporations"; "Railroads"; "Street Railroads."

Insurance companies, see "Insurance."

Telegraph companies, see "Telegraphs and Telephones."

§ 1. Incorporation and organization.

Where two corporations, created under the laws of different states, attempted to consolidate without legislative authority, the attempt was a nullity, and did not create a de facto

corporation.—*Whaley v. Bankers' Union of the World* (Tex. Civ. App.) 259.

§ 2. Corporate existence and franchise.

Persons whose claims arise out of transactions with a company as a corporation are estopped to assert the invalidity of a deed of trust given by it to others, on the ground that it was not properly organized as a corporation.—*Hasbrouck v. Rich* (Mo. App.) 131.

§ 3. Capital, stock, and dividends.

Transaction by which a trust company acquired corporate stock for a foreign railroad held not invalidated as between the trust company and the vendors of the stock by reason of any inability on the part of the railroad to enter into the contract.—*Newman v. Mercantile Trust Co.* (Mo. Sup.) 6.

Transaction by which a railroad, acting through a trust company, procured a majority of the stock of a ferry company, held not fraudulent.—*Newman v. Mercantile Trust Co.* (Mo. Sup.) 6.

Sale of stock in corporation held complete and sufficient to pass title.—*Newman v. Mercantile Trust Co.* (Mo. Sup.) 6.

§ 4. Corporate powers and liabilities.

In an action against a corporation, a finding that the corporation had appeared held proper.—*Shorter University v. Franklin Bros.* (Ark.) 974.

A deed of trust is not made void by a provision that foreclosure shall not be had till a certain portion of the holders of the bonds secured so request.—*Hasbrouck v. Rich* (Mo. App.) 131.

In an action for breach of a carrier's contract to furnish cars for the shipment of cattle, evidence held admissible to show that the contract made by the agent of one of the carriers to furnish cars at a particular point was within the scope of his authority.—*Pecos River R. Co. v. Latham* (Tex. Civ. App.) 392.

§ 5. Consolidation.

Corporations created in different states can consolidate only by concurrent legislation, in which event there is a separate and distinct corporation in each state.—*Whaley v. Bankers' Union of the World* (Tex. Civ. App.) 259.

§ 6. Foreign corporations.

The prosecution of a suit by a foreign corporation held not to constitute "doing business" within the state, within Act Feb. 16, 1899, p. 18, c. 19.—*Alley v. Bowen-Merrill Co.* (Ark.) 833.

Under Rev. St. 1895, arts. 1230, 1233, service of the notice upon a nonresident defendant corporation held not to authorize a personal judgment, although petition alleged that the corporation did business in this state.—*Louisville & N. R. Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 413.

Foreign corporation must allege and prove that it had a permit to do business in the state.—*St. Louis Expanded Metal Fireproofing Co. v. Beilharz* (Tex. Civ. App.) 512.

Foreign corporation which furnishes labor and material for construction work in the state pursuant to contract made therein held engaged in business within Rev. St. 1895, art. 745, and not engaged in interstate commerce.—*St. Louis Expanded Metal Fireproofing Co. v. Beilharz* (Tex. Civ. App.) 512.

Change in name of foreign corporation held not to affect the validity of a permit to do business in the state.—*St. Louis Expanded Metal Fireproofing Co. v. Beilharz* (Tex. Civ. App.) 512.

* Point annotated. See syllabus.

Under Rev. St. 1895, arts. 749, 5243, as amended by Laws 1897, p. 168, c. 120, certificate of Secretary of State that foreign corporation has forfeited its permit for nonpayment of taxes *held* not evidence of such forfeiture.—*St. Louis Expanded Metal Fireproofing Co. v. Beilharz* (Tex. Civ. App.) 512.

CORRECTION.

Of record on appeal or writ of error, see "Appeal and Error," § 10.

CORROBORATION.

In action for rape, see "Rape," § 3.

Of wife in suit for divorce, see "Divorce," § 2.

COSTS.

In action by or against trustee in bankruptcy, see "Bankruptcy," § 2.

In action for partition, see "Partition," § 1.

§ 1. Nature, grounds, and extent of right in general.

Plaintiff *held* not entitled to object for the first time on motion to retax costs to a tender made by defendant.—*Thompson v. Baxter* (Ark.) 985.

§ 2. On appeal or error, and on new trial or motion therefor.

Where the motion for new trial assigned as ground that the damages were excessive, and the instruction was to find a specified sum, with interest from certain dates, the plaintiff cannot avoid the costs of the appeal because specific objection was not made in the trial court.—*Missouri Pac. Ry. Co. v. Kansas City & I. Air Line Co.* (Mo. Sup.) 3.

A party appealing from a judgment erroneous on account of a miscalculation *held* not entitled to costs.—*Sweet v. Lyon* (Tex. Civ. App.) 384.

CO-TENANCY.

See "Tenancy in Common."

COUNCIL.

See "Municipal Corporations," § 4.

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTERFEITING.

See "Forgery."

COUNTERMAND.

Of order of goods bought, see "Sales," § 3.

COUNTIES.

Proof of agency for, see "Principal and Agent," § 2.

§ 1. Government and officers.

Under Sayles' Rev. Civ. St. 1897, art. 797, *held* that an agent of a county for the erection of a county building, etc., must have been authorized by the county commissioners acting as a body.—*Jackson-Foxworth Lumber Co. v. Hutchinson County* (Tex. Civ. App.) 412.

Under Sayles' Rev. Civ. St. 1897, art. 797, *held* that the authority of an agent for a county for the erection of a county building, etc., may be shown by parol.—*Jackson-Foxworth Lumber Co. v. Hutchinson County* (Tex. Civ. App.) 412.

§ 2. Property, contracts, and liabilities.

A contract, made by the county court, providing for payment of fees to an attorney "in consideration of services rendered and to be rendered," is totally void both as to the county and the attorney, under Rev. St. 1899, § 6759.—*Morrow v. Pike County* (Mo. Sup.) 99.

A contract made by the county court for the employment of an attorney not evidenced by any record entry is void.—*Morrow v. Pike County* (Mo. Sup.) 99.

Record entry of contract between county court and an attorney for the employment of the latter in a certain case *held* sufficient to satisfy Rev. St. 1899, §§ 6759, 6760.—*Morrow v. Pike County* (Mo. Sup.) 99.

As the commissioners' court of a county has no power to contract to pay the cost of publication of a notice to nonresident taxpayers, it cannot ratify such a contract when made by the county attorney.—*Baldwin v. Travis County* (Tex. Civ. App.) 480.

In an action against a county on a contract alleged to have been made with the county attorney, and ratified by the commissioners' court, but which was such that the commissioners' court had no power to make it, the county could not be estopped from setting up this defense.—*Baldwin v. Travis County* (Tex. Civ. App.) 480.

Gen. Laws 25th Leg. p. 138, c. 103 (Delinquent Tax Act) § 15, *held* to give counties no power to contract to pay the expense of publication of notice to nonresident delinquent taxpayers.—*Baldwin v. Travis County* (Tex. Civ. App.) 480.

§ 3. Fiscal management, public debt, securities, and taxation.

Attorney, employed to protect county school fund provided for by Rev. St. 1899, § 9824, should be paid out of the fund and not from the general county revenue.—*Morrow v. Pike County* (Mo. Sup.) 99.

In an action on a county warrant by the assignee thereof, in order to entitle him to recover interest from the time of presentment of the warrant and refusal of payment, the burden was on plaintiff to show that he had complied with all the requirements of law.—*Isenhour v. Barton County* (Mo. Sup.) 759; *Fink v. Barton County* (Mo. Sup.) 765.

Under Rev. St. 1899, §§ 3705, 6771, 6798, 6799, 6808, *held*, that interest did not run on an assigned county warrant from time of its presentment and rejection for lack of funds.—*Isenhour v. Barton County* (Mo. Sup.) 759; *Fink v. Barton County* (Mo. Sup.) 765.

Under Rev. St. 1899, § 3705, interest at 6 per cent. *held* to run on a county warrant which calls for no rate of interest, after presentment and failure to pay for lack of money in the treasury.—*Isenhour v. Barton County* (Mo. Sup.) 759; *Fink v. Barton County* (Mo. Sup.) 765.

§ 4. Actions.

Where a contract for the employment of an attorney provides for the payment of the attorney out of a certain fund, a judgment in the attorney's favor on the contract should provide for its satisfaction out of that fund.—*Morrow v. Pike County* (Mo. Sup.) 99.

* Point annotated. See syllabus.

COUNTY COURTS.

Condemnation proceedings, see "Eminent Domain," § 2.

COURTS.

Attendance on, by nonresident, exemption from service of process, see "Process," § 2.

Clerks, see "Clerks of Courts."

Contempt of court, see "Contempt."

Indian courts, see "Indians."

Judges, see "Judges."

Judicial power, see "Constitutional Law," § 1.

Justices' courts, see "Justices of the Peace."

Mandamus to inferior courts, see "Mandamus," § 1.

Province of court and jury, see "Trial," § 5.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

Right to trial by jury, see "Jury," § 1.

Special or local laws, see "Statutes," § 2.

Jurisdiction of particular actions, proceedings, or subjects.

See "Criminal Law," § 3; "Divorce," § 2;

"Partition," § 1; "Quo Warranto," § 1.

Action against carrier, see "Carriers," § 1.

Condemnation proceedings, see "Eminent Domain," § 2.

Sale of school lands, see "Public Lands," § 2.

To compel excise commissioner to make and certify record, see "Certiorari," § 2.

§ 1. Establishment, organization, and procedure in general.

The decision of the Supreme Court of the United States, construing a state statute as in conflict with the interstate commerce act, is conclusive.—*Spratlin v. St. Louis Southwestern Ry. Co. (Ark.) 836.*

An act creating a criminal court for a county is not void, because it imposes special duties on the sheriff and clerk of the court and incidental expenses of the county.—*State v. Etchman (Mo. Sup.) 643.*

Ruling of Supreme Court that a certain contract is not in violation of the anti-trust act of 1903 (Laws 1903, p. 119, c. 94) held conclusive that the contract is not in violation of the act of 1899 (Laws 1899, p. 246, c. 146).—*Ft. Worth & D. C. Ry. Co. v. State (Tex. Civ. App.) 370.*

§ 2. Courts of general original jurisdiction.

A petition held not to show a cause of action within jurisdiction of the district court.—*Moore v. Snell (Tex. Civ. App.) 270.*

A deduction by the purchaser of cattle of \$100 from the price for injuries in transit, with interest, held the measure of the seller's damages, and that the suit was therefore not within the jurisdiction of the county court.—*Atchison, T. & S. F. Ry. Co. v. Waddell Bros. (Tex. Civ. App.) 390.*

§ 3. Courts of limited or inferior jurisdiction.

In a suit by a carrier to enforce the lien given by Rev. St. 1895, arts. 327, 328, 330, the value of the property on which the lien is claimed, and not the amount of the freight charges, determines the jurisdiction of the trial court.—*Texas & N. O. R. Co. v. Rucker (Tex. Civ. App.) 815.*

Where petition by carrier seeks the recovery of property on which freight charges are due, the value of the property determines the jurisdiction of the court.—*Texas & N. O. R. Co. v. Rucker (Tex. Civ. App.) 815.*

§ 4. Courts of appellate jurisdiction.

Under Const. art. 7, §§ 14, 4, and the provision requiring appeals from the probate court to be taken to the circuit court and from thence to the Supreme Court, the latter court held to have no jurisdiction to issue a writ of mandamus directing a probate court to enter a nunc pro tunc order granting an appeal to the circuit court.—*Featherstone v. Folbre (Ark.) 554.*

The office of school director is an office within Const. art. 6, § 12, conferring exclusive appellate jurisdiction on the Supreme Court in cases involving the title to an office under this state.—*State ex inf. Sutton v. Fasse (Mo. Sup.) 1.*

An appeal raising a constitutional question not decided when appeal was taken held to be retained by the Supreme Court.—*Boling v. St. Louis & S. F. R. Co. (Mo. Sup.) 35.*

Under Const. art. 5, § 6, and Sayles' Ann. Civ. St. 1897, art. 997, courts of civil appeals held to have no power to issue writ of prohibition when not sought in aid of appellate jurisdiction.—*Dunn v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 532.*

§ 5. Concurrent and conflicting jurisdiction, and comity.

Consideration of a petition for the appointment of a receiver for a corporation by judge held an assumption of jurisdiction over the corporation's property, precluding a subsequent attachment from operating as a lien thereon.—*Worden v. Pruter (Tex. Civ. App.) 434.*

COVENANTS.

§ 1. Construction and operation.

*Covenantee in covenant against incumbrances held entitled to sue for a breach, although he had knowledge of such breach.—*Brown v. Taylor (Tenn.) 933.*

§ 2. Actions for breach.

*Covenantee in broken covenant against incumbrances held not entitled to recover as damages certain counsel fees.—*Brown v. Taylor (Tenn.) 933.*

Recovery of certain special damages for breach of covenant against incumbrances denied.—*Brown v. Taylor (Tenn.) 933.*

*Measure of covenantee's damages for breach of covenant against incumbrances stated.—*Brown v. Taylor (Tenn.) 933.*

Vendee held entitled to recover from the vendor the value of the land to which title failed, and costs of suit.—*McBride v. Burns (Tex. Civ. App.) 394.*

COVERTURE.

See "Husband and Wife,"

CREDIBILITY.

Of witness, see "Witnesses," § 3.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

Remedies against surety, see "Principal and Surety," § 4.

Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of assignments, see "Assignments for Benefit of Creditors," § 1.

* Point annotated. See syllabus.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CRIMINAL LAW.

Ball, see "Ball," § 1.
Competency of jurors, see "Jury," § 3.
Competency of witnesses, see "Witnesses," § 1.
Conviction of offense included in that charged, see "Indictment and Information," § 4.
Credibility, impeachment, contradiction and corroboration of witnesses, see "Witnesses," § 3.
Indictment, information, or complaint, see "Indictment and Information."
Leading questions, see "Witnesses," § 2.
Requisites and validity in general of work-house law, see "Statutes," § 1.
Statute authorizing commutation of sentence as invasion of pardoning power, see "Constitutional Law," § 1.
Summoning and attendance of jurors, see "Jury," § 2.
Termination of prosecution, see "Malicious Prosecution," § 2.

Particular offenses.

See "Arson"; "Assault and Battery," § 2;
"Breach of the Peace"; "Burglary"; "Contempt"; "False Pretenses"; "Forgery"; "Homicide"; "Intoxicating Liquors," § 4;
"Larceny"; "Lotteries," § 1; "Perjury"; "Rape"; "Rescue"; "Robbery"; "Seduction," § 1.
Against liquor laws, see "Intoxicating Liquors," § 3.
Violations of municipal ordinances, see "Municipal Corporations," § 6.

§ 1. Capacity to commit and responsibility for crime.

*Voluntary drunkenness, though producing temporary mental aberration, is no excuse for crime.—Byrd v. State (Ark.) 974.

§ 2. Parties to offenses.

A person *held* not an accomplice in an assault.—Mahaney v. State (Tex. Cr. App.) 223.

§ 3. Jurisdiction.

Where, in a prosecution before a justice of the peace, defendant is charged merely with the offense of carrying a pistol, the fact that he carried it at a public assembly did not alter the nature of the charge so as to deprive the justice of jurisdiction.—Trevino v. State (Tex. Cr. App.) 356.

§ 4. Venue.

Failure to comply with a rule of the circuit court relative to change of venue in criminal case *held* not sufficient reason for refusing a change of venue.—Maxey v. State (Ark.) 1009.

*In a criminal case, the action of the court in overruling a motion for change of venue *held* not arbitrary.—Maxey v. State (Ark.) 1009.

On an application for a change of venue for prejudice of the inhabitants, witnesses *held* properly permitted to withdraw their affidavits.—Williams v. United States (Ind. T.) 334.

§ 5. Former jeopardy.

Suspension of prosecution for seduction on marriage of female by accused, and subsequent trial after desertion of female by accused, *held* not to put accused twice in jeopardy of his liberty.—Burnett v. State (Ark.) 956.

§ 6. Evidence — Judicial notice, presumptions, and burden of proof.

State *held* not bound to show in rebuttal of plea of former jeopardy, based on account of suspension of prosecution for seduction, that

defendant consented to such suspension, but his consent would be presumed.—Burnett v. State (Ark.) 956.

The court has no judicial knowledge as to when local option laws are put into operation.—Craddick v. State (Tex. Cr. App.) 347.

In a prosecution for theft from the person, certain evidence *held* properly excluded.—Nelson v. State (Tex. Cr. App.) 807.

§ 7. — Facts in issue and relevant to issues, and res gestæ.

*In a criminal prosecution, evidence that on the day before the trial defendant had assaulted one of the witnesses for the prosecution *held* admissible.—Maxey v. State (Ark.) 1009.

In a prosecution for murder, evidence that immediately after the shooting the wife of deceased asked defendant why he shot deceased, and that defendant replied: "Don't come down here with your gun. I have got as much lead as anybody"—was admissible.—Long v. State (Tex. Cr. App.) 203.

In a prosecution for murder, refusal to permit accused to state the circumstances of his surrender *held* proper.—Upton v. State (Tex. Cr. App.) 212.

In a prosecution for murder *held* error to refuse to permit accused to show what his child stated to his wife in delivering a note from deceased.—Upton v. State (Tex. Cr. App.) 212.

On a trial for homicide *held* error to permit the state to show that defendant, while in jail awaiting trial, was studying law.—Cole v. State (Tex. Cr. App.) 341.

In a prosecution for murder, a certain statement made by deceased *held* admissible as res gestæ.—Franklin v. State (Tex. Cr. App.) 357.

In a prosecution for theft from the person, certain evidence *held* admissible as res gestæ.—Nelson v. State (Tex. Cr. App.) 807.

§ 8. — Other offenses, and character of accused.

In a prosecution for larceny, evidence of similar acts by defendant *held* admissible on question of intention.—Johnson v. State (Ark.) 905.

*Where defendant, in a prosecution for murder, does not place his general character for peace and quiet in issue, the state has no right to attack his character in that respect.—Newman v. Commonwealth (Ky.) 1069.

In homicide, testimony of a similar assault made by defendants earlier in the evening on a person situated as deceased was *held* competent.—State v. Bailey (Mo. Sup.) 733.

§ 9. — Admissions, declarations, and hearsay.

A defendant, on trial for murder, who did not object to the state's questions assuming that he killed decedent, *held* deemed not to have denied the killing.—Casteel v. State (Ark.) 1004.

*In a prosecution for murder, a statement made by a witness to defendant, to which the latter made no answer, was not admissible.—Newman v. Commonwealth (Ky.) 1069.

On a trial for homicide, evidence that decedent's wife had stated that decedent had threatened to kill defendant was hearsay.—Cole v. State (Tex. Cr. App.) 341.

On a trial of defendant for the murder of his father-in-law, evidence of what the wife stated defendant had told her during a quarrel *held* inadmissible.—Cole v. State (Tex. Cr. App.) 341.

In a prosecution for violation of the local option law, certain testimony *held* hearsay and

* Point annotated. See syllabus.

inadmissible.—Craddick v. State (Tex. Cr. App.) 347.

In a prosecution for theft, testimony as to an explanation made by defendant to deputy sheriff *held* incompetent under the circumstances.—Pool v. State (Tex. Cr. App.) 350.

In a prosecution for horse theft, certain testimony *held* hearsay and prejudicial to defendant.—Pool v. State (Tex. Cr. App.) 350.

In a prosecution for aggravated assault, certain evidence *held* inadmissible because of self-serving declaration.—Ellington v. State (Tex. Cr. App.) 361.

In a prosecution for swindling by means of fraudulent sale of property, certain evidence as to title to the property *held* hearsay.—Brown v. State (Tex. Cr. App.) 811.

§ 10. — Documentary evidence and exclusion of parol evidence thereby.

On a prosecution for murder, *held* proper to admit in evidence a diagram of the room where the killing occurred.—State v. Cummings (Mo. Sup.) 706.

§ 11. — Opinion evidence.

*In a prosecution for murder, witnesses who have detailed the acts of defendant may state whether they considered him insane.—Byrd v. State (Ark.) 974.

On a trial, under Cr. Code Prac. § 156, on the issue of the sanity of one indicted for crime, physicians *held* competent witnesses.—Commonwealth v. Woelfel (Ky.) 1061.

In a prosecution for horse theft, testimony as to witness' opinion on the question of identity *held* incompetent.—Pool v. State (Tex. Cr. App.) 350.

§ 12. — Confessions.

A confession made by an accused while laboring under the influence of threats which induced a prior confession to another person is inadmissible.—Johnson v. State (Tex. Cr. App.) 223.

§ 13. — Weight and sufficiency.

A case *held* not one of circumstantial evidence, in view of defendant's confession and the testimony of an accomplice.—McKinney v. State (Tex. Cr. App.) 1012.

§ 14. Time of trial and continuance.

Kirby's Dig. § 2044, relative to the suspension of a prosecution for seduction on the marriage of defendant to the female seduced, and its renewal in case of subsequent abandonment of such female, *held* not repugnant, as against a defendant who does not demand a trial notwithstanding the marriage, to the constitutional guaranty of a speedy trial.—Burnett v. State (Ark.) 956.

The overruling of a motion for a continuance for absence of a witness in a criminal case *held* not an abuse of discretion.—Williams v. United States (Ind. T.) 334.

*Applications for continuance for absence of witnesses *held* not to show sufficient diligence, within Cr. Code Prac. § 189, and Civ. Code Prac. § 315.—McQueen v. Commonwealth (Ky.) 1047.

*The refusal to allow an affidavit to be read as the testimony of an absent witness *held* not error.—McQueen v. Commonwealth (Ky.) 1047.

*Where affidavit for a continuance was read as the deposition of absent witness, *held* error to permit the commonwealth to prove that absent witness had been dead for a year.—Darrell v. Commonwealth (Ky.) 1060.

Where defendant forfeited his bail bond, it was error to force him to trial on the second

day after he was arrested on a bench warrant.—Baldridge v. Commonwealth (Ky.) 1076.

The refusal to grant a continuance in a criminal case or to read the affidavit therefor as the deposition of the absent witnesses *held* error.—Kehoe v. Commonwealth (Ky.) 1107.

The requisites of an application for a continuance in a criminal case stated.—State v. Cummings (Mo. Sup.) 706.

In a criminal case, *held*, under the facts, not an abuse of discretion to deny a continuance.—State v. Cummings (Mo. Sup.) 706.

The granting of a continuance rests largely in the discretion of the trial court in a criminal case.—State v. Cummings (Mo. Sup.) 706.

§ 15. Trial.

The inquiry on a trial under Cr. Code Prac. § 156 on the issue of the sanity of one indicted for crime, is whether he is sane enough to appreciate his situation and rationally conduct his case.—Commonwealth v. Woelfel (Ky.) 1061.

On a prosecution for the illegal sale of liquor, evidence of two distinct offenses committed on the same day *held* admissible.—Kehoe v. Commonwealth (Ky.) 1107.

Objections to testimony and exceptions to rulings must be made and saved, both in civil and criminal cases, at the time the testimony is given.—State v. Bailey (Mo. Sup.) 733.

Under Rev. St. 1899, § 2517, *held* not error to permit the state to examine certain witnesses whose names were not indorsed on the information.—State v. Bailey (Mo. Sup.) 733.

Where defendant rested his case in chief without being introduced as a witness, it was proper for the court to confine testimony afterwards given by him to the rebuttal of rebuttal testimony introduced by the state.—State v. Forsha (Mo. Sup.) 746.

A conviction will not be reversed because the verdict finds the accused guilty, and assesses his "punish" at confinement, etc.—Upton v. State (Tex. Cr. App.) 212.

Hearing of testimony after the state's counsel has finished his opening argument, and while defendant's counsel is addressing the jury, *held* a matter within the discretion of the court, under the provision of Code of Criminal Procedure.—Trevino v. State (Tex. Cr. App.) 356.

A verdict stating that the jury assesses defendant's punishment "to fine of \$300" is not vitiated by the use of the word "to" instead of "at a."—Ellington v. State (Tex. Cr. App.) 361.

In a criminal prosecution, proceeding with the trial, though the official stenographer was absent, *held* not error.—Nelson v. State (Tex. Cr. App.) 807.

§ 16. — Arguments and conduct of counsel.

In prosecutions for unlawfully selling intoxicating liquors, certain language used by prosecuting attorney in his closing arguments *held* not reversible error.—Reese v. State (Ark.) 841.

*Under the statute, providing that the failure of defendant in a criminal prosecution to testify in his own behalf shall not be commented upon, the prosecuting attorney has no right to refer to defendant's failure to testify as a witness upon an application for bail.—Newman v. Commonwealth (Ky.) 1089.

Argument of counsel for the state in a criminal case, in reference to testimony which was not objected to and which was not made the subject of a motion to strike, was not error.—State v. Cummings (Mo. Sup.) 706.

* Point annotated. See syllabus.

Statement of district attorney in argument relative to failure to put plaintiff's character in issue *held* proper.—*Moore v. State* (Tex. Cr. App.) 228.

On a prosecution for burglary, permitting district attorney in arguing to jury to refer to exclusion of evidence of conspiracy to burglarize *held* error.—*Tally v. State* (Tex. Cr. App.) 339.

Argument of counsel in a criminal case should be kept strictly within the testimony adduced upon the trial.—*Pool v. State* (Tex. Cr. App.) 350.

§ 17. — Instructions.

An instruction on a trial for homicide *held* properly refused, because invading the province of the jury.—*Ince v. State* (Ark.) 818.

On prosecution for homicide, objection to portion of charge as to eyewitnesses *held* hypercritical.—*State v. Heusack* (Mo. Sup.) 21.

In homicide, instructions specially singling out the testimony of certain person who accompanied defendant on the occasion of the killing *held* properly refused.—*State v. Bailey* (Mo. Sup.) 733.

In a prosecution for homicide, defendant *held* entitled to a charge that proof of his good character should be considered in weighing his credibility.—*Phelan v. State* (Tenn.) 1040.

In a prosecution for homicide, refusal to charge as to the weight to be given to evidence of an undenied accusation of defendant by his daughter immediately after the killing *held* prejudicial error.—*Phelan v. State* (Tenn.) 1040.

In a prosecution for homicide, an instruction that, if defendant denied an accusation made by his daughter immediately after the killing, such accusation could not be considered for any purpose, *held* properly refused.—*Phelan v. State* (Tenn.) 1040.

In a prosecution for homicide, refusal of a request submitting to the jury whether a denial of an accusation made by defendant's daughter was required *held* error.—*Phelan v. State* (Tenn.) 1040.

On prosecution for homicide, charge on self-defense *held* erroneous under express provisions of statute prohibiting court from giving a charge on the weight of testimony.—*Craig v. State* (Tex. Cr. App.) 208.

Where, in a criminal case, the court charged correctly, special charges, in so far as they announced the same principles, were not called for.—*Tones v. State* (Tex. Cr. App.) 217.

Where dying declarations of deceased were made while under the influence of opiates, the court should have guarded the matter by an appropriate instruction.—*Roberts v. State* (Tex. Cr. App.) 221.

Court *held* required under the evidence to charge that if accused's confession was not voluntary it must be disregarded.—*Johnson v. State* (Tex. Cr. App.) 223.

In a prosecution for murder, a charge that, if the jury believed that after defendant justifiably fired the first shot deceased ran and defendant pursued and killed him, though he did not believe himself then in danger, defendant was guilty, was not on the weight of evidence in assuming that deceased fled.—*Coleman v. State* (Tex. Cr. App.) 238.

On prosecution for crime, charge as to effect of evidence of defendant's intoxication *held* erroneous, as in violation of statute prohibiting charges on weight of testimony.—*Tally v. State* (Tex. Cr. App.) 339.

In a prosecution for seduction, an instruction *held* on the weight of the testimony.—*Garlas v. State* (Tex. Cr. App.) 345.

Where one of defendant's witnesses testified on cross-examination that he had been indicted for murder and tried for hog theft, it was not error to fail to limit the evidence by instruction.—*Franklin v. State* (Tex. Cr. App.) 357.

Where evidence is introduced to contradict a witness, it is proper to instruct that it can be considered only for that purpose.—*Franklin v. State* (Tex. Cr. App.) 357.

A charge as to corroboration of accomplice testimony, though not following White's Ann. Code Cr. Proc. art. 781, *held* not erroneous.—*McKinney v. State* (Tex. Cr. App.) 1012.

A charge as to confession *held* in proper form.—*McKinney v. State* (Tex. Cr. App.) 1012.

§ 18. — Custody, conduct, and deliberations of jury.

The refusal to set aside a conviction on the ground of separation of the jury *held* not error.—*Ince v. State* (Ark.) 818.

The burden of proving that a juror, separating from the jury, was not exposed to improper influence, *held* not on the state.—*Ince v. State* (Ark.) 818.

The court *held* not to have abused its discretion in sending the jury out while accused's counsel was arguing the questions of law to the court.—*Upton v. State* (Tex. Cr. App.) 212.

An instruction *held* proper, under White's Ann. Code Cr. Proc. art. 734, where the jury after retirement asked to have a witness' testimony read to them (art. 735).—*McKinney v. State* (Tex. Cr. App.) 1012.

§ 19. Motions for new trial and in arrest.

An application for a new trial for newly discovered evidence *held* properly denied.—*Williams v. United States* (Ind. T.) 334.

In a criminal case, the court *held* warranted in refusing to consider affidavits for a new trial.—*State v. Cummings* (Mo. Sup.) 706.

New trials are not ordinarily granted for newly discovered evidence of an impeaching character.—*Hilscher v. State* (Tex. Cr. App.) 227.

In a prosecution for theft from the person, the overruling of defendant's motion for a new trial on the ground of newly discovered evidence *held* not error.—*Hilscher v. State* (Tex. Cr. App.) 227.

In a criminal case *held* that on the calling of the case for trial the court under the circumstances should have given accused an opportunity to employ other counsel or to have procured his witnesses.—*Jackson v. State* (Tex. Cr. App.) 239.

In a criminal case *held* that a motion for a new trial should have been granted.—*Jackson v. State* (Tex. Cr. App.) 239.

In a criminal case, certain evidence relied on as newly discovered *held* not to have been shown to be such.—*Sexton v. State* (Tex. Cr. App.) 348.

In a criminal case, certain evidence *held* no ground for a new trial on the ground of newly discovered evidence.—*Sexton v. State* (Tex. Cr. App.) 348.

In prosecution for bringing stolen horses into the state, new trial should have been granted on the ground of the absence of a certain witness.—*Long v. State* (Tex. Cr. App.) 809.

* Point annotated. See syllabus.

§ 20. Judgment, sentence, and final commitment.

Sufficient grounds for believing that defendant was insane at time of trial or sentence *held* shown, so as to require an inquiry, as provided by Kirby's Dig. § 2440.—*Ince v. State* (Ark.) 818.

Under Kirby's Dig. § 2440, a verdict of guilty, notwithstanding the defense of insanity, *held* not a bar to a plea of insanity at time of trial or sentence.—*Ince v. State* (Ark.) 818.

A motion in arrest of judgment, on conviction of crime, on the ground of present insanity of defendant, should be treated as a motion to stay sentence.—*Ince v. State* (Ark.) 818.

§ 21. Appeal and error, and certiorari—Form of remedy, jurisdiction, and right of review.

Circuit court *held* to have jurisdiction of an appeal from a conviction before a justice of the peace for violation of Kirby's Dig. § 1680.—*Maxey v. State* (Ark.) 1009.

§ 22. — Presentation and reservation in lower court of grounds of review.

Where there was no exception to an instruction, nor any assignment of error based thereon in the motion for a new trial, the instruction is not reviewable.—*Corothers v. State* (Ark.) 585.

An exception to the admission of evidence on a trial for crime, not brought forward in the motion for a new trial, will not be considered on appeal.—*Ince v. State* (Ark.) 818.

*On appeal in a criminal case, an objection to evidence which was not excepted to in the trial court will not be considered.—*Maxey v. State* (Ark.) 1009.

*A general exception to evidence is insufficient to raise the question of error in its admission.—*Maxey v. State* (Ark.) 1009.

An objection to an omission of the court to charge particular propositions in a criminal case will not be reviewed where no exceptions were served or requests made to give such instructions.—*Williams v. United States* (Ind. T.) 334.

Objections not made at the trial, nor included in the grounds for a new trial, but first appearing in the assignments of error, will not be considered on appeal.—*Williams v. United States* (Ind. T.) 334.

An objection to the sufficiency of the indictment cannot be raised for the first time on appeal.—*Baldrige v. Commonwealth* (Ky.) 1076.

Where a verdict finding defendant guilty of aiding and assisting in establishing a "policy" was fatally defective, defendant *held* entitled to object thereto on appeal, without raising the objection by motion in arrest.—*State v. Cronin* (Mo. Sup.) 604.

Objection cannot be made to the testimony of witnesses for the first time on appeal.—*State v. Cummings* (Mo. Sup.) 706.

An objection after the close of the examination of a juror, "challenged for cause," is insufficient to preserve for appellate review any error in overruling the challenge.—*State v. Forsha* (Mo. Sup.) 746.

Objections and exceptions to testimony must be made at the time the testimony is given, in order to preserve for appellate review any error in admitting the same.—*State v. Forsha* (Mo. Sup.) 746.

§ 23. — Proceedings for transfer of cause, and effect thereof.

Under Act 27th Legislature (Gen. Laws 1901,

p. 291, c. 124), an appeal bond in criminal case *held* sufficient.—*Holland v. State* (Tex. Cr. App.) 361.

§ 24. — Record and proceedings not in record.

The overruling of a motion for a new trial in a criminal case cannot be reviewed in the absence of a bill of exceptions filed within the term; there being no extension of time for filing the same.—*State v. Miller* (Mo. Sup.) 607.

In determining, on appeal in a criminal case, the propriety of denying a continuance, affidavits filed subsequent to the trial cannot be looked to.—*State v. Cummings* (Mo. Sup.) 706.

An unsigned bill of exceptions cannot be considered.—*Long v. State* (Tex. Cr. App.) 203.

In a prosecution for murder, exclusion of certain testimony will not be reviewed where the object of the testimony was not stated in the bill of exceptions.—*Upton v. State* (Tex. Cr. App.) 212.

A bill of exceptions *held* too indefinite to be considered, because it was difficult to determine whether defendant was objecting to the courts' refusal to retire the jury, or the admission of the evidence.—*Hall v. State* (Tex. Cr. App.) 244.

Where the court adjourned on April 30th, and the statement of facts was not filed until August 30th, it cannot be considered, in the absence of any reason assigned for the delay.—*Hall v. State* (Tex. Cr. App.) 244.

The refusal of a continuance will not be reviewed in the absence of a statement of facts.—*Hall v. State* (Tex. Cr. App.) 244.

A bill of exceptions *held* to raise no question for review.—*Reyes v. State* (Tex. Cr. App.) 245.

Where the district judge appends a qualifying explanation to a bill of exceptions, appellant cannot accept the bill with the explanation and then procure the appellate court to strike out the explanation.—*Pool v. State* (Tex. Cr. App.) 350.

The sufficiency of the evidence to support conviction cannot be reviewed where the record contains no statement of facts.—*Lockhart v. State* (Tex. Cr. App.) 350.

Under Code Cr. Proc. § 1895, art. 723, a record without bill of exceptions or statement of facts *held* insufficient to show prejudicial error in instructions.—*Ruiz v. State* (Tex. Cr. App.) 808.

§ 25. — Dismissal, hearing, and rehearing.

A motion to dismiss an appeal in a criminal case because no affidavit for an appeal had been filed, not filed until submission of the case on its merits, *held* too late.—*State v. Miller* (Mo. Sup.) 607.

§ 26. — Review.

The court in controlling the cross-examination of accused is vested with discretionary power.—*Corothers v. State* (Ark.) 585.

Under the record on appeal in a prosecution for murder, *held*; that it was presumable that a juror was peremptorily challenged before he was sworn in chief.—*Daniels v. State* (Ark.) 844.

All presumptions are in favor of the trial court's rulings and to call for reversal an affirmative showing of error is required, not a mere showing that under some circumstances there might have been error.—*Johnson v. State* (Ark.) 905.

* Point annotated. See syllabus.

In a prosecution for larceny, error in admitting certain evidence *held* not shown by record.—*Johnson v. State* (Ark.) 905.

Where the record in a criminal case disclosed that the jury were placed in charge of a "sworn bailiff," it would be presumed after verdict that the bailiff was "duly sworn."—*Williams v. United States* (Ind. T.) 334.

The Supreme Court, on appeal in a criminal case, will review only such errors as were admitted and properly preserved by the record.—*State v. Cummings* (Mo. Sup.) 706.

When an appellant assumes to point out specifically grounds of objection to a charge, it will be presumed that he has no others to urge.—*Coleman v. State* (Tex. Cr. App.) 238.

In the absence of a showing to the contrary, it will be presumed, on a criminal appeal, that an application for a continuance, the overruling of which is complained of, was a second application.—*Sliger v. State* (Tex. Cr. App.) 243.

§ 27. — Harmless error.

On a trial for homicide, a verdict of guilty set aside in view of the evidence and conditional verdict originally rendered.—*Ince v. State* (Ark.) 818.

The remarks of the court, on refusing to receive the jury's verdict in a homicide case and directing them to retire, *held* not reversible error.—*Ince v. State* (Ark.) 818.

Where, on defendant's objection to certain evidence, the jury are instructed that it is incompetent, it will not be considered on appeal.—*Johnson v. State* (Ark.) 905.

Argument of prosecuting attorney as to effect of certain impeaching testimony *held* improper and prejudicial.—*Hinson v. State* (Ark.) 947.

Where the record raises a presumption of consent by accused to a suspension of a former prosecution, parol proof by the state of accused's express consent to such suspension is immaterial and harmless.—*Burnett v. State* (Ark.) 956.

In a prosecution for murder, argument of the prosecuting attorney *held* not cause for reversal.—*Byrd v. State* (Ark.) 974.

On a trial for murder, the error in excluding evidence contradicting the testimony of a witness *held* not prejudicial.—*Casteel v. State* (Ark.) 1004.

*The admission of incompetent evidence over objection is harmless, where the same facts are shown by other evidence not objected to.—*Maxe v. State* (Ark.) 1009.

In a prosecution for the violation of Kirby's Dig. § 1680, making it a crime to furnish a prisoner with means to escape, evidence that the prisoner assisted was tried and acquitted *held* irrelevant but nonprejudicial.—*Maxe v. State* (Ark.) 1009.

In a criminal prosecution, remarks of prosecuting attorney merely drawing inferences from testimony before the jury are not prejudicial.—*Maxe v. State* (Ark.) 1009.

*The error in permitting the wife of the accused to testify on a trial, under Cr. Code Prac. § 156, to determine his sanity, *held* harmless.—*Commonwealth v. Woelfel* (Ky.) 1061.

It is reversible error, on a trial for crime, to fail to instruct on the whole law governing the case.—*French v. Commonwealth* (Ky.) 1070.

A person indicted for murder in the first degree and convicted of a lesser degree cannot complain of an instruction on murder in the first degree.—*State v. Craig* (Mo. Sup.) 641.

* Point annotated. See syllabus.

On a prosecution for the murder of defendant's husband, testimony of a police officer as to the business in which deceased was engaged at the time witness first knew him, and the character and nature of the business, though immaterial, was not reversible error.—*State v. Cummings* (Mo. Sup.) 706.

On a prosecution for arson, *held*, that there was no prejudicial error in an instruction calling for a conviction, if the crime was committed within three years prior to the date when the amended information was filed.—*State v. Hunt* (Mo. Sup.) 719.

In homicide, the admission in evidence of a vile epithet applied by defendant after the killing to nonunion hack drivers, to which class deceased belonged, was not ground for reversal.—*State v. Bailey* (Mo. Sup.) 733.

Under Code Cr. Proc. arts. 817, 821, instructions to jurors in a murder case not to make affidavits as to their misconduct, if any, *held* not prejudicial to defendant.—*Long v. State* (Tex. Cr. App.) 203.

Showing made on motion for new trial in a prosecution for murder *held* not to indicate that defendant was prejudiced by statements made in the jury room as to how a former jury had stood.—*Long v. State* (Tex. Cr. App.) 203.

In a prosecution for robbery, the admission of certain evidence, if erroneous, *held* not reversible error.—*Tones v. State* (Tex. Cr. App.) 217.

The mere inquiry by one of the jurors during their deliberations, "Why did defendant not testify?" *held* not misconduct of the jury.—*Parrish v. State* (Tex. Cr. App.) 231.

The admission of certain evidence on a trial for murder *held* not prejudicial.—*Cole v. State* (Tex. Cr. App.) 341.

In a criminal prosecution, the exclusion of evidence of a conversation cannot be regarded as injurious to defendant where it is not shown what the conversation was.—*Ellington v. State* (Tex. Cr. App.) 361.

In a prosecution for theft from the person, a charge that the theft must be committed without the knowledge of the person *held*, if erroneous, harmless as to defendant.—*Nelson v. State* (Tex. Cr. App.) 807.

Admission of testimony, afterwards withdrawn, that in the opinion of witnesses defendant had sufficient mental capacity to know it was wrong to attempt to kill prosecutor, *held* harmless.—*McKinney v. State* (Tex. Cr. App.) 1012.

CROPS.

As subject to levy on execution, see "Execution," § 1.

Excessive damages for injuries to crops, see "Damages," § 4.

Injuries to, caused by flowage, see "Waters and Water Courses," § 2.

Landlord's lien for rent, see "Landlord and Tenant," § 4.

CROSS-EXAMINATION.

See "Witnesses," § 2.

CROSSINGS.

Accidents at railroad crossing, see "Railroads," § 6.

CRUELTY.

See "Divorce," § 2.

CUSTODY.

Of child, see "Parent and Child."
Of jury, see "Criminal Law," § 18.

CUSTOMS AND USAGES.

As affecting landowner's right to recover forfeited money paid broker, see "Brokers," § 2.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 1.
Instructions in general, see "Trial," § 9.
Liability of building and loan association for negligence of building contractor, see "Building and Loan Associations."
Negligence in general as cause of, see "Negligence," § 4.

Damages for particular injuries.

See "Assault and Battery," § 1; "Death," § 1.
Breach by buyer of contract for sale of goods, see "Sales," § 6.
Breach of contract to transport passenger, see "Carriers," § 5.
Breach of covenant, see "Covenants," § 2.
Breach of warranty, see "Sales," §§ 5, 7.
Ejection of passenger, see "Carriers," § 8.
Failure to furnish cars, see "Carriers," § 1.
From malicious acts of servant, see "Master and Servant," § 10.
From overflow, see "Waters and Water Courses," § 2.
Injuries to live stock by carrier, see "Carriers," § 2.
Refusal of landlord to deliver possession of demised premises, see "Landlord and Tenant," § 3.
To live stock by railroads, see "Railroads," § 8.

§ 1. Nature and grounds in general.

Where one who has contracted to erect buildings wholly fails to perform any part of his contract, the other party may recover damages, though he does not proceed with the erection of the buildings.—*Simons v. Wittmann* (Mo. App.) 791.

§ 2. Grounds and subjects of compensatory damages.

Where one employed to repair the cylinder of an engine improperly delayed its return, *held* not liable for special damage caused by the idleness of the mill during the delay.—*Pine Bluff Iron Works v. Boling & Bro.* (Ark.) 306.

Where injuries are such that they are necessarily certain to continue to cause pain and anguish, the fact that they are not shown to be permanent does not preclude the consideration of future pain and anguish as elements of damages therefor.—*Haxton v. Kansas City* (Mo. Sup.) 714.

Pain of body and mental anguish resulting from personal injuries are elements that enter into the estimation of compensatory damages.—*Waechter v. St. Louis & M. R. R. Co.* (Mo. App.) 147.

An allowance of damages for future pain and suffering likely to result from personal injuries should be confined to such damages as are reasonably certain to result from the injuries.—*Waddell v. Metropolitan St. Ry. Co.* (Mo. App.) 765.

The fact that reasonable obligations, such as medical attention, etc., resulting from personal injuries, have not been paid, does not prevent a recovery therefor.—*Nelson v. Metropolitan St. Ry. Co.* (Mo. App.) 781.

*In an action for personal injuries, plaintiff may recover damages for pain which will be suffered in the future as a result of the injury.—*Nelson v. Metropolitan St. Ry. Co.* (Mo. App.) 1119.

A carrier having failed to perform a contract to furnish certain cars for the shipment of cattle as agreed, the shipper *held* not bound to arrange for the shipment for a part of the distance over such carrier's line in order to reduce the damages.—*Pecos River R. Co. v. Latham* (Tex. Civ. App.) 392.

*Evidence *held* to present issue of future suffering from personal injury.—*Missouri, K. & T. Ry. Co. of Texas v. Nesbit* (Tex. Civ. App.) 891.

§ 3. Measure of damages.

In an action for personal injuries, damages should be estimated on the basis of compensation.—*Waechter v. St. Louis & M. R. R. Co.* (Mo. App.) 147.

Measure of damages for personal injuries as dependent on physician's services stated.—*Nelson v. Metropolitan St. Ry. Co.* (Mo. App.) 781.

Under Rev. St. 1899, c. 51, a married woman who runs a boarding house is entitled to the profits thereof and to damages resulting from personal injuries rendering her unable to pursue her vocation.—*Nelson v. Metropolitan St. Ry. Co.* (Mo. App.) 781.

The measure of damages for breach of a contract to erect a building stated.—*Simons v. Wittmann* (Mo. App.) 791.

§ 4. Inadequate and excessive damages.

In an action against a street railroad for injuries, an award of \$23,400 *held* excessive.—*Reynolds v. St. Louis Transit Co.* (Mo. Sup.) 50.

Under the facts in a suit against a city for injuries caused by falling over an obstruction in a street, a verdict for \$1 *held* the result of prejudice.—*Fischer v. City of St. Louis* (Mo. Sup.) 82.

In an action for injuries, verdict for \$5,000 *held* not excessive.—*Haxton v. Kansas City* (Mo. Sup.) 714.

In an action for injuries to a servant, a verdict for \$7,500 *held* not excessive.—*Smith v. Fordyce* (Mo. Sup.) 679.

*In an action for injuries, *held*, that a verdict for \$6,000 was not excessive.—*Rapp v. St. Louis Transit Co.* (Mo. Sup.) 865.

Verdict for \$2,500 in action against street railroad for personal injuries *held* not grossly excessive.—*Waechter v. St. Louis & M. R. R. Co.* (Mo. App.) 147.

A verdict for \$6,375 in favor of a husband for injuries to his wife *held* not excessive.—*Chicago, R. I. & T. Ry. Co. v. Jones* (Tex. Civ. App.) 445.

In action for injury to crops and realty by overflows, verdict for plaintiff for \$500 *held* not excessive.—*Gulf, C. & S. F. Ry. Co. v. Harbison* (Tex. Civ. App.) 452; Same v. *Wetherly* (Tex. Civ. App.) 456; Same v. *Oates* (Tex. Civ. App.) 457.

In an action for personal injuries *held* that a judgment for plaintiff for \$2,000 was not excessive.—*St. Louis Southwestern Ry. Co. of Texas v. Harkey* (Tex. Civ. App.) 506.

§ 5. Pleading, evidence, and assessment.

In an action for injuries, an instruction *held* not erroneous as authorizing a recovery of loss of time, and also for diminished earning capacity during the same period, and for loss of what plaintiff may sustain in the future.—

* Point annotated. See syllabus.

Reynolds v. St. Louis Transit Co. (Mo. Sup.) 50.

In an action for injuries to a physician which interfered with his practice, it was proper to permit him to testify as to his earnings for that month in the previous year.—Sluder v. St. Louis Transit Co. (Mo. Sup.) 648.

In an action for breach of warranty of soundness of hogs, evidence held insufficient to authorize an award of substantial damages.—Narr v. Norman (Mo. App.) 122.

Where testimony as to physician's services, made necessary by personal injuries, fails to show the amount of the charge or the reasonable value of the services, a recovery for liability incurred for such services cannot be sustained.—Nelson v. Metropolitan St. Ry. Co. (Mo. App.) 781.

A petition alleging the payment of sums of money for medical attention, etc., made necessary by personal injuries, does not authorize a recovery for liabilities incurred for such items, but not paid.—Nelson v. Metropolitan St. Ry. Co. (Mo. App.) 781.

In an action for damages from the breach of a contract to erect buildings, an allegation of the petition held sufficient to justify admission of evidence as to the reasonable cost of erecting the buildings.—Simons v. Wittmann (Mo. App.) 791.

Damages not specially pleaded should not be made an element of damage in the instructions.—Stafford v. Adams (Mo. App.) 1130.

In an action for personal injuries, an instruction authorizing the recovery of damages for the impairment of plaintiff's nervous system and memory in addition to the damages to which he was entitled on other grounds held proper.—Northern Texas Traction Co. v. Yates (Tex. Civ. App.) 233.

In an action for injuries to plaintiff's wife, the refusal to caution the jury not to allow more than the amount claimed in the petition for medical expenses held not error.—San Antonio Traction Co. v. Menk (Tex. Civ. App.) 290.

In action for killing horse on track, where petition alleged market value, evidence of intrinsic value for special purpose held inadmissible.—Gulf, C. & S. F. Ry. Co. v. Cooper (Tex. Civ. App.) 301.

In an action for injuries, evidence held sufficient to justify a recovery for time lost in the past and future.—Texas & P. Ry. Co. v. McDowell (Tex. Civ. App.) 415.

In an action for injuries, an instruction authorizing a recovery for expenses incurred for physician and medicine held not objectionable as authorizing a recovery for services of a physician, in the absence of evidence of the reasonable value thereof.—Texas & P. Ry. Co. v. McDowell (Tex. Civ. App.) 415.

In an action for death, defendant held entitled, under the general issue, to show that decedent, at the time she sustained the injuries, had a disease which would have caused her death as soon as she did die, independent of the injuries.—Hardin v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 440.

Petition for injuries held to state the damages sustained by plaintiff with sufficient particularity.—El Paso & S. W. Ry. Co. v. Vizard (Tex. Civ. App.) 457.

In an action for injuries, a petition held not subject to exception for indefiniteness of allegation as to the nature and extent of the injuries.—Alexander v. McGaffey (Tex. Civ. App.) 462.

In an action by an employé for injuries through negligence, defendant held entitled to show by plaintiff's medical witness that his original diagnosis of the injuries was incompatible with subsequent developments.—Chicago, R. I. & M. Ry. Co. v. Harton (Tex. Civ. App.) 837.

An instruction held to authorize double damages for diminished capacity to labor and earn money.—Missouri, K. & T. Ry. Co. of Texas v. Nesbit (Tex. Civ. App.) 891.

The charge held not to assume that there would necessarily be future suffering from personal injuries received.—Missouri, K. & T. Ry. Co. of Texas v. Nesbit (Tex. Civ. App.) 891.

DAMS.

See "Waters and Water Courses," § 2.

DEATH.

Caused by operation of railroad, see "Railroads," §§ 5-7.

Competency of evidence in action for wrongful death, see "Evidence," § 2.

Declarations as evidence in action for wrongful death, see "Evidence," § 4.

Instructions in general in action for, see "Trial," §§ 5, 11.

Liability of carrier for death of passenger, see "Carriers," § 6.

Of party to action ground for abatement, see "Abatement and Revival," § 1.

Pleading and evidence of damages, see "Damages," § 5.

§ 1. Actions for causing death.

*In an action against a railroad for wrongful death, a verdict for \$10,000 held not excessive.—St. Louis, I. M. & S. Ry. Co. v. Hitt (Ark.) 908, 990.

*Testimony of a life insurance agent as to the expectancy of life, as shown by the mortality tables, of a man of decedent's age, and an estimate of the amount required to purchase an annuity equal to his income, held admissible.—St. Louis, I. M. & S. Ry. Co. v. Hitt (Ark.) 908, 990.

*In action for death, a verdict for \$13,190 held not excessive.—St. Louis, I. M. & S. Ry. Co. v. Cleere (Ark.) 995.

*In an action for death, plaintiff was entitled to interest at the rate of 6 per cent. per annum on the amount of damages from the date of deceased's death to the date of recovery.—St. Louis, I. M. & S. Ry. Co. v. Cleere (Ark.) 995.

*Where, after the commencement of an action by a widow as administratrix of her deceased husband to recover damages for his death, she remarried, held proper to instruct that the jury should not consider the remarriage of the widow as affecting the assessment of damages.—St. Louis, I. M. & S. Ry. Co. v. Cleere (Ark.) 995.

*An action for death by wrongful act is transitory.—Kansas City Southern Ry. Co. v. McGinty (Ark.) 1001.

*Widow and children of a decedent held entitled to sue for his death by negligent act on refusal of administrator to sue, under Civ. Code, § 24, notwithstanding Const. § 241, Civ. Code, § 21, and Ky. St. 1903, § 3882.—McLeMore v. Seebree Coal & Mining Co. (Ky.) 1062.

In an action for the death of an eight-year old child at a railroad crossing, held that the question whether the child was sui juris was one for the jury.—Holmes v. Missouri Pac. Ry. Co. (Mo. Sup.) 623.

* Point annotated. See syllabus.

An instruction defining the measure of damages in an action for death by wrongful act *held* misleading.—*International & G. N. R. Co. v. Glover* (Tex. Civ. App.) 515.

It is not necessary, in an action for death by wrongful act, that the proof be confined to the date alleged in the petition.—*International & G. N. R. Co. v. Glover* (Tex. Civ. App.) 515.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."
Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECEIT.

See "Fraud."

DECLARATION.

In pleading, see "Pleading," § 2.

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 5.
As evidence in criminal prosecutions, see "Criminal Law," § 9.
Dying declarations, see "Homicide," § 8.
Of agent to prove agency, see "Principal and Agent," § 1.

DEDICATION.

§ 1. **Nature and requisites.**
The legal effect of a deed dedicating to the public streets and alleys on land platted as a town site and of a deed granting a railroad a right of way over a street *held* a question of law for the court.—*Oklahoma City & T. R. Co. v. Dunham* (Tex. Civ. App.) 849.
§ 2. **Operation and effect.**
A deed of dedication to public of streets and alleys in a town site and a deed granting a railroad a right of way over a street *held* to confer right to use of right of way, restricted only by the right of the public to the reasonable use of the street and the right not to have a nuisance imposed.—*Oklahoma City & T. R. Co. v. Dunham* (Tex. Civ. App.) 849.

DEEDS.

See "Lost Instruments."
Best and secondary evidence, see "Evidence," § 2.
Cancellation, see "Cancellation of Instruments."
Covenants in deeds, see "Covenants."
Dedicating streets and alleys to public, see "Dedication," § 1.
Distinguished from will, see "Wills," § 1.
In fraud of creditors, see "Fraudulent Conveyances."
In trust, see "Trusts," § 1.
Parol or extrinsic evidence, see "Evidence," § 8.
Reformation, see "Reformation of Instruments."

Deeds by or to particular classes of parties.

See "Executors and Administrators," § 3;
"Husband and Wife," § 2; "Insane Persons," § 1.

* Point annotated. See syllabus.

Agent, see "Principal and Agent," § 2.
Sheriffs, see "Execution," § 4.

Deeds of particular species of property.

See "Homestead," § 2; "Public Lands," §§ 1, 2.
Accretions, see "Waters and Water Courses," § 1.

Particular classes of deeds.

Of trust, see "Chattel Mortgages," § 1; "Corporations," § 4; "Mortgages."
Tax deeds, see "Taxation," § 2.

§ 1. **Requisites and validity.**

A deed reserving a life estate to the grantor and to become operative at her death is valid.—*Lewis v. Tisdale* (Ark.) 579.

In an action against a railroad company for damages caused by the appropriation of land for a right of way, certain deeds evidencing plaintiff's title *held* to describe the land with sufficient definiteness.—*Little Rock & Ft. S. Ry. Co. v. Evans* (Ark.) 992.

Where a married woman conveyed her separate estate in satisfaction of a liability which she supposed she had incurred as surety for her husband, she was entitled to have the deed set aside.—*Bowron v. Curd* (Ky.) 1106.

Whether the vendor in a deed shared in a mistake as to the person to whom the deed should have been made is immaterial after a conveyance has been made by the vendee to correct the alleged mistake.—*Jones v. Humphreys* (Tex. Civ. App.) 403.

A conveyance by one joint purchaser of property to another in payment for the latter's supposed interest in the property *held* without consideration.—*Paddock v. Bray* (Tex. Civ. App.) 419.

A description in a deed *held* sufficient.—*Wall v. Club Land & Cattle Co.* (Tex. Civ. App.) 534.

§ 2. **Construction and operation.**

Under Kirby's Dig. § 784, a quitclaim deed to an undivided interest in a mining location *held* not to convey the interest acquired by the grantors after they abandoned the location as a lode claim and relocated it as a placer claim.—*Walls v. Chase* (Ark.) 1030.

A deed *held* to have given the grantee a fee simple, free from attempted restrictions.—*Kessner v. Phillips* (Mo. Sup.) 66.

A grantee, in possession under an unrecorded deed, does not lose his title by redelivery of the deed to the grantor for the purpose of inserting additional property and redating and redelivering it.—*City of St. Joseph ex rel. Forsee v. Baker* (Mo. App.) 1122.

When there are two descriptions in a deed which are inconsistent with each other, the grantee is at liberty to select that which is most favorable to him.—*McBride v. Burns* (Tex. Civ. App.) 394.

§ 3. **Pleading and evidence.**

In a suit to set aside a deed, the evidence *held* sufficient to show delivery.—*Lewis v. Tisdale* (Ark.) 579.

That a certain power of attorney did not authorize the attorneys to convey the land for a consideration mentioned in the attorneys' ancient deed *held* insufficient to establish that the deed was made in pursuance of such power, and that it was invalid.—*Brown v. Orange County* (Tex. Civ. App.) 247.

DE FACTO CORPORATIONS.

See "Corporations," § 1.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," § 8.

DELAY.

In transportation or delivery of goods by carrier, see "Carriers," § 1.
In transportation or delivery of live stock, see "Carriers," § 2.
Laches, see "Equity," § 2.

DELEGATION.

Of legislative power, see "Constitutional Law," § 1.

DELIVERY.

Of goods to carrier, see "Carriers," § 1.
Redelivery of deed, see "Deeds," § 2.

DEMAND.

For payment of bill or note, see "Bills and Notes," § 4.
Sufficiency of complaint to show demand for cars, see "Carriers," § 1.

DEMURRAGE.

Liability of carrier for demurrage paid by shipper, see "Carriers," § 1.

DEMURRER.

To evidence, see "Trial," § 4.

DEPOSITIONS.

See "Affidavits"; "Witnesses."
In election contests, see "Elections," § 3.
Presence of witnesses whose depositions had been withdrawn as ground for continuance, see "Continuance."

Depositions taken in a cause are not admissible in a subsequent cause as against one not a party to that in which they were taken.—*Parlin & Orendorff Co. v. Vawter* (Tex. Civ. App.) 407.

Copy of notice to take depositions and interrogatories, required by Rev. St. 1895, art. 2274, to be served on the opposite party, need not be certified by the clerk of court.—*El Paso & S. W. Ry. Co. v. Vizard* (Tex. Civ. App.) 457.

Under *Sayles' Rev. Civ. St. 1897*, art. 2289, motion to quash deposition made after announcement of ready for trial held too late.—*St. Louis Southwestern Ry. Co. of Texas v. Harkey* (Tex. Civ. App.) 506.

Motion to quash deposition held to raise question of fact, authorizing court to receive testimony outside of what was shown by deposition itself or indorsement on envelope.—*St. Louis Southwestern Ry. Co. of Texas v. Harkey* (Tex. Civ. App.) 506.

DEPOSITS.

In bank, see "Banks and Banking," § 1.

DEPOTS.

Maintenance of by railroads, see "Railroads," § 2.

DESCENT AND DISTRIBUTION.

See "Executors and Administrators"; "Homestead," § 8; "Wills."

Inheritance and transfer taxes, see "Taxation," § 3.

§ 1. **Persons entitled and their respective shares.**

A widow held in equity to have title to personal property left by her husband, not exceeding that allowed by Rev. St. 1899, §§ 107, 108.—*Mahoney v. Nevins* (Mo. Sup.) 731.

DESCRIPTION.

Of land partitioned, see "Partition," § 1.
Of property conveyed, see "Deeds," §§ 1, 2.

DETECTIVES.

Liability of railroad for assault by detective, see "Principal and Agent," § 2.

DEVICES.

See "Wills."

DILIGENCE.

Duty of carrier, see "Carriers," § 2.

DIRECTING VERDICT.

In civil actions, see "Trial," § 4.

DISABILITIES.

Of aliens, see "Aliens," § 1.
Of passenger as ground for his nonacceptance by carrier, see "Carriers."

DISCHARGE.

From indebtedness, see "Accord and Satisfaction"; "Release."

From liability as guarantor, see "Guaranty," § 1.

From liability as surety, see "Principal and Surety," § 3.

Of judgment, see "Judgment," § 11.

DISCRETION OF COURT.

Continuance in criminal prosecution, see "Criminal Law," § 14.

Review in civil actions, see "Appeal and Error," § 20.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Appeal and Error," § 8; "Criminal Law," § 25.

Dismissal of condemnation proceedings, see "Eminent Domain," § 2.

Nonsuit in action on insurance policy, see "Insurance," § 7.

DISORDERLY CONDUCT.

See "Breach of the Peace."

Drunkenness, see "Drunkards."

DISQUALIFICATION.

Of judge, see "Judges," § 1.

* Point annotated. See syllabus.

DISSOLUTION.

Of partnership, see "Partnership," § 4.

DISTRIBUTION.

Of assets of partnership on dissolution, see "Partnership," § 4.

Of estate assigned for creditors, see "Assignments for Benefit of Creditors," § 1.

Of estate of decedent, see "Descent and Distribution"; "Executors and Administrators," § 2.

DISTRICT AND PROSECUTING ATTORNEYS.

Argument and conduct at trial, see "Criminal Law," §§ 16, 27.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

DIVISIBLE CONTRACTS.

See "Sales," § 2.

DIVORCE.

Presumptions on appeal or writ of error, see "Appeal and Error," § 19.

§ 1. Defenses.

Both parties in a suit for divorce denied relief, because both were at fault.—*Malone v. Malone* (Ark.) 840.

§ 2. Jurisdiction, proceedings, and relief.

The testimony of the wife, suing for a divorce, held not sufficiently corroborated.—*Malone v. Malone* (Ark.) 840.

Evidence in a suit by a wife for divorce held not to show cruel treatment sufficient to warrant a decree.—*Malone v. Malone* (Ark.) 840.

Facts held not to show one a resident of Tennessee so as to entitle him to maintain a bill for divorce there under Shannon's Code, § 4203.—*Sparks v. Sparks* (Tenn.) 173.

§ 3. Alimony, allowances, and disposition of property.

*Awarding \$400 to a wife as alimony in a decree of divorce held excessive.—*Newton v. Newton* (Ky.) 1050.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 7.

As evidence in criminal prosecutions, see "Criminal Law," § 10.

DOMICILE.

In suits for divorce, see "Divorce," § 2.

DRAMSHOPS.

See "Intoxicating Liquors."

DRUNKARDS.

*Municipal corporations held authorized, by Kirby's Dig. §§ 5438, 5461, to by ordinance declare drunkenness in a public place to be a nuisance and disorderly conduct.—*Town of Dewitt v. La Cotts* (Ark.) 877.

* Point annotated. See syllabus.

An ordinance declaring drunkenness in a public place a nuisance held not to conflict with Kirby's Dig. §§ 2550, 2552, 2553, authorizing arrest by a peace officer of the state of a drunken person in a public place.—*Town of Dewitt v. La Cotts* (Ark.) 877.

DRUNKENNESS.

As a defense to criminal prosecution, see "Criminal Law," § 1.

As contributory negligence of person sitting on end of railroad cross-tie, see "Railroads," § 7.

Of passenger, see "Carriers," §§ 3, 6, 7.

DYING DECLARATIONS.

See "Homicide," § 8.

EARNINGS.

Damages for loss of, see "Damages," § 3.

EASEMENTS.

See "Dedication"; "Highways."

EJECTION.

Of passenger, see "Carriers," § 8.

EJECTMENT.

See "Trespass to Try Title."

Contradiction of witnesses, see "Witnesses," § 3.

§ 1. Right of action and defenses.

*In ejectment, the plaintiff must rely on the strength of his own title.—*Carpenter v. Jones* (Ark.) 871.

§ 2. Pleading and evidence.

In ejectment for a mining claim, plaintiffs could not, under the issues, rely on adverse possession as a source of title.—*White River Min. & Nav. Co. v. Langston* (Ark.) 971.

In ejectment held incompetent for defendants to contradict issues tendered by them and conceded by plaintiffs.—*Kessner v. Phillips* (Mo. Sup.) 66.

ELECTION.

Between causes of action in pleading, see "Pleading," § 7.

Between testamentary provisions and other rights, see "Wills," § 4.

ELECTION OF REMEDIES.

As against principal and agent, see "Principal and Agent," § 2.

In an action on a contract between railroad companies for the protection of a right of way, defendant company, electing to stand on the contract, cannot recover on a quantum meruit.—*Missouri Pac. Ry. Co. v. Kansas City & Air Line Co.* (Mo. Sup.) 3.

ELECTIONS.

Best and secondary evidence of vote cast, see "Evidence," § 3.

Local option elections, see "Intoxicating Liquors," § 1.

Stock law elections, see "Animals."

Submission to voters of question of issuance of school district bonds, see "Schools and School Districts," § 1.

§ 1. Election districts or precincts and officers.

Votes cast in the wrong township in reliance on universally recognized but erroneous lines would not be excluded.—*Lovewell v. Bowen* (Ark.) 570; *Rhodes v. Driver*, Id.

§ 2. Count of votes, returns, and canvass.

Under Kirby's Dig. § 2838, when election ballots are once turned over to the court no presumption in favor of official regularity can be indulged to sustain them if subsequently produced from election commissioners.—*Lovewell v. Bowen* (Ark.) 570; *Rhodes v. Driver*, Id.

Under Kirby's Dig. § 2838, certain defective ballots produced at an election contest could not be deemed the identical original ballots in untampered form that were cast in a certain township, so as to authorize the returns from such township to be thrown out.—*Lovewell v. Bowen* (Ark.) 570; *Rhodes v. Driver*, Id.

§ 3. Contests.

Kirby's Dig. § 2861, requiring evidence in election contests to be taken by depositions, is exclusive of other modes, and precludes the hearing of oral testimony of judges of election to sustain the returns.—*Lovewell v. Bowen* (Ark.) 570; *Rhodes v. Driver*, Id.

ELEVATORS.

In stores as common carriers, see "Carriers," § 6.

EMINENT DOMAIN.

Assignment of errors in condemnation proceedings, see "Appeal and Error," § 14.

Establishment of highways, see "Highways," § 1.

Examination of witnesses in condemnation proceedings, see "Witnesses," § 2.

Instructions in general in condemnation proceedings, see "Trial," § 5.

Opinion evidence in condemnation proceedings, see "Evidence," § 9.

Public improvements by municipalities, see "Municipal Corporations," § 5.

Relevancy of evidence in condemnation proceedings, see "Evidence," § 2.

§ 1. Compensation.

Under Kirby's Dig. §§ 3001, 6681, a railroad company *held* not entitled to compensation for constructing a road crossing or keeping it in repair, but entitled to damages for the establishment of a road across its right of way.—*St. Louis Southwestern Ry. Co. v. Royall* (Ark.) 555.

Where a landowner, after condemnation of a highway, received the damages assessed, he could not, without the consent of the county, restore his rights by a return of the money.—*Brooks, Neely & Co. v. Yell County* (Ark.) 590.

Where the establishment of a railroad depot and switches near defendant's land was not a special benefit to him, it should not be considered in determining his damages in condemnation proceedings.—*Kirby v. Panhandle & G. Ry. Co.* (Tex. Civ. App.) 281.

In proceedings to condemn land for a railroad right of way, damages sustained by the landowner by an overflow caused by a defective construction of the railroad's embankment *held* not recoverable.—*Kirby v. Panhandle & G. Ry. Co.* (Tex. Civ. App.) 281.

An instruction authorizing a jury in condemnation proceedings to consider conditions surrounding the property at the time it was taken

with reference to business, the demand for property, and any increase or development reasonably to be expected in the immediate future, *held* proper.—*City of El Paso v. Coffin* (Tex. Civ. App.) 502.

In a proceeding to condemn land near a projected union station for a park, the jury *held* entitled to consider the contemplated construction of the depot as bearing on the value of defendant's land.—*City of El Paso v. Coffin* (Tex. Civ. App.) 502.

Property owner *held* entitled to recover damages sustained by personal annoyance and inconvenience suffered by her and her family on account of operation of railway near her residence.—*St. Louis, S. F. & T. Ry. Co. v. Shaw* (Tex. Civ. App.) 817.

In an action against a railroad for damages to plaintiff's property from the use of a right of way granted defendant over a street, plaintiff's recovery *held* limited by allegations and proof to certain damages.—*Oklahoma City & T. R. Co. v. Dunham* (Tex. Civ. App.) 849.

§ 2. Proceedings to take property and assess compensation.

Under Kirby's Dig. §§ 2947, 2952, 2954, 2955, a court, on petition by a railway company to condemn land for a right of way, *held* not entitled to try the issues raised by the answer of the owner of the land questioning the company's right to condemn the land.—*Mountain Park Terminal Ry. Co. v. Field* (Ark.) 897.

In an action against a railroad company for damages caused by the appropriation of a right of way, defendant *held* not entitled to complain of a verdict on the ground that the market value of the land had not been shown.—*Little Rock & Ft. S. R. Co. v. Evans* (Ark.) 902.

In the absence of statutory regulations to the contrary, a municipal corporation *held* entitled to abandon condemnation proceedings at any time before judgment in favor of property owners.—*In re Seventeenth St.* (Mo. Sup.) 45; *Kansas City v. Kansas City, Ft. S. & M. R. Co.*, Id.

Under St. Louis City Charter, art. 6, § 7 et seq., relating to proceedings to condemn land, the disapproval by the municipal assembly of the report of the commissioners appointed does not of itself operate as a dismissal of the proceeding.—*City of St. Louis v. Lawton* (Mo. Sup.) 80.

In condemnation proceedings, *held*, that owing to previous determination the question whether one of defendants was entitled to any damages was not examinable.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

In condemnation proceedings the rental value of the property is one consideration to be looked to in determining the value.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

In condemnation proceedings it was error not to permit petitioner to show that a lease of the property held by one of the defendants was not obtained with a view to use and enjoyment of the property, but as a means of speculation in the expected condemnation proceedings.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

In condemnation proceedings a lessee of the land is a necessary party.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

Under Sayles' Ann. Civ. St. art. 4447, a petition for condemnation of land *held* not required to allege the amount of defendant's land not taken which might be damaged thereby.—*Kirby v. Panhandle & G. Ry. Co.* (Tex. Civ. App.) 281.

* Point annotated. See syllabus.

In proceedings to condemn land for a railroad right of way, answers to special issues submitted *held not responsive*, nor sufficient to sustain the judgment.—*Kirby v. Panhandle & G. Ry. Co.* (Tex. Civ. App.) 281.

Const. art. 5, §§ 8, 16, *held not to deprive* county courts of jurisdiction of condemnation proceedings.—*City of El Paso v. Coffin* (Tex. Civ. App.) 502.

In condemnation proceedings, the fact that the court had already charged on the same subject did not render a subsequent instruction, referring to Const. art. 1, § 17, objectionable, as calculated to unduly impress the jury with the fact that defendant was entitled to receive the full value of the property.—*City of El Paso v. Coffin* (Tex. Civ. App.) 502.

In a condemnation proceeding, the fact that a certain paragraph of the charge did not state the time as of which the value of the property was to be estimated was not error.—*City of El Paso v. Coffin* (Tex. Civ. App.) 502.

EMPLOYES.

See "Master and Servant."

ENTRY.

Re-entry by landlord, see "Landlord and Tenant," § 5.

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE ESTOPPEL

See "Estoppel," § 1.

EQUITY.

Equitable estoppel, see "Estoppel," § 1.
Laches in seeking to establish right of subrogation, see "Subrogation."
Relief against judgment, see "Judgment," § 6.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Fraudulent Conveyances"; "Injunction"; "Partition," § 1; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

§ 1. Jurisdiction, principles, and maxims.

Plaintiff, being guilty of irregularities affecting defendant's rights, *held not entitled* to maintain trespass to try title.—*Cobb v. Gooch* (Tex. Civ. App.) 401.

§ 2. Laches and stale demands.

The court will refuse to apply the doctrine of laches to dealings of an old mother with her son except in a pronounced case, and, not being allowable as a defense against her, it is not available against her heirs suing timely on her demise.—*Stevenson v. Smith* (Mo. Sup.) 86.

ERROR, WRIT OF.

See "Appeal and Error."

ESCAPE.

Harmless error in prosecution for furnishing means of, see "Criminal Law," § 27.

ESTABLISHMENT.

Of courts, see "Courts," § 1.
Of highways, see "Highways," § 1.
Of lost instruments, see "Lost Instruments."
Of railroads, see "Street Railroads," § 1.
Of trusts, see "Trusts," § 8.

ESTATES.

Created by deed, see "Deeds," §§ 1, 2.
Created by will, see "Wills," § 3.
Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."
Estates for years, see "Landlord and Tenant."
Tenancy in common, see "Tenancy in Common."

ESTOPPEL.

By judgment, see "Judgment," § 9.
Of principal by knowledge of agent, see "Principal and Agent," § 2.
To avoid or forfeit insurance policy, see "Insurance," § 2.
To deny corporate existence, see "Corporations," § 2.
To set up tax title, see "Taxation," § 1.

§ 1. Equitable estoppel.

A municipality *held not estopped* from asserting the invalidity of a franchise.—*Little Rock Ry. & Electric Co. v. City of North Little Rock* (Ark.) 826.

Creditor *held not estopped* to deny authority of attorney who collected a certain claim.—*Bank of Batesville v. Maxey* (Ark.) 968.

*Certain facts *held not* to constitute estoppel.—*Fox v. Commercial Press Co.* (Ky.) 1063.

EVICITION.

Of tenant of demised premises, see "Landlord and Tenant," § 3.

EVIDENCE.

See "Affidavits"; "Depositions"; "Witnesses."
Applicability of instructions to evidence, see "Trial," § 8.

Harmless error in rulings on, see "Appeal and Error," § 24; "Criminal Law," § 27.

Newly discovered evidence as ground for new trial, see "Criminal Law," § 19; "New Trial," § 1.

Objections for purpose of review, see "Appeal and Error," § 2; "Criminal Law," § 22.

Questions of fact for jury, see "Trial," § 4.

Questions presented for review, see "Appeal and Error," § 12.

Reception at trial, see "Criminal Law," § 15; "Trial," § 2.

Review on appeal or writ of error, see "Appeal and Error," § 21.

Tax deed as evidence, see "Taxation," § 2.

Verdict or findings contrary to evidence, see "New Trial," § 1.

As to particular facts or issues.

See "Damages," §§ 2, 5; "Deeds," § 8; "Fraudulent Conveyances," § 2; "Judgment," § 13; "Partnership," § 1; "Trusts," § 1.

Agency, see "Principal and Agent," §§ 1, 2.

Authority of corporate agent, see "Corporations," § 4.

Breach of warranty, see "Sales," § 5.

Criminal intent, see "Robbery."

Customs of railroad as affecting release by injured employé, see "Release," § 1.

Fire caused by railroad locomotive, see "Railroads," § 9.

* Point annotated. See syllabus.

Giving of signals, at railroad crossings, see "Railroads," § 6.
 Negligence of passenger, see "Carriers," § 7.
 Ownership of railroad, see "Railroads," § 4.
 Probable cause for prosecution, see "Malicious Prosecution," § 1.
 Undue influence in procuring making of will, see "Wills," § 1.

In actions by or against particular classes of parties.

See "Building and Loan Associations"; "Carriers," §§ 1, 2, 6; "Husband and Wife," § 4; "Master and Servant," § 9; "Principal and Surety," § 3; "Railroads," §§ 7-9; "Street Railroads," § 2.
 Against agent, see "Principal and Agent," § 2.
 Telegraph company, see "Telegraphs and Telephones," § 1.

In particular civil actions or proceedings.

See "Account, Action on"; "Conspiracy," § 1; "Divorce," § 2; "Ejectment," § 2; "Fraud," § 2; "Negligence," § 4; "Rape," § 3; "Reformation of Instruments," § 2; "Trespass," § 1.
 Condemnation proceedings, see "Eminent Domain," § 2.
 Election contests, see "Elections," § 3.
 For breach of contract, see "Contracts," § 3.
 For causing death, see "Death," § 1.
 For delay in transportation of live stock, see "Carriers," § 2.
 For failure to deliver telegram, see "Telegraphs and Telephones," § 1.
 For injuries from fires caused by operation of railroad, see "Railroads," § 9.
 For injuries from overflow, see "Waters and Water Courses," § 2.
 For injuries to live stock from operation of railroad, see "Railroads," § 8.
 For injuries to property from use of right of way, see "Eminent Domain," § 1.
 For personal injuries, see "Carriers," § 6; "Master and Servant," § 9; "Railroads," § 7; "Street Railroads," § 2.
 For price of goods sold, see "Sales," § 7.
 On bill or note, see "Bills and Notes," § 6.
 On judgment, see "Judgment," § 12.
 On note given as bonus to railroad, see "Railroads," § 2.
 Probate proceedings, see "Wills," § 2.
 To enforce homestead rights, see "Homestead," § 5.
 To establish lost instrument, see "Lost Instruments."
 To foreclose vendor's lien, see "Vendor and Purchaser," § 4.

In criminal prosecutions.

See "Assault and Battery," § 2; "Burglary," § 1; "Criminal Law," §§ 6-13; "Homicide," §§ 7-9; "Larceny," § 2; "Perjury," § 2; "Rape," § 2; "Robbery"; "Seduction," § 1.
 For offenses against liquor laws, see "Intoxicating Liquors," § 4.

§ 1. Presumptions.

In an action on a liquor dealer's bond, held proper for the district attorney to state that the minor's mother was mentally unsound, as rebutting any unfavorable inference from failure to put her on the stand.—Brewster v. State (Tex. Civ. App.) 858.

§ 2. Relevancy, materiality, and competency in general.

*In an action against a street railway company for the death of a traveler in a collision with a car, evidence of certain experiments held inadmissible.—Louisville Ry. Co. v. Hoskins' Adm'r (Ky.) 1087.

*In an action against a street railway for injuries to a passenger, evidence of plaintiff's expressions of pain at time of injury held competent.—McHugh v. St. Louis Transit Co. (Mo. Sup.) 853.

In condemnation proceedings, it was error to refuse to allow petitioner to show the price of other lots in the neighborhood of the lot in question within a reasonable time prior to the taking of the land involved.—Union Ry. Co. v. Hunton (Tenn.) 182.

On the issue of the market price of goods sold, evidence of a sum realized by the seller on a resale is admissible, but is not conclusive.—Hardwick v. American Can Co. (Tenn.) 797.

Evidence of purchases of certain land by a witness in the vicinity of that condemned for a railroad right of way held inadmissible without proof of similarity.—Kirby v. Panhandle & G. Ry. Co. (Tex. Civ. App.) 281.

Evidence material only on a question, issue as to which is not raised, held improperly admitted.—Oneal v. Weisman (Tex. Civ. App.) 290.

In an action for personal injuries, the admission in rebuttal of certain evidence relative to a different accident held proper.—Texas & P. Ry. Co. v. Malone (Tex. Civ. App.) 389.

§ 3. Best and secondary evidence.

*When the original deed is lost and was recorded, oral evidence thereof is admissible.—Carpenter v. Jones (Ark.) 871.

Testimony of election commissioners as to vote cast on license question held incompetent in the absence of a showing of a loss of original returns.—State v. Songer (Ark.) 903.

§ 4. Admissions.

In an action against a railway company for failure to furnish cars to a shipper, the statements of certain persons, known as the company's officers, held admissible.—Choctaw, O. & G. Ry. Co. v. Rolfe (Ark.) 870.

Where plaintiff's pleadings admitted that a certain person was its agent, it was not error to admit in evidence the conversations of such agent, without evidence of the agency.—Nicola Bros. Co. v. Hurst (Ky.) 1081.

In an action for injuries to cattle shipped, a statement of defendant's conductor to plaintiff during the transportation held admissible as an admission against interest.—Missouri, K. & T. Ry. Co. of Texas v. Russell (Tex. Civ. App.) 379.

An application for a continuance, made by plaintiffs through their attorney, containing an admission contradicting plaintiffs' testimony, is admissible for that purpose.—W. Scott & Co. v. Woodard (Tex. Civ. App.) 406.

In a suit by a trustee in bankruptcy to recover property alleged to have been conveyed pursuant to a conspiracy to defraud creditors, testimony is admissible that the bankrupt stated to witnesses that the property was his, and that he placed it in his wife's name to prevent his creditors from subjecting it to the payment of debts.—Shelley v. Nolen (Tex. Civ. App.) 524.

§ 5. Declarations.

In an action against a carrier for the death of plaintiff's wife, held that her declarations were admissible against plaintiff to show her physical condition.—Hardin v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 440.

In an action for injuries, statements by injured party to her physician as to how she was injured were not admissible in favor of plaintiff.—Hardin v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 440.

* Point annotated. See syllabus.

§ 6. Hearsay.

On an issue of whether a husband or wife owned certain property, certain testimony of the county clerk as to the husband's statements in assessing the property *held* hearsay and incompetent, under Kirby's Dig. § 3095, subd. 4.—Terry v. Clark (Ark.) 987.

Testimony of market value of cattle at a certain place, based on information received from others, is hearsay and incompetent.—Texas & P. Ry. Co. v. Arnett (Tex. Civ. App.) 448.

In an action against railroads for damages to plaintiff's cattle resulting from delay in transportation, certain testimony *held* not hearsay.—Red River, T. & S. Ry. Co. v. Eastin & Knox (Tex. Civ. App.) 530.

*It was error to permit a witness to testify that a certain certificate located on the land in controversy had been given to her husband and was his separate property, where she was testifying to what her husband had told her.—Stephens v. Herron (Tex. Civ. App.) 849.

§ 7. Documentary evidence.

Under Kirby's Dig. § 3064, a certified copy of the records of state land office by the commissioner *held* of equal dignity as evidence with the originals.—Boynton v. Ashabraner (Ark.) 566; Same v. Ashabraner, Id. 1011.

*Exemplification of records of State Land Commissioner is not the best evidence of a patent, and is not competent, in the absence of a showing of the loss of the patent.—Carpenter v. Smith (Ark.) 976.

*A transcript of the record of the State Land Office is inadmissible to prove a conveyance from the state, in the absence of a showing that the original patent is lost or cannot be produced.—Covington v. Berry (Ark.) 1005.

*A certified transcript from the land office showing the record of the issuance of a patent is not admissible in evidence, in the absence of any proof of the loss of the original.—Boynton v. Ashabraner (Ark.) 1011.

§ 8. Parol or extrinsic evidence affecting writings.

In action on note, parol evidence of condition on which note was delivered *held* admissible.—Graham v. Rammel (Ark.) 899.

Ky. St. 1903, §§ 470, 472, 656, 679, *held* to render parol evidence admissible to show the premiums stipulated for in a policy of insurance.—Continental Casualty Co. v. Jasper (Ky.) 1078.

In an action for failure to deliver a telegram *held* proper to permit addressee to testify what he would have understood from the message.—Elam v. Western Union Telegraph Co. (Mo. App.) 115.

Where parties executed a written contract, such contract would be conclusively presumed to contain all of the terms and constitute a waiver of all matters discussed not included therein.—Standard Mfg. Co. v. Hudson (Mo. App.) 137.

Where defendant signed a written contract to purchase goods, he would be conclusively presumed to know the contents thereof.—Standard Mfg. Co. v. Hudson (Mo. App.) 137.

Oral testimony is admissible to explain the meaning of figures and abbreviations employed in a mechanic's lien statement.—Kneisley Lumber Co. v. Edward B. Stoddard Co. (Mo. App.) 774.

Testimony is admissible to establish the fact of the execution of a prior deed, which has subsequently been changed as to date, consideration, and the addition of property.

—City of St. Joseph ex rel. Forsee v. Baker (Mo. App.) 1122.

A letter written by a purchaser pending negotiations for the trade *held* not to prevent his testifying what the agreement as to price was.—Oneal v. Weisman (Tex. Civ. App.) 290.

Where a contract for the sale of land described the vendor as the "estate of F.," parol evidence that by the quoted words was meant not the heirs, legatees, and devisees of F., but those of another person, would be inadmissible, because varying the written instrument.—Morrison v. Hazzard (Tex. Civ. App.) 385.

In an action on mortgage note, evidence that a part of the consideration was a contemporaneous parol agreement for an extension without the knowledge of the sureties, *held* not inadmissible as contradicting a written contract.—Moroney v. Coombes (Tex. Civ. App.) 430.

§ 9. Opinion evidence.

*In an action against a railroad for the killing of cattle in the nighttime, certain testimony as to how far a common headlight would light up a track *held* competent.—St. Louis, M. & S. E. Ry. Co. v. Shannon (Ark.) 851.

Testimony as to how far one could see on a railroad track *held* incompetent unless the result of actual experiment.—Ayers v. Wabash R. Co. (Mo. Sup.) 608.

In an action for injuries to one whose vehicle was run down by a street car, *held* proper to permit him to testify as to the speed at which the car was running.—Sluder v. St. Louis Transit Co. (Mo. Sup.) 648.

In an action for injuries to a servant employed by a railroad, a witness *held* competent to testify as to the purpose of a derailing switch, and as to where one should be placed.—Smith v. Fordyce (Mo. Sup.) 679.

In condemnation proceedings *held* error to exclude evidence as to the rental value of the land in controversy.—Union Ry. Co. v. Hunton (Tenn.) 182.

In an action for death of deceased while walking on defendant's railroad track, evidence that it was witness' opinion that deceased was one of two men he saw walking on the track shortly before deceased was killed *held* admissible.—Gulf, C. & S. F. Ry. Co. v. Matthews (Tex. Sup.) 192.

In a will contest, the opinion of a witness that testator was not capable of self-control or self-government was incompetent.—Franklin v. Boone (Tex. Civ. App.) 262.

In a will contest, the question whether testator controlled his wife or was controlled by the wife called for a conclusion.—Franklin v. Boone (Tex. Civ. App.) 262.

Conclusions or opinions of common observers *held* admissible under exception to general rule.—McCabe v. San Antonio Traction Co. (Tex. Civ. App.) 387.

In action for injury to passenger, admissibility of testimony of eyewitness as to cause of passenger's fall *held* not affected, because a conclusion of witness.—McCabe v. San Antonio Traction Co. (Tex. Civ. App.) 387.

In an action against a carrier for damages to a shipment of cattle, a witness *held* properly allowed to state from his personal knowledge the freight rate between two points.—Texas Cent. R. Co. v. West (Tex. Civ. App.) 426.

The belief or opinion of a witness to the effect that certain other persons would swear to the truth was not admissible.—Hardin v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 440.

* Point annotated. See syllabus.

In an action by a husband for injuries to his wife, he may testify from his actual knowledge, derived from personal observation as to the effect on the wife of her efforts to work, without qualifying as an expert.—*Chicago, R. I. & T. Ry. Co. v. Jones* (Tex. Civ. App.) 445.

Witnesses held not qualified to give their opinions as to effect of obstructions on natural flow of water of a stream.—*Gulf, C. & S. F. Ry. Co. v. Harbison* (Tex. Civ. App.) 452; *Same v. Wetherly* (Tex. Civ. App.) 456; *Same v. Oates* (Tex. Civ. App.) 457.

It is not error to permit a witness to testify from his own knowledge as to what the freight rates between two points are.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 490.

In an action by an employé for injuries through negligence, a question asked a medical expert witness held not objectionable in form.—*Chicago, R. I. & M. Ry. Co. v. Harton* (Tex. Civ. App.) 857.

In an action for injuries, the opinion of a physician, based on the fact that plaintiff seemed to be in good health, as to whether his brain was in any way affected by the injury, was competent.—*Chicago, R. I. & M. Ry. Co. v. Harton* (Tex. Civ. App.) 857.

§ 10. Weight and sufficiency.

In order to support an action based on circumstantial evidence, the circumstances must form a connected chain pointing to a single conclusion, or a number of independent circumstances pointing in the same direction.—*Fields v. Missouri Pac. Ry. Co.* (Mo. App.) 134.

EXAMINATION.

Of expert witnesses, see "Evidence," § 9.

Of witnesses in general, see "Witnesses," § 2.

EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 2.

Taking exceptions at trial, see "Criminal Law," § 15; "Trial," §§ 2, 10.

To pleading, see "Pleading," § 4.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," § 7.

§ 1. Nature, form, and contents in general.

Under the express provisions of Sayles' Ann. Civ. St. 1897, art. 1362, where evidence in the statement of facts would explain or show the relevancy of evidence in bill of exceptions, it is sufficient for bill to refer to such evidence without setting it out.—*Northern Texas Traction Co. v. Yates* (Tex. Civ. App.) 283.

§ 2. Settlement, signing, and filing.

*An instrument not signed or approved by the trial judge held not to be considered as a supplemental bill of exceptions.—*Flint v. Illinois Cent. R. Co.* (Ky.) 1055.

The amendment of defendant's bill of exceptions by incorporating into it an admission, contained in plaintiff's bill, of defendant's counsel, that the accident was the result of defendant's negligence, if allowable, would not materially alter the case, where the admission was nothing more than what the uncontradicted evidence showed was the fact.—*Reynolds v. St. Louis Transit Co.* (Mo. Sup.) 50.

Where no bill of exceptions was filed during the term, or within an extension of time then

granted, the exceptant could not incorporate the proceedings in a bill filed at a subsequent term.—*City of St. Louis v. Lawton* (Mo. Sup.) 80.

In the absence of a bill of exceptions prepared as prescribed by Sayles' Ann. Civ. St. 1897, art. 1369, the appellate court must accept the bill prepared by the court.—*Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 466.

EXCESSIVE DAMAGES.

See "Damages," § 4.

For wrongful death, see "Death," § 1.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCISE COMMISSIONER.

Duty as to making and certifying record in relation to granting dramshop licenses, see "Certiorari," § 2.

EXCUSABLE HOMICIDE.

See "Homicide," § 5.

EXECUTION.

See "Attachment"; "Garnishment"; "Judicial Sales."

Exemptions, see "Exemptions"; "Homestead."

§ 1. Property subject to execution.

*A levy on a tenant's interest in a crop not removed from the premises held valid.—*Grosbeck v. Evans* (Tex. Civ. App.) 889.

§ 2. Lien, levy or extent, and custody of property.

*A constable levying under an execution from a justice held to have secured a prior lien as against a sheriff levying under execution from the circuit court.—*Miller v. Grady* (Ark.) 963.

§ 3. Stay, quashing, vacating, and relief against execution.

Owners of certain cattle held entitled to enjoin the collection of a judgment in replevin in favor of the holders of a junior claim thereon, which judgment in effect represented the cattle.—*Tootle v. Buckingham* (Mo. Sup.) 619.

§ 4. Sale.

Laws 1866-67, p. 817, changing the time of holding court in Arkansas county, held not to affect an order for the publication of a warning order in attachment made at the May, 1867, term of that court.—*Williams v. Bennett* (Ark.) 600.

That a foreign judgment sued on was not properly authenticated held not an objection which could be urged to defeat the validity of a sale of real estate under the attachment.—*Williams v. Bennett* (Ark.) 600.

Plaintiff held guilty of laches precluding them from making certain objections to defendant's title to land acquired under an attachment proceeding.—*Williams v. Bennett* (Ark.) 600.

Where land was sold under an attachment, the title of the purchaser was not subject to collateral attack for irregularities which might have been cured by amendment.—*Williams v. Bennett* (Ark.) 600.

*The purchaser at execution sale is not precluded from setting up his rights when acquir-

* Point annotated. See syllabus.

ed by failure of the constable to make proper return.—*Miller v. Grady* (Ark.) 963.

A sheriff's deed given pursuant to execution sale *held* not required to contain the recitals which the execution return is required to contain by Rev. St. 1899, § 3617.—*Kessner v. Phillips* (Mo. Sup.) 66.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Actions for wrongful death, see "Death," § 1.
Authority to sign protest against public improvement in city, see "Municipal Corporations," § 5.

Refusal to sue for wrongful death of decedent, see "Death," § 1.

§ 1. Collection and management of estate.

A conveyance in fee by the widow and children of a testator *held* to convey, by virtue of his will, the fee to a creditor of the testator in settlement of his claim.—*Kerr v. Long's Ex'r* (Ky.) 1068.

§ 2. Distribution of estate.

Under a will a loss caused by the insolvency of an executor *held* to fall upon the entire estate.—*Barret v. Gwyn* (Ky.) 1096.

§ 3. Sales and conveyances under order of court.

The validity of an executor's sale of land is not affected by the fact that the deed was made to the husband of the successful bidder at her request, even though the purchase price was paid by the wife.—*West v. Burgie* (Ark.) 557.

In a suit to set aside an executor's deed on the ground that the name of the defendant as grantee was fraudulently inserted, evidence *held* to show that the defendant paid the purchase price.—*West v. Burgie* (Ark.) 557.

Order for the sale of lands of a decedent *held* not subject to collateral attack, though the proof of publication was made by the publishers as a firm.—*Robbins v. Boulware* (Mo. Sup.) 674.

An administrator's sale *held* not subject to collateral attack because of insufficiency of notice thereof.—*Robbins v. Boulware* (Mo. Sup.) 674.

An heir *held* not entitled to complain in an ejectment suit of delay in sale of lands of the ancestor for the payment of debts.—*Robbins v. Boulware* (Mo. Sup.) 674.

Proceedings in probate court for the sale of land of a decedent *held* not subject to collateral attack merely because the petition for the sale contained no affidavit as required by statute.—*Robbins v. Boulware* (Mo. Sup.) 674.

Rev. St. 1879, § 148, requiring notice of proceedings for the sale of land by a decedent to be published four weeks in some newspaper before the term of court, does not require the publication for the four weeks immediately preceding the term of court.—*Robbins v. Boulware* (Mo. Sup.) 674.

Failure of vendor, after decease of vendee, to enforce remedy under vendor's lien through the probate court, *held* to result in a loss of the debt. *Sayles' Ann. Civ. St. 1897, art. 2121.*—*Wall v. Club Land & Cattle Co.* (Tex. Civ. App.) 534.

§ 4. Foreign and ancillary administration.

*A married woman, acting as a foreign administratrix, *held* entitled to sue in Arkansas. *Kirby's Dig. §§ 6003, 7823.*—*St. Louis, I. M. & S. Ry. Co. v. Cleere* (Ark.) 995.

* Point annotated. See syllabus.

EXECUTORY CONTRACTS.

Of sale, see "Sales," § 2.

EXEMPLARY DAMAGES.

For malicious acts of servant, see "Master and Servant," § 10.

EXEMPLIFICATIONS.

As evidence, see "Evidence," § 7.

EXEMPTIONS.

See "Homestead."

From service of process, see "Process," § 2.

§ 1. Nature and extent.

A creditor, obtaining judgment against a garnishee for a debt due the principal debtor for goods bought by the garnishee, could levy on the goods; they not being exempt under Const. 1874, art. 9, § 1, and Kirby's Dig. § 4966.—*Liddell v. Jones* (Ark.) 961.

EXHIBITS.

To pleading as evidence against agent, see "Principal and Agent," § 2.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 9.

In criminal prosecutions, see "Criminal Law," § 11.

FACTORS.

See "Brokers"; "Principal and Agent."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

FALSE PRETENSES.

Hearsay in prosecution for swindling, see "Criminal Law," § 9.

An indictment for swindling *held* not to charge any offense against the laws of the state.—*Curtis v. State* (Tex. Cr. App.) 236.

In a prosecution for swindling by means of pretended sale of property, induced by false representations of ownership, charge on defendants' duty to ascertain the truth or falsity of the representations *held* properly refused.—*Brown v. State* (Tex. Cr. App.) 811.

Deed conveying property *held* admissible under an indictment alleging fraudulent sale of property.—*Brown v. State* (Tex. Cr. App.) 811.

In order to constitute one guilty of swindling by means of a pretended sale of property, it is not necessary that the defrauded purchaser be involuntarily dispossessed of the property sold to him.—*Brown v. State* (Tex. Cr. App.) 811.

FALSE SWEARING.

See "Perjury."

FEDERAL COURTS.

See "Courts," § 1; "Removal of Causes."

FEES.

Of attorney, see "Attorney and Client," § 3.

FEE SIMPLE.

Creation by deed, see "Deeds," § 2.

FELLOW SERVANTS.

See "Master and Servant," §§ 6, 9.

Concurrent negligence of employer and fellow servant as affecting question of proximate cause of injury, see "Negligence," § 2.

FENCES.

Duty of railroad to fence track, see "Railroads," § 8.

Instruction in action for breach of contract relating to fences, see "Contracts," § 8.

FERRIES.

Acquirement of stock of ferry company by railroad corporation, see "Corporations," § 3.
Tenant of ferry acting as servant after expiration of tenancy, see "Master and Servant," § 1.

§ 1. Regulation and operation.

*A ferryman becomes responsible for the safety of a team which undertakes to use the ferry as soon as the operator of the ferry directs the driver of the team to drive upon the ferryboat. —Wilson v. Alexander (Tenn.) 935.

*Ferryman on whose boat mules were being driven held negligent. —Wilson v. Alexander (Tenn.) 935.

*Driver of team held not guilty of contributory negligence in driving upon a ferryboat which he knew was not fastened to the bank. —Wilson v. Alexander (Tenn.) 935.

FILING.

Bill of exceptions, see "Exceptions, Bill of," § 2.
Criminal information or complaint, see "Indictment and information," § 1.

Record on appeal or writ of error, see "Appeal and Error," § 9.

Written instrument in justice's court, see "Justices of the Peace," § 1.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 21.

Special findings by jury, see "Trial," § 12.

FINES.

For violation of city ordinances, see "Municipal Corporations," § 6.

FIRE INSURANCE.

See "Insurance."

FIRES.

See "Arson."

Caused by operation of railroad, see "Railroads," § 9.

FIXTURES.

Timber cut from land and piled thereon for the purpose of building a fence does not pass

on sale of the land. —Longino v. Wester (Tex. Civ. App.) 445.

FLOODS.

Liability of carrier for destruction of goods by, see "Carriers," § 1.

FLOWAGE.

See "Waters and Water Courses," § 2.

FOLLOWING TRUST PROPERTY.

See "Trusts," § 3.

FORCE.

As element of robbery, see "Robbery."

FORCIBLE DEFILEMENT.

See "Rape."

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 2.

Of vendor's lien, see "Vendor and Purchaser," § 4.

FOREIGN ADMINISTRATION.

See "Executors and Administrators," § 4.

FOREIGN CORPORATIONS.

See "Corporations," §§ 1, 2, 5; "Railroads," § 1.

Action by on foreign judgment, see "Judgment," § 10.

FOREIGN JUDGMENTS.

See "Judgment," §§ 10, 12.

FORFEITURES.

Of homestead, see "Homestead," § 1.

Of insurance, see "Insurance," § 5.

Of permit to foreign corporation, see "Corporations," § 6.

Of railroad charter, see "Railroads," § 1.

Of rights under contract for sale of realty, see "Vendor and Purchaser," § 2.

FORGERY.

Payment of forged paper by bank, see "Banks and Banking," § 1.

An indictment for forgery of a check held bad for failing to contain innuendo averments explaining certain terms in the check. —McBride v. State (Tex. Cr. App.) 237.

FORMER ADJUDICATION.

See "Judgment," §§ 8, 9.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 5.

FORMS OF ACTION.

See "Action," § 2; "Ejectment"; "Trespass," § 1; "Trover and Conversion."

* Point annotated. See syllabus.

FORNICATION.

See "Seduction," § 1.

FRANCHISES.

Corporate franchises, see "Corporations," § 2.
 Estoppel to assert validity, see "Estoppel," § 1.
 Forfeiture of railroad franchise, see "Railroads," § 1.
 Of street railroad company, see "Street Railroads," § 1.
 Power of legislature to grant and control in cities, see "Municipal Corporations," § 3.
 Right to grant pending injunction to restrain declaration of election on question of annexation of property to municipality, see "Injunction," § 2.
 Right to jury trial in action for forfeiture of, see "Jury," § 1.

FRATERNAL ASSOCIATIONS.

See "Insurance," § 8.

FRAUD.

See "False Pretenses"; "Fraudulent Conveyances."

Conclusions in pleading, see "Pleading," § 1.
 Instructions in general, see "Trial," § 5.
 Motion to make allegations of more definite and certain, see "Pleading," § 7.

In particular classes of conveyances, contracts, or transactions.

See "Release," § 1.

Acquirement of control of ferry by railroad as, see "Corporations," § 3.

§ 1. Deception constituting fraud, and liability therefor.

A purchaser *held* entitled to recover damages for false representations of the seller innocently made.—*Oneal v. Weisman* (Tex. Civ. App.) 290.

Certain representations and concealments on the part of one joint purchaser of property *held* to relate to material matters, and to be such as the other purchaser had a right to rely upon.—*Paddock v. Bray* (Tex. Civ. App.) 419.

§ 2. Actions.

In an action wherein defendant was charged with fraud in a sale of plaintiff's farm, evidence *held* to sustain judgment for defendant.—*Burgess v. Deierling* (Mo. App.) 770, 771.

FRAUDS, STATUTE OF.

As affecting contract made by agent, see "Principal and Agent," § 2.

Operation and effect as to right to specific performance, see "Specific Performance," § 1.
 Operation on trusts, see "Trusts," § 1.

§ 1. Promises to answer for debt, default, or miscarriage of another.

The complaint in an action on account *held* to show a suit on an original undertaking, to which the statute of frauds was not a defense.—*Cauthron Lumber Co. v. Hall* (Ark.) 594.

*A promise *held* not within the statute of frauds, as one to answer for the debt of another.—*Long v. McDaniel* (Ark.) 964.

§ 2. Real property and estates and interests therein.

*Where adjoining landowners agree upon a boundary line and occupy according to the agreement, it is not within the statute of frauds, but is enforceable in equity as against

* Point annotated. See syllabus.

subsequent owners.—*Cheatham v. Hicks* (Ky.) 1093.

§ 3. Sales of goods.

A sale of personal property *held* void, under Kirby's Dig. § 3656.—*Taylor v. Godbold* (Ark.) 959.

§ 4. Requisites and sufficiency of writing.

Telegram and letter *held* not a sufficient memorandum of a contract to satisfy the statute of frauds. Kirby's Dig. § 3656.—*Wm. Falt Co. v. Anderson* (Ark.) 905.

A memorandum evidencing the sale of personal property is not rendered insufficient as to designation of the parties by reason of the fact that one of them is acting as agent for an undisclosed principal; parol evidence being admissible to prove the agency.—*Darnell v. Lafferty* (Mo. App.) 784.

A memorandum evidencing the sale of personal property is sufficient, with regard to the description of the subject-matter, if the description, taken together with the facts surrounding the transaction, identifies the subject-matter.—*Darnell v. Lafferty* (Mo. App.) 784.

Under Rev. St. 1899, § 3419 (Statute of Frauds), a memorandum evidencing the sale of personal property must contain the essential terms of the contract, expressed with such certainty that it may be understood without recourse to parol evidence.—*Darnell v. Lafferty* (Mo. App.) 784.

A written memorandum of a sale of personalty *held* sufficiently definite as to time and place of delivery to satisfy the statute of frauds.—*Darnell v. Lafferty* (Mo. App.) 784.

A memorandum evidencing the sale of personal property is sufficient to satisfy the statute of frauds, though it does not state the time and place of delivery.—*Darnell v. Lafferty* (Mo. App.) 784.

Where a contract for the sale of cattle fixed the price at a certain amount per pound, and made no other stipulation as to payment, the price was payable in cash at the time and place of delivery.—*Darnell v. Lafferty* (Mo. App.) 784.

A memorandum evidencing the sale of personal property described as ten head of cows and heifers is sufficiently definite in its description of the subject-matter to satisfy the statute of frauds.—*Darnell v. Lafferty* (Mo. App.) 784.

Where a contract for the sale of land showed on its face that a part of the land was owned by an individual and part by a certain estate, but did not describe the respective parts owned by each, the contract was insufficient to comply with Sayles' Rev. Civ. St. 1897, art. 2543 (statute of frauds).—*Morrison v. Hazzard* (Tex. Civ. App.) 385.

A contract for the sale of realty, describing the vendor as the "estate of F." did not sufficiently describe the vendor to comply with Sayles' Rev. Civ. St. 1897, art. 2543 (statute of frauds).—*Morrison v. Hazzard* (Tex. Civ. App.) 385.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 2.
 Of homestead, see "Homestead," § 5.

§ 1. Transfers and transactions invalid.

Under Const. art. 9, § 3, judgment creditor cannot complain of a conveyance by the judgment debtor of his homestead, nor reach the property so conveyed in the hands of the grantee.—*Isbell v. Jones* (Ark.) 593.

Where the grantee has knowledge that the grantor intends to defraud his creditors, the question whether consideration was paid is not material.—*Wiggington v. Minter* (Ky.) 1082.

As under Rev. St. Mo. 1899, § 3616, a homestead is exempt from attachment and execution, a conveyance thereof by husband to wife is not fraudulent as to his creditors.—*Reed Bros. v. Nicholson* (Mo. Sup.) 71.

A deed of trust *held* not within Rev. St. 1899, § 3397, avoiding deeds conveying chattels to the use of the grantor.—*Hasbrouck v. Rich* (Mo. App.) 131.

A deed of trust *held* not void as to creditors because of provision for sale of real estate at request of mortgagor.—*Hasbrouck v. Rich* (Mo. App.) 131.

§ 2. Remedies of creditors and purchasers.

*A wife's bare statement that the conveyance to her by her insolvent husband was in consideration of a loan made years before *held* insufficient to prevent the conveyance being treated as fraudulent.—*Waters v. Merritt Pants Co.* (Ark.) 879.

In a suit to set aside a conveyance as fraudulent toward creditors, evidence *held* to charge the grantee with notice of the grantor's fraudulent purpose.—*Brite v. Guy* (Ky.) 1069.

A conveyance by a husband in failing circumstances to his wife places upon the grantee the burden of proving the good faith of the transaction.—*Wiggington v. Minter* (Ky.) 1082.

In a suit to set aside a fraudulent conveyance, evidence *held* to support findings that the grantee had knowledge of the fraudulent intent of the grantor and that no consideration was paid.—*Wiggington v. Minter* (Ky.) 1082.

In order to set aside a deed at the instance of a creditor, the proof need not establish fraud beyond all doubt.—*Wiggington v. Minter* (Ky.) 1082.

In an action to set aside a conveyance as fraudulent, fraud may be proved by circumstantial evidence.—*Wiggington v. Minter* (Ky.) 1082.

Question as to whether the garnishee held moneys in fraud of defendant's creditors *held* under the evidence one for the jury.—*White v. Gibson* (Mo. App.) 120.

Where there was evidence of conspiracy between defendant and the garnishee to defraud the defendant's creditors, it was error not to permit plaintiff to introduce the application of defendant to be discharged in bankruptcy.—*White v. Gibson* (Mo. App.) 120.

On an issue whether a transfer by an insolvent was fraudulent, evidence that shortly before the transfer the insolvent had transferred other property to another party for less than it was worth was admissible.—*Horstman v. Little* (Tex. Civ. App.) 286.

FREIGHT.

Delay in shipment, see "Carriers," § 1.

GAMING.

See "Lotteries."

GARNISHMENT.

See "Attachment"; "Execution."

§ 1. Nature and grounds.

*Act Feb. 27, 1867 (Laws 1866-67, p. 157) § 2 (Kirby's Dig. § 3707), relative to issuance of garnishment to another county from a circuit court on a justice's judgment filed therein, *held* repealed by Act 1889, entitled "An act to provide the procedure in judicial garnishment." Acts 1889, p. 168.—*St. Louis & S. F. R. Co. v. Bowman* (Ark.) 1033.

Under Kirby's Dig. §§ 3705, 4631-4633, 4634, *held*, a writ of garnishment may issue to another county from a circuit court on a justice's judgment filed therein.—*St. Louis & S. F. R. Co. v. Bowman* (Ark.) 1033.

§ 2. Persons and property subject to garnishment.

A creditor *held* entitled to reach the interest of a tenant in a gathered crop, placed in the hands of the landlord as security for debts, by garnishment.—*Groesbeck v. Evans* (Tex. Civ. App.) 889.

GIFTS.

Charitable gifts, see "Charities."
To wife, see "Husband and Wife," § 2.
Transfer taxes, see "Taxation," § 3.

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 3;
"Sales," § 4.

GOVERNOR.

Statute authorizing commutation of sentence as invasion of pardoning power, see "Constitutional Law," § 1.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Indemnity"; "Principal and Surety."
Acceptance of check as guaranty, see "Bills and Notes," § 1.
Requirements of statute of frauds, see "Fraud," Statute of, § 1.
Review of findings, see "Appeal and Error," § 21.

§ 1. Discharge of guarantor.

Where a contract of guaranty was changed without the guarantors' knowledge, that the indebtedness accrued before the alteration cannot preclude the guarantors from insisting on their discharge.—*John A. Tolman Co. v. Hunter* (Mo. App.) 636.

GUARDIAN AND WARD.

Joinder of causes of action between, see "Action," § 3.
Liability of guardian of indigent insane person for support of ward, see "Paupers," § 1.

§ 1. Custody and care of ward's person and estate.

Under Kirby's Dig. §§ 3804, 3805, 3806, a guardian *held* chargeable with interest because of his failure to make a loan of his ward's money.—*Merritt v. Wallace* (Ark.) 876.

§ 2. Accounting and settlement.

A guardian must introduce evidence to sus-

* Point annotated. See syllabus.

tain the challenged items of his final account.—*Merritt v. Wallace* (Ark.) 876.

Under Rev. St. 1889, § 5329, a settlement made by a guardian, without filing the exhibit and giving the notice required by statute, *held* not a final settlement, but merely to have the effect of an annual settlement as *prima facie* evidence.—*May v. May* (Mo. Sup.) 75.

The final settlement of a guardian stands upon the same footing as a judgment, and is conclusive as to all proper subjects of account included and involved.—*May v. May* (Mo. Sup.) 75.

HABEAS CORPUS.

§ 1. Jurisdiction, proceedings, and relief.

On habeas corpus, where bail is the only question, errors of the trial judge in rejecting or admitting certain facts will not be considered on appeal.—*Ex parte Parker* (Tex. Cr. App.) 230.

Where a petition for habeas corpus is dismissed, it is equivalent to a refusal to grant the writ, and the remedy is by another application.—*Ex parte Billups* (Tex. Cr. App.) 847.

Where, after an appeal from a judgment in habeas corpus admitting appellant to bail, he gives bond and is liberated, the appeal will be dismissed.—*Ex parte Elmore* (Tex. Cr. App.) 347.

HABITUAL DRUNKARDS.

See "Drunkards."

HARMLESS ERROR.

In civil actions, see "Appeal and Error," §§ 22-25.

In criminal prosecutions, see "Criminal Law," § 27.

HEARING.

By arbitrators, see "Arbitration and Award," § 1.

In probate proceedings, see "Wills," § 2.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 6.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Municipal Corporations," §§ 7, 8.

Accidents at railroad crossings, see "Railroads," § 6.

Condemnation proceedings, see "Eminent Domain," § 1.

Duty of county clerk as to transmission of transcript in highway proceedings, see "Certiorari," § 1.

Restraining opening road, see "Injunction," § 1.

§ 1. Establishment, alteration, and discontinuance.

Acts 24th Leg. Sess. Laws 1895, p. 213, c. 132, constituting a special road law for certain counties, and incorporating the provisions of the railroad law (amended by Acts 26th Leg. Gen. Laws 1899, p. 105, c. 70) regulating the condemnation of land, is as to the condemnation of land for road purposes inconsistent with, and

repeals, the general road law.—*Plowman v. Dallas County* (Tex. Civ. App.) 252.

Provision of Acts 24th Leg. Sess. Laws 1895, p. 213, c. 132, authorizing the condemnation of land for a road in certain counties in accordance with the railroad law, *held* mandatory.—*Plowman v. Dallas County* (Tex. Civ. App.) 252.

§ 2. Taxes, assessments, and work on highways.

The county road tax is, when collected, a fund belonging to the county, which should be paid into the county treasury, to be expended under the orders of the county court.—*City of Texarkana v. Edwards* (Ark.) 862.

Constitutional amendment No. 5, and Kirby's Dig. §§ 7351, 7358, relative to county road taxes and their expenditure, construed.—*City of Texarkana v. Edwards* (Ark.) 862.

HOLOGRAPHIC WILLS.

See "Wills," § 1.

HOMESTEAD.

See "Exemptions."

Conveyance of in fraud of creditors, see "Fraudulent Conveyances," § 1.

§ 1. Nature, acquisition, and extent.

Under the express provisions of Kirby's Dig. § 3902, the debtor's right of homestead is not forfeited by his omission to claim it as exempt before sale on execution.—*Isbell v. Jones* (Ark.) 593.

Where legal title to homestead is in wife, she is entitled to the rents and profits against creditors of husband.—*Sharp v. Fitzhugh* (Ark.) 929.

The fee of the homestead of a widow is liable to sale, subject to her right, by order of the probate court, for payment of debts of the husband.—*Robbins v. Boulware* (Mo. Sup.) 674.

Where land has become a homestead prior to the owner executing a note which did not include any of the purchase price of the land, the payee could acquire no lien on the land as security for the note.—*Sweet v. Lyon* (Tex. Civ. App.) 384.

A judgment creditor of husband *held* not entitled to subject to lien vendor's lien notes given the wife on sale of the homestead.—*Howard v. Mayher* (Tex. Civ. App.) 409.

Homestead rights of tenant in common stated.—*Griffin v. Harris* (Tex. Civ. App.) 493.

§ 2. Transfer or incumbrance.

*Creditors may not complain of the conveyance to the wife of the homestead, although it is bought by the husband with his own funds.—*Sharp v. Fitzhugh* (Ark.) 929.

Under Rev. St. 1899, § 3617, conferring on a homesteader the right to designate and choose the part of the land which shall be exempt from execution under section 3616, a wife is entitled to select the particular part of land conveyed to her by her husband, to the value of the amount of exemption, which she will retain as a homestead.—*Reed Bros. v. Nicholson* (Mo. Sup.) 71.

Under Rev. St. 1899, § 3616, relating to homestead exemptions, where land is subject to a mortgage, the homesteader *held* entitled to a homestead to the amount of the exemption in what remains of the total value of the land after the mortgage is deducted.—*Reed Bros. v. Nicholson* (Mo. Sup.) 71.

* Point annotated. See syllabus.

The purchaser of a homestead acquired it unaffected by the lien of a judgment against the grantor.—Howard v. Mayher (Tex. Civ. App.) 409.

Where land of a lunatic on which he resided as head of a family was sold to pay debts, the question as to whether the purchaser acquired a good title *held* dependent on whether the property was the homestead of the lunatic when it was sold.—Griffin v. Harris (Tex. Civ. App.) 493.

Under Const. art. 16, § 50, the county court has no jurisdiction to sell the homestead of a lunatic to pay the ordinary debts of the estate, and a purchaser thereunder acquires no title.—Griffin v. Harris (Tex. Civ. App.) 493.

§ 3. Rights of surviving husband, wife, children, or heirs.

In partition, the fee-simple interest of infants should be laid off with respect to their rights, given by Ky. St. 1903, § 1707, to occupy the homestead of their deceased father during their minority.—Campbell v. Asher (Ky.) 1067.

A widow with no minor children was entitled to the crops growing on the homestead at the time of the husband's death.—Mahoney v. Nevins (Mo. Sup.) 731.

§ 4. Abandonment, waiver, or forfeiture.

*In a suit to restrain a levy on a homestead, an instruction as to intent to abandon *held* erroneous as a charge on the weight of evidence.—Lynch v. McGown (Tex. Civ. App.) 894.

§ 5. Protection and enforcement of rights.

Under Rev. St. 1899, § 3617, where an execution is levied on a homestead, the sale is void unless the homesteader is given a right to make his selection.—Kessner v. Phillips (Mo. Sup.) 66.

In a proceeding in equity to set aside a conveyance of land by a husband to his wife as fraudulent to creditors, powers of court in respect to finding and decree, where the land is occupied as a homestead, defined.—Reed Bros. v. Nicholson (Mo. Sup.) 71.

Even courts of equity are bound by the homestead laws of the state, and cannot, in proceedings to enforce a judgment, order the homestead interest paid to the debtor in cash instead of allowing him to designate the particular piece of the land he will hold as such homestead.—Reed Bros. v. Nicholson (Mo. Sup.) 71.

In a proceeding to set aside a conveyance of land by a husband to his wife as fraudulent to creditors, evidence examined, and *held* insufficient to show a reduction by the husband to his possession of the wife's money invested by him in the land, so as to entitle him to such money under the rules of the common law.—Reed Bros. v. Nicholson (Mo. Sup.) 71.

Under Rev. St. 1899, § 3617, relating to homestead exemptions, a sheriff's sale of land subject to a homestead, without compliance with the statute, is void.—Reed Bros. v. Nicholson (Mo. Sup.) 71.

Whether land subject to a mortgage exceeds in value the \$1,500 homestead exemption over and above the mortgage can only be ascertained by commissioners appointed to value the land, as the statutes do not confer power on the court—even on a court of equity—to determine the question.—Reed Bros. v. Nicholson (Mo. Sup.) 71.

In proceedings to enforce a judgment, the setting apart of a homestead in kind *held* possible

under the facts.—Reed Bros. v. Nicholson (Mo. Sup.) 71.

A party *held* not entitled to claim a homestead right without pleading it.—Sweet v. Lyon (Tex. Civ. App.) 384.

Where land of a lunatic was sold, the fact that the court required the guardian to place the land on the inventory, as required by Rev. St. 1895, art. 1965, and failed to set it aside as a homestead, as required by article 2046, did not waive the homestead exemption.—Griffin v. Harris (Tex. Civ. App.) 493.

HOMICIDE

Admissions by accused, see "Criminal Law," § 9.

Competency of jurors, see "Jury," § 3.

Competency of witnesses, see "Witnesses," § 1.

Credibility, impeachment and contradiction of witnesses, see "Witnesses," § 3.

Documentary evidence, see "Criminal Law," § 10.

Evidence of character of accused, see "Criminal Law," § 8.

Evidence of similar offenses, see "Criminal Law," § 8.

Examination of witnesses, see "Witnesses," § 2.

Hearsay, see "Criminal Law," § 9.

Indictment in general, see "Indictment and Information," § 2.

Instructions in general, see "Criminal Law," § 17.

Opinion evidence, see "Criminal Law," § 11.

Questions presented for review, see "Criminal Law," § 24.

Relevancy of evidence and *res gestae*, see "Criminal Law," § 7.

Review in general, see "Criminal Law," § 25.

§ 1. The homicide.

Pocket knives are not per se deadly weapons.—Craiger v. State (Tex. Cr. App.) 208.

The bare fact that a wound inflicted by a weapon produced death is not conclusive that it was a deadly weapon.—Craiger v. State (Tex. Cr. App.) 208.

§ 2. Murder.

Robbers *held* not guilty of homicide, where the person they rob, shooting at them in self-defense, kills a third person.—Commonwealth v. Moore (Ky.) 1085.

The fact that a participant in a homicide flees from the scene thereof before the fatal shot is fired *held* not to relieve him from criminal responsibility.—State v. Forsha (Mo. Sup.) 746.

§ 3. Manslaughter.

The provocation that will reduce a homicide to manslaughter must arise at the time of the killing.—Cole v. State (Tex. Cr. App.) 341.

A husband is entitled to the custody of his wife and to use force against her father to obtain custody of her, and is guilty of manslaughter only, on killing the father while under excitement growing out of the difficulty.—Cole v. State (Tex. Cr. App.) 341.

*Homicide *held* not manslaughter when defendant had cooling time after previous altercation.—Franks v. State (Tex. Cr. App.) 923.

§ 4. Assault with intent to kill.

Without a specific intent to kill there can be no assault with intent to murder.—Reyes v. State (Tex. Cr. App.) 245.

§ 5. Excusable or justifiable homicide.

To render one guilty of provoking a difficulty, he must be shown to have used some last

* Point annotated. See syllabus.

guage or done some act with that intent.—*Garza v. State* (Tex. Cr. App.) 231.

To render one guilty of provoking a difficulty, it must be shown that he did some act at the time calculated to have that effect.—*Pedro v. State* (Tex. Cr. App.) 233.

Law of self-defense as applied to one accused of assault with intent to commit murder *held* not applicable to accused personally, so that accused's right of self-defense would be same as that of person in whose defense he was acting.—*Martinez v. State* (Tex. Cr. App.) 234.

A husband *held* entitled to the custody of his wife and to the right of self-defense on danger to his life arising out of his efforts to secure her custody from her father.—*Cole v. State* (Tex. Cr. App.) 341.

*Mere pursuit of a person with intent to bring on a difficulty *held* not to deprive pursuer of right of self-defense.—*Franks v. State* (Tex. Cr. App.) 923.

§ 6. Indictment and information.

An indictment for murder *held* not defective, because the word "willingly" was used therein, instead of "willfully".—*Daniels v. State* (Ark.) 844.

Information in homicide *held* to have sufficiently charged defendants with having inflicted the wound upon deceased from which he died.—*State v. Bailey* (Mo. Sup.) 733.

§ 7. Evidence—Admissibility in general.

*In a prosecution for murder by shooting with a pistol, it was improper to ask a witness whether defendant was in the habit of carrying a pistol or had that reputation.—*Newman v. Commonwealth* (Ky.) 1089.

On a prosecution for the murder of defendant's husband, *held* proper to admit evidence of a conversation by a witness with defendant a short time before the homicide.—*State v. Cummings* (Mo. Sup.) 706.

In homicide, statement of defendant *held* competent to show motive and intent.—*State v. Bailey* (Mo. Sup.) 733.

In homicide, *held* not error to exclude certain testimony as to whether defendant instigated the principal actor to commit the crime.—*State v. Forsha* (Mo. Sup.) 746.

In a prosecution for murder, the rifle with which defendant killed deceased is admissible in evidence.—*Long v. State* (Tex. Cr. App.) 203.

In a prosecution for murder, evidence that defendant did not indorse the religious views of deceased was competent on the question of motive.—*Long v. State* (Tex. Cr. App.) 203.

In a prosecution for murder, a note written by defendant to deceased three days before the killing, warning him to keep his stock out of defendant's pasture, *held* admissible.—*Long v. State* (Tex. Cr. App.) 203.

In a prosecution for murder, evidence of certain threats by defendant against deceased *held* admissible.—*Long v. State* (Tex. Cr. App.) 203.

In a prosecution for murder, certain evidence as to threats made by defendant a year before the homicide *held* admissible as original as well as impeaching testimony.—*Long v. State* (Tex. Cr. App.) 203.

In a prosecution for murder, *held* error to exclude testimony by accused that deceased's relations with his children were friendly, to show that deceased could procure the children to carry a note to his wife.—*Upton v. State* (Tex. Cr. App.) 212.

In a prosecution for murder, evidence *held* inadmissible that a pistol used by deceased in the conflict was unloaded, which fact was not known to accused.—*Roberts v. State* (Tex. Cr. App.) 221.

In a prosecution for murder, where the difficulty arose from a report imputed to accused, it was error to exclude evidence by accused that he did not start the report.—*Roberts v. State* (Tex. Cr. App.) 221.

On a prosecution for murder alleged to have been committed for the purpose of procuring decedent's money, certain evidence *held* admissible in behalf of defendant as tending to show that another committed the crime.—*Johnson v. State* (Tex. Cr. App.) 223.

In a prosecution for murder, certain evidence *held* not to raise the issue of manslaughter, and inadmissible.—*Coleman v. State* (Tex. Cr. App.) 238.

In a prosecution for murder, *held* not error to permit a witness to testify to a statement of defendant, when considered in connection with the court's explanation in the bill of exceptions.—*Hall v. State* (Tex. Cr. App.) 244.

A defendant on trial for murder relying on self-defense *held* entitled to prove acts tending to show the desperate character of decedent.—*Cole v. State* (Tex. Cr. App.) 341.

On a trial for homicide, the admission of evidence of blood on the ground where the homicide occurred and of the wounds of decedent *held* not error.—*Cole v. State* (Tex. Cr. App.) 341.

On a trial for murder, the exclusion of evidence as to what defendant had stated about his family troubles *held* error.—*Cole v. State* (Tex. Cr. App.) 341.

On the trial of defendant for the murder of his father-in-law, letters written by defendant to his wife *held* admissible.—*Cole v. State* (Tex. Cr. App.) 341.

On a trial for homicide, certain evidence relating to decedent's physical condition *held* improper.—*Cole v. State* (Tex. Cr. App.) 341.

In a prosecution for murder, evidence that a short time before deceased was killed he was drunk and quarrelsome *held* admissible, if defendant had knowledge of these facts.—*Crow v. State* (Tex. Cr. App.) 814.

§ 8. — Dying declarations.

On prosecution for homicide, dying declarations of deceased *held* admissible.—*State v. Craig* (Mo. Sup.) 641.

In a prosecution for murder, *held* not error to admit oral evidence of a dying declaration of deceased, objected to on the ground that a dying declaration had been taken in writing.—*Long v. State* (Tex. Cr. App.) 203.

In a prosecution for murder, a statement by deceased to his physician the morning after the shooting *held* admissible as a part of the predicate for the introduction of a dying declaration.—*Long v. State* (Tex. Cr. App.) 203.

Sufficient predicate *held* laid for the admission of dying declarations.—*Roberts v. State* (Tex. Cr. App.) 221.

§ 9. — Weight and sufficiency.

Evidence *held* to support a conviction for murder in the second degree.—*Daniels v. State* (Ark.) 844.

On a prosecution for murder, evidence considered, and *held* sufficient to corroborate the testimony of an accomplice.—*Chancellor v. State* (Ark.) 880.

* Point annotated. See syllabus.

Evidence *held* sufficient to sustain a conviction of murder in the first degree.—*Moore v. State* (Ark.) 946; *Goley v. Same* (Ark.) 952.

In a prosecution for assault with intent to kill, evidence *held* sufficient to show that defendants were guilty of aggravated assault.—*Hinson v. State* (Ark.) 947.

Evidence on trial for murder *held* to show that the death of decedent resulted from the act of defendant.—*Casteel v. State* (Ark.) 1004.

In a prosecution for murder, evidence *held* sufficient to support a conviction.—*Newman v. Commonwealth* (Ky.) 1089.

On prosecution for murder, evidence *held* to identify defendant as murderer.—*State v. Heusack* (Mo. Sup.) 21.

On a prosecution for murder, evidence *held* to establish the corpus delicti.—*State v. Heusack* (Mo. Sup.) 21.

On a prosecution for murder, evidence considered, and *held* sufficient to warrant a conviction of that crime in the second degree.—*State v. Cummings* (Mo. Sup.) 706.

Evidence *held* not to show an assault with intent to murder.—*Reyes v. State* (Tex. Cr. App.) 245.

§ 10. Trial.

Under Kirby's Dig. §§ 1765, 2387, *held*, on a prosecution for murder, that an instruction that matters of mitigation must be shown by a preponderance of the evidence was erroneous.—*Cogburn v. State* (Ark.) 822.

In a prosecution for homicide, an instruction that deceased had a right to draw his gun, and if defendant pressed him he would have a right to use it, *held* proper.—*Williams v. United States* (Ind. T.) 334.

*On a trial for homicide, an instruction *held* to give defendant the same right to defend his brother as himself.—*McQueen v. Commonwealth* (Ky.) 1047.

On a trial for voluntary manslaughter, the failure to charge with respect to defendant's testimony *held* reversible error.—*French v. Commonwealth* (Ky.) 1070.

Where an indictment only charged murder in the second degree, the court was not called on to charge on murder in the first degree.—*State v. Cummings* (Mo. Sup.) 706.

In homicide, charge *held* a correct statement of law of provoking the difficulty.—*State v. Bailey* (Mo. Sup.) 733.

In homicide, charge on provocation of difficulty *held* not open to the objection of predicating a "felonious intent upon condition."—*State v. Bailey* (Mo. Sup.) 733.

In homicide, instructions on self-defense and on provoking the difficulty *held* not in conflict.—*State v. Bailey* (Mo. Sup.) 733.

In homicide, instruction on manslaughter, hypothesized on a petty difficulty instigated by defendant and a subsequent killing in self-defense, *held* properly refused.—*State v. Bailey* (Mo. Sup.) 733.

The terms "self-defense" and "bring on difficulty," as used in the law of homicide, are self-explanatory, and need not be specifically defined in instructions.—*State v. Bailey* (Mo. Sup.) 733.

On prosecution for homicide, defendant *held* entitled to have Pen. Code, art. 717, relating to the means by which the homicide was committed, given in the charge.—*Craig v. State* (Tex. Cr. App.) 208.

Defendant on prosecution for homicide *held* entitled to a charge the converse of one limit-

ing right of self-defense with provoking difficulty.—*Craig v. State* (Tex. Cr. App.) 208.

On prosecution for homicide, defendant *held* entitled to charge as to previous threats by deceased to injure defendant, under Pen. Code 1895, art. 713.—*Armsworthy v. State* (Tex. Cr. App.) 215.

Defendant on prosecution for homicide *held* entitled to have Pen. Code 1895, arts. 651, 652, relating to the cause of death, charged.—*Armsworthy v. State* (Tex. Cr. App.) 215.

On a prosecution for homicide, evidence *held* to raise the issue of self-defense.—*Armsworthy v. State* (Tex. Cr. App.) 215.

On prosecution for homicide, evidence *held* to entitle defendant to charge on aggravated assault.—*Armsworthy v. State* (Tex. Cr. App.) 215.

On a prosecution for homicide, evidence *held* to entitle defendant to charge on manslaughter.—*Armsworthy v. State* (Tex. Cr. App.) 215.

In a prosecution for murder, evidence *held* not to suggest the issue of provoking the difficulty on the part of accused.—*Roberts v. State* (Tex. Cr. App.) 221.

In a prosecution for murder, the evidence *held* to warrant a charge with reference to self-defense.—*Roberts v. State* (Tex. Cr. App.) 221.

Evidence on a prosecution for murder *held* to require the submission to the jury of the issue of murder in the second degree.—*Johnson v. State* (Tex. Cr. App.) 223.

Evidence on prosecution for assault with intent to murder *held* to require a charge that, if defendant's friend, in whose behalf defendant interfered, had no intention of provoking difficulty, and did no act to bring it on, his friend's right of self-defense was complete.—*Garza v. State* (Tex. Cr. App.) 231.

Defendant, on prosecution for assault with intent to murder, *held* not entitled to a charge on self-defense, but to a charge confined to affirmation of his right to interfere in behalf of his friend.—*Garza v. State* (Tex. Cr. App.) 231.

Evidence on prosecution for assault with intent to murder *held* to justify charge on provoking difficulty.—*Garza v. State* (Tex. Cr. App.) 231.

In a prosecution for murder, a charge *held* not erroneous as limiting defendant's right of self-defense.—*Coleman v. State* (Tex. Cr. App.) 238.

In a prosecution for murder, an instruction that, when danger of death or serious bodily injury ceases, the right to kill ceases with it, was correct, and not erroneous as limiting defendant's right to act on apparent danger.—*Coleman v. State* (Tex. Cr. App.) 238.

In a prosecution for murder, an instruction that, when danger of death or serious bodily injury ceases, the right to kill ceases with it, *held* applicable.—*Coleman v. State* (Tex. Cr. App.) 238.

In a prosecution for murder, a charge on self-defense *held* not erroneous as eliminating the appearance of danger.—*Coleman v. State* (Tex. Cr. App.) 238.

In a prosecution for murder, an instruction as to threats *held* not erroneous.—*Coleman v. State* (Tex. Cr. App.) 238.

On a prosecution for assault with intent to murder, *held* the duty of the court to have instructed on a lesser degree of the offense.—*Jackson v. State* (Tex. Cr. App.) 239.

On a prosecution for assault with intent to murder, *held* that the court should have in-

* Point annotated. See syllabus.

structed under the evidence on aggravated assault.—*Jackson v. State* (Tex. Cr. App.) 239.

A charge on simple assault *held* required under the evidence on a trial for assault with intent to murder.—*Reyes v. State* (Tex. Cr. App.) 245.

Evidence *held* not sufficient to require submission to the jury of the issues of manslaughter and self-defense.—*Franklin v. State* (Tex. Cr. App.) 357.

In a prosecution for murder, certain evidence *held* not to justify a charge on provoking the difficulty.—*Crow v. State* (Tex. Cr. App.) 814.

In a prosecution for murder, facts *held* insufficient to justify the qualification of a charge on self-defense.—*Crow v. State* (Tex. Cr. App.) 814.

§ 11. Appeal and error.

In a prosecution for murder, admission in evidence of the bloody clothing of deceased *held* not cause for reversal.—*Long v. State* (Tex. Cr. App.) 203.

HOSPITALS.

Railroad hospital association *held* a distinct corporation from the railroad, and the latter was not liable for the negligence of the former's physicians in treating a railroad employé.—*Illinois Cent. R. Co. v. Buchanan* (Ky.) 312.

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

See "Divorce."

Action by wife for wrongful death of husband, see "Death," § 1.

Appointment of receiver in suit to cancel deed of trust of wife's separate property, see "Receivers."

Competency as witnesses, see "Witnesses," § 1. Conveyance of wife's separate estate, see "Deeds," § 1.

Excessive damages for injuries to wife, see "Damages," § 4.

Fraudulent conveyances between, see "Fraudulent Conveyances," § 2.

Hearsay on issue of ownership of property as between husband and wife, see "Evidence," § 6.

Husband as trustee of wife, see "Trusts," § 2.

Interest on judgment in favor of trustee in bankruptcy for community funds invested in improvements on wife's separate property, see "Interest," § 1.

Measure of damages for injury to married woman, see "Damages," § 3.

Rights of survivor, see "Descent and Distribution," § 1; "Homestead," § 3.

Rights of trustee in bankruptcy as to community property, see "Bankruptcy," § 2.

§ 1. Mutual rights, duties, and liabilities.

The children of a husband and wife, to whom land had been conveyed, take on the wife's death a half interest in the land, and share with the husband's children by a second wife on his death in the other half.—*Campbell v. Asher* (Ky.) 1067.

§ 2. Conveyances, contracts, and other transactions between husband and wife.

*Where a husband advances money to pay for land, title to which is taken in his wife's

name, it will be presumed that such advancements constitute a gift.—*O'Hair v. O'Hair* (Ark.) 945.

In an action by a mother-in-law against the surviving husband to recover personal property owned by the wife, evidence *held* to support a finding that the husband had acquired the property by gift from the wife.—*Carter v. Reeves* (Ark.) 976.

§ 3. Wife's separate estate.

*Wife's property *held* not liable to creditors of the husband for enhancement of value by labor of the husband.—*Sharp v. Fitzhugh* (Ark.) 929.

A wife, who merely signs notes of her husband as his surety, does not charge her separate estate.—*Bowron v. Curd* (Ky.) 1106.

A conveyance of real estate by a husband to his wife makes the land conveyed her separate estate, irrespective of whether the deed specifically so declares.—*Jones v. Humphreys* (Tex. Civ. App.) 403.

The separate property of a wife cannot be sold to reimburse the community estate for improvements made out of community funds.—*Collins v. Bryan* (Tex. Civ. App.) 432.

A wife who had joined in deed of trust on her separate property *held*, as to certain portions of the debt, not released, under *Sayles' Ann. Civ. St. 1897, art. 2970*, by the husband's extension.—*De Barrera v. Frost* (Tex. Civ. App.) 476.

The insolvency of a husband does not affect the rule that a contract or extension of his debt, not participated in by the wife, discharges her property which stands as surety for the debt.—*De Barrera v. Frost* (Tex. Civ. App.) 476.

Certain provisions in a deed of trust given by a husband and wife on her separate property to secure his debt *held* not to have authorized him to make extensions so as to deprive her of any rights she might have by reason of an extension not participated in by her.—*De Barrera v. Frost* (Tex. Civ. App.) 476.

A husband has no authority to extend any indebtedness secured by a mortgage on the wife's separate property.—*De Barrera v. Frost* (Tex. Civ. App.) 476.

§ 4. Actions.

Burden *held* on the wife to show, as against creditors of the husband, that funds used in purchases and investments were not furnished by the husband.—*Sharp v. Fitzhugh* (Ark.) 929.

A husband may recover damages for breach of a contract made with him for the erection of buildings on his wife's land.—*Simons v. Wittmann* (Mo. App.) 791.

§ 5. Community property.

No presumption arises that improvements erected by a husband out of community funds on land which is the separate property of his wife are a gift, in the absence of evidence to show such intention.—*Collins v. Bryan* (Tex. Civ. App.) 432.

In a suit by a wife to cancel a deed of trust given by her and her husband on her separate property to secure his debt, the authorizing of a receiver to rent the property and collect the rents *held* not erroneous.—*De Barrera v. Frost* (Tex. Civ. App.) 476.

IDENTIFICATION.

Of defendant on prosecution for burglary, see "Burglary," § 1.

* Point annotated. See syllabus.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 2.

IMPEACHMENT.

Of record, see "Appeal and Error," § 11.
Of witness, see "Witnesses," § 8.

IMPLIED WARRANTY.

See "Sales," § 5.

IMPRISONMENT.

See "Bail."

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."
Public improvements, see "Municipal Corporations," § 5.
Right of purchasers at void partition sale to compensation for, see "Partition," § 1.

IMPUTED NEGLIGENCE.

See "Negligence," § 3.

INADEQUATE DAMAGES.

See "Damages," § 4.

INCOMPETENT PERSONS.

See "Insane Persons."

INCORPORATION.

See "Corporations," § 1.

INCUMBRANCES.

On homestead, see "Homestead," § 2.

INDEMNITY.

See "Guaranty"; "Principal and Surety."
Indemnity mortgage, see "Mortgages," § 1.
In action on lost instrument, see "Lost Instruments."
To surety, see "Principal and Surety," § 4.

An action *held* maintainable on a contract of indemnity on the facts showing the sustaining of a loss on the part of the indemnitee.—*Bonta v. Harvey* (Ky.) 1079.

INDEPENDENT CONTRACTORS.

Liability of building and loan association for negligence of building contractor, see "Building and Loan Associations."

INDIANS.

Act Cong. July 1, 1902, c. 1362, §§ 31-33, 32 Stat. 646-648, providing for the establishment of a Choctaw and Chickasaw citizenship court of the Indian Territory, etc., *held* constitutional.—*Wallace v. Adams* (Ind. T.) 308.

INDICTMENT AND INFORMATION.

Presentation of objections for purpose of review, see "Criminal Law," § 22.

For particular offenses.

See "Arson"; "Burglary," § 1; "False Pretenses"; "Forgery"; "Homicide," § 6; "Larceny," § 2; "Rape," § 2; "Robbery."
Establishing or keeping lottery, see "Lotteries," § 1.

§ 1. Filing and formal requisites of information or complaint.

An information for arson *held* sufficient as to the venue, under Rev. St. 1899, § 2527.—*State v. Hunt* (Mo. Sup.) 719.

Information *held* sufficient, without repeating venue in verification.—*State v. Bailey* (Mo. Sup.) 783.

The omission of the seal of the court to the jurat of the clerk does not invalidate the verification of an information.—*State v. Forsha* (Mo. Sup.) 746.

§ 2. Requisites and sufficiency of accusation.

An indictment for murder *held* sufficient.—*Newman v. Commonwealth* (Ky.) 1089.

§ 3. Issues, proof, and variance.

Under Code Cr. Proc. 1896, art. 420, it must be shown that an offense was committed prior to the presentation of the indictment.—*Moore v. State* (Tex. Cr. App.) 228.

§ 4. Conviction of offense included in charge.

Under an indictment for an assault with intent to rape, which does not charge defendant as being an adult male and the assaulted party as a female, a conviction for aggravated assault may be had.—*Kearse v. State* (Tex. Cr. App.) 363.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.

INEVITABLE ACCIDENT.

As affecting liability of carrier, see "Carriers," § 1.

INFANTS.

See "Adoption"; "Guardian and Ward"; "Parent and Child."

Care required as to children, see "Negligence," § 1.

Care required as to infant employes, see "Master and Servant," § 5.

Citizenship of, see "Citizens."

Injury at railroad crossing, see "Railroads," § 6.

Whether child is *sui juris* as question for jury, see "Trial," § 4.

INFERIOR COURTS.

See "Courts," § 3.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INHERITANCE.

See "Descent and Distribution."

INHERITANCE TAX.

See "Taxation," § 3.

* Point annotated. See syllabus.

INJUNCTION.

Review of judgment on complaint for violation of, see "Contempt," § 1.

Restraining particular acts or proceedings.

See "Execution," § 3.

Collection of municipal tax, see "Municipal Corporations," § 9.

Enforcement of judgment, see "Judgment," § 6.

Tax sale, see "Taxation," § 1.

§ 1. Subjects of protection and relief.

A property owner is entitled to an injunction to restrain the opening of a contemplated road over his land, where there has been no valid condemnation of such land for the road.—*Plowman v. Dallas County* (Tex. Civ. App.) 252.

§ 2. Writ, order or decree, service, and enforcement.

Pending an injunction restraining the declaration of the result of an election, held pursuant to Kirby's Dig. § 5522, to determine the question of the annexation of a portion of one municipality to another, the municipality from which the territory was sought to be severed *held* to have no right to grant a franchise affecting the territory in question.—*Little Rock Ry. & Electric Co. v. City of North Little Rock* (Ark.) 826.

INNUENDO.

See "Libel and Slander," § 3.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSANE PERSONS.

Competency of witnesses on issue of sanity, see "Witnesses," § 1.

Harmless error in trial of issue of sanity of accused, see "Criminal Law," § 27.

Indigent insane persons, see "Paupers," § 1. Insanity of accused after conviction, see "Criminal Law," § 20.

Opinion evidence as to sanity of accused, see "Criminal Law," § 11.

Prejudice against plea of insanity as affecting competency of jurors, see "Jury," § 3.

Trial of issue of insanity of accused, see "Criminal Law," § 13.

§ 1. Property and conveyances.

The action of the guardian of an insane person in bringing a partition suit as to the ward's interest in real estate binds the ward to everything which the partition suit could validly accomplish.—*Cowling v. Nelson* (Ark.) 918.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

INSTITUTIONS.

State institutions, see "States," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," §§ 5-11.

In criminal prosecutions, see "Criminal Law," § 17; "Homicide," § 10.

* Point annotated. See syllabus.

INSURANCE.

Insurance partnership, see "Partnership," § 4. Mistake in policy of insurance as ground for reformation, see "Reformation of Instruments," § 1.

Parol or extrinsic evidence of policy, see "Evidence," § 8.

Questions for jury in general in action on policy, see "Trial," § 4.

§ 1. Insurance agents and brokers.

In action on policy of insurance, evidence *held* to show that insurance agent was made the agent of the insured for the purpose of procuring and canceling policies so that defendant's policy was in force.—*Phoenix Ins. Co. v. State* (Ark.) 917.

Insurance solicitor *held* agent of the general agent, and not of the policy holder, in accepting a note for a premium.—*Rommel v. Witherington* (Ark.) 967.

§ 2. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

The stipulation in a policy of fire insurance for cancellation on five days' notice to the assured is for the benefit of, and may be waived by, the assured.—*Phoenix Ins. Co. v. State* (Ark.) 917.

*A soliciting agent of a life insurance company *held* not authorized to accept notes in lieu of cash payments of premium.—*Mutual Life Ins. Co. v. Abbey* (Ark.) 950.

*A general agent of an insurance company *held* authorized to bind the company by accepting notes in lieu of cash payments of premiums.—*Mutual Life Ins. Co. v. Abbey* (Ark.) 950.

A policy *held* lapsed for failure to pay premiums to a person authorized to receive payment.—*Continental Casualty Co. v. Jasper* (Ky.) 1078.

§ 3. Risks and causes of loss.

An accident policy *held* to insure against inability to substantially perform the duties of assured's occupation, and not merely against inability to perform any of the duties.—*James v. United States Casualty Co* (Mo. App.) 125.

§ 4. Extent of loss and liability of insurer.

Where a building covered by an insurance policy was wholly destroyed by fire with the exception of a glass door, the loss was a total one.—*American Cent. Ins. Co. v. Noe* (Ark.) 572.

Under Kirby's Dig. § 4875, the value of a house wholly destroyed by fire is not open to evidence in an action on the insurance policy covering the same.—*American Cent. Ins. Co. v. Noe* (Ark.) 572.

A provision in an accident policy that it insured only against total inability to perform any of the duties of insured, who was a merchant, cannot be construed literally, and has no practical control over other provisions of the policy.—*James v. United States Casualty Co.* (Mo. App.) 125.

§ 5. Notice and proof of loss.

A provision of an accident policy *held* not to work a forfeiture for failure to comply with a provision as to notice.—*James v. United States Casualty Co.* (Mo. App.) 125.

§ 6. Adjustment of loss.

An award made pursuant to the terms of a fire policy should not be vacated unless it clearly appears to have been made without authority, or to be the result of fraud or mistake or of the misfeasance of malfeasance of the ap-

praisers.—*Niagara Fire Ins. Co. v. Boon* (Ark.) 915.

§ 7. Actions on policies.

Under the express provisions of Kirby's Dig. § 4381, if plaintiff in an action on an insurance policy suffers nonsuit, he may commence a new action within one year after such nonsuit.—*American Cent. Ins. Co. v. Noe* (Ark.) 572.

In an action on a life policy, evidence held to warrant a finding that insurer's general agent accepted notes in lieu of cash payment of a premium on the policy.—*Mutual Life Ins. Co. v. Abbey* (Ark.) 950.

An instruction in an action on a life policy held to correctly submit to the jury the issue whether the insurer's general agent accepted notes in lieu of cash payment of the premium on the policy.—*Mutual Life Ins. Co. v. Abbey* (Ark.) 950.

In an action on an accident policy providing for double payments if insured was injured while a passenger on a street car, evidence held to justify submission to the jury of the question whether plaintiff was a passenger at the time he was injured.—*James v. United States Casualty Co.* (Mo. App.) 125.

§ 8. Mutual benefit insurance.

A fraternal beneficial association doing business in Texas will be presumed, in the absence of proof to the contrary, to have been incorporated for the purpose described in Acts 1899, p. 195, c. 115, §§ 1, 2, 3, and could not divert its benefit fund to pay certificates of another society with which it had no power to consolidate.—*Whaley v. Bankers' Union of the World* (Tex. Civ. App.) 259.

A mutual benefit society, alleged to have absorbed another society by which plaintiff's wife was insured for plaintiff's benefit, held not liable on such certificate on the ground of equitable estoppel.—*Whaley v. Bankers' Union of the World* (Tex. Civ. App.) 259.

The holder of a certificate against a mutual benefit association held entitled to enforce his rights against its assets which had been turned over to another association under an invalid consolidation agreement only through a receiver.—*Whaley v. Bankers' Union of the World* (Tex. Civ. App.) 259.

Under the by-laws of a mutual benefit society, written acceptance of a benefit certificate held not necessary to its validity.—*Sovereign Camp Woodmen of the World v. Brown* (Tex. Civ. App.) 372.

The holder of a mutual benefit certificate who exchanged it for a new certificate held not entitled to recover the premiums paid on the first certificate.—*Supreme Council A. L. H. v. Lyon* (Tex. Civ. App.) 435.

INTENT.

Criminal, see "Burglary," § 1; "Robbery." Of parties to contract, see "Contracts," § 1.

INTEREST.

Authority of agent to collect interest as evidence of authority to collect principal, see "Principal and Agent," § 2.

On particular classes of liabilities.

See "Bills and Notes."

County warrant, see "Counties," § 3.

Damages for wrongful death, see "Death," § 1.

Funds of ward, see "Guardian and Ward," § 1.

Money collected by attorney, see "Attorney and Client," § 2.

Purchase price of land, see "Vendor and Purchaser," § 2.

Pecuniary interest in particular subjects.

Effect as to credibility of witness, see "Witnesses," § 3.

§ 1. Rights and liabilities in general.

Husband's trustee in bankruptcy held not entitled to interest on a judgment for the amount of community property of bankrupt invested in improvements erected on separate property of bankrupt's wife.—*Collins v. Bryan* (Tex. Civ. App.) 432.

§ 2. Time and computation.

Under Rev. St. 1899, § 3705, contingent attorney's fee held to become due on and bear interest from the final determination of the case.—*Morrow v. Pike County* (Mo. Sup.) 99.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 1.

INTERNATIONAL LAW.

See "Aliens"; "Treaties."

INTERROGATORIES.

To jury, see "Trial," § 12.

To witnesses, see "Depositions."

INTERSTATE COMMERCE.

See "Commerce," § 1.

INTERVENTION.

In attachment proceedings, see "Attachment," § 2.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Absence of witness as cause for continuance in action on liquor dealer's bond, see "Continuance."

Adoption of local option as ground for termination of lease of premises for saloon purposes, see "Landlord and Tenant," §§ 1, 3.

Argument and conduct of counsel in prosecution for offense against liquor laws, see "Criminal Law," § 16.

Best and secondary evidence of vote cast at election on license question, see "Evidence," § 3.

Hearsay in prosecution for violation of liquor law, see "Criminal Law," § 9.

Judicial notice of local option laws, see "Criminal Law," § 6.

Presumptions in action on liquor dealer's bond, see "Evidence," § 1.

Reception of evidence in prosecution for offense against liquor laws, see "Criminal Law," § 15.

Duty of excise commissioner to make and certify record in relation to granting dramshop license, see "Certiorari," § 2.

§ 1. Local option.

Under Kirby's Dig. § 5119, license issued by county judge raises a presumption that a majority of votes cast in the county were in favor of license.—*State v. Songer* (Ark.) 903.

Finding of the county court that a majority of votes were in favor of license held not overcome by an abstract of the vote filed by the

* Point annotated. See syllabus.

election commissioners, certificate to which does not cover the question of license.—*State v. Songer* (Ark.) 903.

Under *Sayles' Ann. Civ. St. 1897, art. 3393*, a local option election, held more than two years after the last preceding election, is not invalid because the result of the preceding election was published within two years.—*Ex parte Smith* (Tex. Cr. App.) 245.

An order for a local option election may be made either at a regular or special session of the commissioners' court.—*Koch v. State* (Tex. Cr. App.) 809.

§ 2. Licenses and taxes.

*A liquor license is a mere privilege, subject to revocation.—*Sarlo v. Pulaski County* (Ark.) 953.

A county court, authorized to issue licenses for the sale of liquors, *held* empowered to impose a condition forfeiting the license on the licensee violating the law.—*Sarlo v. Pulaski County* (Ark.) 953.

*Under *Kirby's Dig. § 5120*, a county court, authorized to issue licenses, *held* required to treat alike all applicants possessing the legal qualifications.—*Sarlo v. Pulaski County* (Ark.) 953.

The posting of notices for the application for a liquor license *held* not a compliance with *Ky. St. 1903, § 4203*.—*Commonwealth v. Redman* (Ky.) 1073.

**Ky. St. 1903, § 4203, held* to authorize the county court to grant liquor licenses only in the case the proper notice for the application therefor has been given.—*Commonwealth v. Redman* (Ky.) 1073.

Transaction *held* to constitute a transfer of a dramshop license within the prohibition of *Rev. St. 1899, § 2992*.—*Sawyer v. Sanderson* (Mo. App.) 151.

Contract, including as an indivisible part thereof the transfer of a liquor license, *held* void under *Rev. St. 1899, § 2992*, and other provisions of the dramshop act.—*Sawyer v. Sanderson* (Mo. App.) 151.

Under *Rev. St. 1899, §§ 2993, 2997*, where a petition was filed for dramshop license in May, 1904, and was not acted on until January, 1906, the commissioner was without jurisdiction to grant a license to continue for a term of six months from the latter date.—*State ex rel. Sager v. Mulvihill* (Mo. App.) 773.

§ 3. Offenses.

In a prosecution for violating the local option law, *held* error to refuse an instruction that the defendant was not guilty if the liquor sold was a medical preparation, and was not an intoxicating liquor when drunk in such quantities as could be practically drunk.—*Pearce v. State* (Tex. Cr. App.) 234.

Defendant *held* not guilty if the liquor sold contained various drugs as ingredients, and the intoxication of a person taking it was the result of the drugs, and not of any intoxicating liquor contained in the preparation.—*Pearce v. State* (Tex. Cr. App.) 234.

Defendant *held* guilty of violating the local option law.—*Sliger v. State* (Tex. Cr. App.) 243.

Pen. Code 1895, art. 200, authorizing restaurants to keep open on Sunday, does not exempt restaurant keepers from the penalty provided by article 199 for the sale of intoxicating liquors on Sunday.—*Savage v. State* (Tex. Cr. App.) 351.

Where an employé of the owner of a still delivered brandy in exchange for peaches and

for the revenue license on the brandy, he was guilty of a sale of intoxicating liquor.—*Barnes v. State* (Tex. Cr. App.) 804.

Where the owner of fruit has it manufactured into liquor, receiving the product of the identical fruit furnished, the distiller is not guilty of a sale of liquor; but if the fruit is exchanged for liquor already manufactured, or if the distiller furnishes the owner of the fruit liquor in advance, the transaction is a sale.—*Barnes v. State* (Tex. Cr. App.) 805.

§ 4. Criminal prosecutions.

Proof of selling "beer" to a minor without proof that it was intoxicating, does not warrant conviction.—*Cassens v. State* (Tex. Cr. App.) 229.

On a prosecution for the sale of intoxicating liquor on Sunday in violation of *Pen. Code 1895, art. 199*, whether sale of a lunch in connection with a purported gift of the liquor was in fact a sale of the liquor *held* a question for the jury.—*Savage v. State* (Tex. Cr. App.) 351.

In a prosecution for violation of the local option law, evidence *held* to require submission to the jury of the question whether the transaction was a sale or a gift.—*Barnes v. State* (Tex. Cr. App.) 805.

In a prosecution for violating the local option law, testimony that witness had drunk liquor at the same place some years before the sale in question *held* inadmissible.—*Rutherford v. State* (Tex. Cr. App.) 810.

In a prosecution for violating the local option law, evidence of prior sale of certain liquid *held* inadmissible to prove the intoxicating property of the liquid in question.—*Rutherford v. State* (Tex. Cr. App.) 810.

In prosecution for violating local option law, charge *held* to improperly place the burden of proof of nonintoxicating character of liquor sold on defendant.—*Rutherford v. State* (Tex. Cr. App.) 810.

In a prosecution for violating the local option law, requested instruction on the properties of the drink sold should have been given.—*Rutherford v. State* (Tex. Cr. App.) 810.

INTOXICATION.

As defense to criminal prosecution, see "Criminal Law," § 1.
Common or habitual drunkards, see "Drunkards."

Of person sitting on cross-tie of railroad track as affecting contributory negligence, see "Railroads," § 7.
Proof of to affect credibility of witness, see "Witnesses," § 3.

ISSUES.

In criminal prosecutions, see "Indictment and Information," § 3.
Presented for review on appeal, see "Appeal and Error," § 2.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 5.

JOINDER.

Of causes of action, see "Action," § 3.

JOINT ADVENTURES.

The relation of joint purchasers of property is fiduciary, and one will not be permitted to ac-

* Point annotated. See syllabus.

quire a secret advantage in the purchase over his associates.—Paddock v. Bray (Tex. Civ. App.) 419.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

Mandamus to judge, see "Mandamus," § 1.

Remarks and conduct at trial, see "Trial," § 1.

§ 1. Disqualification to act.

The affidavit of appellant attempting to appeal under Rev. St. 1895, art. 1401, held not properly taken under Sayles' Ann. Civ. St. 1897, art. 1129, before the county judge who was appellant's counsel in the litigation.—Kalklosh v. Bunting (Tex. Civ. App.) 389.

JUDGMENT.

Decisions of courts in general, see "Courts," § 1.

Review, see "Appeal and Error."

Sales under judgment, see "Judicial Sales."

In actions by or against particular classes of parties.

See "Counties," § 4; "Municipal Corporations," § 9.

Trustee in bankruptcy, see "Bankruptcy," § 2.

In particular civil actions or proceedings.

See "Contempt," § 1; "Injunction," § 2.

On appeal or writ of error, see "Appeal and Error," § 28.

On bond, see "Bonds," § 1.

To enforce mechanic's lien, see "Mechanics' Liens," § 2.

In criminal prosecutions.

See "Criminal Law," § 20.

§ 1. Nature and essentials in general.

Where plaintiff's petition fails to show an amount sufficient to bring the action within the jurisdiction of the district court, the judgment of that court for plaintiff is fatally erroneous.—Moore v. Snell (Tex. Civ. App.) 270.

§ 2. On consent, offer, or admission.

Where it appeared that a consent decree was entered between two terms of court, it was a nullity.—Boynton v. Ashabranner (Ark.) 566; Same v. Ashabranner, Id. 1011.

A void consent decree entered in vacation held not cured by a term time amendment correcting a description in the name of one of the parties.—Boynton v. Ashabranner (Ark.) 566; Same v. Ashabranner, Id. 1011.

§ 3. By default.

A motion to vacate a default judgment having been filed, but not heard at the same term, the court had jurisdiction to hear the same at the succeeding term, though no order of continuance was entered.—Harkness v. Jarvis (Mo. App.) 1025.

§ 4. On trial of issues.

Rev. St. 1895, art. 1331, authorizing the court to enter judgment in the absence of a finding by the jury on special issues, is constitutional.—Featherstone v. Brown (Tex. Civ. App.) 470.

§ 5. Opening or vacating.

Under Rev. St. 1899, c. 8, art. 9, § 795, the Supreme Court held justified in directing the correction of the judgment, where plaintiff in error would otherwise be without remedy.—

Fidelity & Deposit Co. of Maryland v. Schuchman (Mo. Sup.) 628.

§ 6. Equitable relief.

That one against whom a judgment has been rendered has lost his right of appeal through the loss by unavoidable accident of a bill of exceptions is no ground for enjoining the execution of a judgment.—Church v. Gallic (Ark.) 307.

That defendant was a married woman when the action was instituted, and that her husband was not a party, is no ground for enjoining the execution of the judgment against her.—Church v. Gallic (Ark.) 307.

§ 7. Collateral attack.

A judgment against a corporation cannot be collaterally attacked on the ground that when it was rendered the corporation had ceased to do business and transferred its property to a trustee for the benefit of creditors.—Temple v. Branch Saw Co. (Tex. Civ. App.) 442.

§ 8. Merger and bar of causes of action and defenses.

A judgment in equity sustaining a deed held a bar to further prosecution of a suit in equity to cancel the deed.—Church v. Gallic (Ark.) 979.

A judgment in a former suit against plaintiffs' assignor held not res judicata of plaintiffs' right to certain cattle sued for.—Tootle v. Buckingham (Mo. Sup.) 619.

§ 9. Conclusiveness of adjudication.

Decree rendered on a cross-bill by the grantor in a deed of trust held res judicata of the grantor's subsequent right to redeem under a contract set up in the cross-bill.—Sturgeon v. Mudd (Mo. Sup.) 630.

Where an issue is settled against a party in litigation, it is res judicata in a subsequent suit involving the same issue between the parties and their privies in estate.—Delaney v. West (Tex. Civ. App.) 275.

In a suit to set aside a conveyance as fraudulent, recitals in a former judgment held not admissible as against the grantee.—Parlin & Orendorff Co. v. Vawter (Tex. Civ. App.) 407.

§ 10. Foreign judgments.

Under Const. U. S. art. 4, § 1, a foreign judgment in replevin would be given the same force in Missouri as a similar judgment of a domestic court.—Tootle v. Buckingham (Mo. Sup.) 619.

In a suit by a foreign corporation on a foreign judgment, defendant may show that the judgment arose out of a transaction entered into by the corporation in the state of the forum, without having had a permit to do business there.—St. Louis Expanded Metal Fireproofing Co. v. Beilharz (Tex. Civ. App.) 512.

§ 11. Payment, satisfaction, merger, and discharge.

A judgment for plaintiff held to vest the ownership of certain property in him, so that it was error to require it to be sold to satisfy the judgment.—Hildebrand v. Head (Tex. Civ. App.) 438.

§ 12. Actions on judgments.

A judgment of a foreign state may be proved by a witness who has compared the copy offered in evidence with the original record entry thereof.—St. Louis Expanded Metal Fireproofing Co. v. Beilharz (Tex. Civ. App.) 512.

§ 13. Pleading and evidence of judgment as estoppel or defense.

In trespass to try title to land, where the plaintiff claimed under a purchase at a trustee's sale on the foreclosure of a deed of trust, evi-

* Point annotated. See syllabus.

dence *held* to show that the foreclosure was based on a note involved in a previous suit.—*Delaney v. West* (Tex. Civ. App.) 275.

JUDICIAL NOTICE.

In criminal prosecutions, see "Criminal Law," § 6.

JUDICIAL POWER.

See "Constitutional Law," § 1.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 3.
On execution, see "Execution," § 4.

That the date of a judicial sale as stated in the sheriff's deed varies from the date stated in the return upon the order of sale does not render the sale void.—*Temple v. Branch Saw Co.* (Tex. Civ. App.) 442.

JURISDICTION.

Amount in controversy, see "Appeal and Error," § 1.

Jurisdiction of particular actions or proceedings.

See "Divorce," § 2; "Partition," § 1; "Quo Warranto," § 1.

Against carrier, see "Carriers," § 1.

Appellate jurisdiction, see "Appeal and Error," § 4; "Criminal Law," § 21.

Condemnation proceedings, see "Eminent Domain," § 2.

Criminal prosecutions, see "Criminal Law," § 3.

For causing death, see "Death," § 1.

Particular courts, see "Courts."

JURY.

Custody and conduct, see "Criminal Law," § 18.

Instructions in civil actions, see "Trial," §§ 5-11.

Instructions in criminal prosecutions, see "Criminal Law," § 17.

Questions for jury in civil actions, see "Trial," § 4.

Questions for jury in criminal prosecutions, see "Criminal Law," § 17.

Taking case or question from jury at trial, see "Trial," § 4.

Verdict in civil actions, see "Trial," § 12.

Verdict in criminal prosecutions, see "Criminal Law," § 15.

§ 1. Right to trial by jury.

In a proceeding by the state under Acts Ark. 1901, p. 368, §§ 1, 2 (Kirby's Dig. §§ 6749, 6750), for the forfeiture of the "franchise and all charter rights" of a railroad in and to railroad property acquired by it under lease, defendant *held* to have a constitutional right to a jury trial on the question whether it had maintained the leased property in good repair.—*Louisiana & Northwest R. Co. v. State* (Ark.) 559.

Under St. Louis City Charter, art. 6, § 7, an order by the court making changes in the benefit assessment by commissioners condemning land, *held* not an infringement on the right given by Const. art. 2, § 21, to have the damages assessed by a jury or commission of freeholders.—*City of St. Louis v. Lawton* (Mo. Sup.) 80.

§ 2. Summoning, attendance, discharge, and compensation.

A sheriff's return to a special venire *held* to

recite facts as to certain jurors rendering any amount of diligence on the officer's part to secure their attendance unnecessary.—*Coleman v. State* (Tex. Cr. App.) 238.

§ 3. Competency of jurors, challenges, and objections.

The fact of formation of opinion by juror in criminal case *held* not to disqualify him.—*State v. Forsha* (Mo. Sup.) 746.

Where several prosecutions were pending against defendant, he was entitled to inquire of jurors who had heard the evidence in a case previously tried if they would have a fixed opinion as to the guilt of accused, if it should transpire that the evidence in the two cases was similar.—*Barnes v. State* (Tex. Cr. App.) 805.

Prejudice against the plea of insanity *held* not to disqualify a juror on a prosecution for murder.—*Franks v. State* (Tex. Cr. App.) 923.

Prejudice against the crime of murder does not disqualify a juror.—*Franks v. State* (Tex. Cr. App.) 923.

JUSTICES OF THE PEACE.

Jurisdiction of criminal prosecutions, see "Criminal Law," § 3.

Pleading contract of warranty on sale in action before, see "Sales," § 7.

§ 1. Procedure in civil cases.

Rev. St. 1899, § 3852, requiring a written instrument, when made the basis of suit before a justice, to be filed, does not require the action to be brought specifically on such instrument.—*Standard Scale & Foundry Co. v. Kansas City Furnace Co.* (Mo. App.) 108.

Under Rev. St. 1899, § 3852, declaring that no formal pleadings shall be required in a justice's court, a statement of a cause of action and account filed before a justice of the peace are sufficient, if they advise the opposite party of what he is charged and bar another action for the same subject-matter.—*Darnell v. Lafferty* (Mo. App.) 784.

§ 2. Review of proceedings.

Under Sayles' Ann. Civ. St. 1897, art. 358, defendant *held* not entitled to plead a set-off on appeal to the county court, where such set-off was not pleaded before a justice until after judgment by default had been entered.—*Omer v. Floore* (Tex. Civ. App.) 246.

A bond reciting a justice's judgment, and stating that defendant desires to appeal therefrom to the county court, is insufficient to confer jurisdiction of the appeal on the district court.—*Fort Worth & D. C. Ry. Co. v. Henry* (Tex. Civ. App.) 399.

JUSTIFICATION.

Of actionable words, see "Libel and Slander," § 2.

Of homicide, see "Homicide," § 5.

KNOWLEDGE.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.

LACHES.

Effect in equity, see "Equity," § 2.

In seeking to establish right of subrogation, see "Subrogation."

LANDLORD AND TENANT.

Lease of railroad, see "Railroads," § 1.

* Point annotated. See syllabus.

Lessee as party in condemnation proceedings, see "Eminent Domain," § 2.
 Relation of tenancy and servant distinguished, see "Master and Servant," § 1.
 Tenant's interest in crops as subject to execution, see "Execution," § 1.

§ 1. Leases and agreements in general.

Though a lease provided that the premises should be used for the saloon business, the contract was not rendered illegal, nor the lessee absolved, by the adoption of local option in the county.—*Houston Ice & Brewing Co. v. Keenan* (Tex. Sup.) 197.

§ 2. Terms for years.

*A tenant who holds over after the expiration of his term continues to occupy the relation of tenant toward his former landlord on the same conditions as those of the preceding term.—*Wilson v. Alexander* (Tenn.) 935.

§ 3. Premises, and enjoyment and use thereof.

In an action by a tenant, on the landlord's refusal to deliver possession, the measure of damages was the difference between the agreed rental and the rental value.—*Andrews v. Minter* (Ark.) 822.

*A tenant *held* not entitled to recover on account of rental value for an unlawful eviction, in the absence of evidence that such value exceeded the agreed rent.—*McElvaney v. Smith* (Ark.) 981.

Where a tenant, because of an unlawful eviction, is required to remove to temporary quarters and then to permanent quarters, *held*, that it cannot as matter of law be said that he cannot recover the cost of both.—*McElvaney v. Smith* (Ark.) 981.

Lease of premises for saloon construed, and *held* not to authorize the lessee to abandon the same on the passage of a law making it unlawful to use the property for a saloon.—*San Antonio Brewing Ass'n v. Brents* (Tex. Civ. App.) 368.

In trespass to try title, a charge on defendant's measure of damages under his plea of re-convention *held* correct.—*Freeman v. Slay* (Tex. Civ. App.) 404.

§ 4. Rent and advances.

*A landlord, under his lien, has such possessory rights in the crop of his tenant as to entitle him to prevent a removal thereof by the tenant's creditor under execution, and to maintain an action for the trial of the right of property to compel its return.—*Groesbeck v. Evans* (Tex. Civ. App.) 889.

§ 5. Re-entry and recovery of possession by landlord.

Under a contract for the clearing of land in consideration of the use thereof, the owner *held* not entitled to retake possession without tendering the amount due for work performed in partially clearing the land.—*Bunch v. Williams* (Ark.) 588.

LANDS.

See "Public Lands."

LARCENY.

See "False Pretenses"; "Robbery."

Evidence of other offenses, see "Criminal Law," § 8.

Hearsay, see "Criminal Law," § 9.

New trial, see "Criminal Law," § 19.

Opinion evidence, see "Criminal Law," § 11.

Presumptions, see "Criminal Law," § 6.

* Point annotated. See syllabus.

Res gestæ, see "Criminal Law," § 7.

Review in general, see "Criminal Law," § 26.

§ 1. Offenses, and responsibility therefor.

In a prosecution for larceny, evidence *held* to bring the case within the rule that the taking by persons conspiring to cheat a man under color of a bet of money merely deposited as a stake by him, without intending to part with ownership thereof, constitutes larceny.—*Johnson v. State* (Ark.) 905.

Facts *held* to constitute larceny of goods in Illinois, and, the goods having been subsequently brought into Missouri, the offense was punishable under Rev. St. 1899, § 2362.—*State v. Mintz* (Mo. Sup.) 12.

In a prosecution for larceny, the want of a felonious intent on the part of the person who acted merely as defendant's servant in obtaining the goods *held* immaterial.—*State v. Mintz* (Mo. Sup.) 12.

§ 2. Prosecution and punishment.

In a prosecution for larceny, an instruction *held* all defendant was entitled to on a certain point.—*Johnson v. State* (Ark.) 905.

In a prosecution for larceny, an instruction *held* to fully protect defendant's rights.—*Johnson v. State* (Ark.) 905.

Evidence *held* sufficient to support a conviction for larceny.—*Martin v. State* (Ark.) 962.

Evidence on a trial for hog stealing *held* to support a conviction.—*McGaha v. State* (Ark.) 983.

In a prosecution for larceny, under Rev. St. 1899, § 2362, it was not essential to the validity of the information that it should contain an allegation that the property was stolen in another state and brought into Missouri.—*State v. Mintz* (Mo. Sup.) 12.

In a prosecution for theft from the person, an instruction regarding defendant's explanation of his possession of the alleged stolen property *held* not erroneous.—*Hilscher v. State* (Tex. Cr. App.) 227.

In a prosecution for theft from the person, an instruction regarding defendant's explanation of his possession of the alleged stolen property *held* not vague, confusing, or misleading.—*Hilscher v. State* (Tex. Cr. App.) 227.

In a prosecution for theft from the person, an instruction regarding defendant's explanation of his possession of the alleged stolen property *held* not to impose on defendant a greater burden than the law requires.—*Hilscher v. State* (Tex. Cr. App.) 227.

In a prosecution for theft from the person, evidence *held* to sustain a conviction.—*Nelson v. State* (Tex. Cr. App.) 807.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 27.

LEADING QUESTIONS.

See "Witnesses," § 2.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEGACY TAX.

See "Taxation," § 3.

LEGISLATIVE POWER.

See "Constitutional Law," § 1; "Municipal Corporations," § 3.

LIBEL AND SLANDER.

Instructions in general, see "Trial," § 6.

§ 1. Words and acts actionable, and liability therefor.

A false publication, impairing the credit of a merchant by imputing insolvency or trickery touching his trade or occupation, is libelous per se.—*Ukman v. Daily Record Co.* (Mo. Sup.) 60.

A statement by defendant concerning plaintiff held to import a larceny, and slanderous per se.—*Grimes v. Thorp* (Mo. App.) 638.

§ 2. Justification and mitigation.

Publication that defendant had sold his stock in trade for a nominal consideration, if construed as imputing insolvency, was not libelous, if defendant was in fact insolvent, as Rev. St. 1899, § 636, makes the truth a defense in such actions.—*Ukman v. Daily Record Co.* (Mo. Sup.) 60.

§ 3. Actions.

Where the meaning of an alleged libel does not plainly appear in the words used, the extrinsic facts should be alleged by way of inducement, and the libelous charge should be followed by an innuendo applying the words to the matter pleaded.—*Ukman v. Daily Record Co.* (Mo. Sup.) 60.

A contention made in trial of a libel suit held not allowable, because an enlargement of the innuendo.—*Ukman v. Daily Record Co.* (Mo. Sup.) 60.

Under Const. art. 2, § 14, leaving the question of libel to the jury, the court may direct a nonsuit, though it cannot coerce a verdict for plaintiff.—*Ukman v. Daily Record Co.* (Mo. Sup.) 60.

In a civil action for slander, an instruction that the jury were themselves the judges of the law, as well as of the facts, was error.—*Grimes v. Thorp* (Mo. App.) 638.

LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," §§ 1, 2.
Injuries to licensees, see "Railroads," §§ 5, 7.
To foreign corporations, see "Corporations," § 6.

LIENS.

Acquired by execution, see "Execution," § 2.
Special verdict in suit to establish, see "Trial," § 12.

Particular classes of liens.

See "Mechanics' Liens."

Agister's lien, see "Animals."

For labor as affecting rights of purchasers of cotton, see "Sales," § 4.

For street improvements, see "Municipal Corporations," § 5.

Laborers' liens, see "Master and Servant," § 2.

Landlord's lien for rent, see "Landlord and Tenant," § 4.

Of bailee, see "Bailment."

* Point annotated. See syllabus.

Vendor's lien on goods sold, see "Sales," § 6.
Vendor's lien on lands sold, see "Vendor and Purchaser," § 4.

LIFE ESTATES.

Creation by deed, see "Deeds," § 1.
Creation by will, see "Wills," § 3.

LIFE INSURANCE.

See "Insurance."

LIMITATION.

Of doctrine of *res ipsa loquitur*, see "Carriers," § 6.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Laches, see "Equity," § 2.

To open partition sale, see "Partition," § 1.

§ 1. Computation of period of limitation.

Limitations did not cease to run against a second action of ejectment, brought after suffering a nonsuit in a former action, until the commencement of such second action, where it was based on a title acquired subsequent to the first action.—*Covington v. Berry* (Ark.) 1006.

§ 2. Acknowledgment, new promise, and part payment.

Where the last payment on a note was made within five years after the note became due, a suit brought within five years after such payment was not barred by limitations.—*Brown v. Fuller* (Ark.) 888.

LIMITATION OF LIABILITY.

Of carrier, see "Carriers," §§ 1, 2.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIVE STOCK.

Carriage of, see "Carriers," § 2.

Injuries from operation of railroads, see "Railroads," §§ 4, 8.

LOAN COMPANIES.

See "Building and Loan Associations."

LOANS.

By agent, see "Principal and Agent," § 2.

LOCAL LAWS.

See "Statutes," § 2.

LOCAL OPTION.

Adoption of as ground for termination of lease of premises for saloon business, see "Landlord and Tenant," §§ 1, 3.

Traffic in intoxicating liquors, see "Intoxicating Liquors," §§ 1, 3, 4.

LOCATION.

Misdescription of location of mortgaged cattle as affecting validity of mortgage, see "Chattel Mortgages," § 1.

LOGS AND LOGGING.

Time for performance of contract to purchase lumber, see "Contracts," § 1.
Transfer of title to lumber sold, see "Sales," § 4.

The acts of the parties *held* a practical demonstration that a contract of sale of timber to be cut was sufficiently definite and certain as to the timber sold.—Bradford v. Huffman (Ky.) 1057.

*A contract of sale *held* to be of all the timber on a certain tract.—Bradford v. Huffman (Ky.) 1057.

LOOKOUT.

On railroad locomotives, see "Railroads," §§ 7, 8.

LOST INSTRUMENTS.

Under Rev. St. 1899, § 3854, an affidavit in an action on a lost note *held* to sufficiently describe the note by reference to the statement.—Hogan v. Kaiser (Mo. App.) 1128.

*Under Rev. St. 1899, § 3854, an affidavit in an action on a lost instrument *held* sufficient.—Hogan v. Kaiser (Mo. App.) 1128.

*Under Rev. St. 1899, § 745, requiring the giving of an indemnifying bond in actions on lost instruments, the bond is given in time if it is filed and approved before the ruling of the trial court upon a motion for a new trial.—Hogan v. Kaiser (Mo. App.) 1128.

*Under Rev. St. 1899, §§ 745, 3854, 3855, plaintiff, in an action on a lost instrument commenced before a justice of the peace and appealed to the circuit court, cannot have judgment without filing an indemnifying bond.—Hogan v. Kaiser (Mo. App.) 1128.

*Under Rev. St. 1899, § 745, requiring an indemnifying bond in actions on lost instruments, the filing of the bond is not jurisdictional, but merely a condition precedent to recovery, which must be performed before judgment is entered.—Hogan v. Kaiser (Mo. App.) 1128.

Certain evidence *held* admissible on the issue of due execution of a lost deed.—Garrett v. Spradling (Tex. Civ. App.) 293.

LOTTERIES.

§ 1. Criminal responsibility.

An indictment under Rev. St. 1899, § 2219, for establishing a "policy" as a business, *held* not objectionable for failure to define in what manner a "policy" was made or established, and what was meant by a "policy."—State v. Cronin (Mo. Sup.) 604.

In a prosecution for aiding and assisting in establishing a "policy," in violation of Rev. St. 1899, § 2219, evidence *held* sufficient to sustain a conviction.—State v. Cronin (Mo. Sup.) 604.

In a prosecution for aiding and assisting in the establishment of a "policy," an instruction *held* not objectionable for failure to require that defendant's acts must have been "feloniously" committed.—State v. Cronin (Mo. Sup.) 604.

In a prosecution for aiding and assisting in establishing a "policy" as a business or avocation, a verdict and judgment merely finding defendant guilty of establishing a policy *held* fatally defective.—State v. Cronin (Mo. Sup.) 604.

In a prosecution for violating Rev. St. 1899, § 2219, a verdict finding defendant guilty of

aiding and assisting in establishing a "policy" *held* fatally defective.—State v. Miller (Mo. Sup.) 607.

LUMBER.

See "Logs and Logging."

LUNATICS.

See "Insane Persons."

MALICIOUS PROSECUTION.

§ 1. Want of probable cause.

The binding over of accused by the committing magistrate to await the grand jury is *prima facie* evidence of probable cause in a subsequent action by accused for malicious prosecution.—Wells v. Parker (Ark.) 602.

§ 2. Termination of prosecution.

A discharge by a grand jury is *prima facie* a termination of a prosecution, such as will support an action for malicious prosecution.—Wells v. Parker (Ark.) 602.

§ 3. Actions.

In a suit for malicious prosecution, whether defendant acted under advice of counsel and made a full disclosure of the facts to counsel is a question of fact for the jury.—Wells v. Parker (Ark.) 602.

MANDAMUS.

Jurisdiction of particular courts to issue, see "Courts," § 4.

To compel levy of municipal tax, see "Municipal Corporations," § 9.

To compel removal of dam and construction of culverts, see "Waters and Water Courses," § 2.

To contest validity of organization of school district, see "Schools and School Districts," § 1.

§ 1. Subjects and purposes of relief.

Under Const. art. 5, § 6, and Sayles' Ann. Civ. St. 1897, art. 1000, Courts of Civil Appeals *held* to have no jurisdiction to issue writ of mandamus to compel judge of district court to proceed to trial of cause.—Dunn v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 532.

Mandamus will not go to compel a city to appropriate to the payment of interest on bonds taxes collected indiscriminately for interest and sinking fund both.—City of Austin v. Cahill (Tex. Civ. App.) 536.

§ 2. Jurisdiction, proceedings, and relief.

Holders of refunding bonds *held* necessary parties to mandamus proceedings, instituted by holders of unrefunded bonds, to compel a city to apply the proceeds of taxes raised for the refunding bonds to the payment of interest charges on the unrefunded bonds.—City of Austin v. Cahill (Tex. Civ. App.) 536.

MANDATE.

See "Mandamus."

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 28.

MANSLAUGHTER.

See "Homicide," §§ 3, 10.

* Point annotated. See syllabus.

MANUFACTURES.

Contracts for manufacture and sale, see "Sales," § 1.

MARRIAGE.

See "Divorce"; "Husband and Wife."

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

Damages for injuries to servant, see "Damages," §§ 4, 5.

Instructions in general in action for injuries to servant, see "Trial," § 9.

Liability of carrier for acts of servant, see "Carriers," § 6.

Liability of railroad for acts of servants, see "Railroads," § 6.

Opinion evidence in action for injuries to servant, see "Evidence," § 9.

Release of claim for injuries to servant, see "Release," § 1.

§ 1. The relation.

Finding that a tenant of a ferry was acting after the expiration of his term not as tenant but as servant *held* justified.—*Wilson v. Alexander* (Tenn.) 935.

The unexplained fact that one is seen operating the machinery of a carrier is sufficient to justify the conclusion that he is acting as the carrier's servant.—*Wilson v. Alexander* (Tenn.) 935.

§ 2. Services and compensation.

In an action for commissions under a contract of employment, defendant *held* entitled to set off sums due it from plaintiff on account of one of the years sued for, though the contracts for each year were separate.—*Wrought Iron Range Co. v. Young* (Ark.) 586.

In an action on an agency contract providing that overdrafts of employés under plaintiff should be charged to his account, refusal of an instruction stating the converse of the proposition, that, if the overdrafts were not made with plaintiff's knowledge or acquiescence, he was not liable therefor, *held* error.—*Wrought Iron Range Co. v. Young* (Ark.) 586.

*Under the laborers' lien law of 1895 (Acts 1895, p. 217, No. 146), the lien of a laborer who aided in growing a crop *held* superior to that of a mortgage given before the crop was produced.—*Sheeks-Stephens Store Co. v. Richardson* (Ark.) 988.

One who takes a mortgage on a crop to be produced in the future does so with notice of the laborers' liens.—*Sheeks-Stephens Store Co. v. Richardson* (Ark.) 988.

§ 3. Master's liability for injuries to servant—Nature and extent in general.

Failure of railroad to have the headlight of its engine burning, or to furnish an employé with a lantern, or to give a signal before starting the engine, *held* not shown to be the proximate cause of injury to an employé.—*Walker v. Louis-Werner Sawmill Co.* (Ark.) 988.

Negligence of others *held* not to relieve railroad company from liability for the injury to a servant.—*Smith v. Fordyce* (Mo. Sup.) 679.

§ 4. — Tools, machinery, appliances, and places for work.

*The absence of sufficient light in a mill room *held* not evidence of negligence on the master's

part.—*Carey v. W. B. Samuels & Co.* (Ky.) 1052.

It was not negligence for a master to fail to provide a ladder with prongs or safety hooks.—*Blundell v. William A. Miller Elevator Mfg. Co.* (Mo. Sup.) 103.

A master must furnish reasonably safe appliances, considering the character of the work, but they need not necessarily be the latest or best.—*Blundell v. William A. Miller Elevator Mfg. Co.* (Mo. Sup.) 103.

A railroad company is not bound, in its duty toward its servants, to adopt every new invention, although it is an improvement, but it is merely its duty to use reasonable care in procuring and keeping its appliances in good condition.—*Smith v. Fordyce* (Mo. Sup.) 679.

In an action for injuries to an employé in a quarry by being struck by a rock thrown out by a blast, defendant *held* not guilty of negligence in failing to provide plaintiff with a safe place to work.—*Zeigenmeyer v. Charles Goetz Lime & Cement Co.* (Mo. App.) 139.

A master *held* not bound to furnish a servant a safe place to work, where the danger is temporary or arises from the hazard and progress of the work itself.—*Zeigenmeyer v. Charles Goetz Lime & Cement Co.* (Mo. App.) 139.

Fact that locomotive engineer knew that the conductor was riding on the pilot *held* not to require him to keep watch of the conductor, to the neglect of other duties, so as to guard against the emergency of his falling.—*Cardwell v. Gulf, B. & G. N. Ry. Co.* (Tex. Civ. App.) 422.

§ 5. — Warning and instructing servant.

In the absence of evidence that a master knew that a servant dismantling a trestle did not appreciate the danger, the master was not bound to instruct him of that danger.—*Grayson-McLeod Lumber Co. v. Carter* (Ark.) 597.

In an action for injuries to a minor servant, defendant *held* not entitled to object to certain instructions on the theory that the work was dangerous in itself and that defendant was liable for failure to instruct, though the danger was obvious.—*Wood v. Texas Cotton Product Co.* (Tex. Civ. App.) 496.

§ 6. — Fellow servants.

An injured servant and certain others employed by a railroad company *held* not fellow servants, within Laws 1891, p. 25, c. 24, and Act June 18, 1897 (Laws 1897, p. 14, c. 6).—*International & G. N. R. Co. v. Still* (Tex. Civ. App.) 257.

Laws 1891, p. 25, c. 24, and Act June 18, 1897 (Laws 1897, p. 14, c. 6), determining who shall be fellow servants in the employ of a railroad company, are constitutional.—*International & G. N. R. Co. v. Still* (Tex. Civ. App.) 257.

Rev. St. Ariz. 1901, para. 2533, 2767, does not abrogate the common-law rule making masters responsible for the negligence of inspectors.—*El Paso & S. W. Ry. Co. v. Vizard* (Tex. Civ. App.) 457.

Where a servant is not guilty of contributory negligence, and his master is guilty of negligence which is the proximate cause of injuries, it is liable, though the negligence of fellow servants may have concurred in producing the result.—*Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 466.

§ 7. — Risks assumed by servant.

Servant engaged in dismantling a trestle *held* to have assumed the risk, and to be without the protection of the rule requiring the master to

* Point annotated. See syllabus.

furnish a safe place.—Grayson-McLeod Lumber Co. v. Carter (Ark.) 597.

A railroad company *held not negligent* in furnishing a bell cord strong enough only to ring the engine bell, and not to support the fireman when he lost his balance.—Illinois Cent. R. Co. v. Mercer (Ky.) 1054.

The risks assumed by a servant do not include subsequent negligence of the master.—Blundell v. William A. Miller Elevator Mfg. Co. (Mo. Sup.) 103.

A servant assumes the risks that ordinarily and usually are incident to the business being conducted by the master.—Blundell v. William A. Miller Elevator Mfg. Co. (Mo. Sup.) 103.

Where a master fails to furnish safe appliances, and the servant knows or by ordinary care could know that the appliances are not reasonably safe, he is not obliged to refuse to use them or quit the service, if he reasonably believes that by the exercise of proper care he can safely use the appliances.—Blundell v. William A. Miller Elevator Mfg. Co. (Mo. Sup.) 103.

A servant *held* to have assumed the risk of doing work on which he was engaged without a helper.—Blundell v. William A. Miller Elevator Mfg. Co. (Mo. Sup.) 103.

A car repairer, at work on a car on the main line of a railroad, does not assume the risk of injury from a car escaping from a switch track and running onto the main line.—Smith v. Fordyce (Mo. Sup.) 679.

A servant is not precluded from recovery for injuries sustained by the negligence of the master, if the risk is not of such a character that a reasonably prudent person would not continue in the service.—Whaley v. Coleman (Mo. App.) 119.

In an action for injuries to an employé in a quarry by being struck by a rock thrown out by a blast, plaintiff *held* to have assumed the risk.—Zeigenmeyer v. Charles Goetz Lime & Cement Co. (Mo. App.) 139.

Servant, sent to make safe an unsafe place, *held* to assume the risk.—Henson v. Armour Packing Co. (Mo. App.) 166.

In an action for injuries, evidence *held* to show that the plaintiff had not assumed the risk.—Fouts v. Swift & Co. (Mo. App.) 167.

*That dangers resulting from a master's failure to exercise ordinary care are obvious will not excuse him from liability.—Stafford v. Adams (Mo. App.) 1130.

*An experienced servant, who knows of the methods employed by the master in inspecting the appliances used, cannot recover for an injury received by reason of a defect in the appliance.—Hollingsworth v. National Biscuit Co. (Mo. App.) 1118.

The mere knowledge by a servant of a danger does not charge him with the assumption of the risk thereof, unless he understood and appreciated such risk.—El Paso & S. W. Ry. Co. v. Vizard (Tex. Civ. App.) 457.

Where plaintiff was injured by an engine striking timber lying on the track, which was left there by plaintiff and others engaged in moving a heavy boiler between two tracks, leaving the timber lying on the rails was not a risk ordinarily incident to the employment, and was not assumed.—Ray v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 466.

§ 8. — Contributory negligence of servant.

Railroad servant, who needlessly got off the engine in the dark to get sand, and fell, and

had his hand run over, *held* guilty of contributory negligence.—Walker v. Louis-Werner Sawmill Co. (Ark.) 988.

Use of obviously dangerous appliance *held* contributory negligence.—Blundell v. William A. Miller Elevator Mfg. Co. (Mo. Sup.) 103.

Contributory negligence *held* to have precluded a servant from recovering for injuries.—Whaley v. Coleman (Mo. App.) 119.

A railroad brakeman is under no duty to inspect a car on which he is working in order to ascertain whether parts thereof, such as hand rails, are unsafe for his use.—El Paso & S. W. Ry. Co. v. Vizard (Tex. Civ. App.) 457.

§ 9. — Actions.

*In an action for injuries to a servant, burden of showing that defendant's negligence was the proximate cause of the injury is on plaintiff.—Walker v. Louis-Werner Sawmill Co. (Ark.) 988.

*An employé injured while operating a mill *held* as a matter of law to have assumed the risk.—Carey v. W. B. Samuels & Co. (Ky.) 1052.

Evidence *held* not to show that a certain ladder was one of the appliances furnished by a master.—Blundell v. William A. Miller Elevator Mfg. Co. (Mo. Sup.) 103.

In an action for injuries to a car repairer from the escape of a car from a switch track, *held* a question for the jury whether defendant should have had a derailing switch at the junction of the switch track where the accident happened.—Smith v. Fordyce (Mo. Sup.) 679.

In an action for injuries to a car repairer, injured by the escape of a car from a switch track, *held*, that the evidence warranted a finding that the brake on the car had not been set when the car was set out.—Smith v. Fordyce (Mo. Sup.) 679.

In an action for injuries to a car repairer from a car escaping from a switch track onto the track where he was at work, it was competent, to show the absence of a derailing switch at the junction of the switch track and the other track, and that such a device was in common use by defendant.—Smith v. Fordyce (Mo. Sup.) 679.

In an action for injuries to a car repairer, *held*, that there was no failure of proof under the petition.—Smith v. Fordyce (Mo. Sup.) 679.

In an action against a master for injuries received by a servant, evidence *held* not to show actionable negligence.—Hollingsworth v. National Biscuit Co. (Mo. App.) 1118.

In an action for injuries, evidence *held* not to charge plaintiff with contributory negligence in coming in contact with electric fan.—Fouts v. Swift & Co. (Mo. App.) 167.

Evidence that servant's injuries were caused by the unguarded condition of machinery *held* reconcilable with physical facts.—Stafford v. Adams (Mo. App.) 1130.

It is negligence per se for the owner of a mill to fail to guard pulleys and belts, as required by Rev. St. 1899, § 6433.—Stafford v. Adams (Mo. App.) 1130.

In an action by a servant for injuries, *held*, that the issue of contributory negligence was for the jury.—Stafford v. Adams (Mo. App.) 1130.

In an action against a railroad company for injuries to a servant, owing to other servants having rolled a bale of cotton on plaintiff, *held*, that the question of their negligence was for the jury.—International & G. N. R. Co. v. Still (Tex. Civ. App.) 257.

* Point annotated. See syllabus.

In an action against a railroad company for injuries to a servant, evidence *held* not to show any negligence on the part of plaintiff's foreman.—*International & G. N. R. Co. v. Still* (Tex. Civ. App.) 257.

Whether a railroad had properly performed its duty of inspecting cars *held* a question for the jury.—*El Paso & S. W. Ry. Co. v. Vizard* (Tex. Civ. App.) 457.

Whether an inspector was negligent in inspecting cars, or whether he negligently failed to make an inspection, were questions of fact for the jury.—*El Paso & S. W. Ry. Co. v. Vizard* (Tex. Civ. App.) 457.

In an action for injuries to a railroad brakeman, charge submitting the issue of the brakeman's negligence as proximate cause *held* erroneous, where the negligent act specified necessarily contributed to the injury.—*El Paso & S. W. Ry. Co. v. Vizard* (Tex. Civ. App.) 457.

In an action for injuries sustained by being struck by a timber left on a railway truck, the evidence *held* to present an issue of fellow servants.—*Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 466.

In an action for injuries by reason of a defective tool, a charge presenting propositions of negligence in furnishing the defective tool "and" in failing to warn *held* proper.—*Wood v. Texas Cotton Product Co.* (Tex. Civ. App.) 496.

§ 10. Liabilities for injuries to third persons.

Exemplary damages cannot be recovered for the malicious acts of railroad agents in failing or refusing to carry a passenger, where ratification is not shown.—*Townsend v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 302.

MATERIALITY.

Of alteration of written instrument, see "Alteration of Instruments."

MAXIMS.

Of equity, see "Equity," § 1.

MEASURE OF DAMAGES.

See "Damages," § 3.

For breach of contract of sale, see "Sales," § 6.

For breach of warranty, see "Sales," § 7.

For delay in transportation, see "Carriers," § 2.

MECHANICS' LIENS.

Parol or extrinsic evidence of mechanic's lien statement, see "Evidence," § 8.

§ 1. Proceedings to perfect.

Under Rev. St. 1899, § 4207, and chapter 47, art. 4, §§ 4239-4256, lien account of subcontractor *held* sufficient as to the dates of supplying materials.—*Kneisley Lumber Co. v. Edward B. Stoddard Co.* (Mo. App.) 774.

Mechanic's lien statement *held* sufficiently full as to the items of material furnished.—*Kneisley Lumber Co. v. Edward B. Stoddard Co.* (Mo. App.) 774.

§ 2. Enforcement.

Though notice of an intention to file a mechanic's lien was not served on all the owners of the property, where it was served on one of such owners, the lien can be enforced against his undivided interest.—*Kneisley Lumber Co. v. Edward B. Stoddard Co.* (Mo. App.) 774.

A judgment in favor of a transferee for amount of a note for materials *held* proper, though the special verdict found that the value of the materials furnished was less than the sum stated in the note.—*Featherstone v. Brown* (Tex. Civ. App.) 470.

MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 4.

MENTAL SUFFERING.

See "Damages," § 2.

MERGER.

Of contract, see "Contracts," § 2.

Of prior verbal contract in written contract between shipper and carrier, see "Carriers," § 2.

MILITIA.

Requisites and validity in general of statutes relating to, see "Statutes," §§ 1, 2.

MINES AND MINERALS.

Contradiction of witnesses in ejectment for mining claim, see "Witnesses," § 3.

Deeds of mineral lands, see "Deeds," § 2.

Ejectment for mining claim, see "Ejectment," § 2.

Quarry operators as employers, see "Master and Servant," §§ 4, 7.

MISREPRESENTATION.

See "False Pretenses"; "Fraud."

By vendor of land, see "Vendor and Purchaser," § 1.

MISTAKE.

As ground for reformation of deed, see "Reformation of Instruments," § 1.

MITIGATION.

Of damages, see "Damages," § 2.

MODIFICATION.

Of contract, see "Contracts," § 2.

MONEY RECEIVED.

Liability of broker for, see "Brokers," § 2.

Recovery of price paid for goods, see "Sales," § 7.

MONOPOLIES.

Conclusiveness of decision as to violation of anti-trust act, see "Courts," § 1.

§ 1. Trusts and other combinations in restraint of trade.

Where an action is brought to recover a penalty allowed by the anti-trust statutes of Texas, *held*, that no right of the state to the penalties could be based on the ground that the contract created a monopoly at common law or was in violation of the anti-trust statutes of the United States.—*Ft. Worth & D. C. Ry. Co. v. State* (Tex. Civ. App.) 370.

* Point annotated. See syllabus.

MORTALITY TABLES.

Evidence in action for wrongful death, see "Death," § 1.

MORTGAGES.

In fraud of creditors, see "Fraudulent Conveyances," § 1.

Parol or extrinsic evidence, see "Evidence," § 8.

Power of agent as to, see "Principal and Agent," § 2.

Priority of laborer's lien, see "Master and Servant," § 2.

Subrogation to rights of mortgagee, see "Subrogation."

Mortgages by particular classes of parties.

See "Corporations," §§ 2, 4; "Husband and Wife," §§ 3, 5.

Mortgages of particular species of property.

Community property, see "Husband and Wife," § 5.

Personal property, see "Chattel Mortgages." Wife's separate estate, see "Husband and Wife," § 3.

§ 1. Construction and operation.

"Neither a surety nor his heirs take any legal interest in land mortgaged to him for purposes of indemnity.—Dyer v. Jacoway (Ark.) 901.

§ 2. Payment or performance of condition, release, and satisfaction.

A beneficiary of a deed of trust *held* justified in refusing to perform an agreement to extend the time of payment and to dismiss foreclosure proceedings.—Sturgeon v. Mudd (Mo. Sup.) 630.

A promise by a beneficiary of a trust deed to grant an extension of time or postpone a foreclosure sale, unsupported by a valuable consideration, *held* unenforceable.—Sturgeon v. Mudd (Mo. Sup.) 630.

§ 3. Redemption.

Under Rev. St. 1889, §§ 4343, 4344, a bill to redeem from a foreclosure sale under a deed of trust, not filed within 12 months after the sale, and failing to allege an attempt to give security, *held* fatally defective.—Sturgeon v. Mudd (Mo. Sup.) 630.

MOTIONS.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 20.

Change of venue in civil actions, see "Venue," § 1.

Continuance in civil actions, see "Continuance."

Direction of verdict in civil actions, see "Trial," § 4.

Dismissal of appeal or writ of error in criminal prosecutions, see "Criminal Law," § 25.

New trial in civil actions, see "New Trial," § 2.

New trial in criminal prosecutions, see "Criminal Law," § 19.

Opening or setting aside default judgment, see "Judgment," § 3.

Presentation of objections for review, see "Appeal and Error," § 2.

Quashing depositions, see "Depositions."

Relating to pleadings, see "Pleading," § 7.

Striking out evidence, see "Trial," § 2.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.

Dedication of streets and alleys to public, see "Dedication," § 1.

Delegation of legislative power to, see "Constitutional Law," § 1.

Disapproval by municipal assembly of report of commissioners in condemnation proceedings, see "Eminent Domain," § 2.

Estoppel to assert invalidity of franchise, see "Estoppel," § 1.

Inadequate damages for injuries from obstruction in street, see "Damages," § 4.

Laws impairing obligation of municipal bonds, see "Constitutional Law," § 2.

Mandamus, see "Mandamus," §§ 1, 2.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Right to grant franchise pending injunction to restrain declaration of result of election to determine annexation of territory, see "Injunction," § 2.

Right to jury trial in proceedings for change in benefit assessments, see "Jury," § 1.

Right to punish drunkenness, see "Drunkards."

Street railroads, see "Street Railroads."

§ 1. Creation, alteration, existence, and dissolution.

Under Kirby's Dig. § 5522, relative to the annexation of portions of one municipality to another, the jurisdiction of the annexing municipality over the annexed territory *held* to commence when the result of the election is declared.—Little Rock Ry. & Electric Co. v. City of North Little Rock (Ark.) 826.

§ 2. Governmental powers and functions in general.

The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state granting the same or suffering it to be exercised within its borders.—State ex rel. Garner v. Missouri & K. Telephone Co. (Mo. Sup.) 41.

§ 3. Legislative control of municipal acts, rights, and liabilities.

The General Assembly, except as limited in the Constitution, has jurisdiction to grant franchises to be exercised in the streets of the cities and other public highways in the state.—State ex rel. Garner v. Missouri & K. Telephone Co. (Mo. Sup.) 41.

§ 4. Proceedings of council or other governing body.

The invalidity of one provision of a municipal ordinance *held* not to affect the validity of another provision.—Moody v. City of Williamsburg (Ky.) 1075.

§ 5. Public improvements.

Under Ky. St. 1903, § 3453, failure of plaintiff to file a copy of the resolution accepting a street improvement *held* not to defeat its right to enforce the lien therefor.—Cabell v. City of Henderson (Ky.) 1095.

A petition to enforce a lien for street improvement, containing a general allegation that the council passed the ordinance for the improvement, as required by Ky. St. 1903, § 3279, *held* sufficient.—Cabell v. City of Henderson (Ky.) 1095.

Under Laws 1892-93, p. 93, § 113, defendant in an action on a special tax bill for a street improvement *held* entitled to show absence of material steps in the proceedings.—City of Sedalia ex rel. Gilsonite Const. Co. v. Montgomery (Mo. App.) 1014.

In an action on a special tax bill for a street improvement, *held*, under Laws 1892-93, p. 92, § 110, that a protest against the improvement could be impeached by showing the signers were not property owners or authorized to sign.—

* Point annotated. See syllabus.

City of Sedalia ex rel. Gilsonite Const. Co. v. Montgomery (Mo. App.) 1014.

A city council, by passing an ordinance for a street improvement after the receipt and filing of the report of its committee that a protest against it by property owners, under Laws 1892-93, p. 92, § 110, was insufficient, *held* to have adopted the report.—City of Sedalia ex rel. Gilsonite Const. Co. v. Montgomery (Mo. App.) 1014.

Officers of a corporation owning land *held*, in the absence of special authority from the directors not to be empowered to protest, under Laws 1892-93, p. 92, § 110, against improvement of a street.—City of Sedalia ex rel. Gilsonite Const. Co. v. Montgomery (Mo. App.) 1014.

An administrator *held* not entitled to protest, under Laws 1892-93, p. 92, § 110, against improvement of a street.—City of Sedalia ex rel. Gilsonite Const. Co. v. Montgomery (Mo. App.) 1014.

One filing a letter withdrawing from a protest under Laws 1892-93, p. 92, § 110, against a street improvement, *held* not to be counted as protesting.—City of Sedalia ex rel. Gilsonite Const. Co. v. Montgomery (Mo. App.) 1014.

One signing a protest against a street improvement, under Laws 1892-93, p. 92, § 110, *held* entitled to withdraw from it within the time limited for its filing.—City of Sedalia ex rel. Gilsonite Const. Co. v. Montgomery (Mo. App.) 1014.

Under Laws 1892-93, p. 92, § 110, the finding by a city council of assent of property owners requisite for its jurisdiction to make a street improvement *held* not conclusive.—City of Sedalia ex rel. Gilsonite Const. Co. v. Montgomery (Mo. App.) 1014.

§ 6. Police power and regulations.

Ky. St. 1903, c. 47 and sections 3623, 3637, *held* not to authorize a municipality to adopt an ordinance providing that, when a judgment for a fine shall be less than \$10, a fee for the city attorney of \$2.50 shall be taxed as costs.—Moody v. City of Williamsburg (Ky.) 1075.

Under Const. Mo. art. 9, § 16, and Acts 1887, p. 51, § 50, 51 (Rev. St. 1899, §§ 6408, 6409), providing means for cities of certain population to avail themselves of the constitutional privilege to frame their own charters, a clause in the charter of Kansas City authorizing the enactment of an ordinance fixing maximum amount of telephone tolls *held* invalid.—State ex rel. Garner v. Missouri & K. Telephone Co. (Mo. Sup.) 41.

§ 7. Use and regulation of public places, property, and works.

Facts *held* to justify a presumption that a city had abandoned proceedings to condemn land for the opening of a street.—In re Seventeenth St. (Mo. Sup.) 45; Kansas City v. Kansas City, Ft. S. & M. R. Co., Id.

An owner of property, neither taken, damaged, nor assessed in certain street opening proceedings, *held* not entitled to appeal, under Kansas City Charter, art. 7, § 5.—In re Seventeenth St. (Mo. Sup.) 45; Kansas City v. Kansas City, Ft. S. & M. R. Co., Id.

An affidavit of an appellant in street opening proceedings, failing to state the interest of the appellant in the proceeding, *held* insufficient, under Kansas City Charter, art. 7, § 5.—In re Seventeenth St. (Mo. Sup.) 45; Kansas City v. Kansas City, Ft. S. & M. R. Co., Id.

Under Const. art. 12, § 20, a city *held* authorized to permit a street railway company to construct and operate a line on its streets.—

St. Louis & S. Ry. Co. v. Lindell Ry. Co. (Mo. Sup.) 634.

A street crossing a railway company's right of way and tracks *held* a public highway.—St. Louis & S. Ry. Co. v. Lindell Ry. Co. (Mo. Sup.) 634.

§ 8. Torts.

In an action against a city for injuries caused by falling over a stone step leading to private premises and projecting under the street, evidence *held* to justify submission to the jury of the question whether plaintiff was guilty of contributory negligence.—Fischer v. City of St. Louis (Mo. Sup.) 82.

In an action against a city for injuries caused by falling over a stone step leading to private premises and projecting under the street, evidence *held* to justify submission to the jury of the question whether defendant was negligent.—Fischer v. City of St. Louis (Mo. Sup.) 82.

A city *held* not liable for injuries to a pedestrian by a defect in a sidewalk constructed by third persons along a portion of the street that the city had not improved.—Ruppenthal v. City of St. Louis (Mo. Sup.) 612.

In an action for injuries to a pedestrian, the city *held* not entitled to an instruction that, if the accident was caused by the raising of the cover of a coal hole by the occupier of adjoining property on the morning of the accident, the city was not liable.—Drake v. Kansas City (Mo. Sup.) 689.

In an action for injuries to a pedestrian by falling into a defectively constructed coal hole, an instruction as to defendant's liability in case the cover of the hole was displaced by a third person before the accident *held* properly modified.—Drake v. Kansas City (Mo. Sup.) 689.

In an action for injuries to a pedestrian by falling into an alleged defectively constructed coal hole in a sidewalk, evidence *held* insufficient to establish that the verdict was the result of passion and prejudice.—Drake v. Kansas City (Mo. Sup.) 689.

A city *held* not entitled to actual notice of a defect in a sidewalk, consisting of a defectively constructed coal hole, as a prerequisite to its liability for injuries to a pedestrian by reason thereof.—Drake v. Kansas City (Mo. Sup.) 689.

In an action for injuries to a pedestrian by falling into a defectively constructed coal hole, a requested instruction as to defendant's duty to discover the defect *held* properly modified.—Drake v. Kansas City (Mo. Sup.) 689.

In an action against a city for injuries, whether plaintiff was injured in a public street, or attempted to cross the street at an irregular place, which the city had not put in use for pedestrians, or was guilty of contributory negligence, *held* questions for the jury.—Haxton v. Kansas City (Mo. Sup.) 714.

A traveler on a public street has a right to presume, in the absence of knowledge to the contrary, that the city has performed its duty to exercise ordinary care to keep its sidewalks and crossings in a reasonably safe condition for public travel.—Haxton v. Kansas City (Mo. Sup.) 714.

It is the duty of a city to exercise ordinary care to keep its sidewalks and crossings in a reasonably safe condition for public travel.—Haxton v. Kansas City (Mo. Sup.) 714.

§ 9. Fiscal management, public debt, securities, and taxation.

In mandamus proceedings by original bondholders to reach taxes levied by a city under Sp. Laws 27th Leg. (1st Called Sess.) p. 13, c. 4, § 37, for refunding bonds, holders of refund-

* Point annotated. See syllabus.

ing bonds *held* not necessary parties.—City of Austin v. Cahill (Tex. Sup.) 542.

Failure of a city to levy taxes to meet bonds at the time required by law may be remedied by mandamus, relating back to the time when the levy should have been made.—City of Austin v. Cahill (Tex. Sup.) 542.

Writ of mandamus, being based on default of duty, cannot direct a future levy of taxes in advance of default in making such levy.—City of Austin v. Cahill (Tex. Sup.) 542.

Judgment on a claim against a city, and mandamus to enforce the levy of a tax, *held*, under the circumstances, obtainable in the same suit.—City of Austin v. Cahill (Tex. Sup.) 542.

Demand on a city to levy taxes to meet bonds *held* not necessary prerequisite of a mandamus to compel it to do so, where such demand would have met with a refusal.—City of Austin v. Cahill (Tex. Sup.) 542.

The proceeds of a tax levy under Sp. Laws 27th Leg. (1st Called Sess.) p. 13, c. 4, § 37, cannot be diverted by the city to meet the charges of unrefunded bonds.—City of Austin v. Cahill (Tex. Sup.) 542.

Illegal tax levy, while in strictness returnable to taxpayers, may be applied as a credit on omitted legal levies, in order to avoid circuitry.—City of Austin v. Cahill (Tex. Sup.) 542.

Austin City Charter (Sp. Laws 27th Leg. [1st Called Sess.] pp. 12, 13, c. 4) § 33, par. 2, and section 37, authorize a tax levy to be devoted exclusively to the payment of interest and accumulation of sinking fund on refunding bonds, and permits an additional levy to meet unrefunded bonds.—City of Austin v. Cahill (Tex. Sup.) 542.

Const. art. 11, § 5, prescribing the municipal tax rate limit, *held* not to prohibit the assessment of omitted taxes for past years, so long as the tax limit for such past year is not exceeded.—City of Austin v. Cahill (Tex. Sup.) 542.

Whatever interest refunding bondholders have in a tax collected for them under Sp. Laws, 27th Leg. (1st Called Sess.) p. 13, c. 4, § 37, is an equitable interest; the legal title to the money collected being in the city.—City of Austin v. Cahill (Tex. Sup.) 542.

Purchasers of bonds take the same subject to the law in force at the time of their issuance, including the constitutional limitation upon the taxing power of the city.—City of Austin v. Cahill (Tex. Sup.) 542.

In a suit by a taxpayer to enjoin collection of tax levied to pay town bonds, the town and the holder of the bonds *held* necessary parties.—Bradford v. Westbrook (Tex. Civ. App.) 382.

Where bonds of a de facto municipal corporation were subsequently assumed as provided by statute by the corporation as reorganized, the bonds were valid.—Bradford v. Westbrook (Tex. Civ. App.) 382.

Under Const. art. 11, § 6, Rev. St. 1895, arts. 416, 498, and Austin City Charter (Sp. Laws 27th Leg. [1st Called Sess.] pp. 12-17, 67, c. 4), taxes raised to accumulate a sinking fund on municipal bonds cannot be diverted to the payment of interest on other bonds.—City of Austin v. Cahill (Tex. Civ. App.) 536.

MURDER.

See "Homicide."

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 8.

NAMES.

Of corporation, see "Corporations," § 6.

NATIONAL BANKS.

See "Banks and Banking," § 2.

NAVIGABLE WATERS.

See "Ferries."

NEGLIGENCE.

Causing death, see "Death," § 1.

Evidence of damages, see "Damages," § 5.

Liability of building and loan association for negligence of contractor, see "Building and Loan Associations."

By particular classes of parties.

See "Carriers," §§ 1, 2, 6; "Clerks of Courts"; "Municipal Corporations," § 8; "Railroads," §§ 4-9.

Employers, see "Master and Servant," §§ 3-9.

Hospital physicians, see "Hospitals."

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Condition or use of particular species of property, works, or machinery.

See "Ferries," § 1; "Railroads," §§ 4-9; "Street Railroads," § 2.

Contributory negligence.

Of passenger, see "Carriers," § 7.

Of person injured by defect in street, see "Municipal Corporations," § 8.

Of person injured by operation of railroad, see "Railroads," § 5.

Of person injured by operation of street railroad, see "Street Railroads," § 2.

Of person using ferry, see "Ferries," § 1.

Of servant, see "Master and Servant," §§ 3, 9.

§ 1. Acts or omissions constituting negligence.

*Where plaintiff ordered certain medicine for cattle, and defendant sent the wrong medicine, and in replying to a notice stated that the medicine was all right, and plaintiff used it, defendant was liable for resulting injuries to plaintiff's animals.—Mann-Tankersly Drug Co. v. Cheairs & Son (Ark.) 873.

Facts *held* insufficient to show an implied invitation by defendant railroad company to the public or plaintiff's child to use stone steps of a railroad bridge abutment as a passway.—Williamson v. Gulf, O. & S. F. Ry. Co. (Tex. Civ. App.) 279.

Where plaintiff's child, in using the stone abutment of a railroad bridge as a passway, was a trespasser, the railroad company owed him no duty, except to avoid willfully injuring him.—Williamson v. Gulf, O. & S. F. Ry. Co. (Tex. Civ. App.) 279.

§ 2. Proximate cause of injury.

Where plaintiff was injured by the agency of fellow employes and defendant company, the presence and assistance of the act of the fellow servants *held* not to exculpate the other agency.—Ray v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 466.

Where plaintiff was injured by an engine striking a timber lying on the track, and the employes of defendant company were negligent in running the engine against the timber, it was liable if plaintiff was not negligent in removing the timber from the track, though the

* Point annotated. See syllabus.

negligence of plaintiff's employer, or that of its employes other than plaintiff, may have concurred with its negligence in producing the results.—*Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 466.

§ 3. Contributory negligence.

The occupant of a carriage *held*, under the circumstances, not subject to the imputed negligence of the driver.—*Sluder v. St. Louis Transit Co.* (Mo. Sup.) 648.

One injured through failure of another to take proper steps to avoid injury after the discovery of peril *held* entitled to recover, though guilty of contributory negligence.—*Ross v. Metropolitan St. Ry. Co.* (Mo. App.) 144.

Where, in an action for personal injuries, plaintiff seeks recovery on sole ground that at the time of the injury he was in a position of peril, which defendant discovered in time to have prevented the injury, contributory negligence is no defense.—*Northern Texas Traction Co. v. Yates* (Tex. Civ. App.) 283.

The doctrine of discovered peril has no application, in the absence of actual and timely knowledge on the part of the person causing the injury of the peril of the person injured.—*Cardwell v. Gulf, B. & G. N. Ry. Co.* (Tex. Civ. App.) 422.

§ 4. Actions.

Where the evidence is conflicting the questions of negligence and contributory negligence are for the jury.—*Price v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 575.

Finding that a buyer of drugs relied on representations by the seller that the same could be administered to animals with safety *held* supported by the evidence.—*Mann-Fankersly Drug Co. v. Cheairs & Son* (Ark.) 873.

*Where, in an action for injuries through negligence, fair-minded men may draw from the facts different conclusions, the question of contributory negligence is for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Hitt* (Ark.) 908, 990.

In an action for personal injuries, in which plaintiff sought recovery for impairment of memory, the record on appeal *held* not to show certain excluded evidence relevant to show that plaintiff's memory was poor before the injury.—*Northern Texas Traction Co. v. Yates* (Tex. Civ. App.) 283.

An instruction in an action for the death of a traveler in a collision with a train at a highway crossing *held* not erroneous for failing to define decedent's care to avoid the collision.—*International & G. N. R. Co. v. Glover* (Tex. Civ. App.) 515.

A petition in an action against a railway company for negligently causing a person's death *held* not to fail to allege that the enumerated acts of negligence caused the death.—*International & G. N. R. Co. v. Glover* (Tex. Civ. App.) 515.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

As ground for new trial in criminal prosecutions, see "Criminal Law," § 19.
Ground for new trial in civil actions, see "New Trial," § 1.

NEWSPAPERS.

Termination of contract with newspaper company, see "Contracts," § 1.

NEW TRIAL.

Costs, see "Costs," § 2.

In criminal prosecutions, see "Criminal Law," § 19.

Necessity of motion for purpose of review, see "Appeal and Error," § 2.

Opening or vacating judgment, see "Judgment," § 5.

§ 1. Grounds.

*A new trial will not be awarded for newly discovered evidence which is merely cumulative.—*Long v. McDaniel* (Ark.) 964.

In an action for personal injuries, a verdict of \$1 for plaintiff *held* properly set aside as inadequate.—*Loevenhart v. Lindell Ry. Co.* (Mo. Sup.) 757.

Certain alleged newly discovered evidence *held* not ground for new trial.—*Wilson v. Alexander* (Tenn.) 935.

In an action against a carrier for injuries to a shipment of cattle, *held* not error to refuse a new trial on the ground that the verdict is against the evidence.—*Gulf, C. & S. F. Ry. Co. v. House & Watkins* (Tex. Civ. App.) 1110.

In an action against a carrier for injuries to a shipment of cattle, a verdict for the shipper *held* not against the evidence.—*Gulf, C. & S. F. Ry. Co. v. House & Watkins* (Tex. Civ. App.) 1110.

§ 2. Proceedings to procure new trial.

Under Shannon's Code, § 6075, and the rule of a circuit court, *held*, that the grounds for a new trial in such court were insufficiently stated.—*Memphis St. Ry. Co. v. Johnson* (Tenn.) 169.

NEXT OF KIN.

See "Descent and Distribution."

NON EST FACTUM.

Execution of contract, see "Contracts," § 3.

NONRESIDENCE.

Exemption from service of process of non-resident attending court, see "Process," § 2.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

See "Mechanics' Liens," § 2.

Application for liquor license, see "Intoxicating Liquors," § 2.

Defect in sidewalk, see "Municipal Corporations," § 8.

Execution sale, see "Execution," § 4.

Laborer's lien, see "Master and Servant," § 2.

Loss insured against, see "Insurance," § 5.

Nonpayment or protest of bill or note, see

"Bills and Notes," § 4.

Of bringing of action against a corporation, see

"Corporations," § 6.

Proceedings for sale of land for taxes, see

"Taxation," § 1.

Proceedings for sale of property belonging to decedent's estate, see "Executors and Administrators," § 3.

Taking depositions, see "Depositions."

To particular classes of parties.

See "Principal and Agent," § 2.

* Point annotated. See syllabus.

Foreign corporation, see "Corporations," § 6.
 Purchaser of negotiable instrument, see "Bills and Notes," § 3.

NUISANCE.

Drunkenness, see "Drunkards."

§ 1. Public nuisances.

The mere increased use of a right of way granted a railroad over a street over what may have originally been contemplated, resulting from the erection of a depot on land adjoining the street, *held* not to constitute a nuisance.—*Oklahoma City & T. R. Co. v. Dunham* (Tex. Civ. App.) 849.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 2.

OBSTRUCTING JUSTICE.

See "Rescue."

OFFER.

Of judgment, see "Judgment," § 2.

Of proof, see "Trial," § 2.

OFFICERS.

Jurisdiction of particular courts of actions involving title to office, see "Courts," § 4.
 Robbery by, see "Robbery."

Particular classes of officers.

See "Clerks of Courts"; "Judges"; "Justices of the Peace"; "Receivers"; "Sheriffs and Constables."

County officers, see "Counties," § 1.

Court officers, see "Courts," § 1.

School officers, see "Schools and School Districts," § 1.

OPENING.

Judgment, see "Judgment," §§ 3, 5.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 9.

In criminal prosecutions, see "Criminal Law," § 11.

OPINIONS.

Of courts, see "Courts," § 1.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Grant of power to pass, as delegation of legislative power, see "Constitutional Law," § 1.
 Municipal ordinances, see "Municipal Corporations," §§ 4-6.

Regulating street railroads, see "Street Railroads," § 2.

OWNERSHIP.

Of railroad, see "Railroads," § 4.

PARDON.

Statute authorizing commutation of sentence as invasion of pardoning power, see "Constitutional Law," § 1.

PARENT AND CHILD.

See "Adoption"; "Guardian and Ward."

Application of equitable defenses to dealings between, see "Equity," § 2.

Mother of certain children living apart from her husband *held* entitled to retain their custody, subject to the father's right to visit and correspond with them.—*In re Redmond* (Mo. App.) 129; *Redmond v. Redmond*, Id.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 8.

In criminal prosecutions, see "Criminal Law," § 10.

PARTIES.

Death ground for abatement, see "Abatement and Revival," § 1.

Parties entitled to allege error, see "Appeal and Error," § 18.

Persons concluded by judgment, see "Judgment," § 9.

In actions by or against particular classes of parties.

See "Brokers," § 2.

Agent, see "Principal and Agent," § 2.

In particular actions or proceedings.

See "Death," § 1; "Mandamus," § 2.

Condemnation proceedings, see "Eminent Domain," § 2.

Criminal prosecutions, see "Criminal Law," § 2.

Mandamus to compel levy of municipal tax, see "Municipal Corporations," § 9.

To restrain collection of municipal tax, see "Municipal Corporations," § 9.

To particular classes of conveyances, contracts, or transactions.

Joint interests, see "Joint Adventures."

§ 1. Plaintiffs.

The holders of bonds illegally issued by a school district may maintain a suit against the district in their name as the real party in interest.—*Board of Trustees of Fordville v. Postel* (Ky.) 1065.

§ 2. Defendants.

The fact that, in the course of litigation, points of law may be determined that will make a precedent harmful to the interests of certain persons in some future litigation, is not a sufficient reason for making such persons parties.—*City of Austin v. Cahill* (Tex. Sup.) 542.

PARTITION.

Authority of guardian of insane person as to partition of property in which ward has an interest, see "Insane Persons," § 1.

§ 1. Actions for partition.

A purchaser at a void partition sale does not have color of title until the deed is delivered to him.—*Cowling v. Nelson* (Ark.) 913.

Under Kirby's Dig. § 2754, relating to compensation for improvements on real estate by persons believing themselves the owners thereof, purchaser at void partition sale *held* not entitled to compensation for improvements made prior to confirmation of sale.—*Cowling v. Nelson* (Ark.) 913.

When a sale of real estate on partition has been confirmed by a court having jurisdiction, the five-year statute of limitations runs in

* Point annotated. See syllabus.

favor of the purchaser at the sale against the parties thereto, although the sale is void.—*Cowling v. Nelson* (Ark.) 913.

It is not necessary that confirmation of the sale of land on partition shall appear of record by a formal order to sustain the validity of the sale, where it can be gathered from the whole record.—*Cowling v. Nelson* (Ark.) 913.

The sale of land for costs is not an issuable fact in partition suits, and when the court entertains it, it is going beyond its jurisdiction.—*Cowling v. Nelson* (Ark.) 913.

Since at common law there was no right to sale in partition proceedings, only jurisdiction which court has to order sale in partition proceedings *held* conferred by Kirby's Dig. §§ 5785, 5786, 5792, 5793.—*Cowling v. Nelson* (Ark.) 913.

Insufficiency of the description of land partitioned is cured by the parties having sold their interests in the land, and the purchaser having been put into possession and made a party to the partition suit.—*Cowling v. Nelson* (Ark.) 913.

Under Kirby's Dig. § 6060, relating to partition, circuit court of county where the land of a decedent partly lay *held* to have jurisdiction of a suit to partition it, notwithstanding sections 6063, 6064, and the fact that the estate was administered in another county.—*Cowling v. Nelson* (Ark.) 913.

Sale on partition of improvements on separate estate of wife to enforce collection of judgment at suit of trustee in bankruptcy *held* to subject the wife and trustee to the costs in proportion to their respective shares.—*Collins v. Bryan* (Tex. Civ. App.) 432.

PARTNERSHIP.

See "Joint Adventures."

§ 1. The relation.

On an issue of partnership, statements of one partner made in the absence of the other *held* inadmissible against the latter.—*Bailey v. Fritz Bros.* (Ark.) 569.

§ 2. Mutual rights, duties, and liabilities of partners.

In suit for the settlement of a partnership, facts *held* not to show one of the partners entitled to a salary.—*Whitney v. Whitney* (Ky.) 311.

Partners are not entitled to charge each other or the firm for services in the firm business, unless there is a special agreement to that effect, or the agreement can be implied from the course of business.—*Whitney v. Whitney* (Ky.) 311.

One of two partners in the ownership of a farm *held* entitled to one-half of the entire profits on a sale thereof.—*Burgess v. Deierling* (Mo. App.) 770, 771.

§ 3. Rights and liabilities as to third persons.

A member of a law firm *held* to have implied authority to bind his partner by a written contract for the purchase of law books.—*Alley v. Bowen-Merrill Co.* (Ark.) 838.

A copartner *held* liable on a note given by his partner for money borrowed for firm purposes.—*Brite v. Guy* (Ky.) 1069.

Where, in an action against a firm to enforce a subcontractor's lien, one of the members of such firm was personally served with process, plaintiff was entitled to a personal judgment against him.—*Kneisley Lumber Co. v. Edward B. Stoddard Co.* (Mo. App.) 774.

§ 4. Dissolution, settlement, and accounting.

On sale by receiver of partnership assets, certain property not inventoried *held* not to pass.—*Crawford v. Stainback* (Ark.) 991.

On a partnership accounting, one of the partners should have been charged with half of the attorney's fees and costs expended by the other partner in a suit brought by him in pursuance of firm business and in the name of the firm.—*Whitney v. Whitney* (Ky.) 311.

In a suit to settle a fire insurance partnership, the book of expirations should have been sold with the other property and effects of the firm.—*Whitney v. Whitney* (Ky.) 311.

In suit for settlement of a fire insurance partnership, error of court in failing to require the book of expirations to be sold with the other property *held* no ground for setting aside the sale.—*Whitney v. Whitney* (Ky.) 311.

A suit may be maintained in the partnership name, though the firm has been dissolved, when its affairs have not been entirely settled.—*American Cotton Co. v. Whitfield & Mitchell* (Tex. Civ. App.) 300.

PART PAYMENT.

Within statute of limitations, see "Limitation of Actions," § 2.

PASSENGERS.

See "Carriers," §§ 3-8.

Trespassers on trains, see "Railroads," § 5.

PAUPERS.

§ 1. Support, services, and expenses.

Rev. St. 1899, § 3697, *held* not to render the guardian of an indigent insane person liable for past support furnished by the county on his subsequent acquiring property belonging to his ward.—*Chariton County v. Hartman* (Mo. Sup.) 617.

An order of the county court taking charge of an indigent insane person and the furnishing support by the county *held* not to raise an implied promise on the part of the insane person or his guardian to repay.—*Chariton County v. Hartman* (Mo. Sup.) 617.

PAYMENT.

See "Accord and Satisfaction."

Of fare as affecting status as passenger, see "Carriers," § 3.

Of note by check of principal as affecting liability of surety, see "Principal and Surety," § 3.

Part payment within statute of limitations, see "Limitation of Actions," § 2.

Recovery as damages of expenses incurred though not paid, see "Damages," § 2.

Subrogation on payment, see "Subrogation."

To agent, see "Principal and Agent," § 2.

Of particular classes of obligations or liabilities.

See "Judgment," § 11; "Mortgages," § 2.

Bill of exchange or promissory note, see "Bills and Notes," § 5.

Checks, see "Banks and Banking," § 1.

Compensation for property taken for public use, see "Eminent Domain," § 1.

Price of land sold, see "Vendor and Purchaser," § 2.

§ 1. Requisites and sufficiency.

Giving a check which is never paid is not an extinguishment of a debt, unless shown to

* *Footnote* annotated. See syllabus.

have been accepted absolutely as payment.—*Sharp v. E. Nathan Mercantile Co. (Ark.)* 305.

Drawer of check, who is notified of its loss and acquiesces therein, cannot plead, as a release of the debt for which the check was given, negligence of the creditor in failing to procure payment of the check.—*Sharp v. E. Nathan Mercantile Co. (Ark.)* 305.

PEACE.

Breach of public peace, see "Breach of the Peace."

PENALTIES.

Violation of anti-trust laws, see "Monopolies," § 1.

PERJURY.

§ 1. Offenses and responsibility therefor.

In a prosecution for carrying a pistol, certain testimony by defendant *held* a sufficient basis for an indictment for perjury.—*Trevino v. State (Tex. Cr. App.)* 356.

§ 2. Prosecution and punishment.

Where, in a prosecution for perjury, it was alleged that a justice of the peace administered the oath to defendant at the time the perjury was alleged to have been committed, it was proper to prove by an interpreter, who acted at that time, that he had interpreted the oath to defendant.—*Trevino v. State (Tex. Cr. App.)* 356.

In a prosecution for false swearing in obtaining a marriage license, defendant *held* entitled to a certain instruction relative to the effect of his ignorance of the contents of the statements alleged to be false.—*Porter v. State (Tex. Cr. App.)* 359.

PERSONAL INJURIES.

See "Assault and Battery," § 1; "Negligence."

New trial, see "New Trial," § 1.

Caused by operation of street railroad, see "Street Railroads," § 2.

Declarations as evidence, see "Evidence," § 5.

Determination of cause on appeal or writ of error, see "Appeal and Error," § 23.

Election between causes of action, see "Pleading," § 7.

Evidence of damages, see "Damages," § 5.

Excessive damages, see "Damages," § 4.

Grounds and subjects of compensatory damages, see "Damages," § 2.

Harmless error, see "Appeal and Error," §§ 22, 23, 25.

Instructions in general, see "Trial," §§ 8, 9, 11.

Joinder of causes of action, see "Action," § 3.

Measure of damages, see "Damages," § 3.

Opinion evidence, see "Evidence," § 9.

Pleading damages, see "Damages," § 5.

Release of claim for, see "Release," § 1.

Remarks and conduct of judge at trial, see "Trial," § 1.

Res gestæ, see "Evidence."

Satisfaction of claim for, see "Accord and Satisfaction."

Statement of separate causes of action, see "Pleading," § 2.

To employé, see "Master and Servant," §§ 3-9.

To licensee, see "Railroads," §§ 5, 7.

To passenger, see "Carriers," § 6.

To person on or near railroad tracks, see "Railroads," § 7.

To traveler on highway, see "Municipal Corporations," § 8.

To traveler on highway crossing railroad, see "Railroads," § 6.

To trespasser, see "Railroads," §§ 5, 7.

* Point annotated. See syllabus.

PETITION.

For removal of cause, see "Removal of Causes," § 2.

For stock law election, see "Animals."

In pleading, see "Pleading."

PHYSICIANS AND SURGEONS.

See "Hospitals."

As expert witnesses, see "Criminal Law," § 11.

Evidence of damages for injuries to physician, see "Damages," § 5.

Evidence of value of physician's services, see "Damages," § 5.

Measure of damages as dependent on physician's services, see "Damages," § 3.

PLEADING.

Harmless error in rulings on, see "Appeal and Error," § 23.

In justice's court, see "Justices of the Peace," § 1.

Allegations as to particular facts, acts, or transactions.

See "Damages," § 5.

Agency, see "Principal and Agent," § 2.

Contract of warranty on sale, see "Sales," § 7.

Grounds for removal of cause, see "Removal of Causes," § 1.

In actions by or against particular classes of parties.

See "Brokers," § 2; "Carriers," §§ 1, 2, 5, 6; "Master and Servant," § 9.

Foreign corporation, see "Corporations," § 6.

Trustee in bankruptcy, see "Bankruptcy," § 2.

In particular actions or proceedings.

See "Account, Action on"; "Ejectment," § 2; "Libel and Slander," § 3; "Negligence," § 4;

"Trespass," § 1; "Trespass to Try Title," § 2.

Condemnation proceedings, see "Eminent Domain," § 2.

For accounting by broker, see "Brokers," § 2.

For breach of contract in shipment of cattle by carrier, see "Carriers," § 2.

For breach of contract to transport passenger, see "Carriers," § 5.

For causing death, see "Death," § 1.

For failure to furnish cars, see "Carriers," § 1.

For injuries to property from use of right of way, see "Eminent Domain," § 1.

For personal injuries, see "Carriers," § 6; "Master and Servant," § 9.

For purchase price of land, see "Vendor and Purchaser," § 4.

For removal of cause, see "Removal of Causes," § 2.

Indictment or criminal information or complaint, see "Indictment and Information."

Petition for stock law election, see "Animals."

To enforce homestead rights, see "Homestead," § 5.

To enforce lien for street improvements, see "Municipal Corporations," § 5.

To redeem from mortgage, see "Mortgages," § 3.

§ 1. Form and allegations in general.

A mere charge of fraud, without specification of the acts which constitute the alleged fraud, is not a good allegation of fraud.—*Newman v. Mercantile Trust Co. (Mo. Sup.)* 6.

The allegation in the petition of a trustee in bankruptcy to enforce a claim against the separate property of the bankrupt's wife *held* properly treated as surplusage.—*Collins v. Bryant*

(Tex. Civ. App.) 432.

§ 2. Declaration, complaint, petition, or statement.

*Under Rev. St. 1899, § 593, an action for damages at common law for injuries cannot be joined in the same count with one for statutory negligence.—*McHugh v. St. Louis Transit Co.* (Mo. Sup.) 858.

In an action against a street railroad company for injuries to plaintiff in a collision with his vehicle, the petition *held* not open to the objection that it contained in one count a cause of action *ex contractu* and *ex delicto*.—*Rapp v. St. Louis Transit Co.* (Mo. Sup.) 865.

Petition in action against street railroad for personal injuries *held* to sufficiently state two distinct causes of action, within Code Civ. Proc. § 593 (Rev. St. 1899, § 593), one for negligence and the other for willfulness.—*Waechter v. St. Louis & M. R. R. Co.* (Mo. App.) 147.

Where matter of inducement is stated in the first count of a petition, a mere reference to it in subsequent counts is sufficient.—*Waechter v. St. Louis & M. R. R. Co.* (Mo. App.) 147.

§ 3. Replication or reply and subsequent pleadings.

Where the answer of certain defendants is not made a cross-petition against their co-defendants, the latter are not required to reply.—*Barret v. Gwyn* (Ky.) 1096.

§ 4. Demurrer or exception.

The sustaining of a special exception to that part of plaintiff's petition alleging misrepresentations made by defendant's agents *held* not to prevent the court from thereafter submitting to the jury defendant's liability for such alleged misrepresentations.—*Kneale & Watkins v. Thornton* (Tex. Civ. App.) 298.

§ 5. Amended and supplemental pleadings and replender.

In an action against a carrier for loss of goods, it was proper for the court, on its appearing that the alleged bill of lading had never been signed by the carrier's agent, to permit an amendment to conform to the proof, under Mansf. Dig. § 5080 (Ind. T. Ann. St. 1899, § 3285).—*Patrick v. Missouri, K. & T. Ry. Co.* (Ind. T.) 330.

A pleading, indorsed a trial amendment, and setting up the same matters that had been pleaded in a supplementary petition, to which a demurrer had been sustained, *held* not a trial amendment.—*Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 466.

§ 6. Signature and verification.

Rev. St. 1895, art. 1193, does not excuse plaintiff from denying under oath, as required by articles 1192, 1265, 2318, the execution of a written instrument set up in defense.—*State Nat. Bank v. Stewart* (Tex. Civ. App.) 295.

Under Rev. St. 1895, arts. 1192, 1265, 2318, plaintiff in an action to recover from a bank a balance on deposit could not prove that a check by which the bank claimed the money was withdrawn was a forgery, without having denied its execution under oath.—*State Nat. Bank v. Stewart* (Tex. Civ. App.) 295.

It is not necessary that the execution of a written contract be denied under oath, in order to avoid it for duress, fraud, or mistake.—*Texas Cent. R. Co. v. West* (Tex. Civ. App.) 426.

§ 7. Motions.

*An unnecessary allegation in a pleading should not be made more definite and certain.—*Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.) 870.

*A general plea of fraud in an answer is good, without specifying the facts constitut-

ing the fraud, though it is better pleading to set out the facts.—*Craft v. Barron* (Ky.) 1099.

*Where a petition improperly joins two different causes of action in the same count, the remedy is by motion to elect.—*McHugh v. St. Louis Transit Co.* (Mo. Sup.) 853.

In an action for injuries to plaintiff in a collision under his vehicle, *held* proper to refuse to require plaintiff to elect between allegations charging negligence generally and allegations charging a violation of a certain ordinance.—*Rapp v. St. Louis Transit Co.* (Mo. Sup.) 865.

Plaintiff in an action against a street railroad for personal injuries *held* not obliged to elect between the counts of his petition.—*Waechter v. St. Louis & M. R. R. Co.* (Mo. App.) 147.

A motion attacking a pleading filed as trial amendment should be in writing, so as to preserve the exceptions contained therein.—*Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 466.

§ 8. Defects and objections, waiver, and aid by verdict or judgment.

Defendant, who had failed to file affidavit under Rev. St. 1899, § 655, *held* not entitled to complain on appeal that the petition alleged a written contract, while the proof showed a verbal one.—*Harrison v. Lakanan* (Mo. Sup.) 53.

Want of verification of plea *held* waived by absence of exception to it on such ground.—*Oneal v. Weisman* (Tex. Civ. App.) 290.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 6.

Regulations of street railroads, see "Street Railroads," § 2.

POLICY.

See "Lotteries," § 1.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

Suffrage, see "Elections."

POOR LAWS.

See "Paupers."

POSSESSION.

See "Adverse Possession."

Of demised premises, see "Landlord and Tenant," §§ 3, 5.

POWERS.

Creation by will, see "Wills," § 3.

Execution of deed pursuant to power, see "Deeds," § 8.

Of attorney, see "Principal and Agent."

PRACTICE.

In particular civil actions or proceedings.

See "Account, Action on"; "Contempt," § 1; "Divorce," § 2; "Ejectment"; "Habeas Corpus," § 1; "Mandamus," § 2; "Trespass," § 1; "Trespass to Try Title," § 2.

Condemnation proceedings, see "Eminent Domain," § 2.

* Point annotated. See syllabus.

Particular proceedings in actions.

See "Affidavits"; "Continuance"; "Costs"; "Damages," § 5; "Depositions"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Removal of Causes"; "Trial"; "Venue."
Verdict, see "Trial," § 12.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers."

Procedure in criminal prosecutions.

See "Bail," § 1; "Criminal Law"; "Intoxicating Liquors," § 4.

Procedure in exercise of special jurisdictions.

In bankruptcy, see "Bankruptcy," § 1.
In equity, see "Equity."
In justices' courts, see "Justices of the Peace," § 1.
Particular courts, see "Courts."

Procedure on review.

See "Appeal and Error"; "Certiorari," § 2; "Exceptions, Bill of"; "Justices of the Peace," § 2; "New Trial."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.

PREJUDICE.

Ground for change of venue of criminal prosecution, see "Criminal Law," § 4.
Ground for reversal in civil actions, see "Appeal and Error," §§ 22-25.

PREMIUMS.

Insurance premiums, see "Insurance," § 8.

PRESCRIPTION.

Acquisition of rights, see "Adverse Possession," § 1.

PRESENTMENT.

Of bill or note, see "Bills and Notes," § 4.

PRESUMPTIONS.

As to negligence on part of carrier, see "Carriers," § 6.
In civil actions, see "Evidence," § 1.
In criminal prosecutions, see "Criminal Law," § 6.
On appeal or error, see "Appeal and Error," § 19; "Criminal Law," § 26.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers"; "Carriers," §§ 1, 2.
Admissions by agent, see "Evidence," § 4.
Agency of partner for firm, see "Partnership," § 3.
Agent of carrier, see "Carriers," § 4.
Corporate agents, see "Corporations," § 4.
County agents, see "Counties," § 1.
Insurance agents, see "Insurance," §§ 1, 2.
Liability of agent as surety, see "Principal and Surety," § 1.

Liability of building and loan association for negligence of building contractor, see "Building and Loan Associations."
Liability of principal for conspiracy of agent, see "Conspiracy," § 1.
Rights of buyer on warranty of goods sold by agent of seller, see "Sales," § 5.

§ 1. The relation.

Agency may not be established by the declarations of an alleged agent.—*Higley v. Dennis* (Tex. Civ. App.) 400.

§ 2. Rights and liabilities as to third persons.

In an action against a railroad company for an assault committed on plaintiff by defendant's detective while plaintiff was taking down the numbers of cars belonging to defendant, evidence held sufficient to show that the detective was acting under directions of defendant to stop the taking down of numbers.—*St. Louis, I. M. & S. Ry. Co. v. Grant* (Ark.) 590, 1133.

In an action for an assault on plaintiff by defendant's agent, evidence held sufficient to warrant a finding that the agent was acting in the course of his employment for the benefit of his principal and within the line of his duty.—*St. Louis, I. M. & S. Ry. Co. v. Grant* (Ark.) 590, 1133.

In order to hold a principal liable for a tort of his agent, the agent must have been, at the time of its commission, engaged in the principal's business, and the tort must have been committed while he was carrying out such business.—*St. Louis, I. M. & S. Ry. Co. v. Grant* (Ark.) 590, 1133.

Plaintiff, furnishing materials to defendant pursuant to an order made by it to a third person, who requested plaintiff to fill it, held paid by defendant delivering a check to the third person.—*Fayetteville Wagon, Wood & Lumber Co. v. Kenefick Const. Co.* (Ark.) 1031.

An agent, contracting in his own name for an undisclosed principal, may sue on the contract in his own name.—*Simons v. Wittmann* (Mo. App.) 791.

*Where defendant authorized commission company to receive shipment of cattle mortgaged to it, and sell the same and receive the proceeds as its agent, the company had no authority to take a substituted mortgage note.—*Ridgeley Nat. Bank v. Barse Live Stock Commission Co.* (Mo. App.) 1124.

A power of attorney construed, and held not to authorize the attorneys to convey land in consideration of money expended in the defense of a suit.—*Brown v. Orange County* (Tex. Civ. App.) 247.

Where a contract made by an agent is void under the statute of frauds, the agent, though not authorized by his alleged principal, is not liable thereon.—*Morrison v. Hazard* (Tex. Civ. App.) 385.

Authority to collect the interest on a note forms no presumption of authority to collect the principal.—*Higley v. Dennis* (Tex. Civ. App.) 400.

Admissions and statements of agent do not bind the principal as to third persons until agency is shown.—*Higley v. Dennis* (Tex. Civ. App.) 400.

In an action against a county for materials furnished, an allegation of the petition held to have authorized proof of the authority of the agent claimed to have acted for the county.—*Jackson-Foxworth Lumber Co. v. Hutchinsons* County (Tex. Civ. App.) 412.

* Point annotated. See syllabus.

In an action against an agent of an undisclosed principal and the principal, evidence *held* admissible and sufficient to make out a case against both the agent and principal.—Pittsburg Plate Glass Co. v. Roquemore (Tex. Civ. App.) 449.

A verified account, made out against an agent of an undisclosed principal and attached as an exhibit to the petition, is evidence only against the agent.—Pittsburg Plate Glass Co. v. Roquemore (Tex. Civ. App.) 449.

Where a case is established both against the agent of an undisclosed principal and against the principal, plaintiff must elect which of the two he will ask judgment against.—Pittsburg Plate Glass Co. v. Roquemore (Tex. Civ. App.) 449.

An agent's knowledge of simulated conveyance in making a loan of money for his principal *held* imputable to the principal, so that principal was estopped thereby.—Morrill v. Bosley (Tex. Civ. App.) 519.

PRINCIPAL AND SURETY.

See "Bail"; "Bonds"; "Guaranty"; "Indemnity."

Construction of indemnity mortgaged to surety, see "Mortgages," § 1.

Preferences to surety of bankrupt, see "Bankruptcy," § 2.

Right of principal to recover penalty for usury on payment to bank by surety, see "Banks and Banking," § 2.

Wife as surety of husband, see "Husband and Wife," § 8.

§ 1. **Creation and existence of relation.**
One employed as agent to make a contract for another, but who signs as an obligor, is liable thereon as surety.—Tabet v. Powell (Tex. Civ. App.) 273.

§ 2. **Nature and extent of liability of surety.**

A creditor, who without authority from the sureties filed his claim in bankruptcy proceedings pending against the principal debtor, cannot charge the sureties with the expense of a collection made in that way.—Bank of Batesville v. Maxey (Ark.) 968.

§ 3. **Discharge of surety.**

*The surrender of a note to the maker in exchange for a worthless check *held* not to release the surety.—Hogan v. Kaiser (Mo. App.) 1128.

In an action on mortgage notes, evidence that a part of the consideration was a contemporaneous parol agreement for an extension without the knowledge of the sureties *held* admissible to affect the liability of the surety.—Moroney v. Coombes (Tex. Civ. App.) 430.

Where a new agreement between a debtor and creditor is that the debtor shall pay, at the end of a period agreed on for an extension, precisely the same sum due at the time the agreement was entered into, the surety is nevertheless released.—De Barrera v. Frost (Tex. Civ. App.) 476.

§ 4. **Remedies of creditors.**

*Right of surety to release as against creditor's indemnity security stated.—Dyer v. Jacoway (Ark.) 901.

PRISONS.

Statute authorizing commutation of sentence as invasion of pardoning power, see "Constitutional Law," § 1.

PRIVILEGE.

From service of process, see "Process," § 2.

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 1.

PROBABLE CAUSE.

For prosecution, see "Malicious Prosecution," § 1.

PROBATE.

Of will, see "Wills," § 2.

PROCESS.

Duties of constable as to execution of, see "Sheriffs and Constables," § 1.

In actions against particular classes of parties.

See "Corporations," § 6; "Partnership," § 3.

Particular forms of writs or other process.

See "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Quo Warranto."

§ 1. **Nature, issuance, requisites, and validity.**

Under the express provisions of Sayles' Ann. Civ. St. 1897, arts. 1214, 1447, 2338, 3147, 3152, 4706, the several kinds of writs, processes, and notices in civil actions are to be directed to the "sheriff or any constable" of the county where the process is to be executed.—Medlin v. Seideman (Tex. Civ. App.) 250.

Sayles' Ann. Civ. St. 1897, arts. 4901, 4915, *held* not to preclude a constable from executing process delivered to him by the party or his attorney procuring the same from the clerk of the county or district court.—Medlin v. Seideman (Tex. Civ. App.) 250.

§ 2. **Service.**

A party cannot be lawfully served with civil process while attending on a court in a state not that of his residence.—Martin v. Bacon (Ark.) 863.

Service of process in a civil action on a non-resident while attending court in compliance with bail bond *held* void.—Martin v. Bacon (Ark.) 863.

§ 3. **Defects, objections, and amendment.**

An assignment of error that the court proceeded with the trial after having quashed the service of process *held* not sustained.—Brewster v. State (Tex. Civ. App.) 858.

PROHIBITION.

Jurisdiction of particular courts to issue writ, see "Courts," § 4.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

See "Animals"; "Fixtures"; "Logs and Logging"; "Shipping."

Adverse possession, see "Adverse Possession."

Dedication to public use, see "Dedication."

Intermixture, see "Confusion of Goods."

* Point annotated. See syllabus.

Protection of rights of property by injunction, see "Injunction," § 1.
Taking for public use, see "Eminent Domain."

PROTEST.

Against public improvement in city, see "Municipal Corporations," § 5.

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 5.
In criminal prosecutions, see "Criminal Law," § 17.

PROXIMATE CAUSE.

Of accident at railroad crossing, see "Railroads," § 6.
Of injuries from fires set by locomotives, see "Railroads," § 9.
Of injuries resulting from operation of street railroad, see "Street Railroads," § 2.
Of injury, see "Negligence," § 2.
Of injury as affecting liability of carrier therefor, see "Carriers," § 1.
Of injury to passenger, see "Carriers," § 6.
Of injury to servant, see "Master and Servant," § 8.

PUBLIC AID.

To railroads, see "Railroads," § 2.

PUBLIC DEBT.

See "Municipal Corporations," § 9.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 5.

PUBLIC LANDS.

Exemplification of record as evidence of patent, see "Evidence," § 7.
Right of railroad to construct its road over public domain, see "Railroads," § 3.

§ 1. Survey and disposal of lands of United States.

A conveyance of land as swamp land by the state to a citizen shows prima facie title in the citizen.—Covington v. Berry (Ark.) 1005.

§ 2. Disposal of lands of the states.

A subsequent deed of land by the state held ineffective to invalidate a prior deed, in the absence of evidence rebutting the presumption that the prior grantee had surrendered his certificate to the subsequent grantee or made a valid assignment thereof.—Boynton v. Ashabanner (Ark.) 566; Same v. Ashabanner, Id. 1011.

The county court held to have authority to reject a sale of school land, on account of inadequacy of price.—Williams v. State (Ark.) 980.

PUBLIC NUISANCE.

See "Nuisance," § 1.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Dedication of property, see "Dedication."

* Point annotated. See syllabus.

Taking property for public use, see "Eminent Domain."

QUANTUM MERUIT.

Recovery on for price of lumber sold, see "Sales," § 2.
Right of broker to recover for services, see "Brokers," § 3.
Right of person electing to stand on contract to recover on quantum meruit, see "Election of Remedies."

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 4.
In criminal prosecutions, see "Criminal Law," § 17; "Homicide," § 10.

QUIETING TITLE.

§ 1. **Right of action and defenses.**
*Plaintiff in a suit to quiet title must show title in himself.—Carpenter v. Smith (Ark.) 978.

QUITCLAIM.

See "Deeds," § 2.

QUO WARRANTO.

Questions presented for review, see "Appeal and Error," § 2.

§ 1. Nature and grounds.

Under Kirby's Dig. §§ 7981, 7982, while the Supreme Court has jurisdiction to issue, hear, and determine the writ of quo warranto in aid of its appellate jurisdiction, the writ and information as an original proceeding are abolished.—Louisiana & Northwest R. Co. v. State (Ark.) 559.

RAILROADS.

See "Street Railroads."

Admissions by railroad officers, see "Evidence," § 4.

As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."

Compensation to railroad for injuries to right of way, see "Eminent Domain," §§ 1, 2.
Condemnation proceedings by, see "Eminent Domain."

Deeds as evidence in action against railroad, see "Deeds," § 1.

Election of remedies on breach of contract between railroad companies, see "Election of Remedies."

Evidence of damages for injuries caused by operation of, see "Damages," § 5.

Injuries from overflow caused by railroad embankments, see "Waters and Water Courses," § 2.

Instructions in general in action for death caused by operation of, see "Trial," § 5.

Liability for damages for wrongful death, see "Death," § 1.

Negligence of in general, see "Negligence," § 4.

Opinion evidence in action for injury to live stock caused by operation of railroad, see "Evidence," § 9.

Railroad hospitals, see "Hospitals."

Right of way of railroad over street dedicated to public, see "Dedication," §§ 1, 2.

Right to jury trial in action to forfeit franchise of, see "Jury," § 1.

Use of right of way constituting nuisance, see "Nuisance," § 1.

§ 1. Railroad companies.

Acts Ark. 1901, p. 368, § 1 (Kirby's Dig. § 6749), providing for a forfeiture of "the franchise and all charter rights" of any railroad in and to all railroad property and the right to operate the same, acquired by it under a lease not made in conformity with the statute, *held* not retrospective.—Louisiana & Northwest R. Co. v. State (Ark.) 559.

A contract made under a franchise cannot reach beyond the rights acquired by the franchise itself and afford immunity from public duties.—Louisiana & Northwest R. Co. v. State (Ark.) 559.

Acts 1901, p. 368, §§ 1, 2 (Kirby's Dig. §§ 6749, 6750), providing for a forfeiture of "the franchise and all charter rights" of a railroad in and to property acquired by it under a lease not made in conformity with the statute, *held* applicable to a foreign railroad corporation operating in the state under lease.—Louisiana & Northwest R. Co. v. State (Ark.) 559.

§ 2. Public aid.

In an action on a note given as a bonus to a railway company, the exclusion of certain evidence *held* proper, because insufficient to show a violation of a stipulation in the note.—Fayetteville Wagon, Wood & Lumber Co. v. Kenefick Const. Co. (Ark.) 1031.

A stipulation in a note requiring a railroad company to maintain a depot in a town *held* complied with.—Fayetteville Wagon, Wood & Lumber Co. v. Kenefick Const. Co. (Ark.) 1031.

§ 3. Right of way and other interests in land.

Where a railroad company was chartered in 1866, and authorized to condemn private property for a right of way, it was impliedly authorized to construct its line over the public domain.—Ayres v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 436.

§ 4. Operation—Companies and persons liable for injuries.

In action against railroad for injury to live stock, evidence *held* sufficient to show defendant's ownership of road.—Oyler v. Quincy, O. & K. C. R. Co. (Mo. App.) 162; Payne v. Same (Mo. App.) 164.

§ 5. — Injuries to licensees or trespassers in general.

Railroad *held* not liable for injuries to one riding in caboose of freight train, which, under the rules of the company, did not carry passengers.—St. Louis, I. M. & S. Ry. Co. v. Reed (Ark.) 836.

Where intestate without invitation boarded the footboard at the rear of a switch engine, and was killed in a collision at a street crossing, he was guilty of contributory negligence, precluding a recovery.—Kansas City, M. & B. R. Co. v. Williford (Tenn.) 178.

Defendant railroad *held* under no obligation to plaintiff, which it did not owe to the public generally, who might be about the track and cars.—Texas & N. O. Ry. Co. v. McDonald (Tex. Sup.) 201.

One sitting on a railroad track *held* guilty of contributory negligence, precluding recovery for negligence of those operating the cars in failing to discover his presence and to avoid injuring him.—Texas & N. O. Ry. Co. v. McDonald (Tex. Sup.) 201.

§ 6. — Accidents at crossings.

In an action against a railroad for wrongful death at a crossing, evidence *held* not to show that as a matter of law it was negligence per se for decedent to attempt to cross.—St. Louis, I. M. & S. Ry. Co. v. Hitt (Ark.) 908, 990.

In an action against a railroad for wrongful death, an instruction *held* not erroneous as to the weight of evidence.—St. Louis, I. M. & S. Ry. Co. v. Hitt (Ark.) 908, 990.

The refusal of an instruction requiring decedent to look and listen for an approaching train at a time when it was too late to have avoided the accident *held* not error.—St. Louis, I. M. & S. Ry. Co. v. Hitt (Ark.) 908, 990.

In an action for injuries at a railroad crossing, an instruction on the duty of looking and listening *held* error.—St. Louis, I. M. & S. Ry. Co. v. Hitt (Ark.) 911, 990.

On an issue as to contributory negligence in a crossing accident, *held*, that plaintiffs were entitled to consider the presence of a brakeman at the crossing.—St. Louis, I. M. & S. Ry. Co. v. Hitt (Ark.) 990.

Failure of railroad to sound the bell or whistle on approaching a private crossing *held* not negligence per se.—Ayers v. Wabash R. Co. (Mo. Sup.) 608.

In an action against railroad for injuries, refusal of special charge on issue of negligence of defendant's servants *held* error.—Missouri, K. & T. Ry. Co. of Texas v. Sisson (Tex. Civ. App.) 371.

In an action against a railroad for injuries, testimony of the engineer that it was his habit to ring the bell, etc., at the place where the accident occurred, was properly excluded.—Texas & P. Ry. Co. v. Frank (Tex. Civ. App.) 383.

In an action for injuries to plaintiff in a crossing accident, *held* error to refuse an instruction on proximate cause.—Missouri, K. & T. Ry. Co. of Texas v. Jackson (Tex. Civ. App.) 406.

The rights of a traveler on a highway crossing railroad tracks and of the company to operate trains are reciprocal.—International & G. N. R. Co. v. Glover (Tex. Civ. App.) 515.

The issue of anything other than negligence of the railroad employees being the proximate cause of injury to a child four years old at a railroad crossing *held* not raised by the evidence.—Missouri, K. & T. Ry. Co. of Texas v. Nesbit (Tex. Civ. App.) 891.

Where the complaint in an action for injury to a child at a railroad crossing did not charge as negligence failure to give signals, *held*, an instruction that evidence thereof should not be considered should have been given.—Missouri, K. & T. Ry. Co. of Texas v. Nesbit (Tex. Civ. App.) 891.

§ 7. — Injuries to persons on or near tracks.

In an action for injuries received by one walking on a railroad track, *held*, that the evidence failed to show negligence on the part of the operatives of a locomotive in not stopping the train after discovering plaintiff's peril.—Burns v. St. Louis Southwestern Ry. Co. (Ark.) 824.

One injured while walking on a railroad track *held* guilty of contributory negligence.—Burns v. St. Louis Southwestern Ry. Co. (Ark.) 824.

*Statement of duty of railroads to trespassers on track.—Flint v. Illinois Cent. R. Co. (Ky.) 1055.

Intoxicated man, who sits on the end of a railroad cross-tie on the main track, *held* negligent.—Ayers v. Wabash R. Co. (Mo. Sup.) 608.

Locomotive engineer is bound to be on the lookout for persons using the track at a place where they are accustomed to use it, but is not

* Point annotated. See syllabus.

chargeable with notice that a man is likely to be lying on the track at such a place.—*Ayers v. Wabash R. Co.* (Mo. Sup.) 608.

Plaintiff's decedent *held* not guilty of contributory negligence as a matter of law in walking on defendant's railroad track within the limits of a city.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Sup.) 192.

In an action for the death of a pedestrian while walking on a railroad track, evidence that defendant had never consented to the use of its track by the public at the place in question *held* inadmissible.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Sup.) 192.

Where defendant railroad company had knowingly permitted the public to use its track within the limits of a city as a walkway for a number of years, a person so using the track was a licensee, and not a trespasser.—*Gulf, C. & S. F. Ry. Co. v. Matthews* (Tex. Sup.) 192.

In an action against a railroad company for injuries, the evidence considered, and *held* to sustain a finding that a blast of steam was emitted, which frightened plaintiff's horse, and that defendant was negligent in regard thereto.—*Chicago, R. I. & T. Ry. Co. v. Jones* (Tex. Civ. App.) 445.

§ 8. — Injuries to animals on or near tracks.

In an action against a railroad for killing plaintiff's mule, evidence *held* sufficient to justify a verdict for plaintiff.—*St. Louis & S. F. Ry. Co. v. Carlisle* (Ark.) 584.

In an action against a railroad for negligently killing plaintiff's mule, an instruction that, if the rate of speed of the train was the sole cause of the injury, defendant was not liable, *held* properly refused.—*St. Louis & S. F. Ry. Co. v. Carlisle* (Ark.) 584.

In an action against a railroad for negligently killing plaintiff's mule, an instruction that it was not negligence to run the train at 50 or 55 miles an hour *held* properly refused.—*St. Louis & S. F. Ry. Co. v. Carlisle* (Ark.) 584.

In an action against a railroad for killing plaintiff's cow, evidence *held* to present a case of conflicting testimony, rendering proper the submission of an issue of fact.—*St. Louis & S. F. R. Co. v. Thompson, Yont & Co.* (Ark.) 593.

In an action against a railroad for killing a cow, whether the engineer had time to sound the stock alarm after discovering the cow *held* a question for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Kimberlain* (Ark.) 599.

Locomotive engineer, while passing through a town, should be constantly on the alert, prepared for action in case stock stray upon the track.—*St. Louis, I. M. & S. Ry. Co. v. Kimberlain* (Ark.) 599.

In an action against a railroad company for the killing of cattle in the nighttime, evidence *held* sufficient to show negligence in using an inferior headlight.—*St. Louis, M. & S. E. Ry. Co. v. Shannon* (Ark.) 851.

*In an action against a railroad for the killing of horses on the track, questions of negligence *held* for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Shaver* (Ark.) 961.

*Under the statute requiring railroads to construct cattle guards, a recovery of the prescribed penalty is the only remedy open to one whose stock is killed in consequence of a violation of the statute.—*St. Louis, I. M. & S. Ry. Co. v. Rowland* (Ark.) 994.

In action against railroad for double damages under Rev. St. 1899, § 1105, for killing hogs, killing by train *held* not required to be

proved by direct evidence.—*Oyler v. Quincy, O. & K. C. R. Co.* (Mo. App.) 162; *Payne v. Same* (Mo. App.) 164.

In action against railroad for injury to live stock, contention that recovery could be had under neither section 1105 nor section 1106, Rev. St. 1899, because those sections are intended for benefit of adjoining owners, *held* untenable.—*Oyler v. Quincy, O. & K. C. R. Co.* (Mo. App.) 162.

Rev. St. 1899, § 1106, authorizing recovery of damages for injury to stock by railroads, *held* not an exclusive remedy, so that an owner of stock injured by running along over ties and other hard substances and material of track was entitled to recover.—*Oyler v. Quincy, O. & K. C. R. Co.* (Mo. App.) 162.

Under Rev. St. 1899, § 1105, authorizing recovery of double damages for injury to live stock by railroad trains, railroad *held* liable to owner whose stock reached track over lands of another.—*Oyler v. Quincy, O. & K. C. R. Co.* (Mo. App.) 162.

In action against railroad for killing hogs, evidence *held* to make out case for jury.—*Payne v. Quincy, O. & K. C. R. Co.* (Mo. App.) 164.

In action against railroad for killing hogs, evidence *held* sufficient to show that the killing occurred in township where suit was brought.—*Payne v. Quincy, O. & K. C. R. Co.* (Mo. App.) 164.

In an action against a railroad for injuries to plaintiff's mare while on the track in defendant's depot grounds, evidence examined, and *held* insufficient to show negligence on defendant's part.—*Texas Cent. R. Co. v. Harbison* (Tex. Civ. App.) 414.

A railroad *held* to owe no duty to one in charge of a team in the depot grounds, except to use all means to prevent injuries to him and his team, when seen in a position of danger.—*Texas Cent. R. Co. v. Harbison* (Tex. Civ. App.) 414.

§ 9. — Fires.

In an action for the destruction of a building by fire, the jury need not accept as conclusive the statement of witnesses that the engine was in good order, but may consider all the evidence bearing on its condition.—*St. Louis, I. M. & S. Ry. Co. v. Coombs* (Ark.) 595.

In an action for the destruction of a building by fire, the jury *held* warranted in finding either that the engine was not properly equipped, or that it was not operated with due care, and that the defendant had not rebutted the presumption of negligence arising against it.—*St. Louis, I. M. & S. Ry. Co. v. Coombs* (Ark.) 595.

Where it is shown that fire originated from an engine of defendant, a *prima facie* case is made for plaintiff, casting on defendant the burden of exonerating itself from negligence.—*St. Louis, I. M. & S. Ry. Co. v. Coombs* (Ark.) 595.

Where an engine passed near inflammable material immediately before the discovery of the fire, the jury, in the absence of proof explaining its origin, may infer that it originated from sparks from the engine.—*St. Louis, I. M. & S. Ry. Co. v. Coombs* (Ark.) 595.

A railroad company discharges its duty if it exercises reasonable care in providing its engines with the most approved appliances and contrivances in general use by railroads throughout the country for the prevention of the escape of sparks, and they are in good condition.—*St. Louis, I. M. & S. Ry. Co. v. Coombs* (Ark.) 595.

In an action against a railroad for the destruction of property by fire communicated by

* Point annotated. See syllabus.

sparks from a locomotive, evidence *held* sufficient to support a verdict for plaintiff.—*Fields v. Missouri Pac. Ry. Co.* (Mo. App.) 134.

In an action against a railroad for destruction of property by fire, evidence as to the movement of certain tramps *held* incompetent to show that the fire was started by them.—*Fields v. Missouri Pac. Ry. Co.* (Mo. App.) 134.

In an action against a railroad company for damages from the destruction of property by fire communicated by defendant's locomotive, evidence *held* not to justify submission to the jury of the question whether plaintiff was guilty of contributory negligence.—*McFarland v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 450.

In an action against a railroad company for damages caused by a fire alleged to have been communicated by one of defendant's engines, evidence that the engineer in charge of the locomotive alleged to have caused the fire was careful *held* irrelevant.—*McFarland v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 450.

In an action against a railroad company for damages from a fire alleged to have been communicated by defendant's locomotive, evidence that one of defendant's locomotives had caused a fire some time before that sued for *held* inadmissible.—*McFarland v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 450.

Where the employes of a railroad company negligently allow sparks from a locomotive to fall on buildings so as to destroy them, the negligence is the proximate cause of the loss of the property.—*McFarland v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 450.

RAPE.

Conviction of offense included in charge, see "Indictment and Information," § 4.

§ 1. Offenses and responsibility therefor.

Sexual intercourse with a female under 16 years of age, with or without her consent, constitutes a crime, within Kirby's Dig. § 2008.—*Corothers v. State* (Ark.) 535.

§ 2. Prosecution and punishment.

*Under Kirby's Dig. §§ 2005, 2008, 2413, conviction of carnal abuse of female under 16 years of age *held* sustained by indictment charging forcible rape of female under 16 years of age.—*Henson v. State* (Ark.) 965.

An instruction on a trial for rape *held* misleading under the evidence.—*Darrell v. Commonwealth* (Ky.) 1060.

On a prosecution for assault with intent to rape, *held* error to refuse an instruction that if defendant kissed and hugged prosecutrix, thinking it would not be objectionable, there was no assault.—*Kearse v. State* (Tex. Cr. App.) 363.

On a prosecution for assault with intent to rape, a conversation of prosecutrix with her grandmother, after her return home from the place of the offense, *held* not admissible.—*Kearse v. State* (Tex. Cr. App.) 363.

On a prosecution for assault with intent to rape, *held* not error not to permit a witness to testify to having kissed prosecutrix.—*Kearse v. State* (Tex. Cr. App.) 363.

On a prosecution for assault with intent to rape, evidence as to the mental condition of prosecutrix on her return from the drive during which the offense was alleged to have been committed was admissible.—*Kearse v. State* (Tex. Cr. App.) 363.

§ 3. Civil liability.

In an action for damages owing to plaintiff having been ravished by defendant and caused to become a mother, a requested instruction on the effect to be given of plaintiff's failure to make an outcry or complaint *held* erroneously refused.—*Champagne v. Hamey* (Mo. Sup.) 92.

Corroboration of prosecutrix is not necessary to make out a charge of rape, either in a criminal or a civil case.—*Champagne v. Hamey* (Mo. Sup.) 92.

In an action for damages owing to plaintiff having been ravished by defendant and caused to become a mother, evidence considered, and *held* insufficient to show that any rape was committed.—*Champagne v. Hamey* (Mo. Sup.) 92.

RATIFICATION.

Of acts of attorney, see "Attorney and Client," § 1.

Of payment of check, see "Banks and Banking," § 1.

REAL ACTIONS.

See "Ejectment"; "Trespass to Try Title."

REAL-ESTATE AGENTS.

See "Brokers."

REASONABLE TIME.

For procuring purchaser of farm by broker, see "Brokers," § 1.

For rescission of sale, see "Sales," § 3.

REBUTTAL.

Evidence, see "Trial," § 2.

RECEIPTS.

Authority of attorney to make, see "Attorney and Client," § 1.

RECEIVERS.

Conflicting jurisdiction of courts, see "Courts," § 5.

On dissolution of partnership, see "Partnership," § 4.

§ 1. Nature and grounds of receivership.

In a suit by a wife to cancel a deed of trust given by her and her husband on her separate property to secure his debt, *held*, that the appointment of a receiver to collect the rents was proper.—*De Barrera v. Frost* (Tex. Civ. App.) 476.

§ 2. Appointment, qualification, and tenure.

Where a wife sued to cancel a deed of trust given by her and her husband on her separate property to secure his debt, it was not error, in appointing a receiver, not to limit the receivership to the period during which the marriage relation might continue.—*De Barrera v. Frost* (Tex. Civ. App.) 476.

RECOGNIZANCES.

See "Bail," § 1.

* Point annotated. See syllabus.

RECORDS.

Abstract for purpose of review, see "Appeal and Error," § 8.
 Exemplifications and certified copies as evidence, see "Evidence," § 7.
 Transcript on appeal or writ of error, see "Appeal and Error," §§ 5-13; "Criminal Law," § 24.

REDELIVERY.

Of deed, see "Deeds," § 2.

REDEMPTION.

From mortgage, see "Mortgages," § 3.

REFERENCE.

See "Arbitration and Award."

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

§ 1. Right of action and defenses.

A purchaser *held* entitled to the reformation of his deed as against a subsequent purchaser.—*Thalheimer v. Lockhart* (Ark.) 591.

Purchaser of land *held* entitled to have the deed reformed, so as to include a strip omitted by mistake.—*Perry v. Sadler* (Ark.) 832.

*An insurance policy, like any other contract, which, because of mistake in its execution, does not conform to the real agreement of the parties, may be reformed in a court of equity.—*Phoenix Ins. Co. v. State* (Ark.) 917.

§ 2. Proceedings and relief.

The variance between a decree and the proof in a suit to reform a deed *held* not to authorize a reversal, where no objection to the variance was made.—*Thalheimer v. Lockhart* (Ark.) 591.

Evidence *held* to warrant reformation of an insurance policy as to the name of the insured and the location of the subject-matter of the risk on the ground of mistake.—*Phoenix Ins. Co. v. State* (Ark.) 917.

REHEARING.

See "New Trial."

RELEASE.

See "Accord and Satisfaction"; "Payment." *Of particular classes of rights and liabilities.*

See "Mortgages," § 2.

Indemnity to surety, see "Principal and Surety," § 4.

Of carrier, see "Carriers," § 2.

Of surety, see "Principal and Surety," § 3.

§ 1. Requisites and validity.

Evidence that the amount named in a release executed to a railroad company by an injured employé was already due, according to the custom of the company in dealing with disabled employes, *held* admissible.—*Hot Springs Ry. Co. v. McMillan* (Ark.) 846.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 2.

Of evidence in criminal prosecutions, see "Criminal Law," § 7.

REMAINDERS.

Devise of remainder, for charitable purposes, see "Charities," § 1.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 28.

REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 1.

§ 1. Citizenship or alienage of parties.

*An action by a citizen and resident of the Indian Territory against a citizen of a state is not removable to the federal court on the ground of diversity of citizenship.—*Kansas City Southern Ry. Co. v. McGinty* (Ark.) 1001.

A complaint in an action against corporations and individuals, citizens and residents of Kentucky, by a resident and citizen thereof, *held* to show a joint action against defendants, preventing a foreign corporation from removing the cause to the federal courts for diversity of citizenship.—*Ayles v. Southern Ry. Co.* (Ky.) 1048.

§ 2. Proceedings to procure and effect of removal.

An amended petition for removal of a cause to the federal court was filed too late, when filed after the time allowed by the statute for the filing of answers to complaints.—*Kansas City Southern Ry. Co. v. McGinty* (Ark.) 1001.

REMOVAL OF CLOUD.

See "Quieting Title."

RENT.

See "Landlord and Tenant," § 4.

REPEAL.

Of statute, see "Statutes," § 4.

REPLEVIN.

Foreign judgment in replevin, see "Judgment," § 10.

Of property sold, see "Sales," § 7.

REPLY.

See "Pleading," § 3.

REQUESTS.

For instructions in civil actions, see "Trial," § 9.

For instructions in criminal prosecutions, see "Criminal Law," § 17.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

Of contract for sale of goods, see "Sales," § 3.

RESCUE.

Under Kirby's Dig. § 1690, it is an offense to convey to a prisoner any instrument designed to enable him to escape, although there is no acquiescence or co-operation on the part of the prisoner.—*Maxey v. State* (Ark.) 1009.

* Point annotated. See syllabus.

RESERVATIONS.

For grantor in fraudulent conveyance, see "Fraudulent Conveyances," § 1.

RES GESTÆ.

In civil actions, see "Evidence," § 2.
In criminal prosecutions, see "Criminal Law," § 7.

RESIDENCE.

In suits for divorce, see "Divorce," § 2.

RES IPSA LOQUITUR.

Limitations of doctrine as to injuries to passengers, see "Carriers," § 6.

RES JUDICATA.

See "Judgment," §§ 8, 9.

RESTAURANTS.

Sale of liquor, see "Intoxicating Liquors," § 3.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

RESULTING TRUSTS.

See "Trusts," § 1.

RETURN.

Of election, see "Elections," § 2.

REVENUE.

See "Taxation."

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," §§ 21-27; "Justices of the Peace," § 2.

REVIVAL.

Of action, see "Abatement and Revival," § 1.

REVOCAION.

Of authority of broker, see "Brokers," § 1.
Of liquor license, see "Intoxicating Liquors," § 2.
Of will, see "Wills," § 1.

RIGHT OF WAY.

Of railroads, see "Railroads," § 3.

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See "Waters and Water Courses," § 1.

RISKS.

Assumed by employé, see "Master and Servant," §§ 7, 9.
Within insurance policy, see "Insurance," § 3.

* Point annotated. See syllabus.

ROADS.

See "Highways."

Streets in cities, see "Municipal Corporations," §§ 7, 8.

ROBBERY.

Harmless error, see "Criminal Law," § 27.
Homicide in commission of, see "Homicide," § 2.

In a prosecution for robbery, evidence *held* to show a present intent on part of defendant, an officer, to appropriate to his own use valuables taken from person of prisoner arrested by him.—*Tones v. State* (Tex. Cr. App.) 217.

On proof of either of the allegations in an indictment charging that defendant committed a robbery by an assault and by violence, and by putting the prosecutor in fear of life and bodily injury, etc., the offense is complete.—*Tones v. State* (Tex. Cr. App.) 217.

In a prosecution for robbery, evidence *held* to show use of sufficient force by defendant, an officer, in taking property from person of prisoner, to constitute an element of the offense.—*Tones v. State* (Tex. Cr. App.) 217.

In a prosecution for robbery, it is not necessary that actual fear of life and bodily injury on the victim's part should be strictly proved, as the law presumes fear where there appears to be just ground for it.—*Tones v. State* (Tex. Cr. App.) 217.

Where prosecutor, in anticipation of being robbed, carried marked money, in order to detect the robber, this was not such consent as absolved defendant from criminality.—*Tones v. State* (Tex. Cr. App.) 217.

Officers who make a rightful arrest, and subsequently use violence and rob the party arrested, are not exonerated on account of the legality of the alleged arrest.—*Tones v. State* (Tex. Cr. App.) 217.

Right of search *held* not available to defeat prosecution for robbery of officers taking valuables from prisoner.—*Tones v. State* (Tex. Cr. App.) 217.

In a prosecution for robbery the admission in evidence of a written memorandum of numbers and denominations of money stolen *held* not error.—*Tones v. State* (Tex. Cr. App.) 217.

RULES OF COURT.

Abstracts of record for purpose of review, see "Appeal and Error," § 8.
Argument of counsel, see "Trial," § 3.
Assignment of errors, see "Appeal and Error," § 15.
Statement on appeal, see "Appeal and Error," § 7.

SALES.

See "Brokers"; "Contracts," § 1.
By agent, see "Principal and Agent," § 2.
Evidence of damages for breach of warranty, see "Damages," § 5.
Negligence in sale of medicine for cattle, see "Negligence," §§ 1, 4.
Of assets of dissolved partnership, see "Partnership," § 4.
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Of intoxicating liquors, see "Intoxicating Liquors."
Of property of decedent under order of court, see "Executors and Administrators," § 3.
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Of stock in corporation, see "Corporations," § 3.

Of timber, see "Logs and Logging."

On execution, see "Execution," § 4.

On order or judgment of court, see "Judicial Sales."

Partition sales, see "Partition," § 1.

Refusal to make sale as cause of action, see "Conspiracy," § 1.

Requirements of statute of frauds, see "Frauds, Statute of," § 3.

Tax sales, see "Taxation," § 1.

With reservation of title to secure price as constituting chattel mortgage, see "Chattel Mortgages," § 1.

§ 1. Requisites and validity of contract.

Rule of caveat emptor *held* inapplicable to a sale under express warranty.—*Narr v. Norman* (Mo. App.) 122.

Contract for manufacture and sale of stoves *held* not too indefinite to be susceptible of enforcement.—*Hardwick v. American Can Co.* (Tenn.) 797.

A statement of a vendor as to value of the property *held* ordinarily a mere expression of opinion, not to be relied on.—*Oneal v. Weisman* (Tex. Civ. App.) 290.

§ 2. Construction of contract.

A contract for the furnishing of lumber at a stipulated price *held* severable, so that breach of portion thereof did not entitle the seller to sue on a quantum meruit.—*Magnolia Compress Co. v. Smith* (Ark.) 563.

A contract for the sale of merchandise *held* severable.—*S. M. Duffie & Co. v. Walter Pratt & Co.* (Ark.) 842.

Contract for the manufacture and sale of stoves *held* not unilateral, but to bind the buyer to receive the same.—*Hardwick v. American Can Co.* (Tenn.) 797.

Executory and executed contracts of sale distinguished.—*Hardwick v. American Can Co.* (Tenn.) 797.

§ 3. Modification or rescission of contract.

*A countermand of an order for goods after they were shipped *held* not to prevent recovery of price.—*W. F. Main & Co. v. Tracey & Witherington* (Ark.) 981.

*Where a buyer of personalty offers to rescind the sale, and a tender of the property back would be refused, it is unnecessary.—*Woods v. Thompson* (Mo. App.) 1126.

*An offer to rescind a sale of personalty *held* to have been made within a reasonable time.—*Woods v. Thompson* (Mo. App.) 1126.

*Whether or not the buyer of personalty offered to rescind within a reasonable time *held* a question of law for the court.—*Woods v. Thompson* (Mo. App.) 1126.

§ 4. Operation and effect.

A certain understanding between seller and purchaser of timber *held* not to have amounted to a reservation of title.—*Neal v. Cone* (Ark.) 952.

Where the purchasers of cotton subject to a laborer's lien merely credited the price of the cotton on a past-due account, they were not bona fide purchasers.—*Sheeks-Stephens Store Co. v. Richardson* (Ark.) 983.

A buyer of cattle which were subject to a mortgage *held* not an innocent purchaser thereof.—*Tootle v. Buckingham* (Mo. Sup.) 619.

§ 5. Warranties.

A breach of warranty in the sale of goods

held waived by the buyer.—*S. M. Duffie & Co. v. Walter Pratt & Co.* (Ark.) 842.

*A seller of certain cotton *held* not liable on an implied warranty that the cotton was of the grade implied from the description.—*Hartin Commission Co. v. Pelt* (Ark.) 929.

Evidence that hogs warranted as sound were sick, but recovered, *held* not to afford a basis for damages for breach of warranty.—*Narr v. Norman* (Mo. App.) 122.

Facts *held* to authorize an inference of an express warranty of the suitability of a bull for breeding purposes.—*Young v. Van Natta* (Mo. App.) 123.

Positive assurances by the seller of the soundness of an animal and of his suitability for the purpose intended must be deemed a warranty.—*Young v. Van Natta* (Mo. App.) 123.

*In an action for the price of goods, the buyer can prove that the seller's agent warranted the goods and that he relied upon such warranty.—*Woods v. Thompson* (Mo. App.) 1126.

§ 6. Remedies of seller.

Kirby's Dig. § 4966, *held* not to give a vendor of personal property a lien enforceable by selling the property in the hands of third persons who have purchased for value.—*Neal v. Cone* (Ark.) 952.

An action founded on an affidavit filed under Kirby's Dig. § 4966, *held* not such that it could be converted into an action of replevin to try the right to possession against those holding the property involved under plaintiff's vendee.—*Neal v. Cone* (Ark.) 952.

In an action for breach of contract, the measure of damages defined.—*Nicola Bros. Co. v. Hurst* (Ky.) 1081.

Seller cannot sue the buyer for general damages for breach of contract and recover damages determined by resale made after the commencement of suit.—*Hardwick v. American Can Co.* (Tenn.) 797.

The measure of damages, not liquidated by a resale, for the breach by a buyer of a contract of sale, is the difference between the contract price and the market price at the time and place of delivery.—*Hardwick v. American Can Co.* (Tenn.) 797.

Where a contract of sale is broken by the buyer and the seller determines on a resale, the price realized on the resale is binding on both parties on the question of damages.—*Hardwick v. American Can Co.* (Tenn.) 797.

§ 7. Remedies of buyer.

Measure of damages for breach of warranty stated.—*Narr v. Norman* (Mo. App.) 122.

Statement in justice's court *held* to sufficiently plead a contract of warranty.—*Narr v. Norman* (Mo. App.) 122.

Measure of damages for breach of warranty stated.—*Young v. Van Natta* (Mo. App.) 123.

Vendee of bull *held* entitled, in the event of breach of warranty, to recover interest and shipping and medical expenses.—*Young v. Van Natta* (Mo. App.) 123.

*In an action to recover the price of goods, the question whether there was a warranty or representation relied on by the purchaser is one of fact for the jury.—*Woods v. Thompson* (Mo. App.) 1126.

In an action for the price of goods, evidence *held* to justify submission of the question whether the buyer relied on the representations of plaintiff's agent as to the quality of

* Point annotated. See syllabus.

the goods.—*Woods v. Thompson* (Mo. App.) 1128.

SATISFACTION.

See "Accord and Satisfaction"; "Payment"; "Release."

Of judgment, see "Judgment," § 11.

Of mortgage, see "Mortgages," § 2.

SCHOOLS AND SCHOOL DISTRICTS.

Following proceeds of sale of invalid school district bonds, see "Trusts," § 3.

Jurisdiction of particular courts of actions involving title to office of school director, see "Courts," § 4.

Parties to action on bonds issued by school district, see "Parties," § 1.

Questions presented for review on quo warranto to oust school director, see "Appeal and Error," § 2.

§ 1. Public schools.

The trustees elected for a graded common school district *held* properly elected, within Ky. St. 1903, § 4471, and authorized to submit to the voters the question of the issuance of bonds as prescribed by section 4481.—*Lee v. Trustees of Shepherdsville Graded Common School Dist. No. 4* (Ky.) 1071.

Under Rev. St. 1899, §§ 9750, 9760, *held* not required that a school director be a resident taxpayer of the school district in which he is elected.—*State ex inf. Sutton v. Fasse* (Mo. Sup.) 1.

A majority of the directors of a common school district *held* not entitled to withdraw the notice of an election ordered under Rev. St. 1899, § 9861, to determine whether the district should be changed into a village district.—*State ex rel. Gault v. Gill* (Mo. Sup.) 628.

Rev. St. 1899, § 9861, *held* to authorize the organization of any common school district into a village district.—*State ex rel. Gault v. Gill* (Mo. Sup.) 628.

Rev. St. 1899, § 9860, first adopted in Gen. St. 1865, p. 274, c. 47, § 1, relating to the incorporation of village school districts, *held* to apply to incorporated and unincorporated villages.—*State ex rel. Gault v. Gill* (Mo. Sup.) 628.

The validity of the organization of a school district *held* not subject to collateral attack in a proceeding on relation of a taxpayer to compel a county court clerk to extend taxes, to which proceeding the school district was not a party.—*State ex rel. School Dist. No. 1, Tp. 51, R. 17, Howard and Chariton Counties, v. Miller* (Mo. App.) 637.

A taxpayer *held* barred by laches from maintaining mandamus to contest the validity of the organization of a school district.—*State ex rel. School Dist. No. 1, Tp. 51, R. 17, Howard and Chariton Counties, v. Miller* (Mo. App.) 637.

SEALS.

To jurat on verification of information, see "Indictment and Information," § 1.

SEARCHES AND SEIZURES.

Right of search as defense to charge of robbery, see "Robbery."

Seizure of goods to enforce vendor's lien on sale of personalty, see "Sales," § 6.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

SEDUCTION.

Burden of proof, see "Criminal Law," § 6.

Contradiction of witnesses, see "Witnesses," § 3.

Former jeopardy, see "Criminal Law," § 5.

Instructions in general, see "Criminal Law," § 17.

Time of trial, see "Criminal Law," § 14.

§ 1. Criminal responsibility.

*In a prosecution for seduction, a charge on necessity of corroboration of prosecutrix *held* not erroneous.—*Burnett v. State* (Ark.) 966.

The statute *held* to authorize the court to discharge one accused of seduction, on his offering in good faith after conviction to marry prosecutrix, though she refuses to do so.—*Commonwealth v. Akers* (Ky.) 1108.

In a prosecution for seduction, evidence of a subsequent offer of marriage by defendant, not made to prosecutrix directly, *held* properly excluded.—*Nolen v. State* (Tex. Cr. App.) 242.

In a prosecution for seduction, certain letters written to a third person by prosecutrix, showing a vulgar and lascivious mind on her part, were admissible.—*Nolen v. State* (Tex. Cr. App.) 242.

In a prosecution for seduction, certain conduct of prosecutrix subsequent to the alleged offense *held* admissible to show her unchastity prior to the alleged intercourse with defendant.—*Nolen v. State* (Tex. Cr. App.) 242.

In a prosecution for seduction, subsequent conduct of prosecutrix indicating general prostitution on her part may be considered by the jury as a circumstance in passing on whether she was probably chaste at the time of alleged seduction.—*Nolen v. State* (Tex. Cr. App.) 242.

In a prosecution for seduction, court should instruct that subsequent conduct of prosecutrix indicating general prostitution on her part is to be considered only as a circumstance in passing on whether she was probably chaste at the time of her alleged seduction.—*Nolen v. State* (Tex. Cr. App.) 242.

In a prosecution for seduction, defendant *held* entitled to acquittal, if promise of marriage was not the sole reason of inducement.—*Nolen v. State* (Tex. Cr. App.) 242.

Evidence *held* insufficient to support a conviction for seduction.—*Garlas v. State* (Tex. Cr. App.) 345.

SELF-DEFENSE.

See "Homicide," §§ 5, 10.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 3.

SERVICE.

Of process, see "Process," § 2.

SERVICES.

See "Master and Servant," § 2.

SET-OFF AND COUNTERCLAIM.

On appeal from justice's court, see "Justices of the Peace," § 2.

* Point annotated. See syllabus.

§ 1. Subject-matter.

In an action on a contract for work and materials, a certain counterclaim *held* not maintainable.—Missouri Pac. Ry. Co. v. Kansas City & I. Air Line Co. (Mo. Sup.) 8.

SETTLEMENT.

See "Accord and Satisfaction"; "Payment"; "Release."

By guardian of infant, see "Guardian and Ward," § 2.

By partners, see "Partnership," § 4.

Of bill of exceptions, see "Exceptions, Bill of," § 2.

SEVERABLE CONTRACTS.

See "Sales," § 2.

SHERIFFS AND CONSTABLES.

Process directed to, see "Process," § 1.

Sheriff's deed, see "Execution," § 4.

§ 1. Powers, duties, and liabilities.

A constable *held* to have the same duties and powers in connection with the execution and return of civil process within the county to which his precinct belongs as the sheriff.—Medlin v. Seideman (Tex. Civ. App.) 250.

SHIPPING.

See "Ferries."

§ 1. Carriage of goods.

In an action for loss of a cargo of brick while being towed by one of defendant's steamers under a private contract, whether defendant *held* itself out as a common carrier for the time being *held* for the jury.—Bassett & Stone v. Aberdeen Coal & Mining Co. (Ky.) 318.

In an action for loss of a cargo of brick, on an issue whether defendant was a common carrier, the court should have charged that, if it offered to carry for all persons indifferently on such trips as the boat was then making, etc., it was a common carrier, and liable, notwithstanding it was not guilty of negligence, but not otherwise.—Bassett & Stone v. Aberdeen Coal & Mining Co. (Ky.) 318.

SIDEWALKS.

See "Municipal Corporations," § 8.

SIGNALS.

Failure of railroad to give, as negligence, see "Railroads," § 6.

SLANDER.

See "Libel and Slander."

SPARK ARRESTERS.

Duty of railroads to provide, see "Railroads," § 9.

SPECIAL LAWS.

See "Statutes," § 2.

SPECIFIC PERFORMANCE.**§ 1. Contracts enforceable.**

*Facts *held* to show such part performance of parol contract for sale of land as to take

the same out of the statute of frauds.—Cross v. Johnston (Ark.) 945.

SPENDTHRIFTS.

Spendthrift trusts, see "Trusts," § 1.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STALE DEMAND.

See "Equity," § 2.

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See "Courts," § 1.

STATE GUARDS.

Requisites and validity of statutes in general.

see "Statutes," § 1.

Subject and title of statute, see "Statutes," § 2.

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By witness inconsistent with testimony, see "Witnesses," § 3.

Of agent as binding principal, see "Principal and Agent," § 2.

Of mechanic's lien, see "Mechanics' Liens," § 1.

Of plaintiff's claim, see "Pleading," § 2.

STATES.

Courts, see "Courts."

Legislative power, see "Constitutional Law," § 1.

Legislative power over municipal corporation, see "Municipal Corporations," § 3.

Public lands, see "Public Lands."

§ 1. Property, contracts, and liabilities.

Contract of trustees of the state charitable institutions for coal for four months in advance *held* unauthorized under the statute, and therefore not enforceable.—Bunch v. Tipton (Ark.) 888.

STATUTES.

Laws impairing obligation of contracts, see "Constitutional Law," § 2.

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Delegation of legislative power, see "Constitutional Law," § 1.

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Liens on sales of personalty, see "Sales," § 6.

Statute of frauds, see "Frauds, Statute of."

Statute of limitations, see "Limitation of Actions."

* Point annotated. See syllabus.

§ 1. Enactment, requisites, and validity in general.

*The courts should declare an act of the Legislature void only when the Constitution has been plainly violated.—State v. Moore (Ark.) 881.

*The same presumption in favor of the validity of a legislative enactment is indulged with reference to its form and the observance of the constitutional prerequisites and conditions as in case of the subject-matter of the legislation.—State v. Moore (Ark.) 881.

Under Const. art. 11, an appropriation to promote the efficiency of the state guard is one to defray necessary expenses of government, within Const. art. 5, § 31.—State v. Moore (Ark.) 881.

Under Const. art. 5, §§ 30, 31, legislative determination that certain expenses are necessary is conclusive, so long as such expenses may be necessary.—State v. Moore (Ark.) 881.

*Unconstitutionality of Workhouse Law, § 18 (Shannon's Code, § 7423), relative to commutation of sentence, *held* not to affect the validity of the balance of the act.—Fite v. State (Tenn.) 941.

§ 2. General and special or local laws.

Under Const. art. 6, §§ 1, 31, an act creating a criminal court for a county *held* not obnoxious to article 4, § 53, subd. 32, relating to special laws.—State v. Etchman (Mo. Sup.) 683.

§ 3. Subjects and titles of acts.

An appropriation to promote the efficiency of state guard *held* not to embrace a double appropriation, within the prohibition of Const. art.

5, § 80 (Kirby's Dig. § 5295).—State v. Moore (Ark.) 881.

§ 4. Repeal, suspension, expiration, and revival.

*Repeals by implication are not favored.—Town of Benton v. Willis (Ark.) 1000.

§ 5. Construction and operation.

*The Legislature must be presumed to have known of a prior statute, and to have had reference thereto in enacting a subsequent one on the same subject.—Town of Benton v. Willis (Ark.) 1000.

Where a statute has received a judicial interpretation, and it is re-enacted, it will be presumed the Legislature intended it should have the same construction which was given to the earlier statute.—Walker v. Bobbitt (Tenn.) 327.

In construing a statute, the Legislature must be presumed to have known, when it passed the statute, the constitutional limits of its legislative power.—City of Austin v. Cahill (Tex. Sup.) 542.

A general provision of a statute must yield to a special one, so far as is necessary to give effect to the particular subject of the special provision.—City of Austin v. Cahill (Tex. Sup.) 542.

The legislative policy may be looked to as persuasive in a matter of doubtful statutory construction.—City of Austin v. Cahill (Tex. Sup.) 542.

The courts may not, in order to preserve a statute against constitutional objection, ascribe to it a meaning at variance with its plain import.—City of Austin v. Cahill (Tex. Sup.) 542.

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Consent to judgment, see "Judgment," § 2.

STOCK.

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STORES.

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STREET RAILROADS.

Appellate jurisdiction in action to determine franchise rights, see "Appeal and Error," § 4.
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Election between causes of action against, see "Pleading," § 7.
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Opinion evidence in action for injuries caused by operation of, see "Evidence," § 9.
Right to grant franchise pending injunction to restrain declaration of result of election on question of annexation of territory to municipality, see "Injunction," § 2.
Statement of separate causes of action against, see "Pleading," § 2.

§ 1. Establishment, construction, and maintenance.

Under an ordinance granting a franchise to a street railroad company, compliance by the company with certain conditions precedent to the vesting of rights under the franchise held required within a reasonable time.—*Little Rock Ry. & Electric Co. v. City of North Little Rock* (Ark.) 826.

Under an ordinance granting a franchise to a street railway company, certain action by the company held a reasonable and enforceable condition precedent to the acquisition of any rights under the franchise.—*Little Rock Ry. & Electric Co. v. City of North Little Rock* (Ark.) 826.

The question of the authority to revoke a street railway franchise held not presented by the pleadings and proof.—*Little Rock Ry. & Electric Co. v. City of North Little Rock* (Ark.) 1026.

§ 2. Regulation and operation.

*In an action against a street railroad company for injuries from a collision of car with plaintiff's vehicle, evidence held to justify submission of defendant's negligence.—*Hot Springs St. R. Co. v. Charlton* (Ark.) 1006.

*A recovery for injuries to a traveler by collision with a street car held not barred by his contributory negligence, if the servants in charge of the car could have avoided the accident.—*Louisville Ry. Co. v. Hoskins' Adm'r* (Ky.) 1087.

*An instruction in an action against a street railroad company for injuries to a traveler by collision held bad, because eliminating the question whether the motorman knew of the traveler's peril.—*Louisville Ry. Co. v. Hoskins' Adm'r* (Ky.) 1087.

In an action against a street railroad company for injuries to a traveler, the refusal to give an instruction asked the company held error under the evidence.—*Louisville Ry. Co. v. Hoskins' Adm'r* (Ky.) 1087.

An ordinance of the city of St. Louis held, under St. Louis Scheme and Charter, art. 10, § 1, and article 3, § 26, a valid exercise of the city's police power, and binding on a street railroad company, without any acceptance of the ordinance on its part.—*Sluder v. St. Louis Transit Co.* (Mo. Sup.) 648.

A breach of an ordinance of the city of St. Louis held to constitute negligence, for the results of which a street railroad company is liable to an individual.—*Sluder v. St. Louis Transit Co.* (Mo. Sup.) 648.

A contention that an ordinance of the city of St. Louis exacted a higher degree of care on the part of a street railroad than the common law, and was void, held without merit.—*Sluder v. St. Louis Transit Co.* (Mo. Sup.) 648.

Occupant of a carriage, injured in a collision with a street car, held not guilty of contributory negligence.—*Sluder v. St. Louis Transit Co.* (Mo. Sup.) 648.

A city ordinance providing that conductors shall not allow ladies or children to leave or enter cars while in motion is not unreasonable or void.—*McHugh v. St. Louis Transit Co.* (Mo. Sup.) 853.

A city ordinance providing that conductors shall not allow ladies or children to leave or enter cars while in motion, held a valid police regulation.—*McHugh v. St. Louis Transit Co.* (Mo. Sup.) 853.

*Though one may have been guilty of contributory negligence in being on street car track, the company is liable for any injury, if it could have been prevented by ordinary care.—*Rapp v. St. Louis Transit Co.* (Mo. Sup.) 865.

*In an action against a street railroad company for injuries to plaintiff in a collision with his vehicle, held, that the question of defendant's negligence was for the jury.—*Rapp v. St. Louis Transit Co.* (Mo. Sup.) 865.

* Point annotated. See syllabus.

*In an action against a street railroad company for injuries to plaintiff in a collision with his vehicle, *held*, that the question of plaintiff's contributory negligence was one for the jury.—*Rapp v. St. Louis Transit Co.* (Mo. Sup.) 865.

In an action against a street railroad for injuries to plaintiff in a collision with his vehicle, certain instructions *held* to have correctly presented the issues.—*Rapp v. St. Louis Transit Co.* (Mo. Sup.) 865.

It is the duty of a person crossing railway tracks to look and listen until he is safely across, and it is not sufficient merely to look before going on the track.—*Ross v. Metropolitan St. Ry. Co.* (Mo. App.) 144.

It is not the duty of a motorman operating a street car to stop merely because he observes a pedestrian approaching the track, but he is only required to stop when something in the conduct of the pedestrian indicates that he is unaware of the presence of the car and apt to be struck by it.—*Ross v. Metropolitan St. Ry. Co.* (Mo. App.) 144.

In an action against a street railroad company for injuries to a pedestrian, who was struck by a car, evidence *held* to show plaintiff guilty of contributory negligence.—*Ross v. Metropolitan St. Ry. Co.* (Mo. App.) 144.

In an action against a street railroad company for injuries to a pedestrian who was struck by a car, evidence *held* to justify submission to the jury of the question whether defendant's motorman observed plaintiff's danger in time to have avoided the injury.—*Ross v. Metropolitan St. Ry. Co.* (Mo. App.) 144.

Question of contributory negligence of plaintiff in action against a street railroad *held* to be for the jury.—*Waechter v. St. Louis & M. R. R. Co.* (Mo. App.) 147.

Woman, who was struck by a street car, which she would have seen, had she looked, *held* guilty of contributory negligence.—*Waddell v. Metropolitan St. Ry. Co.* (Mo. App.) 765.

Negligence of a pedestrian in failing to discover an approaching street car *held* superseded as proximate cause by negligence of the motorman, who failed to prevent the injury when it was possible to do so.—*Waddell v. Metropolitan St. Ry. Co.* (Mo. App.) 765.

In an action against a street railroad for injuries to a pedestrian, testimony that the motorman would have been mobbed *held* erroneous and prejudicial to defendant.—*Waddell v. Metropolitan St. Ry. Co.* (Mo. App.) 765.

In an action against a street railroad for injuries to a pedestrian, evidence *held* to raise an issue of fact as to whether the motorman could have stopped the car after discovering plaintiff's peril.—*Waddell v. Metropolitan St. Ry. Co.* (Mo. App.) 765.

In an action for injuries, where plaintiff charged negligence in defendant's permitting its rails to be charged with electricity, causing his horse to fall, etc., an instruction *held* erroneous as not presenting the issues involved.—*San Antonio Traction Co. v. Yost* (Tex. Civ. App.) 428.

STREETS.

See "Highways"; "Municipal Corporations," §§ 7, 8.

Dedication, see "Dedication," §§ 1, 2.

SUBROGATION.

Creditors cannot procure subrogation to deceased surety's rights in indemnity mortgage in a proceeding to which the surety's heirs or rep-

resentatives are not parties.—*Dyer v. Jacoway* (Ark.) 901.

Creditors, seeking subrogation to sureties rights under indemnity mortgage, *held* guilty of laches.—*Dyer v. Jacoway* (Ark.) 901.

*An indorser on notes who has paid only a portion of them cannot claim by subrogation the right to participate in the securities held for the payment of the debt.—*Bank of Fayetteville v. Lorwein* (Ark.) 919.

SUIT.

See "Action."

SUMMONS.

See "Process."

SUNDAY.

Liquor sales on Sunday, see "Intoxicating Liquors," §§ 3, 4.

SUPREME COURTS.

See "Courts," §§ 1, 4.

SURETYSHIP.

See "Principal and Surety."

SURPLUSAGE.

In pleading, see "Pleading," § 1.

SWAMP LANDS.

See "Public Lands," § 1.

SWINDLING.

See "False Pretenses."

TAXATION.

Payment of taxes to sustain adverse possession, see "Adverse Possession," § 1.

Power of county to contract for expenses of publication of notice to nonresident delinquent taxpayers, see "Counties," § 2.

Local or special taxes.

See "Highways," § 2; "Municipal Corporations," § 9.

Assessments for municipal improvements, see "Municipal Corporations," § 5.

Occupation or privileges taxes.

See "Intoxicating Liquors," § 2.

Foreign corporation, see "Corporations," § 6.

§ 1. Sale of land for nonpayment of tax.

The fact that taxes had been paid by defendant or his grantors, and that a forfeiture of the land and sale for taxes was void, did not estop defendant from acquiring the void tax title and setting up adverse possession thereunder.—*Carpenter v. Smith* (Ark.) 976.

The personal property received by an assignee for the benefit of creditors is subject to the unpaid taxes on the assignor's real and personal property before the real estate can be subjected thereto.—*Phoenix Brewing Co.'s Assignee v. Central Consumers' Co.* (Ky.) 1051.

Petition in an action seeking to enjoin the sale of property bid in by the state for delin-

* Point annotated. See syllabus.

quent taxes *held* fatally defective.—*Alexander v. Aud* (Ky.) 1103.

Under Ky. St. 1908, §§ 3760, 4030, an allegation that the tax collector has certified certain facts gives rise to the presumption that the acts certified to have been performed, as well as all other acts required to be done to support them.—*Alexander v. Aud* (Ky.) 1103.

Under Ky. St. 1908, § 4036, plaintiffs, in a suit to enjoin the sale of land which had been bid in by the state for delinquent taxes, must tender the unpaid taxes.—*Alexander v. Aud* (Ky.) 1103.

Under Civ. Code Prac. § 25, all the taxpayers of a county *held* not entitled to join in a suit to enjoin on various grounds the sale of lands bid in by the state for delinquent taxes.—*Alexander v. Aud* (Ky.) 1103.

Under Const. § 171, and Ky. St. 1908, §§ 4019, 4021, 4143, failure of sheriff to levy upon a landowner's personalty to collect taxes assessed against the land *held* not to render a sale of land for taxes invalid.—*Alexander v. Aud* (Ky.) 1103.

*Under Gen. Laws 1897, p. 138, c. 103, § 15, a citation or notice in a tax suit by the state against a nonresident landowner, not complying with the form prescribed, *held* insufficient to support a judgment.—*Garvey v. State* (Tex. Civ. App.) 873.

§ 2. Tax titles.

Tax deeds *held* not sufficiently certain in their descriptions and consequently void.—*Covington v. Berry* (Ark.) 1005.

Under section 3, p. 97, Acts 1866-67, exempting Real Estate Bank lands from taxation, listing of such lands for taxation *held* evidence of the sale by the bank's receiver.—*Cracraft v. Meyer* (Ark.) 1027.

Under the act of 1867 exempting lands of the Real Estate Bank from taxation, certain receivership proceedings *held* to constitute evidence of a sale of certain lands belonging to the bank.—*Cracraft v. Meyer* (Ark.) 1027.

Under Rev. St. 1837, c. 128, §§ 133, 134, Acts July 15, 1868 (Laws 1868, p. 62, § 1), and Kirby's Dig. § 4807, a land commissioner's deed to land forfeited for unpaid taxes is *prima facie* evidence of the taking of the steps necessary for the transmission of title.—*Cracraft v. Meyer* (Ark.) 1027.

Failure to record a deed to certain land belonging to the state *held* not to overcome the presumption of sale which arises from the issuance of a subsequent tax deed by the State Land Commissioner.—*Cracraft v. Meyer* (Ark.) 1027.

§ 3. Legacy, inheritance, and transfer taxes.

Under Shannon's Code, §§ 724, 735, one-half of personal property belonging to a nonresident decedent, which his widow elected to take in kind under his will, *held* not subject to collateral inheritance taxation.—*Memphis Trust Co. v. Speed* (Tenn.) 321.

An executor of a nonresident, owning property in Tennessee which passed to collateral legatees, *held* not entitled to deduct from the amount subject to collateral inheritance tax Tennessee debts not shown to have been paid from such assets.—*Memphis Trust Co. v. Speed* (Tenn.) 321.

TELEGRAPHS AND TELEPHONES.

Municipal regulations, see "Municipal Corporations," § 6.

Parol or extrinsic evidence of telegram, see "Evidence," § 8.

§ 1. Regulation and operation.

Kirby's Dig. § 7946, prescribing a penalty for telegraph company's failure to transmit a message, when construed with sections 7943 and 7944, and Mansf. Dig. § 6419, applies only to a willful or intentional refusal to transmit a message.—*State v. Western Union Telegraph Co.* (Ark.) 834.

In an action for failure to deliver a telegram ordering potatoes from the addressee, *held* proper to permit him to testify that, if he had received the message, he would have complied with the order.—*Elam v. Western Union Telegraph Co.* (Mo. App.) 115.

A telegraph company, on receiving a telegram for persons residing 3½ miles from the destination station, after hours when it had messengers available, *held* not guilty of negligence in failing to deliver until succeeding day.—*McCaul v. Western Union Telegraph Co.* (Tenn.) 325.

TENANCY IN COMMON.

Homestead rights of tenant in common, see "Homestead," § 1.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

A co-tenant cannot, by buying in an outstanding incumbrance, acquire title as against his co-tenants.—*Mahoney v. Nevins* (Mo. Sup.) 731.

§ 2. Rights and liabilities of co-tenants as to third persons.

Where a co-tenant buys in an incumbrance, the other co-tenants are bound to contribute their respective proportions of the consideration paid.—*Mahoney v. Nevins* (Mo. Sup.) 731.

TENDER.

Of property on rescission of sale, see "Sales," § 3.

Sufficiency of complaint to show tender of goods to agent, see "Carriers," § 1.

TERMS.

Of leases, see "Landlord and Tenant," § 2.

TESTAMENT.

See "Wills."

TESTAMENTARY POWERS.

Creation, see "Wills," § 3.

THEFT.

See "Larceny."

THREATS.

Effect on admissibility of confessions, see "Criminal Law," § 12.

Evidence of threats by defendant in prosecution for homicide, see "Homicide," § 7.
Instructions as to threats by deceased against accused in trial for homicide, see "Homicide," § 10.

TICKETS.

For carriage of passengers, see "Carriers," § 4.

* Point annotated. See syllabus.

TIMBER.

See "Logs and Logging."
In piles for use in building fence as fixture, see "Fixtures."
Removal of as trespass, see "Trespass," § 1.

TIME.

For filing bill of exceptions, see "Exceptions, Bill of," § 2.
For giving indemnity bond in action on lost instrument, see "Lost Instruments."
For motion to quash deposition, see "Depositions."
For payment of interest, see "Interest," § 2.
For performance of contract, see "Contracts," § 1.
For rescission of sale, see "Sales," § 3.
For taking appeal or suing out writ of error, see "Appeal and Error," § 3.
Of taking effect of deed, see "Deeds," § 1.

TITLE.

Color of title, see "Adverse Possession."
Covenants of title, see "Covenants," § 1.
Removal of cloud, see "Quieting Title."
Tax titles, see "Taxation," § 2.

Particular matters affecting title.

See "Dedication," § 2; "Partition," § 1.

Particular species of property or rights.

See "Public Lands," § 1.
Stock of corporation, see "Corporations," § 3.
Title necessary to maintain particular actions.
See "Ejectment," § 1; "Quieting Title," § 1; "Trespass," § 1.

Titles of particular acts or proceedings.

Statutes, see "Statutes," § 3.

TORTS.

Causing death, see "Death," § 1.
Excessive damages, see "Damages," § 4.
Measure of damages, see "Damages," § 3.

By particular classes of parties.

See "Municipal Corporations," § 8.
Agents, see "Principal and Agent," § 2.
Employés, see "Master and Servant," § 10.

Particular remedies for torts.

See "Trespass," § 1; "Trove and Conversion," § 2.

Particular torts.

See "Assault and Battery," § 1; "Conspiracy" § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Rape," § 3; "Trespass"; "Trove and Conversion."

TOWNS.

See "Schools and School Districts," § 1.
Validity of votes cast in wrong town, see "Elections," § 1.

TRAMPS.

As cause of fire for which railroad was sued, see "Railroads," § 9.

TRANSCRIPTS.

Of record for purpose of review, see "Criminal Law," § 24.

TRANSFER TAX.

See "Taxation," § 3.

TRANSITORY ACTIONS.

Action for wrongful death, see "Death," § 1.

TREATIES.

Where complainant based his claim upon the provisions of a treaty, it was not necessary to make a formal claim of his rights under the treaty.—*Ehrlich v. Weber* (Tenn.) 188.

TREES.

See "Logs and Logging."

TRESPASS.

Evidence of former judgment, see "Judgment," § 13.
Injuries to trespassers, see "Negligence," § 1; "Railroads," §§ 5, 7.
To the person, see "Assault and Battery," § 1.
§ 1. *Actions.*

In an action for trespass on lands, evidence considered, and held insufficient to show that plaintiff had paid taxes on the lands in three payments before the date of the trespass, and after March 18, 1899, when Acts 1899, p. 177, No. 66, in relation to possession acquired by payment of taxes under color of title, took effect.—*Price v. Greer* (Ark.) 985.

In an action for trespass on lands, held, that the verdict could not be sustained under the evidence.—*Price v. Greer* (Ark.) 985.

In action for trespass on land, held, that the answer sufficiently denied plaintiff's allegation of payment of taxes on the land.—*Price v. Greer* (Ark.) 985.

*In actions for trespass on land, it is not necessary for the complainant to deraign title, but only necessary for him to allege that he is the owner or in possession.—*Price v. Greer* (Ark.) 985.

*In an action for trespass on land, plaintiff must show either title or possession, and mere color of title is not sufficient.—*Price v. Greer* (Ark.) 985.

*One showing only a sheriff's deed on execution sale held not to have title to maintain trespass.—*Phillips v. Beattyville Mineral & Timber Co.* (Ky.) 1058.

In trespass for cutting and removing timber from plaintiff's land, evidence held not to show plaintiff to be the owner of the land on which the alleged trespass was committed.—*Cheatham v. Hicks* (Ky.) 1093.

TRESPASS TO TRY TITLE.

See "Ejectment."

Between landlord and tenant, see "Landlord and Tenant," § 3.

Equitable defenses, see "Equity," § 1.
Harmless error, see "Appeal and Error," § 24.

§ 1. *Right of action and defenses.*

In trespass to try title, plaintiff, claiming under the sole heir of a former vendee, was not entitled to recover without discharging the ven-

* Point annotated. See syllabus.

dor's lien to secure the purchase money, which had never been paid.—*Wall v. Club Land & Cattle Co.* (Tex. Civ. App.) 534.

§ 2. Proceedings.

In trespass to try title, a charge to find for plaintiff if defendant failed to establish the allegations of his plea in reconviction, without requiring plaintiff to prove his right to possession, *held* properly refused.—*Freeman v. Slay* (Tex. Civ. App.) 404.

Where the petition in trespass to try title attacked the sheriff's deed, under which defendant claimed, as void, plaintiff was not entitled to relief on a showing that the deed was merely voidable.—*Temple v. Branch Saw Co.* (Tex. Civ. App.) 442.

TRIAL

See "New Trial"; "Witnesses."

Construction of contract as question for court, see "Contracts," § 1.

Harmless error relating to instructions, see "Appeal and Error," § 25.

Instructions as to damages, see "Damages," § 5.

Instructions as to negligence of passenger, see "Carriers," § 7.

Legal effect of dedication as question for court, see "Dedication," § 1.

Negligence of passenger as question for jury, see "Carriers," § 7.

Objections to instructions for purpose of review, see "Criminal Law," § 22.

Questions relating to instructions presented for review, see "Appeal and Error," § 12.

Trial of right to property levied on, see "Attachment," § 2.

Proceedings incident to trials.

See "Continuance."

Entry of judgment after trial of issues, see "Judgment," § 4.

Place of trial, see "Venue," § 1.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 2.

Trial of particular civil actions or proceedings.

See "Cancellation of Instruments"; "Conspiracy," § 1; "Libel and Slander," § 8; "Malicious Prosecution," § 3; "Negligence," § 4; "Trespass to Try Title," § 2; "Trove and Conversion," § 2.

Against building and loan association for negligence of contractor, see "Building and Loan Associations."

Against carrier for failure to furnish cars, see "Carriers," § 1.

Condemnation proceedings, see "Eminent Domain," § 2.

Election contest, see "Elections," § 3.

For accounting by broker, see "Brokers," § 2.

For breach of contract, see "Contracts," § 3.

For breach of contract to transport passenger, see "Carriers," § 5.

For breach of warranty of goods sold, see "Sales," § 7.

For causing death, see "Death," § 1.

For compensation of broker, see "Brokers," § 4.

For delay in shipment by carrier, see "Carriers," § 1.

For injuries from fires caused by operation of railroad, see "Railroads," § 9.

For injuries to live stock by carrier, see "Carriers," § 2.

For injuries to live stock from operation of railroads, see "Railroads," § 8.

For loss of cargo, see "Shipping," § 1.

For personal injuries, see "Carriers," § 6; "Master and Servant," § 9; "Municipal

Corporations," § 8; "Railroads," § 6; "Street Railroads," § 2.

For wrongful death, see "Death," § 1.

On bill or note, see "Bills and Notes," § 6.

On insurance policy, see "Insurance," § 7.

Probate proceedings, see "Wills," § 2.

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

Trespass to try title to real property, see "Trespass to Try Title."

Trial of criminal prosecutions.

See "Assault and Battery," § 2; "Burglary," § 1; "Criminal Law," §§ 14-18; "False Pretenses"; "Homicide," § 10; "Larceny," § 2; "Perjury," § 2; "Rape," § 2; "Seduction," § 1.

For establishing lottery, see "Lotteries," § 1.

For offense against liquor laws, see "Intoxicating Liquors," § 4.

§ 1. Course and conduct of trial in general.

In an action for injuries, a statement by the court in the presence of the jury, in ruling on an objection to the examination of a juror as to his qualifications in the presence of the entire panel, *held* not error.—*Alexander v. McGaffey* (Tex. Civ. App.) 462.

§ 2. Reception of evidence.

Under Kirby's Dig. §§ 2743, 3190, exceptions to depositions and documentary evidence are to be determined before final submission.—*Boyn-ton v. Ashabraner* (Ark.) 1011.

Where a question is proper, but the answer is improper and prejudicial, an objection immediately following the answer is timely.—*Waddell v. Metropolitan St. Ry. Co.* (Mo. App.) 765.

Objection to improper answer to proper question *held* to have fulfilled the purpose of a motion to strike.—*Waddell v. Metropolitan St. Ry. Co.* (Mo. App.) 765.

Where it appeared on the examination of a witness for plaintiff in rebuttal that if the examination were allowed to proceed the court would again have to go at large into testimony in chief, it was proper to refuse to permit the examination to so proceed.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

In an action against several defendants to recover property transferred by a bankrupt in fraud of his creditors, certain testimony, admitted by agreement between the plaintiff and certain of the defendants, *held* not harmful to other defendants.—*Horstman v. Little* (Tex. Civ. App.) 286.

Evidence of false statements of vendor, admitted on a claim by the purchaser for damages, *held* to be excluded, where the case, when developed, shows the purchaser was not warranted in relying on them, or did not rely on them.—*Oneal v. Weisman* (Tex. Civ. App.) 290.

An offer of competent evidence sufficient to establish plaintiff's case should not be excluded, because made after plaintiff has rested.—*Pittsburg Plate Glass Co. v. Roquemore* (Tex. Civ. App.) 449.

§ 3. Arguments and conduct of counsel.

Argument of counsel, unsupported by the evidence and derogatory to the opposite party, *held* to constitute reversible error.—*English v. Anderson* (Ark.) 533.

On an issue as to whether an alteration had been made in a written contract, *held* not error for counsel to have called the jury's attention to the fact that the contract was in several handwritings.—*Harrison v. Lakenan* (Mo. Sup.) 53.

* Point annotated. See syllabus.

Where no objection was made to the allowance of time for argument, and plaintiff's counsel argued for 35 minutes of the hour allowed him, he cannot complain that the time was not equally distributed.—*Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 466.

Rules for the District Courts 39 (87 S. W. xxi) held violated by an argument of plaintiff's counsel which appealed to the jury on considerations other than the merits of the case.—*St. Louis Southwestern Ry. Co. of Texas v. Boyd* (Tex. Civ. App.) 509.

Rules for the District Courts 39 (87 S. W. xxi) held violated by an argument of plaintiff's counsel which appealed to the self-interest of the jury.—*St. Louis Southwestern Ry. Co. of Texas v. Boyd* (Tex. Civ. App.) 509.

Argument of counsel that the jury should err, if at all, in giving excessive damages for personal injuries, as this could be cured on appeal, held improper.—*Missouri, K. & T. Ry. Co. of Texas v. Nesbit* (Tex. Civ. App.) 891.

§ 4. Taking case or question from jury.

In an action on an insurance policy, where the evidence as to value is uncontradicted, the question of value need not be submitted to the jury.—*American Cent. Ins. Co. v. Noe* (Ark.) 572.

Where there was substantial evidence introduced by plaintiff to establish the allegations of the petition, a demurrer to the evidence was properly overruled.—*Harrison v. Lakenan* (Mo. Sup.) 53.

The question whether a child was sui juris is, when the evidence is all one way, a question for the court; otherwise, for the jury.—*Holmes v. Missouri Pac. Ry. Co.* (Mo. Sup.) 623.

In considering whether a party is entitled to recover, all the evidence of both parties must be reviewed, and, if there is any substantial testimony in support of his case, it must be submitted to the jury.—*Fields v. Missouri Pac. Ry. Co.* (Mo. App.) 134.

Though there be slight testimony, yet if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established, the court should instruct a verdict.—*Wills v. Central Ice & Cold Storage Co.* (Tex. Civ. App.) 265.

§ 5. Instructions to jury—Province of court and jury in general.

In an action against a railroad for wrongful death, certain instructions held not erroneous as an expression of the court's opinion on the evidence.—*St. Louis, I. M. & S. Ry. Co. v. Hitt* (Ark.) 908, 990.

In an action on a contract on which defendants pleaded fraud, instructions on that subject held correct.—*Craft v. Barron* (Ky.) 1099.

In proceedings to condemn land for a railroad right of way, an instruction held error, as assuming that the construction of a proposed depot and switches constituted a special benefit to defendant's land.—*Kirby v. Panhandle & G. Ry. Co.* (Tex. Civ. App.) 281.

It is not error to assume in the charge facts established by uncontroverted evidence.—*Northern Texas Traction Co. v. Yates* (Tex. Civ. App.) 283.

In an action against a carrier for damages to a shipment of cattle, an instruction held properly refused as being on the weight of evidence.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 499.

§ 6. Necessity and subject-matter.

An instruction that the jury, in determining the credibility of testimony, might consider

the character of any witness, held proper.—*Harrison v. Lakenan* (Mo. Sup.) 53.

Where the testimony of a witness is wholly discredited, a charge that the jury may reject the testimony of any witness whom they believe has willfully sworn falsely, etc., is proper.—*Fields v. Missouri Pac. Ry. Co.* (Mo. App.) 134.

An instruction, in action for slander, authorizing the jury, in making up their verdict, to consider the facts and circumstances admitted in evidence as produced by both parties, held error.—*Grimes v. Thorp* (Mo. App.) 638.

§ 7. — Form, requisites, and sufficiency.

An instruction held bad for giving prominence to certain evidence.—*Louisville Ry. Co. v. Hoskins' Adm'r* (Ky.) 1087.

§ 8. — Applicability to pleadings and evidence.

A charge requested, which is not justified by the evidence, is properly refused.—*Haxton v. Kansas City* (Mo. Sup.) 714.

In an action on a note, an instruction held erroneous, as excluding a good defense.—*City of Cleburne v. Gutta Percha & Rubber Mfg. Co.* (Tex. Civ. App.) 300.

In an action for injuries to plaintiff's son, an instruction that if, at the time of his injuries, he was performing work outside the scope of his employment, he assumed the risk, held error.—*Wood v. Texas Cotton Product Co.* (Tex. Civ. App.) 496.

It is not error to refuse a requested charge withdrawing from the jury an essential element of an oral contract supported by the evidence of a party.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 499.

§ 9. — Requests or prayers.

In an action for damages for breach of contract, the request of an incorrect instruction on the measure of damages held sufficient to require the court to give a proper instruction on that point.—*Nicola Bros. Co. v. Hurst* (Ky.) 1081.

In an action for injuries, an instruction on damages held not objectionable.—*Smith v. Fordyce* (Mo. Sup.) 679.

Where defendant, in an action for injuries to a servant, desires to have the question of assumption of risk submitted to the jury, it is his duty to pray an instruction to that effect.—*Smith v. Fordyce* (Mo. Sup.) 679.

A charge requested, which is covered by the instructions given, is properly given.—*Haxton v. Kansas City* (Mo. Sup.) 714.

Omission in a charge held not to be complained of by one asking a special charge in effect like it.—*Oneal v. Weisman* (Tex. Civ. App.) 290.

Where a charge was correct as far as it went, plaintiff could not avail himself of an error of omission therein without having requested a charge to supply it.—*Freeman v. Slay* (Tex. Civ. App.) 404.

There is no error in refusing to give a special charge, where the issue to which it relates was fully covered by the general charge and another special charge given at the same party's request.—*Parlin & Orendorf Co. v. Vawter* (Tex. Civ. App.) 407.

In an action for injuries, an instruction, though defective, held sufficient to direct the court's attention to the matter, making it incumbent to charge in reference thereto.—*Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.) 466.

* Point annotated. See syllabus.

It is not error to refuse a requested instruction covered by the instructions given by the court.—*International & G. N. R. Co. v. Glover* (Tex. Civ. App.) 515.

Where a charge given at a party's request embraces the substance of another requested charge, the party cannot complain of the refusal to give the latter charge.—*International & G. N. R. Co. v. Glover* (Tex. Civ. App.) 515.

§ 10. — Objections and exceptions.

The apparent assumption of a fact by an instruction, being a defect of form, *held* to call for a special exception.—*McElvaney v. Smith* (Ark.) 981.

§ 11. — Construction and operation.

In an action for injuries to a servant, instruction *held* in conflict with, and not to cure the error in, other instructions.—*Grayson-McLeod Lumber Co. v. Carter* (Ark.) 597.

In an action for injuries at a crossing, error in an instruction *held* not cured by other instructions.—*St. Louis, I. M. & S. Ry. Co. v. Hitt* (Ark.) 911, 990.

An erroneous instruction is not cured by subsequent correct ones, which do not refer to it or in terms attempt to modify it.—*City of Cleburne v. Gutta Percha & Rubber Mfg. Co.* (Tex. Civ. App.) 300.

A charge must be read as a whole to determine whether it is on the weight of the evidence or confusing.—*Missouri, K. & T. Ry. Co. of Texas v. Criswell* (Tex. Civ. App.) 373.

In an action against a carrier for death of plaintiff's wife from its negligence and that of another carrier, an instruction *held* erroneous, as excluding liability for negligence of the latter.—*Hardin v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 440.

In an action for injuries to an inexperienced servant, an instruction limiting the master's duty to instruct to latent dangers *held* cured by subsequent instruction.—*Wood v. Texas Cotton Product Co.* (Tex. Civ. App.) 496.

It is not proper to predicate error on a portion of a paragraph in a charge, and sever it from the preceding part of the paragraph.—*Texas Cent. Ry. Co. v. Miller* (Tex. Civ. App.) 499.

§ 12. Verdict.

A special verdict in a suit to determine the existence of a lien *held* sufficient basis for a judgment declaring a lien on the property for which the note in controversy was given.—*Featherstone v. Brown* (Tex. Civ. App.) 470.

§ 13. Waiver and correction of irregularities and errors.

Where plaintiff alleges that she boarded a car for the purpose of becoming a passenger, defendant cannot complain, after verdict, of instructions submitting to the jury to find whether she was a passenger.—*Corum v. Metropolitan St. Ry. Co.* (Mo. App.) 143.

TRIAL OF RIGHT OF PROPERTY.

See "Attachment," § 2.

TROVER AND CONVERSION.

§ 1. Acts constituting conversion and liability therefor.

Demand and refusal are evidence of conversion.—*Newman v. Mercantile Trust Co.* (Mo. Sup.) 6.

§ 2. Actions.

In order to maintain trover for shares of stock, plaintiff must have been the owner of

the shares and entitled to their possession at the time of the alleged conversion.—*Newman v. Mercantile Trust Co.* (Mo. Sup.) 6.

In an action for the conversion of corn, instructions on damage *held* not erroneous.—*Hanaway v. Wiseman* (Tex. Civ. App.) 437.

TRUST COMPANIES.

See "Corporations," § 3.

TRUSTS.

Charitable trusts, see "Charities."

Combinations to monopolize trade, see "Monopolies," § 1.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Estoppel to assert invalidity of trust deed, executed by corporation, see "Corporations," § 2.

Secret trusts, see "Fraudulent Conveyances," § 1.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

Though a constructive trust may be proved by parol, the evidence is insufficient, unless "it is full, clear, and convincing."—*Tillar v. Henry* (Ark.) 573.

Evidence *held* insufficient to establish a constructive trust of land purchased at a foreclosure sale.—*Tillar v. Henry* (Ark.) 573.

A mere preponderance of parol proof *held* insufficient to set aside a deed for fraud and establish a resulting trust.—*McNutt v. McNutt* (Ark.) 589.

Evidence *held* insufficient to sustain a decree setting aside a deed and establishing a resulting trust for fraud.—*McNutt v. McNutt* (Ark.) 589.

*Constructive trusts resting in parol must be established by clear and satisfactory evidence.—*Crosby v. Henry* (Ark.) 949.

In a suit to procure the declaration of a resulting trust, evidence *held* to support a finding that defendant bought the property as trustee for plaintiff, and plaintiff paid for it.—*Crosby v. Henry* (Ark.) 949.

*Payment of price by one for land bought by another, who orally agreed to hold it for the former, *held* to raise a resulting trust, notwithstanding the statute of frauds.—*Crosby v. Henry* (Ark.) 949.

On an issue as to whether a father, in whose name title to property was taken, or his daughter, was the actual purchaser of the property, evidence *held* to support a finding of the chancellor that the father was the purchaser.—*Bendy v. Mudford* (Ark.) 999.

A deed *held* not to create a spendthrift trust.—*Kessner v. Phillips* (Mo. Sup.) 66.

Spendthrift trusts are recognized in Missouri.—*Kessner v. Phillips* (Mo. Sup.) 66.

In a suit by heirs to declare and establish a resulting trust in land, the evidence considered, and *held* to show that defendant purchased the land partly with money furnished by plaintiff's intestate, taking the title in his own name, and that intestate had, and died with, an interest therein corresponding to the amount of her payment.—*Stevenson v. Smith* (Mo. Sup.) 86.

Where only a part of the purchase money is furnished by the beneficiary, a resulting trust will be declared for a proportionate share of the land bought.—*Stevenson v. Smith* (Mo. Sup.) 86.

In order to constitute a direct trust, no particular words are necessary; but there must

* Point annotated. See syllabus.

be a conveyance, a fund, and a beneficiary.—*City of Austin v. Cahill* (Tex. Sup.) 542.

In a suit by the heir of one of the payees of the principal of notes for partition thereof, parol evidence *held* admissible to show that the payees of the principal held the same in trust for their mother during her life.—*Jones v. Day* (Tex. Civ. App.) 424.

§ 2. Management and disposal of trust property.

Where a husband, with his wife's knowledge and consent and in her presence, entered into a contract for the construction of buildings on her land, he was a trustee, and entitled to sue in his own name for breach of the contract, under Rev. St. 1899, § 541.—*Simons v. Wittmann* (Mo. App.) 791.

§ 3. Establishment and enforcement of trust.

Ky. St. 1903, § 2353, *held* not to affect the doctrine that equity follows a fund and compels a restitution as long as it can be identified.—*Board of Trustees of Fordville v. Postal* (Ky.) 1065.

Holders of school district bonds, void under Const. § 157, *held* entitled to follow the proceeds of sale and compel a restitution.—*Board of Trustees of Fordville v. Postal* (Ky.) 1065.

UNDERTAKINGS.

See "Bonds."

UNDUE INFLUENCE.

Procuring making of will, see "Wills," § 1.

UNILATERAL CONTRACTS.

Of sale, see "Sales," § 2.

UNITED STATES.

Citizens, see "Citizens."

Courts, see "Removal of Causes."

Indians, see "Indians."

Public lands, see "Public Lands," § 1.

USURY.

In contract of national bank, see "Banks and Banking," § 2.

VACATION.

Vacating particular proceedings.

See "Judgment," §§ 3, 5.

Partition sale, see "Partition," § 1.

Sale on execution, see "Execution," § 4.

VALUE.

Evidence as to value, see "Damages," § 5.

Hearsay evidence of, see "Evidence," § 6.

Limits of jurisdiction, see "Appeal and Error," § 1.

Representations as to value of property sold, see "Sales," § 1.

VARIANCE.

Between pleading and proof in criminal prosecutions, see "Indictment and Information," § 3.

VENDOR AND PURCHASER.

See "Brokers"; "Deeds," § 1; "Sales."

* Point annotated. See syllabus.

Purchasers at sale on execution, see "Execution," § 4.

Questions presented for review in suit to foreclose vendor's lien, see "Appeal and Error," § 2.

Requirements of statute of frauds, see "Frauds. Statute of," § 2.

Right of purchaser to reformation of deed, see "Reformation of Instruments," § 1.

Sale of public lands, see "Public Lands."

Specific performance of contract, see "Specific Performance."

§ 1. Requisites and validity of contract.

Contract for purchase of land *held* valid.—*Morris v. Green* (Ark.) 565.

Statement of a vendor as to fertility of land *held* one of fact, which under circumstances warranting it may be relied on by the purchaser.—*Oneal v. Weisman* (Tex. Civ. App.) 290.

§ 2. Performance of contract.

Where an agreement secured is simply one for the payment of money, a forfeiture incurred by its nonperformance will be relieved against on payment of the debt, interest, and costs.—*Morris v. Green* (Ark.) 565.

Vendor under contract for purchase of land *held* estopped from insisting on letter of contract.—*Morris v. Green* (Ark.) 565.

*A purchaser *held* liable for interest on the price from the day he received actual possession of the land.—*Ewell & Smith v. Jackson's Adm'r* (Ky.) 1047, 1135.

§ 3. Rights and liabilities of parties.

The reduction in the purchase price in a purchase from the vendor by an heir of the deceased original purchaser from the purchase price agreed to be paid by him, *held* to inure to the benefit of the other heirs of the original purchaser.—*Tillar v. Clayton* (Ark.) 972.

§ 4. Remedies of vendor.

*A purchaser, taking possession of land under a verbal contract of purchase, has the burden of proving payment of the purchase price in an action to foreclose the vendor's lien.—*Tillar v. Clayton* (Ark.) 972.

*Neither a purchaser taking possession of land under a verbal contract of purchase nor his heirs can dispute the title while the purchase money remains unpaid, when sued to foreclose the vendor's lien.—*Tillar v. Clayton* (Ark.) 972.

A vendor, in order to secure a decree foreclosing his vendor's lien, *held* required to make a proper deed.—*Tillar v. Clayton* (Ark.) 972.

In an action on a note given for the price of land, the answer *held* merely a denial that plaintiff had made defendant a good title, and not to a denial that he had accepted a warranty deed.—*Fitzpatrick v. Vincent* (Ky.) 1073.

Grantee, who assumed vendor's lien notes, *held* not entitled to judgment in trespass to try title as against the holder of the notes without paying the same.—*Diffie v. Thompson* (Tex. Civ. App.) 381.

Holder of vendor's lien notes, to whom the land was conveyed by the maker, *held* entitled to the payment of such notes before his superior right to the land could vest in a grantee who assumed the same.—*Diffie v. Thompson* (Tex. Civ. App.) 381.

Superior title to land conveyed by deed remains in the grantor until the discharge of incumbrances reserved by the deed.—*Diffie v. Thompson* (Tex. Civ. App.) 381.

One who forecloses a vendor's lien *held* to possess only such rights as the judgment gives him.—*Wall v. Club Land & Cattle Co. (Tex. Civ. App.)* 534.

VENUE.

Change of as affecting duty of clerk to transmit record, see "Clerks of Courts."
Statement of in information, see "Indictment and Information," § 1.

Of particular actions or proceedings.

Against carrier, see "Carriers," § 1.
Criminal prosecutions, see "Criminal Law," § 4.
For causing death, see "Death," § 1.

§ 1. Change of venue or place of trial.
Any objection to change of venue from circuit court of Jackson county, under Rev. St. 1890, § 822, *held* waived.—*Haxton v. Kansas City (Mo. Sup.)* 714.

VERDICT.

Directing verdict in civil actions, see "Trial," § 4.
In civil actions, see "Trial," § 12.
In criminal prosecutions, see "Criminal Law," § 15.
Review on appeal or writ of error, see "Appeal and Error," § 21.
Setting aside, see "New Trial," § 1.

VERIFICATION.

Of affidavit for continuance, see "Continuance."
Of information, see "Indictment and Information," § 1.
Of pleading, see "Pleading," §§ 6, 8.

VICE PRINCIPALS.

See "Master and Servant," § 6.

VILLAGES.

See "Schools and School Districts," § 1.

VIS MAJOR.

As affecting liability of carrier, see "Carriers," § 1.

VOTERS.

See "Elections."

WAGES.

See "Master and Servant," § 2.

WAIVER.

See "Estoppel."
Of liability as indorser of bill or note, see "Bills and Notes," § 4.

Of objections to particular acts or proceedings.

See "Pleading," § 8; "Trial," § 13.
Change of venue, see "Venue," § 1.

Of rights or remedies.

See "Homestead," § 5; "Insurance," § 2.
Of breach of warranty on sale of goods, see "Sales," § 5.
Of condition in railroad ticket, see "Carriers," § 5.
Of tender of cattle by connecting carrier, see "Carriers," § 2.

WARDS.

See "Guardian and Ward."

WARRANT.

County warrants, see "Counties," § 3.

WARRANTY.

Evidence of damages for breach, see "Damages," § 5.
On sale of goods, see "Sales," §§ 1, 5, 7.

WATERS AND WATER COURSES.

§ 1. Natural water courses.

Where a deed described the land conveyed as a certain number of acres off from one side of a government subdivision, the purchaser was not entitled to accretions lying between the land described and a river.—*Perry v. Sadler (Ark.)* 832.

Where defendant contracted to convey to plaintiff a certain named tract of land, containing a certain number of acres more or less and bounded on one side by a river, plaintiff *held* to take title to accretions.—*Perry v. Sadler (Ark.)* 832.

§ 2. Artificial ponds, reservoirs, and channels, dams, and flowage.

One negligently constructing dam and embankment in and adjacent to stream *held* not excused from liability for additional damages caused thereby during an overflow which would have occurred in the absence of the obstructions.—*Gulf, C. & S. F. Ry. Co. v. Harbison (Tex. Civ. App.)* 452; *Same v. Wetherly (Tex. Civ. App.)* 456; *Same v. Oates (Tex. Civ. App.)* 457.

In action against railroad for injury to crops and realty by overflow, fact that sediment would not tend to injure plaintiff's land *held* immaterial.—*Gulf, C. & S. F. Ry. Co. v. Harbison (Tex. Civ. App.)* 452; *Same v. Wetherly (Tex. Civ. App.)* 456; *Same v. Oates (Tex. Civ. App.)* 457.

Mandatory injunction against railroad, commanding removal of dam and construction of culverts and sluices in embankment, *held* sufficiently specific, under *Sayles' Ann. Civ. St.* 1897, art. 4436.—*Gulf, C. & S. F. Ry. Co. v. Harbison (Tex. Civ. App.)* 452; *Same v. Wetherly (Tex. Civ. App.)* 456; *Same v. Oates (Tex. Civ. App.)* 457.

In action against railroad for injury to crops and realty by construction of dam, evidence as to effect of overflows subsequent to removal of portion of dam *held* admissible.—*Gulf, C. & S. F. Ry. Co. v. Harbison (Tex. Civ. App.)* 452; *Same v. Wetherly (Tex. Civ. App.)* 456; *Same v. Oates (Tex. Civ. App.)* 457.

WAYS.

Public ways, see "Highways"; "Municipal Corporations," § 8.

WEAPONS.

Liability of carrier for accidental shooting of passenger, see "Carriers," § 6.
Use of in commission of homicide, see "Homicide," § 1.

WIDOWS.

Rights under statutes of descent and distribution, see "Descent and Distribution," § 1.

* Point annotated. See syllabus.

WILLS.

See "Descent and Distribution"; "Executors and Administrators."

Charitable bequests and devises, see "Charities."

Construction and execution of trusts, see "Trusts."

Harmless error in will contest, see "Appeal and Error," § 25.

Legacy and succession taxes, see "Taxation," § 3.

Opinion evidence in will contest, see "Evidence," § 9.

§ 1. Requisites and validity.

In a will contest, evidence *held* sufficient to sustain a verdict finding that a will admitted for probate was the result of undue influence.—*Dausman v. Rankin* (Mo. Sup.) 696.

Undue influence, sufficient to invalidate a will, must be such as amounts to overpersuasion, coercion, or force, destroying the free agency and will power of the testator.—*Dausman v. Rankin* (Mo. Sup.) 696.

Undue influence may be inferred from facts and circumstances, from the relation of the parties, and from testator's mental condition.—*Bradford v. Blossom* (Mo. Sup.) 721.

Under Rev. St. 1895, art. 5335, an instrument in the form of a deed, not written by the grantor, and attested by one witness, cannot be probated as a will.—*McLain v. Garrison* (Tex. Civ. App.) 484.

Under Rev. St. 1895, art. 632 (556), an instrument in the form of a deed, to take effect at the grantor's death, *held* not testamentary in character, but a deed.—*McLain v. Garrison* (Tex. Civ. App.) 484.

*Under Sayles' Ann. Civ. St. art. 5337, a will *held* revoked by a subsequent conditional holographic will.—*Dougherty v. Holscheider* (Tex. Civ. App.) 1113.

*Under Sayles' Ann. Civ. St. arts. 5335, 5336, letters *held* to constitute a will.—*Dougherty v. Holscheider* (Tex. Civ. App.) 1113.

*A will, to become effective only on the happening of a contingency, is a contingent will, and, in case the contingency does not arise, it is revoked.—*Dougherty v. Holscheider* (Tex. Civ. App.) 1113.

*Where a testator intended to dispose of his property in case of the happening of an event named, the will is conditional.—*Dougherty v. Holscheider* (Tex. Civ. App.) 1113.

*Letters written by decedent *held* to constitute a conditional will.—*Dougherty v. Holscheider* (Tex. Civ. App.) 1113.

§ 2. Probate, establishment, and annulment.

On an issue as to whether a will was brought about by fraud and undue influence, *held*, that the question was one for the jury.—*Bradford v. Blossom* (Mo. Sup.) 721.

In a suit to set aside a judgment admitting a will to probate, the burden is upon plaintiffs to establish the invalidity of the will.—*Franklin v. Boone* (Tex. Civ. App.) 262.

In a will contest, an instruction *held* not to take from the consideration of the jury the question whether the will had been altered.—*Franklin v. Boone* (Tex. Civ. App.) 262.

§ 3. Construction.

Under a will giving the property to testator's wife, with power to distribute "to her relations and to my relations," *held*, she was not required to distribute the property among next

of kin only.—*Levi v. Fidelity Trust & Safety Vault Co.* (Ky.) 1083.

Under a will, a nephew of testator, to whom was paid his mother's share of the estate, *held* to take absolutely, so that on his death his property passed under the law of descent.—*Barret v. Gwyn* (Ky.) 1096.

Where realty is devised to testatrix's husband, with direction that after his debts and funeral expenses are all paid the remainder of the tract shall go to others, the devisee takes only a life estate in the land devised, with remainder over.—*Carson v. Carson* (Tenn.) 175.

§ 4. Rights and liabilities of devisees and legatees.

The doctrine of election under a will *held* not applicable in regard to lands owned by testator and widow by entirety.—*Walker v. Bobbitt* (Tenn.) 327.

Under Shannon's Code, §§ 4146, 4147, that portion of a husband's personal property as to which he died intestate *held* to have passed to his distributees, to the exclusion of his widow.—*Walker v. Bobbitt* (Tenn.) 327.

WITNESSES.

See "Affidavits"; "Depositions"; "Evidence."

Absence of, as ground for continuance, see "Continuance"; "Criminal Law," § 14.

Experts, see "Evidence," § 9.

In action against carrier, see "Carriers," § 2.

Instructions as to credibility, see "Trial," § 6.

Opinions, see "Evidence," § 9.

Perjury, see "Perjury."

§ 1. Competency.

*On a trial under Cr. Code Prac. § 156, on the issue of the sanity of one indicted for crime, the wife of the accused is not a competent witness.—*Commonwealth v. Woelfel* (Ky.) 1061.

In a criminal case, certain testimony of an attorney *held* not erroneous, on the theory that it related to confidential communications.—*State v. Cummings* (Mo. Sup.) 706.

*Rev. St. 1899, § 4652, relative to the incompetency as witnesses of parties to transactions with deceased persons, *held* not to preclude the surviving party to a contract from testifying to conversations had with the party seeking to enforce the contract.—*Weiermueller v. Scullin* (Mo. App.) 1008.

On a trial for homicide, contents of letters written by decedent to defendant's wife, and by her shown to defendant, *held* privileged communications by wife to husband, and inadmissible.—*Cole v. State* (Tex. Cr. App.) 341.

Code Cr. Proc. 1895, art. 774, *held* not to render a wife incompetent to testify to an exclamation made by her husband immediately after committing a homicide.—*Cole v. State* (Tex. Cr. App.) 341.

A witness *held* incompetent to testify to transactions with a decedent (Sayles' Rev. Civ. St. 1897, art. 2302).—*Jones v. Day* (Tex. Civ. App.) 424.

A defendant, who disclaimed any interest in the notes in controversy, *held* competent to testify as to transactions with plaintiff's ancestor.—*Jones v. Day* (Tex. Civ. App.) 424.

In a suit by a trustee in bankruptcy to recover property, a witness, who is not a party, *held* not incompetent to testify to a conversation had with the bankrupt's wife, since deceased, under Sayles' Ann. Civ. St. art. 2302.—*Shelley v. Nolen* (Tex. Civ. App.) 524.

§ 2. Examination.

Under Kirby's Dig. § 3088, *held* not error to

* Point annotated. See syllabus.

cross-examine accused as to attempts to silence testimony against him.—*Corothers v. State* (Ark.) 585.

The court, in controlling the cross-examination of accused, is vested with discretionary power.—*Corothers v. State* (Ark.) 585.

The trial judge *held* entitled to examine witnesses; he not indicating his opinion of the facts.—*Arkansas Cent. R. Co. v. Craig* (Ark.) 878.

*It was not an abuse of discretion to permit the commonwealth to recall defendant and prove by him that he had been in the penitentiary.—*McQueen v. Commonwealth* (Ky.) 1047.

In condemnation proceedings, certain questions to a witness on cross-examination in regard to the value of the property *held* proper.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

Where counsel stated that he did not hope to obtain anything by certain cross-examination that he was about to enter upon, there was no error in refusing to permit him to go on with it.—*Union Ry. Co. v. Hunton* (Tenn.) 182.

In a prosecution for murder, certain cross-examination *held* proper.—*Long v. State* (Tex. Cr. App.) 203.

In a prosecution for murder, *held* not an abuse of discretion to recall a state's witness and ask him if he was armed on the occasion of the shooting.—*Upton v. State* (Tex. Cr. App.) 212.

Leading questions should not be permitted, where witness understands English sufficiently to answer questions intelligently.—*Craddick v. State* (Tex. Cr. App.) 347.

In a criminal case, there was no error in requiring a witness for defendant to detail all the occupations and businesses which he had been following for several years.—*Sexton v. State* (Tex. Cr. App.) 348.

§ 3. Credibility, impeachment, contradiction, and corroboration.

*Certain testimony *held* to contradict witness as to immaterial matter, and to be improper.—*Hinson v. State* (Ark.) 947.

*Impeachment of witness on collateral matter *held* inadmissible.—*Hot Springs St. Ry. Co. v. Bodeman* (Ark.) 960.

In ejectment for a mining claim, certain affidavits filed in United States Land Office *held* competent to impeach a witness who testified that only a small part of certain development work was applied on another claim than the one in question.—*White River Min. & Nav. Co. v. Langston* (Ark.) 971.

In a prosecution for homicide, defendant *held* not entitled to prove that one of the government witnesses was a "coke fiend," for the purpose of affecting her credibility.—*Williams v. United States* (Ind. T.) 334.

*Where a defendant in a criminal prosecution testifies as a witness, the state has a right to attack his character for truthfulness; but in such case the court should instruct that the evidence is only to be considered for purposes of impeachment.—*Newman v. Commonwealth* (Ky.) 1089.

In a criminal prosecution, a question to an impeaching witness *held* improper.—*Newman v. Commonwealth* (Ky.) 1089.

In a prosecution for murder, it was improper for the prosecuting attorney, on cross-examination of defendant, to ask him if it was not a fact that people generally talked about his being jealous of deceased.—*Newman v. Commonwealth* (Ky.) 1089.

In a prosecution for murder, cross-examination of defendant, tending to insinuate that he was testifying untruthfully, was improper.—*Newman v. Commonwealth* (Ky.) 1089.

*Evidence that the reputation of a witness for truth and veracity was bad at places where he had resided some time before trial is admissible, in connection with similar testimony as to his reputation at a place where he resided at the time of trial, but for only a short time before.—*Craft v. Barron* (Ky.) 1099.

Proof of former conviction for misdemeanor *held* admissible, under Rev. St. 1899, § 4680, concerning impeachment of witnesses.—*State v. Heusack* (Mo. Sup.) 21.

Under Rev. St. 1899, § 4680, state, on prosecution for crime, *held* entitled to cross-examine defendant as to previous conviction for crime.—*State v. Heusack* (Mo. Sup.) 21.

In homicide, *held* competent for the state to contradict certain testimony of defendant's witness.—*State v. Forsha* (Mo. Sup.) 746.

Where a witness admitted that he had pleaded guilty to a common assault, it was proper to show, as affecting his credibility, that he had pleaded guilty to a charge of assault with intent to kill.—*State v. Forsha* (Mo. Sup.) 746.

Certain testimony *held* incompetent to contradict testimony of another witness.—*Fields v. Missouri Pac. Ry. Co.* (Mo. App.) 134.

In a prosecution for seduction, the limitation to contradiction alone of evidence that prior to the trial prosecutrix stated that defendant raped her *held* error.—*Nolen v. State* (Tex. Cr. App.) 242.

The state cannot impeach its own witness, unless the witness has testified to something injurious to the state.—*Reyes v. State* (Tex. Cr. App.) 245.

On a prosecution for crime, evidence of defendant's intoxication is inadmissible to affect his credibility.—*Tally v. State* (Tex. Cr. App.) 339.

In a criminal case, it was not error to permit defendant to be asked, on cross-examination, if he had not been indicted for adultery two or three times in the county of the trial, to which he answered in the affirmative.—*Sexton v. State* (Tex. Cr. App.) 348.

In a criminal case, *held* proper to admit certain testimony of a witness, on cross-examination, as tending to show her interest in the case.—*Sexton v. State* (Tex. Cr. App.) 348.

In a criminal case, *held* not error to permit a witness to testify that defendant was drinking a night he was at witness' house.—*Sexton v. State* (Tex. Cr. App.) 348.

Where a defendant is not surprised by the testimony of his own witness, he cannot impeach him.—*Franklin v. State* (Tex. Cr. App.) 357.

Defendant could not introduce the evidence of one of his witnesses upon the examining trial to impeach him, where it was substantially the same as the verbal evidence of the witness.—*Franklin v. State* (Tex. Cr. App.) 357.

In a prosecution for murder, evidence that a witness for the state, whom the defendants had attempted to impeach, had made a statement out of court similar to his testimony on trial, *held* competent.—*Franklin v. State* (Tex. Cr. App.) 357.

WORK AND LABOR.

Counterclaim in action for work and materials, see "Set-off and Counterclaim," § 1.

* Point annotated. See syllabus.

Liens for work and materials, see "Mechanics' Liens."

WORKHOUSES.

Requisites and validity of statutes in general, see "Statutes," § 1.

WRITS.

See "Processa."

Particular writs.

See "Certiorari"; "Execution"; "Habeas Corpus"; "Injunction"; "Mandamus"; "Quo Warranto."

Writ of error, see "Appeal and Error."

WRONGFUL ATTACHMENT.

See "Attachment," § 3.

YEAR.

Estates for years, see "Landlord and Tenant."

